

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' MEMORIAL

31 JULY 2019

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I. INTRODUCTION

1. This arbitration concerns the loss of hundreds of millions of dollars (US) in investments made by Carlyle Commodity Management L.L.C. and certain related entities (collectively, “Carlyle” or “Claimants”) in the Kingdom of Morocco (“Morocco”), as a result of the Moroccan Government’s (“Government” or “Respondent”) interference with the business and operations of Morocco’s sole oil refinery, Société Anonyme Marocaine de l’Industrie du Raffinage (“SAMIR”). SAMIR is the entity involved with all of Claimants’ investments in Morocco. Without any notice to Carlyle, the Government froze SAMIR’s bank accounts, seized control of SAMIR’s refining and storage facilities, and directed SAMIR personnel to sell the Carlyle-owned commodities being held in SAMIR’s storage tanks to local Moroccan distributors. Moreover, the Government swept the cash in SAMIR’s bank accounts – a substantial portion of which constituted cash proceeds from prior sales of Carlyle-owned commodities. These cash proceeds were owed, but had not yet been transferred, to Carlyle. Finally, the Government instructed the local Moroccan distributors to pay the Government directly for the distributors’ purchases of commodities from SAMIR, including those owned by Carlyle. As demonstrated below, these actions constitute clear violations of the U.S. – Morocco Free Trade Agreement (“FTA”)¹: in particular, violations of Article 10.5.1 of the FTA, which requires that Morocco accord covered investments fair and equitable treatment, and Article 10.6, which prohibits the expropriation of an investor’s property without prompt, adequate, and effective compensation.
2. Beginning in February 2015, Carlyle and SAMIR engaged in a series of investment transactions (collectively, the “Transactions” or “Investments”) whereby Carlyle purchased and took title to oil and refined products (collectively, “Commodities”) that were to be stored in SAMIR’s tanks. The Investments were governed by various documents, including a Master Commodity Transaction Agreement (“MCTA”), a Commodities Storage Agreement (“CSA”), a \$600M MCTA Term Commitment Letter (“Commitment Letter”), a Summary of Terms and Conditions for Crude Oil Purchase and

¹ See U.S. – Morocco Free Trade Agreement (CL-0001-ENG).

Sale Transaction(s) (“Terms and Conditions”), and deal-specific transaction confirmations (“Confirmations”) (collectively, the “Investment Agreements”) between Carlyle and SAMIR.² The Government expressly authorized the structure of the Investments in January 2015 and remained apprised of the Investments throughout and beyond that year. SAMIR, in fact, obtained approval from the Government before entering into each individual Transaction with Carlyle. Between February and August 2015, Carlyle and SAMIR entered into twenty-six Investments, sixteen of which remain outstanding and comprise the bases of Claimants’ claims.

3. Carlyle’s Investments proceeded largely according to plan until August 2015, when the Government froze SAMIR’s bank accounts, seized control of refinery operations, directed SAMIR to sell Carlyle’s Commodities into the open market, prevented Carlyle from ever receiving any of the proceeds from the unauthorized sales of its Commodities or from making any other business arrangements that would allow for such payments, arranged to sweep the proceeds from the unauthorized sales of Carlyle’s Commodities from SAMIR’s accounts, and instructed local distributors to pay the Government directly for Carlyle’s Commodities. Such actions were wrongful and wholly without regard for Carlyle’s rights; they resulted in hundreds of millions of dollars (US) in losses to Carlyle. Up to the time of the Government’s actions, SAMIR declared its full intent and capacity to pay Carlyle for the Commodities. However, by freezing SAMIR’s accounts, and then subsequently preventing the recapitalization of SAMIR, the Government prevented Carlyle from obtaining compensation for its losses. Instead, the Government diverted the proceeds of Carlyle’s Commodities from SAMIR’s frozen accounts into the Moroccan Treasury. In January 2016, Carlyle discovered that the Government had taken the funds SAMIR had earmarked to pay Carlyle.
4. Throughout the fall of 2015, SAMIR repeatedly attempted to negotiate with the Government to unfreeze its bank accounts so that it could make payments to Carlyle. For

² Amended and Restated Master Commodity Transaction Agreement, 22 June 2015, (Witness Statement of Matthew Olivo (“Olivo Statement”), Ex. 3) (MO-0003), Amended and Restated Commodities Storage Agreement, 22 June 2015, (Olivo Statement, Ex. 4) (MO-0004), \$600M MCTA Term Commitment Letter, 22 June 2015, (Olivo Statement, Ex. 5) (MO-0005), Summary of Terms and Conditions for Crude Oil Purchase and Sale Transaction(s) (Olivo Statement, Ex. 6) (MO-0006), and deal-specific transaction confirmations (*see, e.g.* Olivo Statement, Ex. 7) (MO-0007).

example, SAMIR's majority shareholder and Saudi billionaire, Sheikh Mohamed Hussein Al-Amoudi ("Sheikh Al-Amoudi"), offered to personally inject hundreds of millions of dollars into SAMIR to settle any unpaid debt the refinery may have owed to the Government and to secure the release of SAMIR's frozen funds. Despite SAMIR's attempts to resolve the dispute, however, the Government did not negotiate with SAMIR in good faith and instead chose to place SAMIR under severe financial stress. As a result, SAMIR was forced into liquidation proceedings on March 21, 2016.

5. Due to the Government's wrongful interference in the business and operations of SAMIR, Carlyle, to this day, has not been compensated by the Government for the hundreds of millions of U.S. dollars' worth of Commodities that comprised the Investments. The Government's actions unquestionably have deprived Carlyle of any chance of recovering for its losses from the Investments. As discussed in detail herein, the Government's actions caused permanent harm to Carlyle's Investments in Morocco in breach of the FTA.
6. Carlyle submits with this Memorial the witness statements of: 1) [REDACTED] 2) Matthew Olivo, who served as Director of Structured Investments of Carlyle Commodity Management L.L.C. ("CCM") from 2012 to 2016; 3) Christopher Zuech, who served as Chief Operating Officer of CCM from 2005 to 2016; 4) Vishal Suvagiya, who served as a senior commodities structuring associate at CCM from June 2015 to July 2016; and 5) Michael Petrick, who served as Managing Director and Head of Global Market Strategies at The Carlyle Group L.P. from 2010 to 2016.
7. Carlyle also submits with this Memorial the expert witness reports of: 1) Richard E. Walck CPA/ABV/CFF/CGMA, CMA, CFM, a partner and co-founder of Global Financial Analytics LLC; and 2) Steven D. Graybill, president and co-founder of Downstream Advisors, Inc..
8. Finally, Carlyle submits with this Memorial Exhibits 1-13 and Authorities 1-48.
9. In this Memorial, Carlyle first describes the parties to the arbitration (Section II). Next, Carlyle explains that Carlyle is a protected investor with protected investments under the terms of the FTA and ICSID Convention and that the arbitral tribunal has jurisdiction

over this matter (Section III). Carlyle then sets out the factual background to the dispute, followed by a legal analysis of the Government's breaches of the FTA (Sections IV and V). Last, Carlyle particularizes the consequences of the Government's breaches, quantifies the damages inflicted on Carlyle, and sets forth Carlyle's requested relief (Sections VI and VII).

II. THE PARTIES

A. The Claimants

10. The Claimants are The Carlyle Group L.P., Carlyle Investment Management L.L.C. ("CIM"), CCM, TC Group, L.L.C., TC Group Investment Holdings, L.P., Celadon Commodities Fund, LP, and Celadon Partners, LLC. All of the Claimants are entities incorporated in the State of Delaware in the United States of America. The Carlyle Group L.P., which is the ultimate parent of all other Claimants, is a global investment firm with assets under management across hundreds of investment vehicles. The core business of The Carlyle Group L.P. and its affiliated businesses and investment vehicles is to invest wisely and create value on behalf of its investors. Investors rely on The Carlyle Group L.P. to achieve premium returns on invested capital.
11. As explained above, Claimants made their first investment in Morocco in February 2015 through their initial Transaction with SAMIR. After an initially positive experience with SAMIR and numerous successful Transactions, Claimants continued to enter into Transactions with SAMIR until August 2015, thereby making additional investments in Morocco. Claimants' Investments were made through the following entities:
 - **Celadon Partners, LLC**,³ a Delaware limited liability company, is the general partner of **Celadon Commodities Fund, LP**, a Delaware limited partnership that owns 99.96% of the participating shares in Celadon Commodities, Ltd., a Cayman limited company that owns 100% of the participating shares in VMF Special Purpose Vehicle SPC – VMF Q1 Segregated Portfolio ("VMF"), a Cayman segregated portfolio company that invested in Morocco's only refinery, SAMIR. At all relevant times, **CCM** acted as the exclusive investment adviser to Celadon Commodities, Ltd.,

³ **Celadon Partners, LLC** is the sole partner of **Celadon Commodities Fund, LP**, whose limited partnership interest is owned 97.06% by **TC Group, L.L.C.** and 2.94 % by **TC Group Investment Holdings, LP**.

Celadon Commodities Fund, LP, and VMF, and thus exercised control over the investments and other business decisions made by these entities.

- **Carlyle Investment Management L.L.C.**, a Delaware limited liability company, is the sole parent company of (and directly owns and controls 100% of the economic interest in) Carlyle Global Market Strategies Commodities Funding 2014-1, Ltd. and Carlyle Global Market Strategies Commodities Funding 2015-1, Ltd., which are both Cayman limited companies that were parties to the MCTA and CSA with SAMIR.

B. The Respondent

12. The Respondent is the Kingdom of Morocco, represented in this matter by the Government of Morocco. The Government has acted or failed to act in connection with the events giving rise to this arbitration, including through the following agencies and instrumentalities:⁴

- The Moroccan Foreign Exchange Office (Office des Changes)
- The Moroccan Tax Administration
- The Moroccan Ministry of Economy and Finance
- The Moroccan Office of Customs and Indirect Taxes
- The Treasury of the Moroccan Kingdom

III. THE TRIBUNAL HAS JURISDICTION OVER THESE CLAIMS UNDER BOTH THE FTA AND THE ICSID CONVENTION

13. Under Article 10 of the FTA, an arbitral tribunal has jurisdiction over a claim that the respondent has breached one or more obligations of Article 10, Section A, which concern “measures adopted or maintained by a Party relating to . . . (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 10.8 and 10.10, all investments in the territory of the Party.”⁵ As long as six months have passed since the events giving rise to the claim, which is the case here, and both contracting states to the

⁴ To the extent that other governmental entities are/were involved in the actions or omissions affecting Claimants’ Investments in Morocco, Claimants are not privy to such information and retain the right to include such entities in the future as any evidence of their wrongful actions/omissions is discovered.

⁵ See FTA art 10.1, 10.15 (CL-0001-ENG).

FTA are also parties to the ICSID Convention, which is also the case here, the claimant may proceed with its claim under the ICSID Convention.⁶ Further, the jurisdiction of the Centre “extend[s] to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State.”⁷

14. For the reasons discussed herein, the claims set forth by Claimants in their Request for Arbitration (“RFA”) meet all of the jurisdictional requirements of both the FTA and the ICSID Convention.⁸

A. Claimants Are Investors Under the FTA and the ICSID Convention

15. Article 10, Schedule C 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 further defined in Article 10, Schedule C to mean “an enterprise constituted or organized under the law of a Party[.]”⁹

16. Because all of the Claimants are enterprises organized under the laws of the State of Delaware in the United States, and the United States is a Party to the FTA, each Claimant is an “enterprise of a Party” subject to the protections of Article 10 of the FTA.¹⁰

17. In addition, both the United States and Respondent are contracting states to the ICSID Convention.¹¹ Claimants also comply with Article 25(2)(b) of the ICSID Convention because they are “National(s) of another Contracting State.”¹² Specifically, each of the

⁶ See FTA art 10.15.3(a) (CL-0001-ENG).

⁷ See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) (“ICSID Convention”) art 25(1).

⁸ The FTA entered into force on 1 January 2006. See (C-0001-ENG).

⁹ See FTA art 10.27 (CL-0001-ENG).

¹⁰ See Claimants’ Certificates of Formation. (C-0002-ENG).

¹¹ The United States signed the ICSID Convention on 27 August 1965 and ratified it on 10 June 1966. The ICSID Convention entered into force with respect to the United States on 14 October 1966. Respondent signed the ICSID Convention on 11 October 1965 and ratified it on 11 May 1967. The ICSID Convention entered into force with respect to Respondent on 10 June 1967. *Information available at:* <https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf> (last visited on 26 July 2019).

¹² Under Article 25(2)(b) of the ICSID Convention, a “National of another Contracting State” means “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

Claimants was a national of the United States at the time it consented to submit its dispute to arbitration under the FTA (i.e., the date of the submission of the RFA on July 31, 2018).¹³ Therefore, Claimants are entitled to proceed with this arbitration under the ICSID Convention.

B. Claimants' Commodities and Contractual Put Rights Constitute Investments under the FTA

18. Article 10 of the FTA applies “with respect to a Party, [to] an investment (as defined in Article 10.27 (Investment – Definitions)) in its territory of an investor of the other Party in existence on the date of entry into force of this Agreement or established, acquired, or expanded thereafter.”¹⁴ Article 10.27 of the FTA defines “investment” as “every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk[.]”
19. Claimants “own or controlled directly or indirectly” the investments in Morocco. As explained in Section II.A. above, a number of Claimants, namely **TC Group, L.L.C., TC Group Investment Holdings, L.P., Celadon Partners, LLC, and Celadon Commodities Fund, LP**, owned (directly or indirectly) VMF, an entity that invested in Morocco through SAMIR.¹⁵ In addition, at all relevant times, **CCM** acted as the exclusive investment adviser to **Celadon Commodities Fund, LP**, and VMF (and VMF’s parent, Celadon Commodities, Ltd.), and, thus, exercised control over the investments and other business decisions made by these entities.¹⁶ Further, **CIM** directly owns and controls 100% of the economic interest in Carlyle Global Market Strategies Commodities Funding 2014-1, Ltd. and Carlyle Global Market Strategies Commodities Funding 2015-1, Ltd., the entities that were parties to the MCTA and CSA with SAMIR. Finally, **The Carlyle Group L.P.** is the ultimate parent of all the other Claimants.
20. Additionally, in accordance with the Investment Agreements, Claimants retained exclusive ownership of and title to the Commodities that were the subject of the

¹³ See Claimants’ Certificates of Formation (C-0002-ENG). Respondent consented in the FTA to the submission of disputes arising under Chapter 10 of the FTA to the Centre.

¹⁴ See FTA art 1.3 (CL-0001-ENG).

¹⁵ See Olivo Statement, Ex. 3 (MO-0003).

¹⁶ Witness Statement of Michael Petrick (“Petrick Statement”), para 3.

agreements unless and until Claimants expressly agreed to sell Claimants' Commodities to SAMIR in exchange for the payment by SAMIR of the agreed-upon purchase price plus the accrued investment premium owed to Claimants. Title to the Commodities did not transfer to SAMIR until the required payment was made to Claimants in full.

21. Specifically, the MCTA expressly provides, among other things, that Claimants are “the owner[s] of Commodities . . . unless and until such time as the Commodities are sold to [SAMIR] pursuant to section 3(d) [of the MCTA].” *See* MCTA § 9 (MO-0003). Similarly, the CSA expressly provides, among other things, that: (i) Claimants “ha[ve] full exclusive title . . . of the Commodities,” and that “title to Commodities w[ould] not pass to [SAMIR] in any circumstances” unless and until they were purchased from Claimants by SAMIR (CSA § 3(a)); (ii) SAMIR was prohibited from “us[ing] the Commodities” (CSA § 3(b)); (iii) SAMIR could not dispose of Claimants' Commodities without obtaining Claimants' prior, written consent (CSA § 4(a)); and (iv) “[O]wnership of the Commodities shall not pass to [SAMIR] and the [Claimants] shall remain the sole owner of the Commodities.” (CSA § 5(b)) (MO-0004).
22. Claimants' investments in Morocco also complied with all of the remaining characteristics of a protected investment under Article 10.27 of the FTA because they required Claimants to:
 - (i) Commit capital to Morocco: Claimants committed more than US\$400 million through the irrevocable letters of credit issued to purchase the Commodities that were stored in SAMIR's tanks in accordance with the Investment Agreements;
 - (ii) For a significant duration: After months of Transactions, Claimants and SAMIR executed a commitment letter in which Carlyle committed to engage in commodities investments for a minimum of three years;¹⁷
 - (iii) With the expectation of gain or profit: Under the Investment Agreements, SAMIR was required to pay Claimants an accrued investment premium, based on the length of time that Carlyle's irrevocable letter of credit used to fund the initial

¹⁷ MCTA Term Commitment Letter, 1 (MO-0005).

purchase remained open, and the length of time between Carlyle's closing of the letter of credit and its resale of the Commodities to SAMIR; and

(iv) While assuming a risk: Carlyle assumed the risk of loss of Claimants' Commodities (or the diminution in value of Claimants' Commodities in a situation in which Claimants were forced to sell the Commodities to a party other than SAMIR), and Carlyle indeed lost the entire amount of sixteen of their Investments in Morocco due to the wrongful conduct of the Government.¹⁸

23. International investment tribunals have repeatedly and consistently found property and contractual rights such as those enjoyed by Claimants under the Investment Agreements – wherein claimants sold commodities to a local entity over a period of time with the expectation of gain and at some risk – to be an “investment” as defined by the relevant treaty and to meet the jurisdictional requirements of the ICSID Convention. For example, in *Deutsche Bank*, an investment arbitration under the Germany-Sri Lanka Bilateral Investment Treaty, the tribunal found that a twelve-month hedging agreement between a German bank and the State-owned oil company to reduce its exposure to volatility in relation to the importation of 100,000 barrels of oil also met the jurisdictional requirements of the underlying treaty and the ICSID Convention.¹⁹ In that case, the treaty's definition of “investments” included “every kind of asset . . . in particular . . . c) claims to money which have been used to create an economic value or claims to any performance having an economic value and associated with an investment.”²⁰ The tribunal concluded that the hedging agreement was an asset under the treaty and that it

¹⁸ In fact, it is because Claimants assumed this risk that Claimants suffered a significant loss – the loss of the total value of sixteen (16) transactions – due to Respondent's wrongful conduct. As has been accepted by various investment tribunals “the very existence of the dispute is an indication of risk.” See *Deutsche Bank v. Democratic Republic of Sri Lanka*, ICSID Case No. ARB/09/02 (“*Deutsche Bank*”), Award (31 October 2012) 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 (“*Fedax*”), Decision of the Tribunal on Objections to Jurisdiction (11 July 1997) para 40 (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.”) (CL-0003-ENG). As in *Fedax*, the very existence of a dispute regarding Carlyle's loss of the Commodities and other contractual rights is evidence of the risk undertaken by Claimants in connection with the Investments.

