

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

THE CARLYLE GROUP L.P. AND OTHERS,

Claimants,

- and -

KINGDOM OF MOROCCO,

Respondent.

ICSID Case No. ARB/18/29

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 10.19.2 of the United States-Morocco Free Trade Agreement (“U.S.-Morocco FTA” or “Treaty”), the United States of America makes this submission on questions of interpretation of the Treaty. The United States does not take a position on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 10.15.1 (Submission of a Claim to Arbitration)

2. The U.S.-Morocco FTA provides two separate jurisdictional bases for investors to bring claims against a Treaty Party: Articles 10.15.1(a) and 10.15.1(b). Articles 10.15.1(a) and 10.15.1(b) serve to address discrete and non-overlapping types of injury.¹ Where the investor seeks to recover loss or damage that it incurred *directly*, it may bring a claim under Article 10.15.1(a). However, where the alleged loss or damage is to “an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly,” the investor’s

¹ As explained in the context of corollary provisions of the NAFTA, “Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor.” North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 145 (1993).

injury is only *indirect*. Such derivative claims must be brought, if at all, under Article 10.15.1(b).²

3. This distinction between Articles 10.15.1(a) and 10.15.1(b) was drafted purposefully in light of two existing principles of customary international law addressing the status of corporations. The first of these principles is that no claim by or on behalf of a shareholder may be asserted for loss or damage suffered directly by a corporation in which that shareholder holds shares. This is so because, as reaffirmed by the International Court of Justice in *Diallo*, “international law has repeatedly acknowledged the principle of domestic law that a company has a legal personality distinct from that of its shareholders.”³ As the *Diallo* Court further reaffirmed, quoting *Barcelona Traction*: “a wrong done to the company frequently causes prejudice to its shareholders.” Nonetheless, “whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.”⁴ Thus, only *direct* loss or damage suffered by shareholders is cognizable under customary international law.⁵

4. How a claim for loss or damage is characterized is therefore not determinative of whether the injury is direct or indirect. Rather, as *Diallo* and *Barcelona Traction* have found, what is determinative is whether the right that has been infringed belongs to the shareholder or the corporation.

5. Examples of claims that would allow a shareholding investor to seek direct loss or damage include where the investor alleges that it was denied its right to a declared dividend, to

² See, e.g., Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 824-25 (Chester Brown ed., 2013) (“Caplan & Sharpe”) (noting that Article 24(1)(a), nearly identically worded to U.S.-Morocco FTA Article 10.15.1(a), “entitles a claimant to submit claims for loss or damage suffered directly by it in its capacity as an investor,” while Article 24(1)(b), nearly identically worded to U.S.-Morocco FTA Article 10.15.1(b) “creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls”).

³ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 2010 I.C.J. 639, ¶¶ 155-156 (Judgment of Nov. 30) (noting also that “[t]his remains true even in the case of [a corporation] which may have become unipersonal”).

⁴ *Id.* ¶ 156 (quoting *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶ 44 (Second Phase, Judgment of Feb. 5) (“*Barcelona Traction*”). See also *Barcelona Traction* ¶ 46 (“[A]n act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.”).

⁵ See *Barcelona Traction* ¶ 47 (“Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”). The United States notes that some authors have asserted or proposed exceptions to this rule.

vote its shares, or to share in the residual assets of the enterprise upon dissolution.⁶ Another example of a direct loss or damage suffered by shareholders is where the disputing State wrongfully expropriates the shareholders' ownership interests – whether directly through an expropriation of the shares or indirectly by expropriating the enterprise as a whole.⁷

6. The second principle of customary international law against which Articles 10.15.1(a) and 10.15.1(b) were drafted is that no international claim may be asserted against a State on behalf of the State's own nationals.⁸ Article 10.15.1(b) therefore provides a right to present a claim not otherwise found in customary international law,⁹ where a claimant alleges injury to “an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly.” Article 10.15.1(b) allows an investor of a Party that owns or controls that enterprise to submit a claim on behalf of the enterprise for loss or damage incurred by that enterprise.

7. In sum, Article 10.15.1(a) adheres to the principle of customary international law that shareholders may assert claims only for *direct* injuries to their rights.¹⁰ Where an investor suffers loss to its investment and that investment is not an enterprise or held by an enterprise, the

⁶ *Id.* In such cases, the Court in *Barcelona Traction* held that the shareholder (or the shareholder's State that has espoused the claim) may bring a claim under customary international law.

⁷ Under Article 10.6 of the U.S.-Morocco FTA, an expropriation may either be direct or indirect, and acts constituting an expropriation may occur under a variety of circumstances. Determining whether an expropriation has occurred therefore requires a case-specific and fact-based inquiry.

⁸ ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM'S INTERNATIONAL LAW: PEACE* 512-513 (9th ed. 1992) (“[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.”) (footnote omitted).

⁹ See Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in *THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS* 165, 177 (Judith H. Bello et al. eds., 1994) (explaining in the context of the corollary provision in the NAFTA that “Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.”).

¹⁰ Article 10.15.1(a) derogates from customary international law only to the extent that it permits individual investors to assert claims that could otherwise be asserted only by States. See, e.g., *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 24 (Second Phase, Judgment of Apr. 6) (“[B]y taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law[.]”) (internal quotation omitted); F.V. GARCÍA-AMADOR ET AL., *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 86 (1974) (“[I]nternational responsibility had been viewed as a strictly ‘interstate’ legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone.”); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 585 (5th ed. 1998) (“[T]he assumption of the classical law that only states have procedural capacity is still dominant and affects the content of most treaties providing for the settlement of disputes which raise questions of state responsibility, in spite of the fact that frequently the claims presented are in respect of losses suffered by individuals and private corporations.”).