¹⁹ *Deutsche Bank* paras 284-285, 292-312 (CL-0002-ENG).

²⁰ *Id.*, para 284.

was “a claim to money which has been used to create an economic value.”²¹ As in *Deutsche Bank*, Carlyle’s Investment Agreements involve the provision of an asset, crude oil, that was necessary for the economic activity of the local company, including, in this case, the very functioning of the Moroccan state’s only oil refinery,²² as well as other benefits, such as providing the ready availability of the crude oil for repurchase and/or sale to the local market.²³

24. Article 10.27 of the FTA also lists various examples of qualifying “investments,” such as “(a) an enterprise; (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans; (d) futures, options, and other derivatives; (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts; (f) intellectual property rights; (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.” Claimants’ Investment Agreements include options, and therefore clearly fall under the category of “futures, options, and other derivatives” reflected in Article 10.27(d) of the FTA. In addition, the Commodities are movable property, which clearly qualify under 10.27(h) of the FTA.
25. As stated above, between February and August 2015, Claimants and SAMIR entered into twenty-six Transactions – sixteen of which remain open and unpaid. These sixteen transactions involved, among other things, the storage of the Commodities in tanks at

²¹ *Id.*, para 285.

²² See Expert Report of Steven D. Graybill (“Graybill Report”), para 19.

²³ See also *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, (“*GEA*”) Award (31 March 2011) (CL-0004-ENG) In *GEA*, a German company concluded a “Conversion Contract” pursuant to which it supplied diesel and naphtha fuel to Oriana, a local company owned by the Government of Ukraine, and was paid in kind with finished products. *Id.*, paras 44, 51-52. Ukraine argued that the “Conversion Contract” was no more than a sales agreement. *Id.*, para 148. However, the tribunal rejected this argument: “the Conversion Contract was more than just goods against a tolling fee – it established a relationship of “common interest” whereby KCH (and, ultimately GEA) would, among other things, assist with delivery of logistics and pay for Ukrainian domestic freight, resolve customs issues, and supply the Oriana plant with necessary materials.” *Id.*, para 149. The tribunal ultimately concluded that the Conversion Contract constituted an investment within the meaning of the underlying BIT and Article 25 of the ICSID Convention. *Id.*, paras 149-151. As in *GEA*, Claimants’ Investment Agreements with SAMIR in Morocco, and the property and other rights associated with them, comply with the definition of protected “investments” under the FTA. In both cases, the underlying contracts contained important features in addition to the supply of commodities to the local entity. In the case of Carlyle’s Investment Agreements, Carlyle purchased and stored in SAMIR’s tanks crude oil and other products from various suppliers, which were readily available for repurchase by SAMIR, in turn making possible the smooth operation and functioning of the refinery.

SAMIR's refinery in Morocco, pursuant to which Claimants acquired 959,999 metric ton equivalents of Commodities in the aggregate, and paid US\$429,295,148 in the aggregate. For each Transaction, Claimants and SAMIR entered into a confirmation, which included the date and price for each particular purchase. On or about the purchase date, Claimants would post an irrevocable letter of credit in favor of a commodity supplier. The Commodities would then be delivered to the SAMIR refinery, and stored there pursuant to the CSA. Claimants then had a put option (the "Put Right") under which Claimants could resell the Commodities to SAMIR at a fixed price at a later date within an "Exercise Period" specified in the confirmation. Once SAMIR paid Claimants for their Commodities, a close-out confirmation would be signed. Thus, SAMIR was allowed to utilize the Commodities to operate the refinery, but if it wished to do so, it first had to obtain Claimants' consent and make payment to Claimants.

26. The strike price of Claimants' Put Right (i.e., the price at which the put could be exercised) was derived from several elements, including the purchase price of the Commodities in the individual transaction confirmation, a transaction premium, and the time from the original purchase by Carlyle to the exercise of its Put Right.²⁴
27. Therefore, Claimants' "Investments" in Morocco consisted of the following:
 - Commodities stored in SAMIR's tanks pursuant to the Transactions and owned by Claimants under the Investment Agreements, which are protected investments under Article 10.27(h) of the FTA as "movable property;" and
 - Contractual rights derived from the Investment Agreements such as the Transactions' Put Right, which is a type of "option"²⁵ covered by Article 10.27(d) of the FTA.

²⁴ Expert Report of Richard E. Walck ("Walck Report"), para 12.

²⁵ According to Barrons' Dictionary of Finance and Investment, John Downes and others, Barron's Dictionary of Finance and Investment Terms, Fifth Edition, (Barron's Educational Services, Inc. 1998) 416 (C-0003-ENG), an "option" is a "right to buy or sell property that is granted in exchange for an agreed upon sum. If the right is not exercised after a specified period, the option expires and the option buyer forfeits the money." See also Walck Report, para 11, citing Professor Stephen G. Ryan, *Financial Instruments & Institutions: Accounting and Disclosure Risks*, (Wiley Finance 2002), 225 ("An options contract provides the purchaser [Carlyle] with the right but not the obligation to buy or sell the underlying [Commodities] 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.").

28. Finally, all of Claimants' Investments were made in 2015, well after the entry into force of the FTA. Therefore, Claimants' Investments pursuant to the Investment Agreements are "investments" within the meaning of Article 10 of the FTA.

C. Claimants' Dispute Meets the Requirements of the ICSID Convention

29. In addition, Claimants also meet the jurisdictional requirements of Article 25(1) of the ICSID Convention, according to which "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."²⁶

30. Claimants' dispute is "legal" in nature because (i) it concerns the breach of an obligation by Morocco created by a normative instrument (the FTA); and (ii) Claimants are requesting compensation for damages suffered as a consequence of such breach.²⁷

Further, the dispute entails a "disagreement about legal rights or obligations" and "deals with the existence and scope of Claimants' legal rights" under the FTA, which are also evidence that the dispute is "legal" in nature according to arbitral tribunals.²⁸

31. The dispute at issue in this arbitration also "[arises] directly out of" an investment as required by Article 25 of the ICSID Convention.²⁹ Investment tribunals have found that

²⁶ ICSID Convention art 25(1).

²⁷ See *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Objections to Jurisdiction (27 February 2006) para 71 (stating "[p]our qu'il y ait différend juridique, il faut donc que deux conditions soient remplies: que l'existence ou la portée d'un droit ou d'une obligation créée par un instrument normatif soit contestée, et qu'une partie demande réparation pour le préjudice subi, du fait de l'inobservation par l'autre partie dudit droit ou obligation, ou réclame la condamnation de l' autre partie à observer ledit droit ou obligation.") (CL-0005-FR).

²⁸ See *Noble Energy Inc. and Machala Power Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (5 March 2008) para 123 (finding that "[i]n the Tribunal's opinion, the dispute or disputes submitted to it are of a legal nature as they involve a disagreement about legal rights or obligations. Or, to use the words of the Report of the Executive Directors of the World Bank on the Convention, the present dispute is legal in nature because it deals with 'the existence or scope of [the Claimants'] . . . legal right[s]' . . . and with the nature and extent of the relief to be granted to the Claimants as a result of the Respondents' alleged violation of such rights.") (CL-0006-ENG).

²⁹ Although the ICSID Convention does not define the term "investment," ICSID tribunals have found the investments at issue to qualify where claimants demonstrated (i) a contribution of capital, (ii) over a certain duration, (iii) the assumption of the risk of loss associated with the investments, and (iv) significance for the host's State development (the so called "Salini Test") (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco* ICSID Case No. ARB/00/4 ("*Salini*"), Decision on Jurisdiction of (23 July 2001) para 52 (CL-0007-ENG)); see also *Jan de Nul*

this phrase should not be interpreted restrictively.³⁰ It has also been recognized that the term “directly” under this article “has to do with the relationship between the dispute and the investment rather than between the measure and the investment.”³¹ For example, in *Fedax*, promissory notes were issued by the Venezuelan Government pursuant to a contract between the Government and the Venezuelan corporation Industrias Metalurgicas Van Dam C.A. The promissory notes were later endorsed by the corporation to the claimant Fedax N.V., a company from the Netherlands.³² Fedax N.V. submitted the dispute over the lack of payment of the promissory notes to arbitration under the Venezuela-Netherlands Bilateral Investment Treaty. Venezuela argued that the claimant had not made a “direct foreign investment” in the territory of Venezuela.³³ The tribunal, however, found that regardless of whether the promissory notes were considered a direct or indirect investment, the tribunal had jurisdiction under the ICSID Convention because the dispute arose from those transactions. Specifically, the tribunal in *Fedax* noted the following:

It is apparent that the term “directly” relates in this Article to the “dispute” and not to the “investment.” It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term “investment” must be given in the light of the negotiating history of the Convention.³⁴

N.V. and Dredging International N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006) paras 91-92 (CL-0008-ENG); *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7 (“*Houben*”), Award (12 January 2016) paras 112-114 (CL-0009-FR). Although the applicability of the Salini Test has been contested by some tribunals in recent years (see, e.g., *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/2), Award (24 July 2008) paras 312-318 (CL-0010-ENG)), the applicability of the first three elements of the Salini Test in this case cannot be questioned because, as reflected in the previous section, these elements of the Salini Test have been incorporated into Article 10.27 of the FTA. Claimants’ Investments also comply with the fourth element of the Salini Test (i.e., significance for Morocco’s development), which is not required by the FTA, since Claimants’ investments enabled the smooth operation of Morocco’s only oil refinery, and therefore clearly contributed to Morocco’s economic development.

³⁰ *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction (26 April 2005) para 60 (CL-0011-ENG).

³¹ *Id.*

³² *Fedax N.V. v. Republic of Venezuela*, Decision on Objections to Jurisdiction (11 July 1997) para 13 (CL-0003-ENG).

³³ *Id.*, para 24.

³⁴ *Id.*

32. In sum, the *Fedax* tribunal found that the promissory notes were a loan and that loans were specifically covered in the definition of investment under the relevant treaty.³⁵ Therefore, the dispute in *Fedax* met the requirements of Article 25 of the ICSID Convention.³⁶ Here, as in *Fedax*, the “dispute arises directly out” of Claimants’ Investments, which include the purchase and sale of movable property and the provision of options, both of which are explicitly covered under the FTA. Therefore, Carlyle’s Investments in Morocco comply with Article 25 of the ICSID Convention.³⁷

D. The Claims Are Timely

33. As detailed above, Respondent’s wrongful conduct occurred beginning in August 2015 and during part of 2016, and Claimants learned of such conduct only after August 7, 2015. Claimants filed their request for arbitration on July 31, 2018. Accordingly, over six months passed between the events giving rise to the claims here and the filing of the present arbitration, and less than three years elapsed between the time Claimants first became aware of Respondent’s breach and the filing of their claims. Thus, both Article 10.15.3 of the FTA, which requires the six-month lapse of time before a filing, and Article 10.17.1, which provides the three-year window of time within which to file, have been satisfied.³⁸

³⁵ *Id.*, para 29, 31-32.

³⁶ *Id.*, para 45.

³⁷ Further, as noted above, ICSID tribunals have found that investments made in analogous cases that involve similar Investment Agreements and facts comply with Article 25 of the ICSID Convention. *GEA*, para 151 (CL-0004-ENG); *Deutsche Bank*, para 312 (CL-0002-ENG).

³⁸ Article 10.15.3 of the FTA states, in part: “Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1: (a) under the ICSID Convention and the ICSID Rules of Procedures for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention; . . .” Article 10.17.1 of the FTA states, in part: “No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.15.1 and knowledge that the claimant . . . or the enterprise . . . has incurred loss or damage.” (CL-0001-ENG).

IV. STATEMENT OF FACTS

A. Prior to Entering Into the SAMIR Investments, Carlyle Performed Due Diligence on SAMIR and Thoroughly Investigated the Commercial Conditions in Morocco

34. Carlyle began contemplating the Transactions with SAMIR in October 2014.³⁹ Prior to entering into the Investments, Carlyle conducted diligence of SAMIR and thoroughly investigated the business climate in Morocco – including engaging in consultations with Moroccan counsel – before agreeing to enter into the Transactions.⁴⁰ For example, Carlyle reviewed a U.S. State Department report that identified Morocco as a commercially safe jurisdiction.⁴¹ Carlyle also reviewed, among other things, detailed publicly available information concerning SAMIR, such as SAMIR’s financial statements, and met with numerous SAMIR representatives.⁴² Based on its due diligence, Carlyle understood that its position in the SAMIR Transactions would be recognized and protected by Moroccan law.⁴³ Ultimately, in December 2014, Carlyle decided to enter into the Investments with SAMIR.

B. The Government Understood and Approved of the Investments

35. In December 2014, prior to signing the Investment Agreements, SAMIR informed Carlyle that the parties were required to obtain authorization from the Government in order to engage in the Investments.⁴⁴ Due to Morocco’s currency control restrictions, the transaction structure had to be approved by Morocco’s Office des Changes (the “Foreign Exchange Office”) – an official Government agency.⁴⁵

36. In December 2014 and January 2015, SAMIR’s representatives met in person and exchanged correspondence with representatives of the Foreign Exchange Office regarding the proposed Investments with Carlyle.⁴⁶ SAMIR explained to the Foreign

³⁹ See Email from Dietrich to Oswald, 27 October 2014 (C-0004-ENG); Olivo Statement, para 6.

⁴⁰ Olivo Statement, para 6.

⁴¹ See Morocco Investment Climate Statement 2015 (C-0005-ENG); Olivo Statement, para 6.

⁴² Olivo Statement, paras 6-7.

⁴³ *Id.*, para 6.

⁴⁴ *Id.*, para 8.

⁴⁵ *Id.*

⁴⁶ See *id.*, paras 8-9, Ex. 1 (MO-0001).

Exchange Office the entire structure of the proposed Transactions in detail, including that Carlyle would own the Commodities and hold title to the Commodities while they were in storage at SAMIR.⁴⁷ Carlyle worked with SAMIR to gather the information requested by the Foreign Exchange Office and to answer all questions that were posed by the Government officials concerning the Investments.⁴⁸

37. On January 16, 2015, Carlyle learned from Youssef Nadifi, a senior member of the SAMIR finance team, that the Foreign Exchange Office had granted approval of SAMIR's entry into the Investments with Carlyle.⁴⁹ In a letter affirming approval of the Investments, the Foreign Exchange Office outlined the details of the transaction structure between Carlyle and SAMIR, specifically noting that "the SAMIR company must transfer ownership of the imported crude oil shipments . . . to [Carlyle]."⁵⁰
38. After receiving the general approval from the Foreign Exchange Office to enter into the Investments, SAMIR sought and obtained the Foreign Exchange Office's endorsement prior to entering into each individual Transaction with Carlyle.⁵¹ Prior to the Government's freezing of SAMIR's bank accounts in August 2015, the Government's Foreign Exchange Office endorsed each and every Transaction that SAMIR submitted for approval.⁵²

C. The Structure of the Carlyle/SAMIR Transactions

39. As noted previously, the Transactions were governed by the Investment Agreements. The Confirmation for each Transaction specified a purchase date on which Carlyle agreed to commit capital by posting an irrevocable letter of credit in favor of a commodities supplier. Pursuant to the Investment Agreements, title to the Commodities passed from the supplier through SAMIR to Carlyle.⁵³

⁴⁷ *Id.*

⁴⁸ *See id.*, para 9.

⁴⁹ *See id.*, para 10, Ex. 2 (MO-0002); *see also* [REDACTED]

⁵⁰ Olivo Statement, para 10

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*, para 12.

40. SAMIR stored the Commodities in its tanks for a period of time specified in each Confirmation as the exercise period, during which time title to the Commodities remained with Carlyle.⁵⁴ During the exercise period, SAMIR could not use, remove, sell, or otherwise dispose of Carlyle's Commodities being stored in its tanks.⁵⁵
41. At any time during the exercise period, Carlyle had the ability, but not an obligation, to exercise a Put Right to sell the Commodities back to SAMIR at a fixed purchase price set forth in the Confirmation.⁵⁶ The Investment Agreements contemplated that to repurchase the Commodities, in addition to the fixed purchase price, SAMIR would also pay Carlyle a transaction premium, calculated based on the length of time that Carlyle's irrevocable letter of credit used to fund the initial purchase remained open, and the length of time between Carlyle's closing of the letter of credit and its resale of the Commodities to SAMIR.⁵⁷
42. After SAMIR received notice that Carlyle was executing its Put Right, SAMIR signed a closeout confirmation, which contained the final value of the purchase price and the transaction premium.⁵⁸ The Investment Agreements contemplated that SAMIR would then pay Carlyle the total amount listed on each closeout confirmation, and once Carlyle received the payment – and only then – would title to the Commodities pass from Carlyle to SAMIR.⁵⁹

D. From February 2015 to August 2015, the Carlyle/SAMIR Transactions Proceeded Largely According to Plan

43. Beginning in March 2015, SAMIR sent Carlyle regular reports reflecting the volume of inventory stored at the refinery, including the Commodities owned by Carlyle.⁶⁰ During the early course of their dealings, SAMIR made payments to Carlyle to open and close out transactions, for which Carlyle exercised its Put Right, all in accordance with the

⁵⁴ *Id.*, para 13.

⁵⁵ *Id.*

⁵⁶ *Id.*, para 14.

⁵⁷ *Id.*

⁵⁸ *Id.*, para 15.

⁵⁹ *Id.*

⁶⁰ *See, e.g. id.*, para 17, Ex. 9 (MO-0009); Witness Statement of Vishal Suvagiya ("Suvagiya Statement"), para 11.

Investment Agreements.⁶¹ For example, on May 21, 2015, SAMIR made a payment of \$51,181,388.63 to close out the first Transaction between Carlyle and SAMIR.⁶² Three weeks later, on June 4, 2015, SAMIR closed out the parties' second Transaction with a payment of \$17,826,642.52.⁶³

44. In April 2015, SAMIR invited Carlyle to increase the volume of the Investments.⁶⁴ On June 15, 2015 after reviewing every SAMIR deal to date, Carlyle verified that the value of the inventory at SAMIR was greater than the value of Commodities owned by Carlyle.⁶⁵ At that time, Carlyle was thus satisfied that SAMIR was a reliable trading partner, and agreed to increase the volume of the Investments. Accordingly, on June 22, 2015, SAMIR sent a letter formalizing the parties' agreement to increase the Investment volume.⁶⁶ In the letter, SAMIR agreed to repurchase from Carlyle an additional \$600 million of Commodities pursuant to the terms of the Investment Agreements over the course of at least three years.⁶⁷
45. Following the parties' commitment to increase the Investment volume and until August 2015, SAMIR continued to make payments to Carlyle in accordance with the Investment Agreements. For example, on July 22, 2015, SAMIR closed out two additional Transactions with payments totaling over \$35 million.⁶⁸ On August 4, 2015, SAMIR paid Carlyle over \$37 million to close out two deals, and paid an additional \$3 million as a Haircut⁶⁹ payment for a third.⁷⁰
46. Also on August 4, 2015, Carlyle representatives Matthew Olivo, a Director of Structured Investments, and Vishal Suvagiya, a Senior Commodities Structuring Associate, traveled

⁶¹ See Olivo Statement, para 19.

⁶² *Id.*, Ex. 10 (MO-0010);

⁶³ *Id.*, Ex. 11 (MO-0011).

⁶⁴ *Id.*, para 20, Ex. 12 (MO-0012).

⁶⁵ Email from Suvagiya to Olivo, Re: SAMIR Custody Certificates, 16 June 2015 (C-0006-ENG).

⁶⁶ Olivo Statement, para 20, Ex. 5 (MO-0005).

⁶⁷ *Id.*

⁶⁸ *Id.*, para 22, Ex. 16 (MO-0016).

⁶⁹ In connection with each transaction, SAMIR paid Carlyle a sum which was a designated portion of the purchase price (the "Haircut"). The amount of the Haircut was set in each Confirmation and was to be credited against SAMIR's closing payment. Walck Report, paras 15-16.

⁷⁰ Olivo Statement, para 22, Exs. 17-18 (MO-0017-18).

to Morocco for meetings with representatives of SAMIR.⁷¹ At those meetings, SAMIR representatives informed Carlyle that SAMIR was working on a plan with Attijari Finances Corporation, a Moroccan investment bank (“Attijari”), to significantly increase SAMIR’s capital base.⁷² SAMIR represented that the largest portion of the capital raise would come from SAMIR’s controlling shareholder, Sheikh Al-Amoudi, who was one of the richest men in the world.⁷³ At the time, Sheikh Al-Amoudi controlled 67% of the shares of SAMIR.⁷⁴

47. Notably, at no time during this February 2015 to August 2015 period was Carlyle ever notified by the Government that the Transactions would not be honored.⁷⁵

E. In August 2015, the Moroccan Government Seized SAMIR’s Assets and Froze SAMIR’s Bank Accounts Forcing SAMIR to Shut Down Operations

48. In August 2015, the status of Carlyle’s Investments changed dramatically as a result of the Government’s actions. On August 7, 2015, the Government froze SAMIR’s bank accounts, refused to allow ships to unload crude oil at the refinery, and installed officials from the Office of Customs in the refinery to supervise and control SAMIR’s operations.⁷⁶ Pursuant to a “third party holder notification procedure” under Moroccan law, the Moroccan Customs Office also directed SAMIR’s banks and local distributors to pay to the Government – not Carlyle or SAMIR – any funds associated with the sales of Carlyle’s Commodities. Although Carlyle was not notified of this procedure when these third-party notices were issued to SAMIR’s banks and local distributors on August 7, even when it learned of the procedure months later, Carlyle’s attempt to intervene was rejected.⁷⁷ [REDACTED]

⁷¹ Suvagiya Statement, para 12; Olivo Statement, para 23.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Saadallah Al Fathi, ‘Morocco Plays the Waiting Game with Defunct Refinery’ *Gulf News* (2 April 2017) (C-0007-ENG); Tamba Koundouno, ‘SAMIR Refinery: Al Amoudi Claims \$1.5 Billion Compensation from Morocco’ *Morocco World News* (19 May 2019) (C-0008-ENG).

⁷⁵ Olivo Statement, paras 5, 49.

⁷⁶ See Witness Statement of Christopher Zuech (“Zuech Statement”), para 39, Ex. 30 (CZ-0030); [REDACTED]

⁷⁷ Zuech Statement, para 11.

[REDACTED]⁷⁸ Additionally, at some point after the Government froze SAMIR's bank accounts, it swept millions of dollars from SAMIR's accounts.⁷⁹ [REDACTED]

[REDACTED]
[REDACTED]⁸⁰

49. SAMIR had informed Carlyle in early August that the refinery would be shutting down some of its refining units temporarily.⁸¹ However, Carlyle later learned from a news article published by Reuters on August 13, that on August 7, 2015, assets purportedly belonging to SAMIR were seized by the Moroccan Tax Administration over a dispute involving allegedly unpaid taxes.⁸² [REDACTED]

[REDACTED]⁸³

50. When Carlyle reached out to SAMIR to verify the information reported in the Reuters article, SAMIR's representatives responded that they believed SAMIR was current in its tax payments and did not owe any overdue amounts to the Government.⁸⁴ SAMIR also told Carlyle that Carlyle's assets, including cash proceeds from the sale of Carlyle-owned Commodities, were being held for the benefit of Carlyle.⁸⁵ SAMIR further reported that Sheikh Al-Amoudi and other SAMIR board members were actively meeting with the Government to resolve their dispute so that SAMIR could release the funds that were earmarked for Carlyle.⁸⁶

51. In late August 2015, Ahmed Harnouch, SAMIR's CFO, reported that SAMIR had around 2 billion MAD (a little over US\$200 million) of receivables in its accounts from recent sales of refined products, waiting to be paid to Carlyle once the Government unfroze SAMIR's accounts.⁸⁷ Mr. Harnouch confirmed that SAMIR had "every intention" of paying for the Commodities stored in SAMIR's tanks, "as soon as the current situation"

⁷⁸ [REDACTED]

⁷⁹ Zuech Statement, para 40; Suvagiya Statement, para 4.

⁸⁰ [REDACTED]

⁸¹ Olivo Statement, para 24.

⁸² Suvagiya Statement, para 14, Ex. 9 (VS-0009).

⁸³ [REDACTED]

⁸⁴ Olivo Statement, para 25.

⁸⁵ *Id.*

⁸⁶ *Id.*, paras 25-26.

⁸⁷ *Id.*, para 26, Ex. 21 (MO-0021).

with the Government was dealt with.⁸⁸ The position of SAMIR's CFO was echoed by John Oswald, a former SAMIR board member, who assured Mr. Suvagiya and Chris Dietrich, a Carlyle Director of Structured Investments, that "the issues with the Moroccan government will be resolved in the next 2 weeks and [Sheikh] Al Amoudi is writing a check" to solve any liquidity issues.⁸⁹

F. In the Fall of 2015, SAMIR and the Government Failed to Resolve Their Dispute Despite Repeated Efforts by SAMIR

52. In early September 2015, Mr. Zuech and Mr. Olivo traveled to Morocco to meet with SAMIR board members Jamal Ba-Amer, who was also SAMIR's CEO and General Manager, and Bassam Aburdene.⁹⁰ The board members confirmed that SAMIR had over \$200 million of receivables in its accounts earmarked for Carlyle and informed Carlyle that Sheikh Al-Amoudi was currently meeting with the King of Morocco in the United States, to resolve SAMIR's tax dispute with the Government.⁹¹
- i. SAMIR's Board Approved a Recapitalization Plan Designed to Satisfy SAMIR's Obligations to Carlyle and the Government
53. Shortly after meeting with SAMIR, Carlyle learned that SAMIR's board had approved a broad recapitalization plan that was aimed at putting the company in a strong financial position moving forward and structured to satisfy SAMIR's obligations to Carlyle and the Government.⁹² On September 11, 2015, Mr. Aburdene, relayed to Carlyle that the resolution the SAMIR board had approved involved, among other things, \$1 billion dollars of new equity capital scheduled to come into the company by early December 2015.⁹³ As part of the capital increase, Sheikh Al-Amoudi was planning to inject as much as \$670 million into SAMIR. Mr. Aburdene explained, however, that SAMIR still

⁸⁸ *Id.*, para 26, Ex. 20 (MO-0020).

⁸⁹ Zuech Statement, para 13, Ex. 8 (CZ-0008).

⁹⁰ Zuech Statement, para 15; Olivo Statement, para 28, Ex. 23 (MO-0023).

⁹¹ Zuech Statement, para 15; Olivo Statement, para 29, Ex. 24 (MO-0024).

⁹² *See* Zuech Statement, para 17, Ex. 11 (CZ-0011); Olivo Statement, para 31.

⁹³ Zuech Statement, para 18, Ex. 12 (CZ-0012); Olivo Statement, para 32.

had to discuss the plan with the three Government ministers who had the authority to sign off on the deal.⁹⁴

54. SAMIR held another board meeting on October 16, 2015 at which Sheikh Al-Amoudi formally voted for the capital increase of up to \$1 billion.⁹⁵ That same day, SAMIR issued a press release confirming Sheikh Al-Amoudi's intention to inject approximately \$670 million into SAMIR before November 15, 2015.⁹⁶

ii. SAMIR Acknowledged that it Owed Money to Carlyle, But Could Not Pay Carlyle Because the Funds Owed to Carlyle Were in Accounts Frozen by the Government

55. On September 14, Mr. Olivo and Mr. Zuech traveled to Morocco again to meet directly with SAMIR representatives.⁹⁷ While in Morocco, Carlyle representatives met with Jamal Ba-Amer, SAMIR's CEO and General Manager, Ahmed Harnouch, SAMIR's CFO, and Youssef Nadifi, a member of SAMIR's finance team.⁹⁸ The SAMIR representatives maintained that Carlyle would be paid for the Commodities from the funds frozen in SAMIR's accounts.⁹⁹ Mr. Ba-Amer further suggested that Carlyle write a letter to SAMIR highlighting the amounts owed to Carlyle, which SAMIR could show to the Government to urge the Government to release the funds in SAMIR's frozen accounts in order to pay Carlyle.¹⁰⁰ Per SAMIR's request, on September 15, 2015, Mr. Zuech sent a letter to SAMIR stressing that Carlyle held title to the Commodities currently stored in SAMIR's tanks and that any proceeds from SAMIR's disposal of the Commodities belonged to Carlyle.¹⁰¹

56. Mr. Ba-Amer replied to Carlyle's letter on September 21, 2015.¹⁰² In his letter, Mr. Ba-Amer acknowledged that "SAMIR ha[d] sold Disposed Commodities in order to pay

⁹⁴ Olivo Statement, para 31, Ex. 28 (MO-0028). An article published by Reuters on September 11, 2015 reported that Sheikh Al-Amoudi had "been negotiating with the Moroccan government to find a compromise to end the company's crisis." Zuech Statement, para 20, Ex. 13 (CZ-0013).

⁹⁵ Olivo Statement, para 41, Ex. 36 (MO-0036).

⁹⁶ *Id.*, Ex. 37 (MO-0037).

⁹⁷ Zuech Statement, para 21, Ex. 14 (CZ-0014); Olivo Statement, para 33.

⁹⁸ Zuech Statement, para 21; Olivo Statement, para 33.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Zuech Statement, para 22, Ex. 15 (CZ-0015).

¹⁰² Suvagiya Statement, para 20, Ex. 15 (VS-0015).

[Carlyle] in the normal course of business.”¹⁰³ Mr. Ba-Amer explained that “the proceeds from the sales of the Disposed Commodities . . . have been deposited in SAMIR’s account with the intention to transfer to [Carlyle] the sales proceeds.”¹⁰⁴ However, “prior to SAMIR’s repayment to [Carlyle], the Moroccan Government ha[d] frozen all bank accounts of [SAMIR], including the bank account holding the amounts owed to [Carlyle].”¹⁰⁵ SAMIR promised to “write to the Moroccan Government in order to explain the ramifications of the Government’s actions upon the Agreements between [SAMIR] and [Carlyle], and the fact that many of the frozen funds are proceeds of sales which are owed to [Carlyle].”¹⁰⁶ Mr. Ba-Amer further reaffirmed that “negotiations are ongoing between [SAMIR] and the Government in order to achieve an effective recovery of [SAMIR’s] activities after the realization of the proposed capital increase,” and “[o]nce the Government unfreezes [SAMIR’s] accounts, the amounts owed to [Carlyle] will be immediately transferred forthwith to [Carlyle].”¹⁰⁷

57. Then, in late September 2015, Carlyle negotiated a Forbearance Agreement with SAMIR, which the parties signed on October 1, 2015.¹⁰⁸ Under the terms of the Forbearance Agreement, Carlyle agreed to refrain from taking immediate legal action against SAMIR, and, in exchange, SAMIR agreed to make a series of payments to Carlyle.¹⁰⁹ In the Forbearance Agreement, SAMIR affirmed that the Commodities were “the property of Carlyle” and that SAMIR “does not have any ownership or property right, title or interest in or to Commodities.”¹¹⁰ SAMIR further stated that although it had breached the Agreements, these breaches occurred due to the Government’s actions.¹¹¹ Specifically, SAMIR asserted in the Forbearance Agreement that the Government “froze SAMIR’s bank accounts on or about August 7, 2015, which has prevented SAMIR from

¹⁰³ *Id.*, p 1.

¹⁰⁴ *Id.*, p 1.

¹⁰⁵ *Id.*, p 1.

¹⁰⁶ *Id.*, p 1.

¹⁰⁷ *Id.*, p 2.

¹⁰⁸ Petrick Statement, para 17, Ex. 13 (MP-0013).

¹⁰⁹ Olivo Statement, para 38, Ex. 27 (MO-0027).

¹¹⁰ *Id.*, p 3.

¹¹¹ *Id.*, p 1.

withdrawing funds from its bank accounts”¹¹² The Forbearance Agreement further states that after the accounts were frozen, the Government swept funds from the accounts and took Commodities from SAMIR’s custodial possession “in order to meet the needs of the Kingdom of Morocco.”¹¹³ As of October 1, 2015, the balance owed to Carlyle by SAMIR was in excess of \$400 million.¹¹⁴ The day after the Forbearance Agreement was signed, Sheikh Al-Amoudi made the first designated payment of \$8,348,948.39 to Carlyle on SAMIR’s behalf.¹¹⁵ SAMIR advised, however, that because of the Government’s actions, SAMIR was unable to make any additional payments to Carlyle under the Forbearance Agreement.

iii. Despite SAMIR’s Good-Faith Attempts to Negotiate with the Government, the Government Refused to Reach a Resolution with SAMIR

58. Carlyle was informed by numerous sources that the Government was unwilling to negotiate in good faith with SAMIR because high-ranking Government officials wanted to oust Sheikh Al-Amoudi from ownership of the refinery by forcing SAMIR into bankruptcy.¹¹⁶

59. It was also reported that one of the Government ministers involved in negotiating the approval of SAMIR’s capital plan, Aziz Akhanouch, the Moroccan Minister of Agriculture, had a personal interest in and business motive for shutting down the SAMIR refinery.¹¹⁷ A news article published on October 8, 2015, reported that Mr. Akhanouch owned a large Moroccan fuel distribution company and “could be tempted” to take control of SAMIR if the refinery was forced to liquidate.¹¹⁸ SAMIR board member George Salem and the head of the third-party inspection company Intertek Morocco,

112 [REDACTED]

¹¹³ Olivo Statement, Ex. 27, p 1 (MO-0027).

¹¹⁴ *Id.*, p 2.

¹¹⁵ Zuech Statement, para 25.

¹¹⁶ Olivo Statement, para 40.

¹¹⁷ *See id.*, para 31.

¹¹⁸ *Id.*, para 40, Ex. 35 (MO-0035).

Abderrahim El Azzouzy, later reiterated to Carlyle that they both believed Mr. Akhanouch had an interest in taking over SAMIR.¹¹⁹

60. Sheikh Al-Amoudi, himself, “accused the Moroccan Government of being more concerned about debt payments than about saving Samir from bankruptcy” and promised to personally “write a letter to King Mohamed VI to request his intervention in the matter.”¹²⁰ Despite the apparent hostility SAMIR faced from the Government, SAMIR persisted in trying to convince the Government to unfreeze its bank accounts so that it could meet its contractual obligations to Carlyle and others.