Barcelona Traction rule does not apply and Article 10.15.1(a) of the U.S.-Morocco FTA provides a remedy. By contrast, where the injury is to an enterprise or an asset held by that enterprise, the harm to the investor is generally derivative of that to the enterprise and *Barcelona Traction* precludes a claim for direct injuries to a shareholder's rights. Article 10.15.1(b), but not Article 10.15.1(a), is available to remedy any violation of Chapter Ten in such a case. Article 10.15.1(b) may be applicable only where the breach causes loss to an "enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly." Were shareholders to be permitted to claim under Article 10.15.1(a) for indirect injury, Article 10.15.1(b)'s narrow and limited derogation from customary international law would be superfluous.

8. Moreover, it is well-recognized that an international agreement should not be held to have tacitly dispensed with an important principle of international law "in the absence of words making clear an intention to do so."¹¹ Nothing in the text of Article 10.15.1(a) suggests that the Treaty Parties intended to derogate from customary international law restrictions on the assertion of shareholder claims.

Article 10.21 (Burden of Proof)

9. Article 10.21.1 provides in relevant part that the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."

10. General principles of international law concerning the burden of proof in international arbitration provide that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses.¹²

11. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where "jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."¹³ As the tribunal in *Bridgestone v. Panama* stated when

¹¹ *Elettronica Sicula S.p.A. (ELSI) (United States. v. Italy)* 1989 I.C.J. 15, ¶ 50 (Judgment of July) ("Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with [by an international agreement], in the absence of any words making clear an intention to do so."); *Loewen Group, Inc. v. United States*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 160 (June 26, 2003); see also *id.* ¶ 162 ("It would be strange indeed if sub silentio the international rule were to be swept away.").

¹² BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS 334 (2006) ("[T]he general principle [is] that the burden of proof falls upon the claimant[.]"); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence." (quoting *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Adopted 23 May 1997, WT/DS33/AB/R, at 14)).

¹³ *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009); *Vito G. Gallo v. Canada*, NAFTA/UNCITRAL, Award ¶ 277 (Sept. 15, 2011) (citation omitted) ("Both parties submit, and the Tribunal concurs, that the maxim 'who asserts must prove,' or *actori incumbit probatio*, applies also in the

assessing Panama’s jurisdictional objections regarding a claimant’s purported investments under the U.S.-Panama Trade Promotion Agreement, “[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment.”¹⁴

Article 10.27 (Definition of “Investment”)

“Characteristics of an investment”

12. Article 10.27 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.” This definition encompasses “every asset” that an investor owns or controls, directly or indirectly, that has the characteristics of an investment. The “[f]orms that an investment may take include” the categories listed, which are illustrative and non-exhaustive. The enumeration of a type of an asset in Article 1, however, is not dispositive as to whether a particular asset, owned or controlled by an investor, meets the definition of investment; it must still always possess 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.¹⁵

13. Article 10.27’s use of the word “including” in relation to “characteristics of an investment” indicates that the list of identified characteristics, i.e., “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk,” is not an exhaustive list; additional characteristics may be relevant.

14. With respect to debt instruments and loans, for example, Article 10.27 provides that the “[f]orms that an investment may take include: . . . bonds, debentures, other debt instruments, and loans” However, footnote 9, which is appended to subparagraph (c), clarifies that:

jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional phase[.]”); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction ¶ 2.8 (June 1, 2012) (finding “that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant’s CAFTA claims on the basis of an assumed fact (i.e., alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that ‘prima facie’ or other like standard is limited to testing the merits of a claimant’s case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal’s jurisdiction directly depends, such as the Abuse of Process, Ratione Temporis and Denial of Benefits issues in this case.”); *see also Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 118 (Dec. 13, 2017) (“Bridgestone Licensing Services”) (stating that “[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction.”); *see also Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award ¶ 250 (Oct. 22, 2018) (finding that “[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends.”).

¹⁴ *Bridgestone Licensing Services*, ¶ 153.

¹⁵ Caplan & Sharpe at 767-768.

Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

15. Consistent with the distinction drawn in footnote 9, certain shorter-term forms of debt, in contrast to, *e.g.*, long-term notes, are less likely to have the characteristics of an investment.

Meaning of “control”

16. Article 10.27 of the FTA defines “investment” to mean “every asset that an investor owns *or controls*, directly or indirectly, that has the characteristics of an investment.”¹⁶ The term “control” is not defined in the Treaty. The omission of a definition for “control” accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.¹⁷

Respectfully submitted,



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¹⁶ Emphasis added.

¹⁷ See *Hearing Before the Committee on Foreign Relations of the United States Senate on the Bilateral Investment Treaties with Argentina, Armenia, Bulgaria, Ecuador, Kazakhstan, Kyrgyzstan, Moldova, and Romania*, S. Hrg. 103-292, 103rd Cong., 1st Sess. (Sept. 10, 1993), Responses of the U.S. Department of State to Questions Asked by Senator Pell, at 27 (the term “control” is left undefined in U.S. Model BITs “because these [determinations] involve factual situations that must be evaluated on a case-by-case basis”); see also KENNETH J. VANDELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 116 (2009) (“a determination of whether an investor controls a company requires factual determinations that must be made on a case by case basis”).