61. Throughout October and November 2015, SAMIR continued to pursue a deal with the Government.¹²¹ On or around November 4, 2015, for example, Sheikh Al-Amoudi wrote “a letter to the relevant Moroccan Government officials requesting a meeting to resolve all outstanding issues involving [SAMIR].”¹²²

62. After months of failed negotiations, on November 24, 2015, Mr. Jouahri reported that Sheikh Al-Amoudi had finally been granted a meeting with the Government to be held imminently.¹²³ However, Carlyle learned from Mr. Ba-Amer and Mr. Salem that when the day of the meeting arrived, the Government failed to appear, even though Sheikh Al-Amoudi had traveled to Morocco specifically for the meeting.¹²⁴

63. Despite the frustrating setbacks in negotiations with the Government, SAMIR continued making efforts aimed at paying Carlyle. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹²⁵ Carlyle did in fact make such a request to the Government in a December 21, 2015 letter addressed to Mohamed Boussaid, the Moroccan Minister of Economy and Finance.¹²⁶ In that letter, Carlyle

¹¹⁹ *Id.*, para 40.

¹²⁰ *Id.*, para 35, Ex. 33 (MO-0033).

¹²¹ *See id.*, paras 41-42.

¹²² *Id.*, para 42.

¹²³ *Id.*, para 43.

¹²⁴ *Id.*

¹²⁵ [REDACTED]

¹²⁶ Zuech Statement, para 34, Ex. 26 (CZ-0026).

highlighted the “undisputable facts and supporting evidence regarding the unauthorized removal and disposition” of Carlyle’s Commodities and sought the Government’s assistance in recovering the Commodities and the cash proceeds frozen in SAMIR’s accounts.¹²⁷ SAMIR, for its part, filed a petition in the Casablanca Commercial Court on December 10, 2015, specifically asking the court to take the necessary steps for Customs to lift the freeze on SAMIR’s accounts so that it could pay the amounts due to Carlyle.¹²⁸

64. On November 23, 2015, SAMIR filed a petition in Casablanca Commercial Court seeking an amicable settlement with the Government.¹²⁹ The petition stated that although SAMIR “ha[d] paid all its taxes on the periods agreed upon” and met all of its obligations to the Government, on August 7, 2015, the “Customs Department sent to all banks and companies dealing with [SAMIR] a notification . . . that conclusively prohibits [SAMIR] from disposing of all its money available in the banks on the one hand, and prohibits the clients of [SAMIR] from paying the amounts owed thereto following its monthly sales to them.”¹³⁰ The account freeze “deprived [SAMIR] from its own cash resources” causing SAMIR to suspend refinery operations and leaving it unable to pay its suppliers, despite having financial resources in its accounts to meet the obligations.¹³¹

iv. In the Fall and Winter of 2015, the Government Directed SAMIR to Sell Carlyle’s Commodities and Swept the Proceeds from SAMIR’s Frozen Accounts

65. [REDACTED]
[REDACTED]
[REDACTED]¹³² [REDACTED]¹³³ Despite knowing that the Commodities belonged to Carlyle, the Government never notified Carlyle that it was directing SAMIR to dispose of Carlyle’s assets. Indeed, to the

¹²⁷ *Id.*

¹²⁸ Petition to Casablanca Commercial Court, File No. 17/2015, December 10, 2015 (C-0009-ENG), 10.

¹²⁹ Zuech Statement, para 32, Ex. 25 (CZ-0025).

¹³⁰ *Id.*, 2-3 of 9.

¹³¹ *Id.*, 3 of 9.

¹³² [REDACTED]

¹³³ [REDACTED]

contrary, in December 2015, the Government increased its pressure on SAMIR to dispose of Carlyle's assets without any payment to Carlyle.¹³⁴

66. In an email dated December 11, 2015, Mr. Ba-Amer explained that in the months following the Government's freezing of SAMIR's accounts, "supplying the country" with refined products appeared to have become a "strategic" issue for the Government.¹³⁵ Although SAMIR had informed the Government that Carlyle owned the Commodities, SAMIR advised Carlyle that it was not possible for it to stop supplying the domestic market because it was being ordered by the Government to do so.¹³⁶ In addition, SAMIR advised Carlyle that it did not control its own bank accounts and that the Foreign Exchange Office had ordered SAMIR to stop all international financial transactions, including those with Carlyle, further preventing SAMIR from paying Carlyle the funds owed.¹³⁷

v. At Meetings with Carlyle's Representatives, the Government Acknowledged that Funds Belonging to Carlyle were Frozen in SAMIR's Accounts and that Carlyle Owned Commodities in SAMIR's Tanks

67. During the week of December 14, 2015, Carlyle representatives, including Mr. Olivo and Mr. Zuech, traveled to Morocco.¹³⁸ While there, the Carlyle representatives met with Mohamed Boussaid, the Moroccan Minister of Economy and Finance, Dwight L. Bush, Sr., the U.S. Ambassador to Morocco, and representatives of Attijari.¹³⁹

68. At Carlyle's meeting with Mr. Boussaid, the Minister never denied that the frozen funds in SAMIR's bank accounts belonged to Carlyle, and assured Carlyle that the Government would release the funds as soon as the issues between SAMIR and the Government were resolved.¹⁴⁰ Mr. Boussaid also made representations to Carlyle about the amount of cash

¹³⁴ Suvagiya Statement, para 26, Ex. 17, p 5 (VS-0017).

¹³⁵ Olivo Statement, para 45, Ex. 42 (MO-0042).

¹³⁶ *Id.*.

¹³⁷ *Id.*

¹³⁸ *Id.*, para 46, Ex. 43 (MO-0043); Zuech Statement, para 33.

¹³⁹ *Id.*

¹⁴⁰ Olivo Statement, para 46, Ex. 44 (MO-0044); Zuech Statement, para 33.

in SAMIR's accounts, the amount of receivables purportedly due, and the levels of oil and products remaining at the refinery.¹⁴¹

69. On December 16, 2015, Intertek, an inspection company retained by Carlyle, produced an independent report of the oil and refined products remaining in SAMIR's tanks.¹⁴²

Intertek's report showed that SAMIR's tanks held significantly more oil and refined products than the Government had represented at the meeting earlier in the week.¹⁴³

70. On December 21, 2015, SAMIR provided financial information to Carlyle showing that SAMIR had approximately \$307 million of funds in its frozen accounts.¹⁴⁴ As with the level of oil and refined products, the amount of receivables owed to SAMIR and funds frozen in its accounts was far greater than the amount the Government had claimed existed. Still, SAMIR was unable to release any of the frozen funds to Carlyle because the Government was preventing it from doing so.¹⁴⁵

71. Given the circumstances, Carlyle came to believe that the Government was intentionally understating SAMIR's inventory and level of funds to make it appear that SAMIR was insolvent, so that it could push the refinery into bankruptcy and force Sheikh Al-Amoudi out of ownership.¹⁴⁶

vi. Carlyle Repeatedly Sought to Secure the Release of its Funds from the Government's Control

72. Following up on the earlier meeting, on December 21, 2015, Mr. Zuech sent a letter to Mr. Boussaid reiterating that "Carlyle-owned crude oil and refined products and cash proceeds arising from the sales of such products . . . have been improperly removed from SAMIR's tanks and sold, without Carlyle's consent and without payment to Carlyle."¹⁴⁷

Carlyle further requested that the Government "share with [Carlyle] any information [the Government] may receive in relation to the situation of SAMIR, including in respect of Carlyle-owned crude oil and refined products and proceeds of the dispositions of

¹⁴¹ See Olivo Statement, para 46; Zuech Statement, para 33.

¹⁴² See Email from E.A. Abderrahim to M. Olivo attaching Inventory Report (16 December 2015) (C-0010-ENG).

¹⁴³ Olivo Statement, para 47.

¹⁴⁴ Zuech Statement, para 35, Ex. 27 (CZ-0027).

¹⁴⁵ *Id.*, para 35.

¹⁴⁶ *Id.*, para 35; Olivo Statement para 40.

¹⁴⁷ Zuech Statement, para 34, Ex. 26 (CZ-0026).

Carlyle's property”¹⁴⁸ Carlyle also urged the Government to release from SAMIR's frozen funds a payment for Carlyle before the end of the year, noting that Carlyle has “an unalterable deadline on 31 December of this year” to recover payment for the Commodities disposed of without authorization from Carlyle.¹⁴⁹

73. In mid- to late December 2015, Carlyle further sought to persuade the Government to authorize the release of funds from SAMIR's frozen accounts for an immediate cash payment to Carlyle before the end of the year by sending a letter to the United States Ambassador to the Kingdom of Morocco.¹⁵⁰ In that letter, Carlyle stressed that SAMIR had taken and disposed of Carlyle's Commodities without compensation “at the direction of officials from Morocco's Office of Customs”¹⁵¹ While Carlyle stated that it was “loath to take sides in the disputes between the Moroccan government and SAMIR,” Carlyle emphasized its need for a substantial cash payment to be released from SAMIR's accounts by December 31, 2015.¹⁵² Carlyle maintained and asserted that “the blatant and officially sanctioned expropriation of U.S. persons' property in Morocco rises to State-to-State level discourse” for which Carlyle urged the Ambassador's immediate intervention.¹⁵³ Despite these efforts, however, the Government never responded to Carlyle's correspondence and never provided Carlyle with any cash payment whatsoever.
74. Carlyle also sent a letter to SAMIR's board of directors, directly urging them to help secure payment to Carlyle by year-end.¹⁵⁴ On December 28, 2015, Mr. Ba-Amer responded to Carlyle's letter on behalf of the SAMIR board of directors.¹⁵⁵ He stated that after August 7, 2015, when the Government froze SAMIR's accounts and “refused to allow ships to unload crude,” the Government “placed Customs officials in the refinery to supervise and control the refinery” and maintained control of the refinery ever since.¹⁵⁶

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*, para 36, Ex. 28 (CZ-0028).

¹⁵¹ *Id.*, p 1.

¹⁵² *Id.*, p 1.

¹⁵³ *Id.*, p 2.

¹⁵⁴ *Id.*, para 38, Ex. 29 (CZ-0029).

¹⁵⁵ *Id.*, para 39, Ex. 30 (CZ-0030).

¹⁵⁶ *Id.*

Nevertheless, Mr. Ba-Amer remained “hopeful for a resolution soon” and noted that negotiations between Sheikh Al-Amoudi and the Government were ongoing.¹⁵⁷

75. Carlyle also sought payment from certain distributors to whom SAMIR had sold Carlyle’s Commodities.¹⁵⁸ On December 30, 2015, Carlyle sent letters to the distributors, advising that the Commodities were the exclusive property of Carlyle, and that SAMIR’s sales of those Commodities were conducted in violation of Carlyle’s rights.¹⁵⁹ Carlyle requested that the distributors immediately pay Carlyle the proceeds of those sales. The Government, however, rendered these efforts futile by previously instructing the distributors to pay the Government directly for their purchases of commodities from SAMIR, which undisputedly included Commodities owned by Carlyle.¹⁶⁰

G. In January 2016, Carlyle Learned that SAMIR Would Not be in a Position to Pay Carlyle for its Commodities Due to the Government’s Actions

76. On January 10, 2016, Mr. Zuech and Mr. Suvagiya traveled to Morocco to meet with Mr. Ba-Amer and Hicham Es Semmar, SAMIR’s Finance and Treasury Manager.¹⁶¹ While at SAMIR, the Carlyle representatives reviewed SAMIR’s accounts receivable balances and all applicable invoices.¹⁶²

77. During Carlyle’s conversations with Mr. Ba-Amer on this trip, Mr. Ba-Amer reiterated that the Government was preventing SAMIR from releasing the funds belonging to Carlyle and was continuing to force SAMIR to make sales of refined products to the local market.¹⁶³ Based on Carlyle’s review of SAMIR’s accounts and conversations with Mr. Es Semmar, Carlyle determined at that juncture that there were inadequate funds in SAMIR’s accounts and insufficient receivables due to pay Carlyle.¹⁶⁴ Mr. Es Semmar told Carlyle that the Government had already seized MAD 1.7 billion, or about US\$170 million from SAMIR’s accounts, with plans to seize all of the remaining funds in

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*, para 40, Ex. 31 (CZ-0031).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*, para 40.

¹⁶¹ Suvagiya Statement, paras 29-30, Ex. 20 (VS-0020); Zuech Statement, para 41.

¹⁶² *Id.*

¹⁶³ Zuech Statement, para 41.

¹⁶⁴ *Id.*; Suvagiya Statement, paras 29-30.

SAMIR's accounts.¹⁶⁵ At that point, Carlyle understood that due to the Government's actions, Carlyle had no chance to receive any of the funds owed to it by SAMIR.¹⁶⁶

H. Carlyle Still Has Not Been Paid by the Government for the Commodities that SAMIR Disposed of at the Direction of the Government

78. Unable to pay its creditors or Carlyle, SAMIR was forced into liquidation by the Casablanca Commercial Court in March 2016.¹⁶⁷ At the public hearing before the Court on March 21, 2016, SAMIR requested that the Court approve its proposal for an amicable solution with the Government.¹⁶⁸ SAMIR represented to the Court that it had always paid its taxes on time, and was therefore taken utterly by surprise when the Government froze SAMIR's accounts on August 7, 2015 claiming unpaid taxes.¹⁶⁹
79. SAMIR informed the Court that it had sought a resolution with the Government and its other creditors.¹⁷⁰ SAMIR asserted that it had proposed a substantial capital increase to fund restarting the refinery and begin to repay its debts to the Government and other creditors over time.¹⁷¹ However, based on its actions, the Government appears to have had no interest in allowing SAMIR to restart. In fact, SAMIR's lawyer reported that after the Government froze SAMIR's accounts, a ship carrying one million barrels of oil arrived at the port of Mohammedia to deliver oil to SAMIR, but it was turned away by the Government.¹⁷² Ultimately, the Moroccan Court denied SAMIR's request to pursue an amicable settlement and instead ordered complete liquidation of the refinery's assets.¹⁷³ Carlyle subsequently filed several court proceedings in Morocco in an attempt to recover its Investment-related losses, including a claim in 2016 against the Customs Administration. Carlyle, however, withdrew its claim against the Customs Administration

¹⁶⁵ Zuech Statement, para 41.

¹⁶⁶ *Id.*; Suvagiya Statement, para 30.

¹⁶⁷ 'Court Rules to Liquidate SAMIR Refinery' *The Economist Intelligence Unit*, (31 March 2016) (C-0011-ENG).

¹⁶⁸ Casablanca Commercial Court, Judgment No. 38, File No. 23/8302/2016, (21 March 2016) (CL-0012-ENG).

¹⁶⁹ *Id.*, p 4.

¹⁷⁰ *Id.*, p 4-5.

¹⁷¹ *Id.*, p 16.

¹⁷² *Id.*, p 13.

¹⁷³ *Id.*, p 46.

on December 26, 2017, in order to properly commence this arbitration. To date, Carlyle has not received any compensation from the Government for any of its losses.¹⁷⁴

I. After SAMIR was Forced into Liquidation, the Government Blocked All Outside Bids to Purchase the Refinery

80. After SAMIR was forced into liquidation, the Court appointed an independent trustee (subsequently replaced by another appointed trustee) to assume control of the refinery and begin soliciting bids for SAMIR’s assets.¹⁷⁵ By February 2017, the Government confirmed that as many as 20 investors had shown interest in buying the SAMIR refinery.¹⁷⁶ However, the Government declared that it had to approve any bid to purchase the refinery.¹⁷⁷ To date, the Government has rejected all bids to purchase SAMIR, including a September 2017 bid from a Hong Kong-based investor.¹⁷⁸

81. The media reported that very few of the companies interested in buying SAMIR had developed written proposals, mainly due to the Government’s unreasonably restrictive demand that prospective purchasers of the SAMIR facility secure “deposits issued by a Moroccan bank”¹⁷⁹ For most, if not all, of the prospective purchasers, deposits of that nature are prohibitively difficult to obtain.¹⁸⁰

J. SAMIR Claims that its Insolvency was Caused by the Government’s Actions

82. On April 12, 2019, Sheikh Al-Amoudi and his holding company, Corral Petroleum Holdings AB, filed a complaint against the Government to be resolved under the ICSID Convention.¹⁸¹ Among other charges, the claimants in that proceeding allege that the Government allowed SAMIR to go bankrupt by failing to implement regulations and contract terms that would have made SAMIR competitive in the Moroccan market.¹⁸²

¹⁷⁴ Petrick Statement, paras 25-26.

¹⁷⁵ Casablanca Commercial Court, Judgment No. 38, File No. 23/8302/2016, (21 March 2016) (CL-0012-ENG).

¹⁷⁶ ‘Morocco’s Samir Refinery Draws 20 Bidders’ *Energy Monitor Worldwide* (23 February 2017) (C-0012-ENG).

¹⁷⁷ See Saadallah Al Fathi, ‘Morocco Plays the Waiting Game with Defunct Refinery’ *Gulf News* (2 April 2017) (C-0007-ENG).

¹⁷⁸ ‘Hong Kong Company Seeks to Buy SAMIR Oil Refinery’ *Energy Monitor Worldwide* (20 September 2017) (C-0013-ENG).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Tamba Koundouno, ‘SAMIR Refinery: Al Amoudi Claims \$1.5 Billion Compensation from Morocco’ *Morocco World News*, (19 May 2019) (C-0008-ENG).

¹⁸² *Id.*

The claimants in the Corral arbitration further allege that the Government failed to abide by an investment agreement that included protection against expropriation.¹⁸³

V. RESPONDENT BREACHED ITS OBLIGATIONS UNDER THE FTA

83. Based on the facts discussed above and as further demonstrated below, Respondent's wrongful actions clearly violated the FTA. These unlawful actions rendered Claimants' Investments valueless and deprived Claimants of returns to which they were entitled in direct contradiction of Claimants' legitimate expectations, and constituted a blatant expropriation of Claimants' property without any compensation. Accordingly, Respondent should be held liable for the inexcusable breaches of its obligations to (1) accord Claimants' Investments fair and equitable treatment under Article 10.5.1 of the FTA; and (2) prevent the illegal expropriation of Claimants' Investments without having met the specific conditions set forth in Article 10.6 of the FTA, including providing Claimants with adequate compensation for its losses.

A. Respondent Breached its Article 10.5.1 Obligation to Accord Claimants' Investments Fair and Equitable Treatment

84. Under Article 10.5.1 of the FTA, Respondent is required to "accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment . . ." ¹⁸⁴ Respondent, however, blatantly breached this obligation.

85. While the phrase "fair and equitable treatment" ("FET") is not separately defined in the FTA, Article 10.5.2 of the FTA makes clear that the concept encompasses the "minimum standard of treatment of aliens." ¹⁸⁵ Under international law, this means that, at a minimum, investments subject to FET should be protected against conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, . . . discriminatory . . . or involv[ing] a lack of due process leading to an outcome which offends judicial propriety . . ." ¹⁸⁶

¹⁸³ *Id.*

¹⁸⁴ FTA art 10.5.1 (CL-0001-ENG).

¹⁸⁵ *Id.*, art 10.5.2.

¹⁸⁶ *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3 ("Waste Mgmt."), Award (30 April 2004) para 98 (CL-0013-ENG).

86. The preamble to the FTA also provides that the agreement and its provisions (including the guarantee of FET to covered investments) are intended to reflect the Parties’ “[d]esir[e] to establish clear rules governing [the Parties’] trade and investment . . . and thereby foster a predictable and mutually advantageous commercial environment” as well as their “commitment to transparency and their desire to eliminate corruption in international trade and investment[.]”¹⁸⁷
87. Although, beyond the FTA’s text, the determination of a FET violation is typically considered a fact-specific inquiry,¹⁸⁸ there is a consensus among scholars and investment tribunals that FET is generally intended to “protect investors against serious instances of arbitrary, discriminatory or abusive conduct by States.”¹⁸⁹ Failure to provide due process¹⁹⁰ and other tortious actions constitute discriminatory and abusive conduct by a host government which has been found to breach FET obligations.¹⁹¹
88. Arbitrary conduct that violates FET includes: (1) any measure that is taken in willful disregard of due process and procedure; (2) any measure that is not based on objective legal standards but on discretion, prejudice, or personal preference; (3) any measure that is taken for reasons other than the reason put forth by the State; and (4) any measure that inflicts damage on an investor without serving any apparent legitimate purpose.¹⁹²

¹⁸⁷ The preamble of an investment treaty can often shed light on the treatment that is to be accorded to the covered investment by the underlying treaty. *See, e.g., Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20 (“*Micula*”), Award (11 December 2013) para 509 (“[B]oth Parties agree that the fair and equitable treatment standard should be interpreted in the light of the object and purpose of the BIT as reflected in its Preamble.”) (CL-0014-ENG); *El Paso Energy Int’l Co. v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) paras 345-46 (quoting cases in which the tribunals referred to the preambles of the BITs at issue to determine the scope of FET) (CL-0015-ENG).

¹⁸⁸ *See, e.g., Mondev Int’l Ltd. v. United States*, Award, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002) para 118 (“A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.”) (CL-0016-ENG).

¹⁸⁹ Josefa Sicard-Mirabal and Yves Derains, *Introduction to Investor-State Arbitration* (Kluwer Law International 2018), pp 136-37 (CL-0017-ENG); *see also* Rudolf Dolzer and Christoph Schueuer, *Principles of International Investment Law* (2 Oxford University Press 2012), p 145 (noting the “central role of stability, transparency, and the investor’s legitimate expectations for the current understanding of the FET standard”) (CL-0018-ENG).

¹⁹⁰ Article 10.5.2 of the FTA acknowledges that FET includes “the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]” (CL-0001-ENG).

¹⁹¹ *See* Sicard-Mirabal & Derains (n 189), p 140, 142 (CL-0017-ENG).

¹⁹² *Lemire v. Ukraine*, ICSID Case No. ARB/06/18 (“*Lemire*”), Decision on Jurisdiction and Liability, (14 January 2010) para 262 (CL-0019-ENG).

89. Tribunals also routinely find a FET violation where the host government frustrates or thwarts an investor's legitimate expectations with respect to its investment. The standard set forth in *Tecmed v. Mexico*, a case in which the host government arbitrarily rejected the claimant's request for renewal of a license and thereby undermined the claimant's legitimate expectation that it could carry out a long-term investment, is particularly instructive here. In that case, the tribunal stated as follows:

[Fair and equitable treatment] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. . . . The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without required compensation.

¹⁹³

90. It is further agreed that the host government's conduct does not need to be egregious or shocking to rise to the level of a FET violation.¹⁹⁴ Indeed, investment tribunals have noted instead that it is possible for the State to violate FET "without necessarily acting in bad faith."¹⁹⁵ Nevertheless, as further explained below, bad faith is seen as diametrically opposed to the concept of FET. Accordingly, the presence of bad faith conduct alone may be sufficient to demonstrate a FET violation.¹⁹⁶

91. In sum, in order to comply with the obligation to accord FET under the FTA, Respondent is required, among other things, to uphold and not frustrate Claimants' legitimate

¹⁹³ *Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 ("Tecmed"), Award (29 May 2003) para 154 (emphasis added) (CL-0020-ENG).

¹⁹⁴ *Micula* (n 187) para 508 (CL-0014-ENG).

¹⁹⁵ See *Tecmed* (n 193) para 153 (CL-0020-ENG).

¹⁹⁶ *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/05/2, Award (18 September 2009) para 296 (CL-0021-ENG).

expectations, to act transparently, not arbitrarily, and in good faith with respect to Claimants' Investments, to refrain from tortious or abusive conduct, and to provide proper due process.

92. By freezing SAMIR's bank accounts, seizing SAMIR's assets, directing SAMIR to sell Carlyle's Commodities into the Moroccan market, sweeping from SAMIR's accounts the proceeds from the unauthorized sales of Carlyle's Commodities, and instructing local Moroccan distributors to pay the proceeds from the unauthorized sales directly to the Government – all without providing Claimants prior notice or any opportunity to object – Respondent (i) disrupted and undermined Claimants' legitimate expectations with respect to their Investments; and acted (ii) without transparency, (iii) arbitrarily, and (iv) in bad faith as to the Investments. Accordingly, Respondent unquestionably breached its obligation under Article 10.5.1 of the FTA to accord FET to Claimants' Investments.

i. Respondent Usurped Claimants' Legitimate Expectations

93. First, Respondent breached its FET obligation under the FTA by usurping Claimants' legitimate expectations that their Investments would proceed in accordance with the terms of the various Investment Agreements.

94. Since *Tecmed*, upholding the legitimate expectations of the investor and a stable legal and business environment have been considered “central” and “essential” to the definition of FET.¹⁹⁷ This concept is centered in the belief that the investors' decisions *to* invest, along with the details of what, when, and how they will invest, will be significantly impacted by the investors' understanding of the host government's requirements and expected actions toward the investments.¹⁹⁸

¹⁹⁷ See *El Paso* (n 187) paras 346, 348 (CL-0015-ENG); *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) para 274 (CL-0022-ENG).

¹⁹⁸ See *Saluka Investments BV (Netherlands) v. The Czech Republic*, UNCITRAL (“*Saluka*”), Partial Award (17 March 2006) para 301 (“[T]he ‘fair and equitable treatment’ standard . . . should therefore be understood to be treatment which, if not proactively stimulating the inflow of foreign investment capital, does at least not deter foreign capital by providing disincentives to foreign investors. An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable.”) (CL-0023-ENG).

95. As stated in *Suez v. Argentine Republic*:

When an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed. . . . An investor's expectations, created by law of a host country, are in effect *calculations about the future*.¹⁹⁹

96. If a FET obligation exists, an investor's legitimate expectations with respect to its investments in a host country are thus required to be honored by the host government because the investor acts in reliance on the host government's explicit and implicit representations. The investor changes its economic position by investing capital and taking on financial risk that it otherwise might not undertake in the absence of certain basic expectations that, for example, the host government will not unlawfully take over or completely destroy its investments. If the host government suddenly acts in direct opposition to its previous representations and harms the investments in doing so, the host government has violated its FET obligation.²⁰⁰

97. For example, in *Micula*, Romania instituted a special regulatory regime for disfavored regions of the country that created the legitimate expectation that certain tax exemptions and other incentives would remain in place during the entire ten-year period. Having enticed the claimants to make substantial investments in reliance on these incentives, Romania then abruptly changed its legislation and withdrew most of the incentives four years before they were scheduled to expire. The tribunal found this sudden change to have upended the claimants' legitimate expectations – nearly having eviscerated the value of their investments – and therefore in violation of the FET standard.²⁰¹

98. As another example, in *Gold Reserve v. Venezuela*, the claimant argued that, after it was granted certain permits to engage in mining activities, Venezuela reinforced the belief

¹⁹⁹ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010) para 203 (emphasis added) (CL-0024-ENG).

²⁰⁰ *Id.*, para 207.

²⁰¹ *Micula* (n 187) paras 721-25 (CL-0014-ENG).

and expectation that claimant's mining activities were compliant with applicable laws by consistently issuing compliance certificates to claimant.²⁰² As the tribunal in the case stated, such expectations were reinforced by the absence of any warnings or formal notice from the state to the contrary.²⁰³ Yet, following a political policy change, claimant's permits were progressively hindered and ultimately cancelled.²⁰⁴ The tribunal found the state's "breach of legitimate expectations as a FET component [to be] of particular significance" and held that Venezuela had violated its FET obligation.²⁰⁵

99. A breach of the FET obligation was also found in *Masdar Solar & Wind Cooperatief v. Spain*, where the claimant, seeking to invest in renewable energy and sustainable technology internationally, undertook substantial due diligence of Spain's solar thermal technology market, found a favorable regulatory and economic framework in that market for claimant's investments, and invested in three CSP plants.²⁰⁶ But soon after claimants received confirmation from the Ministry of Industry, Tourism and Trade that the favorable regulatory and economic framework would apply to claimants' plants and the plants had become officially registered for those purposes, Spain began working on modifying that regime.²⁰⁷ The new regulatory and economic framework that resulted was contrary to claimants' legitimate expectations, leading the tribunal to conclude that, by its actions, Spain had breached its FET obligation.²⁰⁸
100. As in the foregoing cases, Respondent breached its FET obligation by failing to uphold Claimants' legitimate expectations. Specifically, Claimants had every reason to expect that Respondent would treat Claimants' Investments fairly and equitably in accordance with customary international law. As described in Section IV above, Claimants, like the conscientious claimant in *Masdar*, developed a reasonable expectation that their Investments would be treated fairly and equitably after conducting months of due

²⁰² *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/09/1 ("*Gold Reserve*"), Award (22 September 2014) para 578 (CL-0025-ENG).

²⁰³ *Id.* para 579.

²⁰⁴ *Id.*, paras 581-82.

²⁰⁵ *Id.*, paras 606, 615.

²⁰⁶ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1 ("*Masdar*"), Award (16 May 2018) paras 82-89 (CL-0026-ENG).

²⁰⁷ *Id.*, paras 96-99, 127-137.

²⁰⁸ *Id.*, para 522.

diligence on SAMIR and the business conditions in Morocco, and taking steps to ensure that Claimants' Investments and the underlying Investment Agreements were compliant with Moroccan law.²⁰⁹

101. Similarly, as in *Masdar* as well as in *Micula* and *Gold Reserve*, Claimants' expectations were then specifically reinforced by the conduct of the Government, which included the absence of any disapproval whatsoever by the Government of any of the individual Transactions, the details of which were sent to the Government by SAMIR. Furthermore, before Claimants entered into any Transactions with SAMIR pursuant to the Investment Agreements, the specific overriding structure of the Transactions first had to be approved by the Moroccan Foreign Exchange Office.²¹⁰ Interacting with the Foreign Exchange Office via SAMIR throughout late 2014 and early 2015, Claimants' representatives provided the Foreign Exchange Office with all of the information it requested regarding the contemplated Investments.²¹¹ Claimants' responses clearly satisfied the Government's requests since the deal with SAMIR was approved and moved forward. These interactions reinforced Claimants' expectations that Respondent – through the Foreign Exchange Office – was well aware not only of Claimants' identity but also the detailed nature of the Investments that Claimants expected to make in Morocco over the course of the Investment Agreements.
102. Indeed, when the Foreign Exchange Office issued its formal approval of the Transactions on January 16, 2015, it was specifically highlighted that Claimants would have title to the Commodities.²¹² Consequently, Claimants were further assured that, whenever necessary, Respondent would recognize Claimants' title to the Commodities stored in SAMIR's tanks (unless and until SAMIR purchased the commodities and paid the premium in accordance with the Investment Agreements).
103. Claimants continued to be assured of Respondent's awareness and approval of Claimants' Investments throughout the first seven months of 2015 because, during that

²⁰⁹ Olivo Statement, paras 6-7.

²¹⁰ *Id.*, para 8.

²¹¹ *Id.*, para 9.

²¹² *Id.*, para 10.

time, SAMIR sought approval from the Foreign Exchange Office prior to entering into each individual Transaction with Claimants, and then obtained such approval.²¹³ Indeed, like the Venezuelan government, which consistently issued compliance certificates to the claimant in *Gold Reserve*, the Moroccan Foreign Exchange Office consistently approved every Transaction that SAMIR submitted for approval and never issued any warnings or notice to suggest that the Transactions would not be honored.

104. Significantly, in June 2015, when Claimants and SAMIR sought to increase the volume of the Transactions pursuant to the Investment Agreements, the Foreign Exchange Office should have once again been directly involved in the review and re-approval of the Investments.²¹⁴ The parameters of the Investments in Morocco all changed suddenly and without notice in August 2015, however, when the Government seized the assets of the SAMIR refinery, including those belonging to Claimants, and took the other wrongful actions described herein.²¹⁵ Indeed, less than two months after Claimants agreed to commit even more capital to their Investments, Respondent completely upended Claimants' legitimate and reasonable expectations regarding their Investments. In short, like Romania's abrupt change of legislation in *Micula*, the sudden action of the Government in August 2015 and the following months upended Claimants' expectations that their investments would be honored for at least the duration of the three-year commitment period.
105. Notwithstanding Respondent's affirmative acknowledgment of Claimants' Investments, Claimants' title to Commodities stored in SAMIR's tanks, and Claimants' entitlement to any proceeds from the sales of those Commodities, Respondent indiscriminately seized and forced non-consented sales of Claimants' Commodities without any notice to Claimants.
106. Respondent did so even as Claimants repeatedly reminded Respondent that at least a significant portion of the Commodities seized belonged to Claimants. Significantly, Carlyle representatives traveled to Morocco during the week of December 14, 2015, and met with the Moroccan Minister of Economy and Finance, Mohamed Boussaid. During

²¹³ *Id.*

²¹⁴ *See id.*, para 21.

²¹⁵ *See supra*, para 48.

that meeting, the Minister tacitly acknowledged and certainly never denied that the frozen funds in SAMIR's bank accounts belonged to Carlyle, and assured Carlyle that Carlyle would be paid those funds once SAMIR and the Government were able to resolve their issues.²¹⁶

107. Following that meeting, Claimants sent a letter on December 21, 2015, to the Minister, emphasizing that Claimants' Commodities had been improperly removed from SAMIR's tanks without consent from or payment to Claimants, and imploring the Government to release a payment to Claimants from SAMIR's frozen bank accounts.²¹⁷ Later that same month, Claimants sent another letter to the U.S. Ambassador to the Kingdom of Morocco, reiterating that their Commodities had been wrongfully removed from SAMIR's facilities and sold into the local Moroccan market, and explaining that a substantial cash payment needed to be released to Carlyle from SAMIR's frozen bank accounts by December 31, 2015.²¹⁸
108. The Government never responded to either letter and never relented from its wrongful conduct. Because Respondent refused to reach a resolution of any type with SAMIR, the Minister's assurances that Carlyle would be paid upon resolution went unfulfilled. Furthermore, Respondent made no efforts to compensate Claimants for the wrongful disposal of Carlyle's Commodities.
109. Through all of the above actions, Respondent unquestionably violated Claimants' legitimate expectations with respect to their Investments, clearly contradicting the Parties' stated "desir[e] to . . . foster a predictable and mutually advantageous commercial environment" under the FTA. Like the host governments in *Micula*, *Masdar*, and *Gold Reserve*, Respondent's conduct here through the first half of 2015 reflected acknowledgment and approval of Claimants' Investments (in particular, Claimants' ownership of certain Commodities in SAMIR's tanks and Put Rights), and thereby created the expectation that Claimants' Investments would be recognized and accorded appropriate treatment. Respondent, however, wholly disregarded Claimants' Investments when it undertook the above-described actions beginning in August 2015, eviscerating

²¹⁶ Olivo Statement, para 46, Ex. 45 (MO-0044).

²¹⁷ See Zuech Statement, para 34, Ex. 26 (CZ-0026).

²¹⁸ Petrick Statement, para 23, Ex. 22 (MP-0022); Zuech Statement, para 36, Ex. 28 (MP-0028).

Claimants' expectation that Respondent would be mindful of their rights. Even when Claimants reminded Respondent of its prior acknowledgment and approval of the Transactions, beseeching the Government for relief both in person and in writing, Claimants' pleas were not heard.

110. Because Respondent failed to uphold even the basic expectation that it would not directly interfere with and take over Claimants' Investments, Respondent breached its obligation under the FTA to accord Claimants' Investments fair and equitable treatment.

ii. Respondent's Actions Lacked Transparency

111. Second, Respondent's actions lacked transparency and breached its "commitment to transparency" obligation under the FTA.

112. Part and parcel of a foreign investor's legitimate expectations regarding its investments is a related expectation that, under the applicable investment treaty, the host state will act "totally transparently" vis-à-vis the investor.²¹⁹ In other words, an investor whose investment is covered by a FET obligation expects to know "all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives[.]"²²⁰ Because the investor will act in accordance with its perceived knowledge, it is "[the] duty [of the host government] to ensure that the correct position is promptly determined and clearly stated so that [the] investor[] can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws."²²¹

113. When Respondent suddenly froze SAMIR's bank accounts, took over the refinery, and began forcing SAMIR to sell Carlyle's Commodities into the Moroccan market, Claimants had no warning or clear explanation for the Government's actions, especially as they affected Claimants.²²² Claimants' Investments were made with the knowledge and approval of the Government, and there was no reason for the Government to blatantly disregard Claimants' ownership of their Commodities or Claimants' entitlement

²¹⁹ *Tecmed* (n 193) para 154 (CL-0020-ENG).

²²⁰ *Id.*

²²¹ *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) para 76 (CL-0027-ENG).

²²² *See supra*, paras 48-51.

to the proceeds of any sale of those Commodities. Claimants initially had no visibility into which branch, division, or sub-unit of the Government was responsible for the seizure and disposal of Claimants' Commodities; this meant that Claimants did not know the appropriate forum for their grievances until many months after the wrongful actions took place. Letters that Claimants addressed to the representatives of Respondent that Claimants believed to have knowledge of or involvement in the wrongful conduct were never even acknowledged. These actions clearly deprived Claimants of the ability to take appropriate actions to protect their Investments and were violations of Respondent's FET obligations under the FTA.

iii. Respondent Took Arbitrary Measures Against Claimants' Investments

114. Third, Respondent's actions were arbitrary, motivated by political desires rather than for any legitimate or legal purpose. Because arbitrariness as a concept is "in itself contrary to fair and equitable treatment,"²²³ Respondent also breached its FET obligation for this reason.
115. The prohibition against arbitrary conduct by a host government that is obligated to accord FET to foreign investments reflects the belief that contracting States to an investment agreement should not implement measures or take any other actions affecting covered investments "without engaging in a rational decision-making process."²²⁴ As noted above, if the host government's conduct (i) willfully disregards due process and procedure, (ii) does not appear to be based on an objective legal standard, (iii) is, in fact, taken for reasons other than the stated reason, or (iv) inflicts damage on an investor without serving any apparent legitimate purpose, the host government will be found to have acted arbitrarily and in violation of FET.²²⁵
116. For example, in *Lemire v. Ukraine*, the tribunal found that Ukraine had acted arbitrarily toward the claimant's investments in radio broadcasting – and therefore in violation of FET – because Ukraine had (i) made unsubstantiated decisions to deny several of the

²²³ *CMS* (n 197) para 290 (CL-0022-ENG).

²²⁴ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) para 158 (CL-0028-ENG).

²²⁵ *Lemire* (n 192) para 262 (CL-0019-ENG).

claimant's bids for radio frequencies, while tendering the frequencies to other parties, pursuant to a non-transparent and closed procedure that was not available to the claimant, and (ii) excluded the claimant from at least one official tender session.²²⁶ Among other reasons, the tribunal did not accept Ukraine's argument that the tender was aimed at renewing expired licenses because it concluded that, as a matter of law, renewals of such licenses should have happened as a matter of right. The tribunal deemed Ukraine's argument to the contrary a "legal impossibility" and "at any rate entirely implausible,"²²⁷ and determined that Ukraine's overall frequency tendering processes was arbitrary and "manifestly violat[ive of] the [FET] requirements of consistency, transparency, even-handedness and non-discrimination."²²⁸

117. The tribunal in *Deutsche Telekom v. India* likewise found a FET violation where India had arbitrarily annulled an agreement between the claimant, a German telecommunications company, and an Indian state-owned company regarding the lease of spectrum on two satellites.²²⁹ Although India tried to justify the annulment by citing a "need to protect military needs," the tribunal found, after first putting aside the dubious premise that there had been essential military needs warranting annulment,²³⁰ that there was "no appropriate correlation between the asserted public policy objective and the measure adopted to achieve it"²³¹ Instead, it found that India had chosen "the most extreme solution (the annulment) and then [sought] to justify it *ex post*."²³² According to the tribunal, this arbitrary conduct resulted from a "flawed" decision-making process and constituted a FET violation.²³³

118. Respondent's actions here are as arbitrary, if not more arbitrary, than those of Ukraine in *Lemire* and India in *Deutsche Telekom*. Respondent's seizure of SAMIR's refinery and

²²⁶ *Id.*, paras 412-18.

²²⁷ *Id.*, para 414.

²²⁸ *Id.*, para 418 (internal quotation marks and italics omitted) (quoting *Saluka*).

²²⁹ *Deutsche Telekom AG v. The Republic of India*, PCA Case No. 2014-10 ("*Deutsche Telekom*"), Interim Award (13 December 2017) para 5 (CL-0029-ENG).

²³⁰ *Id.*, paras 364-67 ("There is no evidence that the military had reached the conclusion that its needs could not be met. The fact that the minutes of the December 2009 meeting [where the spectrum lease at issue was discussed] do not show the existence of essential military needs is confirmed by the absence of any follow up action.").

²³¹ *Id.*, para 367.

²³² *Id.*, para 363.

²³³ *Id.*

forced sale of Claimants' Commodities happened unexpectedly and without prior notice or opportunity to object. Although Respondent claimed after the fact that its conduct related to SAMIR's unpaid taxes,²³⁴ Respondent's actions, purportedly to effectuate repayment of those taxes by SAMIR, were plainly disproportionate to the objective and unjustifiably extreme and irrational, given that the assets seized and funds swept belonged to third parties such as Carlyle. Indeed, Respondent provided no explanation as to why the seizure of the assets at the refinery or the freezing and sweeping of SAMIR's bank accounts, which included funds owed to Claimants and other third parties, constituted an appropriate response to the allegedly overdue taxes.

119. Respondent was fully aware that a significant portion of the commodities that SAMIR was forced to sell in fact belonged to Claimants,²³⁵ and that therefore the sale of such Commodities could not and should not have been effectuated for purposes of allegedly fulfilling SAMIR's Moroccan tax obligations.
120. In addition, Claimants heard from various sources that certain highly-ranked Government officials had no interest in allowing SAMIR to continue under Sheikh Al-Amoudi's ownership.²³⁶ The forced liquidation of SAMIR (rather than the amicable settlement it had sought) indicates that these political motivations were more than just mere rumors, and that the Government's reliance on unpaid taxes as an explanation for its conduct was more pretext than a genuine rationale underlying a "rational decision-making process."
121. In short, the arbitrariness of Respondent's actions further support a finding that Respondent breached its FET obligations under the FTA.

iv. Respondent Acted in Bad Faith With Respect to Claimants' Investments

122. Finally, Respondent's conduct rose to the level of a FET violation because Respondent demonstrated egregious bad faith with respect to Claimants' Investments.

²³⁴ Suvagiya Statement, para 14, Ex. 9 (VS-0009).

²³⁵ See *supra*, para 68.

²³⁶ Olivo Statement, para 40, Ex. 35 (MO-0035).

123. As explained above, although a showing of the host government's bad faith is not *required* to establish a violation of FET, demonstrable bad faith is sufficient for a finding of a FET violation²³⁷ because good faith is "inherent in fair and equitable treatment."²³⁸
124. As stated in *Waste Mgmt.*, "[a] basic obligation of the State under Article 1105(1) [Minimum Standard of Treatment under NAFTA] is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means."²³⁹ In addition, foreign investors protected under a treaty that compels FET should be able to "properly expect that [a State] implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination."²⁴⁰
125. Specific examples of bad faith giving rise to a FET violation might include the host state's "use of legal instruments for purposes other than those for which they were created[.]" "a conspiracy by state organs to inflict damage upon or to defeat the investment, the termination of the investment for reasons other than the one put forth by the government," "expulsion of an investment based on local favouritism[.]" and "[r]eliance by a government on its internal structures to excuse non-compliance with contractual obligations"²⁴¹ Bad faith might also be demonstrated by a "blatant disregard" for certain rules, legal constructs, and procedures that may otherwise be applicable to the foreign investor.²⁴²
126. Here, Respondent's "blatant disregard" of Carlyle's rights under the Investment Agreements, despite SAMIR's and Carlyle's numerous reminders that a significant portion of the seized assets belonged to Carlyle, is a clear indication that the Government was acting in bad faith.

²³⁷ *Cargill* (n 196) para 296 ("[A]lthough bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice.") (CL-0021-ENG).

²³⁸ *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL Case No. UN-0050-01, Final Award (12 November 2010) para 297 (CL-0030-ENG).

²³⁹ *Waste Mgmt.* (n 186) para 138 (CL-0013-ENG).

²⁴⁰ *Saluka* (n 198) para 307 (CL-0023-ENG).

²⁴¹ *Frontier* (n 238) para 300 (CL-0030-ENG).

²⁴² *See Lemire* (n 192) para 385 (CL-0019-ENG).

127. Again, the Government was fully cognizant of Claimants' investment arrangement with SAMIR from its inception, and the January 16, 2015 letter from the Foreign Exchange Office even conveyed the Government's *approval* of the arrangement, which expressly provided that Carlyle would own the Commodities and hold title to them while they were in storage at SAMIR.²⁴³ The Government should have also been aware of the June 22, 2015 agreement between Carlyle and SAMIR to increase the Investment volume given the Exchange Office's requirement that each Transaction be approved. The Government, however, did not take any of this into account when it seized all of the assets at SAMIR's facilities and forced the sale of commodities, including those owned by Claimants, into the Moroccan market without giving any prior notice or opportunity to their rightful owners to object. Moreover, the Government did not undertake any due diligence, whether before or after its actions, to determine whether the commodities it was inappropriately dealing in belonged to third-parties like Carlyle. Even when Claimants sought to intervene to (among other things) suspend the Moroccan Customs Office's "third party holder notification procedure" on the basis that the funds being diverted to the Government pursuant to such procedure belonged or were owed to Claimants, the Government, in bad faith, simply chose to disregard Claimants' ownership of the Commodities and the related proceeds.²⁴⁴
128. As noted above in Section IV, throughout the fall of 2015, Claimants were repeatedly told that SAMIR was in negotiations with the Government and that successful negotiations would lead to reparations to Claimants for their Investment losses. However, as of that winter, SAMIR was still being forced to supply the domestic market with refined products (even though the refinery had been shut down),²⁴⁵ and SAMIR remained with neither a resolution with the Government nor an official recapitalization plan. Indeed, the Government's refusal to negotiate in good faith with SAMIR led SAMIR directly into bankruptcy,²⁴⁶ indicating that the Government never sincerely intended to

²⁴³ Olivo Statement, para 10, Ex. 2 (MO-0002); [REDACTED]

²⁴⁴ See *supra*, para 48.

²⁴⁵ Olivo Statement, para 30, Ex. 26 (MO-0026); [REDACTED]

²⁴⁶ See *supra*, paras 78-79.

resolve its alleged tax dispute with SAMIR and/or allow Claimants to recover their losses.

129. As also noted above in Section IV, despite receiving several bids in SAMIR's bankruptcy proceedings, Respondent (through the Moroccan courts) have continued to impose arbitrary requirements on prospective buyers of SAMIR, conditioning bids not only on their ability to obtain the Government's approval, but also on their ability to secure deposits from a Moroccan bank (a formidable task).²⁴⁷ In doing so, Respondent effectively prevented SAMIR from avoiding bankruptcy and, in turn, prevented Claimants from recovering the moneys due to them. Furthermore, this conduct is another indication that Respondent acted in bad faith in this matter, and is additional evidence that Respondent breached the FET obligation under the FTA.
130. In sum, Respondent's actions undermined Claimants' legitimate expectations, lacked transparency, were arbitrary in nature, and demonstrated bad faith with respect to Claimants' Investments. Each element is independently sufficient to establish a breach of Respondent's FET obligation, but, in the aggregate, Respondent's breach is made glaringly clear. Accordingly, Respondent should be held liable for its wrongful conduct.

B. Respondent Breached its Article 10.6 Obligation to Not Expropriate Claimants' Investments Without Just Compensation

131. Respondent should also be held liable because its conduct constituted an unlawful expropriation of Claimants' Investments in violation of Article 10.6 of the FTA.
132. Article 10.6 of the FTA provides, in relevant part:
1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation") except:
 - (a) for a public purpose;
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation; and
 - (d) in accordance with due process of law and Article 10.5.1 through 10.5.3.

²⁴⁷ See *supra*, para 81.

2. The compensation referred to in paragraph 1(c) shall:
- (a) be paid without delay;
 - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
 - (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
 - (d) be fully realizable and freely transferable.²⁴⁸
133. These provisions prohibit a host state from expropriating investments protected under the FTA unless all of the enumerated conditions are met. Yet here, Respondent failed to meet any of the treaty’s requirements, and instead acted to expropriate property belonging to Claimants without providing them with any compensation or due process.
134. Specifically, the seizure of assets at the SAMIR refinery, which included property belonging to Claimants that SAMIR had taken, and the freezing and sweeping of accounts that included funds belonging to Claimants were expropriating acts for which Claimants received not only no compensation but also no due process by way of a hearing or other opportunity to be heard. Moreover, the disproportionality of the actions is such that it cannot be convincingly argued that these actions were taken for a recognizable public purpose. Respondent thus unlawfully expropriated Claimants’ Investments in violation of Article 10.6 of the FTA.

i. Respondent Expropriated Claimants’ Commodities

135. While Article 10.6.1 does not define “expropriation,” Annex 10-B of the FTA²⁴⁹ states that Article 10.6.1 should reflect “customary international law concerning the obligation of States with respect to expropriation[,]” and that “[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.”²⁵⁰

²⁴⁸ FTA, art 10.6.1(c).

²⁴⁹ The FTA states that Article 10.6 “shall be interpreted in accordance with Annexes 10-A and 10-B.” *See id.* art 10.6, n.2 (CL-0001-ENG).

²⁵⁰ *Id.*, Annex 10-B, cl. 1-2.

136. Annex 10-B further makes clear that Article 10.6.1 is intended to address both situations of (1) direct expropriation, where an investment is expropriated “through formal transfer of title or outright seizure,” and (2) indirect expropriation, where “an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”²⁵¹
137. Under international law, the expropriated property at issue need not be tangible physical assets, but can be contractual rights.²⁵² Here, Respondent’s conduct constituted both a direct expropriation of Claimants’ Commodities and an indirect expropriation of Claimants’ contractual Put Rights.

(a) Direct Expropriation

138. Both the FTA and investment tribunals make clear that a host state’s “outright seizure” or “forcible taking” of property is sufficient to constitute a direct expropriation and that formal transfer of title to that property to the host state is not required.²⁵³
139. In *Gemplus v. United Mexican States*, for example, the claimants made investments in Mexico in and through an investment company. In 1999, a consortium in which the claimants were members successfully tendered for a concession granted by Mexico to establish and operate a national road vehicle registration system. After granting the concession and permitting the company to operate, Mexico subsequently took a number of measures that frustrated the claimants’ venture, first by intervening in the operations of the company and ultimately by arbitrarily revoking the concession in December 2002 and interfering with the investment assets without compensation. Explaining that “a direct

²⁵¹ *Id.*, Annex 10-B, cl. 3-4.

²⁵² See, e.g., *Phillips Petroleum Co. Iran v. Iran*, 21 Iran-US CTR 79, Award No. 425-39-2 (29 June 1989) para 76 (“[E]xpropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, and this is so whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contract rights involved in the present Case.”) (CL-0031-ENG); *Starrett Housing Corp. v. Iran*, Interlocutory Award No. ITL 32-24-1 (19 Dec. 1983) para 74 (holding that the property interest expropriated by the Government of Iran was comprised of both the physical property at issue as well as the contractual rights to manage the apartment construction project and to collect the proceeds of the sales resulting from the completion of that project) (CL-0032-ENG).

²⁵³ See FTA, Annex 10-B, cl. 3 (CL-0001-ENG); *LG&E* (n 224) para 187 (direct expropriation is the “forcible appropriation by the State of the tangible or intangible property of individuals by means of administrative or legislative action.”) (CL-0028-ENG); *Tecmed* (n 193) para 113 (defining direct expropriation as a “forcible taking by the Government of tangible or intangible property owned by private persons by means of administrative or legislative action to that effect[.]”) (CL-0020-ENG).

expropriation occurs if the state deliberately takes [an] investment away from the investor[,]” the tribunal held the outright revocation of the concession in the *Gemplus* claimants’ situation was a direct expropriation of their investments.²⁵⁴

140. Also instructive is the decision in *Burlington Resources v. Ecuador*, in which the claimant (Burlington) held investment interests in two crude oil field blocks pursuant to certain production-sharing contracts with Ecuador. After a series of run-ins with the Ecuadorian government over unsuccessful renegotiations of the contracts to make them more favorable to the government, and the institution of tax proceedings against claimant (which claimant argued were retaliatory proceedings for the unsuccessful contract negotiations), Burlington was left with no choice but to temporarily suspend operations in its blocks. While operations were suspended, the Ecuadorian government physically entered and took possession of claimant’s blocks. The investment tribunal found that the government’s “arbitrary takeover of the Blocks was a complete and direct expropriation of Burlington’s investment.”²⁵⁵
141. Here, Claimants committed large amounts of capital to obtain Commodities which, pursuant to the Investment Agreements, were physically stored in SAMIR’s tanks for a period of time, as specified in the corresponding transaction confirmation.²⁵⁶ During this period, title to the Commodities remained with Claimants, and SAMIR was not allowed to use, remove, sell, or otherwise dispose of Claimants’ Commodities.²⁵⁷
142. According to all accounts, in or around August 2015, Respondent outright seized the assets at SAMIR’s refining facilities and then, having effectively taken over the refinery, deliberately directed the sale of products within SAMIR’s facilities into the Moroccan market. But as explained above, [REDACTED] pursuant to sixteen Transactions entered into between February to August 2015, a significant amount of those products comprised a portion of Claimants’ Investments and legally belonged to Claimants, not SAMIR. Therefore, Respondent’s

²⁵⁴ *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award (16 June 2010) paras 8-3, 8-23, 8-24 (CL-0033-ENG).

²⁵⁵ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5 (“*Burlington*”), Decision on Liability (14 December 2012) paras 119-24 (CL-0034-ENG).

²⁵⁶ See Olivo Statement, paras 12-13.

²⁵⁷ *Id.*, para 13.

physical possession of SAMIR's refinery, similar to the Ecuadorian government's physical occupation of the claimant's oil blocks in *Burlington* and the Mexican government's absolute revocation of the *Gemplus* claimants' concession, led to a direct interference with, and expropriation of, Carlyle's Commodities.

143. Approximately 960,000 metric ton equivalents of Claimants' Commodities were disposed of without Claimants' consent and without any compensation to Claimants for the nearly \$430 million invested.²⁵⁸ Because Claimants' Commodities were put directly into the stream of commerce in Morocco, there was – and continues to be – no way to retrieve them. Respondent's conduct thus constituted an unlawful direct expropriation of Claimants' Commodities.

(b) Indirect Expropriation

144. Regarding indirect expropriation, the FTA indicates that it must be determined pursuant to a “case-by-case, fact-based inquiry” which factors in, among other things, “(i) the economic impact of the government action . . . ; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.”²⁵⁹

145. As noted above, “there is considerable authority for the proposition that contract rights [and other intangible property] are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore[,]”²⁶⁰ and contractual rights that are expropriated will typically be considered indirectly expropriated²⁶¹ – i.e., not literally taken by the host government but impacted in such a way that it is as if the contractual rights were rendered void and non-existent.

146. Indeed, investment tribunals have held that the “essential question” for a determination of indirect expropriation is “whether the enjoyment of the property has been effectively neutralized.”²⁶² As the *Tecmed* tribunal explained:

²⁵⁸ Graybill Report, para 51.

²⁵⁹ FTA, Annex 10-B, cl. 4(a) (CL-0001-ENG).

²⁶⁰ *SPP v. Egypt*, 3 ICSID Reports 189, Award (20 May 1992) para 164 (CL-0035-ENG).

²⁶¹ *Id.*, para 165.

²⁶² *CMS* (n 197) para 262 (CL-0022-ENG).

To establish whether [Respondent’s conduct] is a measure equivalent to an [indirect] expropriation . . . , it must be first determined if the Claimant, due to the [conduct], was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to the [property] or to its exploitation—had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder.²⁶³

147. For example, in *SPP v. Egypt*, claimants entered into a contractual arrangement with the Egyptian government’s tourism department to develop certain sites for tourism.²⁶⁴ Mere months after the development plan was approved and construction began, Egypt subsequently cancelled the project due to political opposition, leading claimants to lose the full value of their contracts; the publicity fallout further hindered claimants from being able to raise additional funds for other projects and investments.²⁶⁵ The government attempted to argue that “the term ‘expropriation’ applies only to *jus in rem*[,]” but the tribunal rejected this contention, citing a long history of tribunals recognizing the indirect expropriation of contractual rights.²⁶⁶ Because Egypt’s cancellation of the project fundamentally deprived claimants of their contractual rights, the tribunal held that an indirect expropriation had occurred.²⁶⁷
148. An indirect expropriation was also found in *Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt*, where claimant operated a cement import, storage, and dispatching business in accordance with a ten-year free-zone license. Several years into the duration of claimant’s license, Egypt unexpectedly issued a governmental decree generally prohibiting the import of cement (other than certain imports covered by government contracts). Explaining that measures rising to the level of indirect expropriation were measures whose effect is to “deprive the investor of the use and benefit of [its] investment even though [it] may retain nominal ownership of the

²⁶³ *Tecmed* (n 193) para 115 (emphasis added) (CL-0020-ENG).

²⁶⁴ *SPP* (n 260) para 43 (CL-0035-ENG).

²⁶⁵ *Id.*, paras 60-65, 161.

²⁶⁶ *Id.*, para 164.

²⁶⁷ *Id.*, paras 163, 178.

respective rights being the investment,” the tribunal held that an indirect expropriation had been effected against claimant’s license, i.e., its investment.²⁶⁸

149. Finally, in *Certain German Interests in Polish Upper Silesia*, Poland took possession of a factory, the management and operation of which was handled by a managing company called Bayerische pursuant to certain patents and contracts.²⁶⁹ The Permanent Court of International Justice held that Poland’s expropriation of the Chorzów Factory constituted an indirect expropriation of Bayerische’s patents and contracts. Although Bayerische did not own the factory itself, the Court explained, “it is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland. As these rights related to the Chorzów factory and were, so to speak, concentrated in the factory, the prohibition [against unlawful expropriation] contained in the last sentence of Article 6 of the [German-Polish Convention on Upper Silesia] applies in respect of them.”²⁷⁰

150. Respondent’s actions are most directly analogous to those in *Chorzów I*, but the effect of its actions on Claimants’ Investments is of the same destructive magnitude as in all of the cases noted in the preceding paragraphs. Respondent undeniably froze SAMIR’s bank accounts and seized the assets in the SAMIR refining facilities. Although Claimants were not the direct owners of the bank accounts or the refining facilities, Claimants, by virtue of their Investment Agreements with the direct owner (SAMIR), had valuable contractual rights (the Put Rights) that were rendered worthless by Respondent’s conduct.

151. As discussed above in Sections III and IV, Claimants’ contractual Put Rights gave them an option to sell their Commodities back to SAMIR at a fixed “purchase price” designated in the Confirmations.²⁷¹ In order for Claimants to exercise their Put Rights,

²⁶⁸ *Middle East Cement Shipping & Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6 (“*Middle East Cement*”), Award (12 April 2002) para 107 (CL-0036-ENG).

²⁶⁹ *Certain German Interests in Polish Upper Silesia (Germ. v. Pol.)* (“*Chorzów I*”), 1926 P.C.I.J. (ser. A) No. 7 (25 May 1925), p 43 (CL-0037-ENG).

²⁷⁰ *Id.*, p 44.

²⁷¹ *See supra*, paras 41-42.

(1) Claimants needed to have the Commodities to sell and (2) SAMIR needed to have funds to buy them at the agreed-upon price. Only upon receipt of payment would title to the Commodities pass to SAMIR.²⁷²

152. Obviously, Respondent did not literally usurp Claimants' Put Rights by, for example, substituting itself into Claimants' Investment Agreements with SAMIR. However, by freezing and sweeping SAMIR's bank accounts and seizing and directing the disposal of the very property that would allow Claimants to exercise their Put Rights under the Investment Agreements, Claimants were put in the same situation as the claimants in *Tecmed*, *Middle East Cement*, and *Chorzów I* – that is, they were deprived of the opportunity to use and benefit from their Put Rights and therefore left without economic value in their Investments.

153. In other words, although Claimants “retain[ed] nominal ownership”²⁷³ of their Put Rights (in that Claimants remained *contractually* entitled to exercise their Put Rights), without the Commodities, Claimants *literally* had nothing to sell back to SAMIR pursuant to the Investment Agreements, and without access to its bank accounts, SAMIR had no means of paying Claimants in any event. Respondent's conduct “effectively neutralized” and thus indirectly expropriated Claimants' Put Rights.

ii. Respondent's Expropriation Was Not for a Public Purpose

154. Respondent's expropriation was also unlawful under the FTA because it did not serve any public purpose. There was no public, government-propagated announcement declaring, let alone explaining, the reason for, the seizure of SAMIR's refining facilities, and there was certainly no individual statement sent to Claimants or any other owners of commodities at SAMIR's facilities.

155. While Article 10.6.1 of the FTA exempts an expropriation that, among other things, was “for a public purpose,” the alleged public purpose must be more than a mere pretext for an otherwise unlawful expropriation.

²⁷² *See id.*

²⁷³ *Middle East Cement* (n 268) para 107 (CL-0036-ENG).

156. In *Yukos Universal Limited v. Russian Federation*, shareholders of Yukos, the leading oil company (and largest taxpayer) of Russia, claimed that Russia wrongfully dispossessed Yukos of its assets and thereby expropriated Claimants by (i) levying massive – and illegitimate – taxes for alleged tax deficiencies uncovered in a random “re-audit” of the company, (ii) preventing Yukos from paying those taxes by freezing Yukos’ assets, (iii) seizing and transferring Yukos’ key assets, and (iv) forcing Yukos into involuntary bankruptcy proceedings.²⁷⁴
157. Russia argued that those actions were justified by “the purposes [of] . . . imposition and enforcement of taxes, including severe penalties, fines and other sanctions in case of non-compliance of taxpayers with their obligations to pay taxes,” and especially where Yukos’ “abuses of the low-tax region policy were particularly egregious and the amounts of taxes it evaded unprecedented.”²⁷⁵ The tribunal, however, found Russia’s response disproportionate to the alleged offenses:

Among the many incidents in this train of mistreatment that are within the remit of this Tribunal, two stand out: finding Yukos liable for the payment of more than 13 billion dollars in VAT in respect of oil that had been exported by the trading companies and should have been free of VAT and free of fines in respect of VAT; and the auction of YNG at a price that was far less than its value. But for these actions, for which the Russian Federation for reasons set out above and in preceding chapters was responsible, Yukos would have been able to pay the tax claims of the Russian Federation justified or not; it would not have been bankrupted and liquidated (unless the Russian Federation were intent on its liquidation and found still additional grounds for achieving that end . . .).²⁷⁶

158. The totality of the evidence led the tribunal to conclude that “the primary objective of the Russian Federation was not to collect taxes but rather to bankrupt Yukos and appropriate its valuable assets.”²⁷⁷ The tribunal thus found “profoundly questionable” any argument

²⁷⁴ See *Yukos Universal Ltd v. Russian Federation*, PCA Case No AA 227 (“*Yukos*”), Final Award (18 July 2014) para 63 (CL-0038-ENG).

²⁷⁵ *Id.*, paras 1569, 1571 (internal quotation marks omitted).

²⁷⁶ *Id.*, para 1579.

²⁷⁷ *Id.* (internal quotation marks omitted).

that the “destruction” of Yukos was in the public interest, such that the applicable exemption would apply.²⁷⁸

159. Similarly, although the news media indicated that the Moroccan tax authority had seized assets at SAMIR’s refinery due to unpaid taxes, Respondent’s conduct was disproportionately harsh and even if tax payments were due – which SAMIR denied – could not have constituted an ordinary method of collecting overdue taxes given that a sizeable portion of the assets seized and funds swept belonged to Carlyle and others.²⁷⁹
160. Not only did the Government suspend harbor activities and completely debilitate the normal operations of SAMIR, Morocco’s only oil refinery, Respondent also froze and swept SAMIR’s bank accounts.²⁸⁰ Respondent also directed SAMIR to sell Carlyle’s Commodities into the local market and instructed local Moroccan distributors to pay Respondent directly for those Commodities. After months of purported negotiations between SAMIR and Respondent, including an unanswered proposal from Sheikh Al-Amoudi to implement a repayment schedule for the allegedly past due taxes and inject \$700 million of capital into SAMIR, Claimants learned that Respondent had instead been directing SAMIR to make sales from its refining facilities, including sales of Carlyle’s Commodities, and collecting the proceeds from those sales.²⁸¹
161. When it became apparent that its good-faith negotiation efforts were not succeeding, SAMIR sought (but failed to obtain) an amicable settlement with the Government but was eventually forced into liquidation. To this day, SAMIR has still failed to secure any buyer due to the Government’s unreasonably strict requirement that, in addition to its approval of any bid to purchase the refinery, all potential bidders must secure “deposits issued by a Moroccan bank.”²⁸²
162. To say Respondent’s conduct was in the name of public interest is just as “profoundly questionable,” if not more so, than Russia’s assertion to that effect in *Yukos*. As the

²⁷⁸ *Id.*, para 1581 (stating that the destruction of Yukos “was in the interest of the largest State-owned oil company, Rosneft, which took over the principal assets of Yukos virtually cost-free, but that is not the same as saying that it was in the public interest of the economy, polity and population of the Russian Federation.”).

²⁷⁹ Olivo Statement, para 24.

²⁸⁰ *Id.*, paras 5, 25.

²⁸¹ *Id.*, para 49.

²⁸² *See supra*, paras 80-81.

owner and operator of the only refinery in Morocco, SAMIR—and Claimants’ Investments via transactions with SAMIR—contributed to the Moroccan “economy, polity and population.” Seizing SAMIR’s assets and freezing its bank accounts was counterproductive, and left Morocco without a working refinery. Respondent’s actions appear to have been aimed at benefiting only Respondent, not the public. Therefore, Respondent’s expropriation cannot be considered lawful under the FTA.

iii. Respondent’s Expropriation Was Not Taken Upon Payment of Prompt, Adequate, and Effective Compensation

163. Respondent’s expropriation also was not lawful because Respondent failed to pay *any* compensation to Claimants for the taking. Even if Respondent’s conduct could be deemed an expropriation “for public purpose” under Article 10.16(1) of the FTA, which it clearly was not, an expropriation cannot be considered lawful under Article 10.6.1 if it was not taken upon payment of “prompt, adequate, and effective compensation.”

164. Compensation is “prompt, adequate, and effective” under the FTA only if it “(a) [is] paid without delay; (b) [is] equivalent to the fair market value of the expropriated investment immediately before the expropriation took place . . . ; (c) [does] not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) [is] fully realizable and freely transferable.”²⁸³

165. There is no dispute that Respondent never has returned to Claimants any of its Commodities or cash proceeds for those Commodities, nor offered any compensation to Claimants for their substantial losses arising from Respondent’s expropriation.²⁸⁴ Therefore, on that basis alone, Respondent’s expropriation should be considered unlawful under the FTA.

iv. Respondent’s Expropriation Was Not In Accordance With Due Process of Law

166. Respondent’s actions also were unlawful because due process was not afforded to Claimants prior to or after the taking, in violation of Article 10.6.1, which requires any expropriation to take place in accordance with due process of law.

²⁸³ FTA art 10.6.2. (CL-0001-ENG).

²⁸⁴ See Zuech Statement, para 10; Olivo Statement, para 5; Suvagiya Statement, para 4.

167. In *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, the investment tribunal noted that due process of law in the expropriation context requires the host government to provide a legitimate, substantive legal procedure for the foreign investor to contest the taking that has occurred or is expected imminently to occur against it. As the tribunal elaborated:

Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that ‘*the actions are taken under due process of law*’ rings hollow.²⁸⁵

168. In light of these requirements, the *ADC* tribunal held that Hungary had failed to provide due process to claimants when it passed a decree that hindered claimants from further providing services at the Budapest-Ferihegy International Airport. The decree deprived claimants of their investments (i.e., the commercial agreements underlying the prohibited operations) in an airport expansion project and required claimants to vacate the premises within three business days of receiving notice²⁸⁶ without providing any of the legal mechanisms (legitimate advance notice and a fair hearing to have its claims heard) that would constitute due process.²⁸⁷

²⁸⁵ *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. The Republic of Hungary*, ICSID Case No. ARB/03/16 (“*ADC*”), Award, (2 October 2006) para 435 (underlined emphasis added) (italics in original) (CL-0039-ENG).

²⁸⁶ Specifically, Hungary’s Air Traffic and Airport Administration (ATAA) sought to expand the Budapest-Ferihegy International Airport, and via a tender process, ADC was eventually selected as the contractor to carry out the project. *Id.*, paras 94, 108. Under the commercial agreements between ADC and Hungary for the project, the parties agreed that ATAA would gain an ownership interest in the project company that ADC set up for the project. ADC agreed to invest over \$16 million in the project company that would eventually have the right to operate the airport terminals (\$11 million of which would be invested on behalf of ATAA), and ATAA agreed to pay ADC back in the form of rental payments from the project company. *Id.*, para 118, 121-22. After completion of construction for the project, the project company stepped into the role of providing management services under the commercial agreements between ADC and Hungary. *Id.*, para 164. Three years thereafter, Hungary passed a decree that restricted ATAA from outsourcing such management to ADC, as a result of which the project company lost its operations at the airport and certain of the commercial agreements were rendered void, and the project company was required to vacate its offices at the airport within three business days of receiving notice. *Id.*, para 179-188. After the decree, ADC also ceased to be paid the effective reimbursement of its over \$11 million investment pursuant to the commercial agreements. *Id.*, para 190. ADC and the project company successfully argued that their investments had been expropriated without due process. *Id.*, para 476.

²⁸⁷ *Id.*, paras 434-40.

169. Here, Claimants first learned of Respondent's actions via email on or about August 7, 2015.²⁸⁸ At that time, Claimants were led to believe that there was only a partial – and temporary – shutdown of SAMIR's operations; there was no formal or direct notification whatsoever of the true nature of the Government's actions taken against SAMIR and Claimants' Investments. Moreover, under the pretext of recovering SAMIR's allegedly unpaid taxes, the Government froze SAMIR's bank accounts, seized the assets of SAMIR's refinery (which included Claimants' Commodities), forced the sale of Claimants' Commodities (without their consent), and swept SAMIR's bank accounts (which included the proceeds resulting from the non-consented sales of Claimants' Commodities). No Government-distributed announcement or individualized notification articulating the fact of, or explanation for, the actions was ever given to Claimants.
170. Like the claimants in *ADC*, who only received notice of the expropriating decree after it had already been issued and three business days before they were forced to vacate, Claimants were never given any opportunity to object to such actions prior to their occurrence. Indeed, Claimants here were treated even worse than the claimants in *ADC*, who at least received post-hoc notice from the government, since Claimants never received any notice from the Government of its actions, either before or after such actions. Instead, for months thereafter, having no other legal recourse for Respondent's expropriation, Claimants awaited a purported resolution that they understood would be reached between Respondent and SAMIR.²⁸⁹ At no point were Claimants accorded due process of law, whether by means of a hearing or any other opportunity to be heard. Indeed, when Claimants finally learned of the Moroccan Customs Office's "third party holder notification procedure" months after its inception and proactively sought to intervene to suspend the procedure (among other things), Claimants' request was unceremoniously denied on baseless grounds.²⁹⁰ On that basis alone, Respondent's expropriation should be deemed unlawful under the FTA.
171. In sum, because Respondent ordered the disposal of Claimants' Commodities and eviscerated Claimants' contractual Put Rights for no discernible public purpose and

²⁸⁸ Olivo Statement, para 24.

²⁸⁹ *Id.*, paras 25-28, 31, 37, 39, 42-43, 46.

²⁹⁰ *See supra*, para 48.

without compensation for Respondent's taking or any mechanism of due process, Respondent should be held liable for its breach of Article 10.6.1 of the FTA.

VI. CLAIMANTS SUSTAINED SUBSTANTIAL DAMAGES AS A RESULT OF RESPONDENT'S BREACHES OF THE FTA

A. Due to its Breaches of the FTA, the Kingdom of Morocco Has the Legal Obligation to Compensate Claimants for their Losses

172. Having established Respondent's liability for the above breaches of the FTA, Respondent should now be compelled to make full reparation for the damages caused to Claimants by the illegal conduct. As explained in the Walck Report, as of the date of this submission, Claimants suffered US\$500,693,284 in total losses due to Respondent's breach of the FTA. In this section, Claimants explain the standard of reparation under international law and the FTA. In the subsequent section, Claimants set forth the details regarding the calculation of Claimants' damages based on the Walck Report.

173. The full reparation damages standard under international law was first established by the Permanent Court of International Justice (PCIJ) in the *Case Concerning the Factory at Chorzów* in 1928. There, the PCIJ found:

...[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.²⁹¹

174. This standard has since been codified in Article 31 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (the "ILC Articles"), which reads:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.²⁹²

²⁹¹ *Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) ("Chorzów II")* 1928 PCIJ, Ser A, No 17, p 47 (CL-0040-ENG).

²⁹² *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (International Law Commission 2001) art 31 (CL-0041-ENG).

175. In addition, numerous international tribunals have applied this standard to award damages under investment treaties.²⁹³

176. According to the ILC Articles, full reparation may take several forms, including restitution, compensation and satisfaction. Articles 34 and 36 state as follows in this regard:

Article 34 Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

...

Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.²⁹⁴

177. As the above Articles reflect, when restitution is not available, as is the case here, compensation may be used to fully repair the damages caused by an international illegal act by a State. Per Article 36(1) of the ILC Articles, as noted, compensation encompasses both the loss suffered (*damnum emergens*) and lost profits (*lucrum cessans*).

²⁹³ See, e.g., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 Sept. 2007) para 400 (finding that “[t]he principles governing compensation under international law were well explained by the Permanent Court of International Justice in [*Chorzów II*] and have been developed in numerous decisions of international courts and tribunals. As the Permanent Court held in that case, ‘reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’”) (CL-0042-ENG); *Gold Reserve* (n 202) para 681 (stating “[t]his Tribunal is empowered to award monetary compensation in accordance with the principles of international law. The relevant principles of international law applicable in this situation are derived from the judgment of the Permanent Court of International Justice in [*Chorzów II*] case that reparation should wipe -out the consequences of the breach and reestablish the situation as it is likely to have been absent the breach.”) (CL-0025-ENG); *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) paras 846-848 (applying the *Chorzów II* principle of full reparation as the standard of compensation for breaches of the fair and equitable treatment and expropriation provisions of the bilateral investment treaty between Canada and Venezuela) (CL-0043-ENG).

²⁹⁴ See *ILC Draft articles* (n 292) arts 34, 36 (emphasis added) (CL-0041-ENG).

178. The international standard of compensation must complement any compensation rules found in the underlying investment treaty.²⁹⁵ In this case, Article 10.6 of the FTA (on expropriation) describes the specific features of the compensation that is due to a foreign investor in the case of expropriation:

2. The compensation referred to in paragraph 1(c) [compensation in the case of expropriation] shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

179. In sum, compensation that is compliant with Article 10.6 of the FTA must include “the fair market value of the expropriated investment on the date of expropriation” plus

²⁹⁵ See *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) para 615. (finding that “[t]he Respondent’s obligation to remedy the injury the Claimant suffered as a result of Respondent’s violations of the Treaty derives from [the expropriation provision] of the Treaty and from the rules of international law.”) (CL-0044-ENG).

“interest at a commercially reasonable rate . . . , accrued from the date of expropriation until the date of payment.”

180. For purposes of Article 10.6.2(b) of the FTA, “the date of the expropriation” is August 7, 2015, or the date on which the Government seized the refinery and froze SAMIR’s bank accounts. According to the above principles, Claimants have calculated their damages as set forth in the following section.²⁹⁶

B. Claimants’ Losses as a Result of Respondent’s Breaches

181. As detailed above in Sections IV and V, Respondent’s seizure of the assets in SAMIR’s refinery and subsequent freezing of its bank accounts prevented Claimants from exercising their contractual Put Right per the Investment Contracts. In addition, Claimants were unable to recover their Commodities in storage at SAMIR, because the Respondent directed SAMIR to dispose of Claimants’ Commodities into the Moroccan market and instructed local Moroccan distributors to pay Respondent directly for those Commodities. As a direct result of the Respondent’s actions, Claimants’ then-existing investments, both in physical Commodities and in contractual rights, were rendered valueless.
182. Claimants have engaged the services of Mr. Richard E. Walck, a partner and co-founder of Global Financial Analytics LLC, to quantify their losses as a result of Respondent’s actions in connection with the Investments. Mr. Walck has analyzed each one of the Transactions to determine the respective losses.²⁹⁷ Out of the sixteen transactions at issue

²⁹⁶ In the absence of specific language in the FTA, the principle of full reparation requires the Tribunal to incorporate the two violations (i.e., fair and equitable treatment and expropriation) into the same damages model and calculate the value of the investment as if none of the violations had been committed. *See SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Sentence (22 May 2014) paras 165-166 (stating «[l]e principe de réparation intégrale requiert que le Tribunal intègre les deux violations dans un même modèle et qu’il calcule la valeur d’OSM au moment où s’est produite la première [violation] en admettant le postulat qu’aucune des violations suivantes n’auraient été commises. Cette manière de procéder est conforme aux dispositions de l’APRI, qui établit dans son article 5 que les mesures d’expropriation donnent lieu à une indemnisation dont le montant doit être «calculé sur la valeur réelle des investissements concernés» et «évalué par rapport à une situation économique normale et antérieure à toute menace de dépossession.»») (CL-0045-FR).

²⁹⁷ *See* Section V of the Walck Report.

in this arbitration, three involved the swap of refined products, as opposed to cash, in satisfaction of Carlyle's Put Rights in transactions SAMIR-1003 and SAMIR-1006.²⁹⁸

183. In compliance with Article 10.6.2 of the FTA, Mr. Walck calculated Carlyle's losses by including the value of the Commodities and of the Put Right immediately before the expropriation occurred (i.e., on August 7, 2015). The historic costs of Carlyle's Commodities were calculated by taking the amount paid to the suppliers of the Commodities in the Transactions minus any corresponding Haircuts received from SAMIR.²⁹⁹ The calculations are summarized in Table 1 below:

1. Table 1: Historic Cost of Carlyle's Commodity Investments³⁰⁰

<u>Transaction</u>	<u>Date</u>	<u>Product</u>	<u>Cost</u>	<u>Haircut</u>	<u>Net Cost</u>
SAMIR-1005	3/10/15	HSVGO	\$ 14,629,917	\$ 1,075,086	\$ 13,554,831
SAMIR-1010	4/28/15	Crude	\$ 46,558,223	\$ 3,000,000	\$ 43,558,223
SAMIR-1011	5/4/15	HSVGO	\$ 17,359,569	\$ 600,000	\$ 16,759,569
SAMIR-1012	5/12/15	Fuel Oil	\$ 11,024,909	\$ 661,495	\$ 10,363,414
SAMIR-1014	5/26/15	Crude	\$ 22,653,661	\$ 1,560,000	\$ 21,093,661
SAMIR-1015	5/27/15	Crude	\$ 25,613,000	\$ 1,536,780	\$ 24,076,220
SAMIR-1016	6/1/15	HSFO	\$ 10,316,743	\$ 772,200	\$ 9,544,543
SAMIR-1017	6/9/15	Crude	\$ 46,665,368	\$ 2,868,000	\$ 43,797,368
SAMIR-1018	6/16/15	Crude	\$ 13,757,916	\$ 1,080,000	\$ 12,677,916
SAMIR-1019	6/22/15	Crude	\$ 21,864,747	\$ 1,392,000	\$ 20,472,747
SAMIR-1020	6/25/15	Crude	\$ 25,000,000	\$ 1,500,000	\$ 23,500,000
SAMIR-1021	7/2/15	Crude	\$ 37,670,202	\$ 2,700,000	\$ 34,970,202
SAMIR-1022	7/23/15	Crude	\$ 48,225,613	\$ 3,570,270	\$ 44,655,343
DISTILLATES	6/4/15	Gasoil	\$ 29,253,000	\$ 2,925,300	\$ 26,327,700
DISTILLATES	6/4/15	Jet A1	\$ 6,070,000	\$ 607,000	\$ 5,463,000

²⁹⁸ See Walck Report, paras 19-20. This means that Claimants accepted refined commodities as payment by SAMIR for the crude oil Carlyle sold SAMIR pursuant to Carlyle's Put Rights.

²⁹⁹ See *id.*, para 79.

³⁰⁰ *Id.*, para 80. Mr. Walck noted that the three product swaps were for distillates, fuel oil and gasoline products. Since two of these swaps involved multiple products, each of which had different Haircut amounts, he separated those swaps into their component parts for the table.

<u>Transaction</u>	<u>Date</u>	<u>Product</u>	<u>Cost</u>	<u>Haircut</u>	<u>Net Cost</u>
DISTILLATES	6/4/15	VGO	\$ 2,225,000	\$ 333,750	\$ 1,891,250
FUEL OIL	6/4/15	Fuel Oil	\$ 11,981,880	\$ 1,198,188	\$ 10,783,692
GASOLINE	6/4/15	Gasoline	\$ 17,297,400	\$ 1,729,740	\$ 15,567,660
GASOLINE	6/4/15	Naphtha	<u>\$ 21,128,000</u>	<u>\$ 4,225,600</u>	<u>\$ 16,902,400</u>
TOTAL			<u>\$429,295,148</u>	<u>\$33,335,409</u>	<u>\$395,959,739</u>

184. Mr. Walck then used the net costs in the table above to calculate the value of Carlyle's Put Rights with respect to each Transaction that was still open on the date of the expropriation.³⁰¹ Pursuant to those calculations, Claimants' total Put Rights were valued at \$3,538,738 on the date of expropriation.³⁰²
185. The total net cost of the Commodities and the total value of Claimants' Put Rights were then added together to determine Carlyle's total Investments. These results are summarized in Table 2 below:³⁰³

2. Table 2: Value of Carlyle's Investments

<u>Investment</u>	<u>Historic Cost</u>	<u>Put Right Value</u>	<u>Total Investments</u>
SAMIR-1005	\$ 13,554,831	\$ 286,085	\$ 13,840,916
SAMIR-1010	\$ 43,558,223	\$ 621,514	\$ 44,179,737
SAMIR-1011	\$ 16,759,569	\$ 225,088	\$ 16,984,657
SAMIR-1012	\$ 10,363,414	\$ 127,604	\$ 10,491,018
SAMIR-1014	\$ 21,093,661	\$ 218,466	\$ 21,312,127
SAMIR-1015	\$ 24,076,220	\$ 245,989	\$ 24,322,209
SAMIR-1016	\$ 9,544,543	\$ 90,844	\$ 9,635,387
SAMIR-1017	\$ 43,797,368	\$ 367,899	\$ 44,165,267

³⁰¹ See *id.*, para 81 and Annex 3 (RW-0062).

³⁰² *Id.*, para 9.

³⁰³ *Id.*, para 81.

<u>Investment</u>	<u>Historic Cost</u>	<u>Put Right Value</u>	<u>Total Investments</u>
SAMIR-1018	\$ 12,677,916	\$ 94,081	\$ 12,771,997
SAMIR-1019	\$ 20,472,747	\$ 134,748	\$ 20,607,495
SAMIR-1020	\$ 23,500,000	\$ 144,827	\$ 23,644,827
SAMIR-1021	\$ 34,970,202	\$ 181,293	\$ 35,151,495
SAMIR-1022	\$ 44,655,343	\$ 100,266	\$ 44,755,609
DISTILLATES	\$ 33,681,950	\$ 306,471	\$ 33,988,421
FUEL OIL	\$ 10,783,692	\$ 98,120	\$ 10,881,812
GASOLINE	<u>\$ 32,470,060</u>	<u>\$ 295,444</u>	<u>\$ 32,765,504</u>
TOTAL	<u>\$ 395,959,739</u>	<u>\$ 3,538,738</u>	<u>\$ 399,498,477</u>

186. Finally, Mr. Walck adjusted Claimants' total losses to reflect the \$8,348,949 payment to Carlyle in connection with the October 1, 2015 Forbearance Agreement. As a result, Claimants' net losses comprise the \$399,498,477 value of its Investments from Table 2 above, less the Forbearance Agreement payment. In sum, in connection with the Investments Claimants have suffered a loss of \$391,149,528 (without interest) due to Respondent's violations of the FTA.³⁰⁴

C. Interest

187. As noted in Section A above, Claimants are entitled to claim interest "at a commercially reasonable rate" under Article 10.6.3 of the FTA. Further, under international law, "interest is part of the 'full' reparation to which the Claimants are entitled to assure that they are made whole."³⁰⁵ Thus, Claimants are also entitled to interest under the full reparation standard.³⁰⁶

³⁰⁴ *Id.*, para 82.

³⁰⁵ *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (25 July 2007) para 55 (CL-0046-ENG).

³⁰⁶ *ILC Draft articles* (n 292) art 38: "1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve

188. As observed by the tribunal in *Hrvatska v. Slovenia*:

The purpose of interest is to ‘compensate the injured party for not having had the use of the money between the date when it ought to have been paid and the date of the payment.’ It is therefore appropriate that the rate of interest represents a reasonable and fair rate that approximates the return the injured party might have earned if it had had the use of its money over the full period of time... The purpose of interest is therefore not just to compensate for the time value of money. Interest must also compensate for the loss of opportunity associated with the use of that money. This approach accords with the [*Chorzów II*] principles of making the injured party whole and wiping out the consequences of the breach.³⁰⁷

189. Since interest has the purpose of compensating the injured party for both the time value of money and the loss of opportunity associated with the use of that money, the rate used is determined on a case-by-case basis.

190. In this case, Carlyle’s Put Right was based on an interest rate of 3-month LIBOR plus a premium of 4.75%, as initially agreed by the parties.³⁰⁸ The Put Right continued to accrue interest at that rate until the exercise of the Put Right by Carlyle.³⁰⁹ Therefore, this rate is a commercially reasonable rate to bring Carlyle’s damages forward from the August 7, 2015 takeover of SAMIR to the date of this submission, and was the rate used by Mr. Walck.³¹⁰ This rate also fully compensates Carlyle for the loss of opportunity in connection with the use of the money owed by Respondent since Carlyle’s intended use of the proceeds was reinvestment in similar transactions with SAMIR.

191. Finally, Mr. Walck used quarterly compounding, so that the compounding period and the interest rate period would match.³¹¹ Thus, the interest calculated by Mr. Walck according

that result. 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.” (CL-0041-ENG).

³⁰⁷ *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award (17 December 2015) para 547. (emphasis added, citations omitted) (CL-0047-ENG).

³⁰⁸ Walck Report, para 83. *See also* Summary of Terms and Conditions for Crude Oil Purchase and Sale Transaction(s), December 16, 2014. (RW-0056; MO-0006).

³⁰⁹ *Id.*

³¹⁰ Walck Report, para 83.

³¹¹ *Id.*, para 84. Compound interest is necessary in this case to achieve full reparation. *See Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) para 523 (stating: “[t]he applicable standard of compensation under customary international law is full reparation. Compound interest, which has become the standard to remunerate the use of money in modern finance, comes closer to achieving this purpose than simple interest. Indeed, being deprived of the use of the money to which it was

to the above adds \$109,543,756 to Carlyle's damages, bringing its total damage claim to US\$500,693,284. This is the amount that Respondent is required to pay Carlyle in order to "wipe out all the consequences of [its] illegal act" ³¹²

VII. REQUEST FOR RELIEF

192. For all of the reasons set forth in the above Memorial, Claimants respectfully request an award in their favor:

- Finding that Respondent has breached its obligations under the FTA;
- Directing Respondent to pay damages to Claimants in the amount of \$500,693,284, as set forth above;
- Directing Respondent to pay interest and Claimants' share of taxes on all sums awarded; and
- Directing Respondent to pay Claimants' costs associated with these proceedings, including professional fees and disbursement.

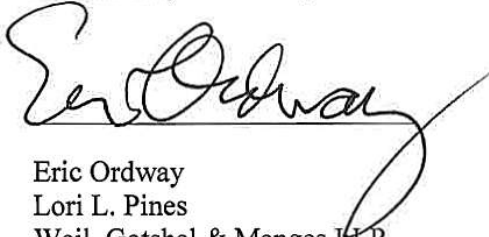
193. Claimants also request that the Tribunal order any other and further relief that it deems available and appropriate in the circumstances.

entitled, a creditor may have to borrow funds or may forego investments, for which it would pay or earn compound interest.") (emphasis added) (CL-0048-ENG).

³¹² *Chorzów II*, p 47 (CL-0040-ENG).

Dated: July 31, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric Ordway". The signature is written in a cursive style with a long, sweeping tail that extends to the right and loops back down towards the text below.

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