

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

Kingdom of Morocco

(ICSID Case No. ARB/18/29)

**PROCEDURAL ORDER NO. 3
(on document production)**

Members of the Tribunal

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

Secretary of the Tribunal

Ms. Ella Rosenberg

Assistant to the Tribunal

Dr. Luis Fernando Rodríguez

November 13, 2019

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WHEREAS

1. This arbitration arises between The Carlyle Group L.P.; Carlyle Investment Management L.L.C.; CCM, TC Group, L.L.C.; TC Group Investment Holdings, L.P.; Celadon Commodities Fund, LP; and Celadon Partners, LLC¹ [**“Carlyle”** or **“Claimants”**] against the Kingdom of Morocco [**“Morocco”** or **“Respondent”**] under the United States-Morocco Free Trade Agreement signed on June 15, 2004 [the **“Treaty”**]. Claimants and Respondent shall be jointly referred to as the **Parties**.
2. On July 1, 2019, the Tribunal issued Procedural Order No. 1 [**“PO 1”**].
3. Paragraph 18.2 of PO 1 provides that, after consulting the Parties, the Tribunal shall issue a procedural order with specific instructions for document production.
4. On September 24, 2019, the Tribunal circulated a draft Procedural Order No. 3, on document production, seeking the Parties’ comments. The Parties submitted their positions on October 30, 2019.
5. This Procedural Order sets out the Tribunal’s decisions after consultation with the Parties.

¹ “All of the Claimants are entities incorporated in the State of Delaware in the United States of America. The Carlyle Group L.P. . . . is the ultimate parent of all other Claimants”. Claimants’ Memorial, para. 10.

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6. The document production phase, if requested by any Party, shall proceed in accordance with the Procedural Timetable attached as Annex B to PO 1.

1. DOCUMENTS

7. The Parties agree to be guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (2010) [**“IBA Rules”**] for the production of documents in this arbitration.

8. The “Definitions” section of the IBA Rules includes the following definition of Document:

“‘*Document*’ means a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means.”

9. The same definition will be used in this Order and must be used by the Parties in their requests for document production.

2. REQUESTS FOR DOCUMENT PRODUCTION

10. The Parties shall submit a Document Production Schedule [**“DPS”**], using the draft model attached hereto as Annex I. For each Document (or category of Documents) a single Document Request shall be completed. Document Requests shall be numbered sequentially. The Parties are kindly requested to adhere to the word limit defined for each cell.

11. Each Party will deliver its DPS directly to its counterparty, without copying the Tribunal.

12. Each requested Document must meet the following cumulative requirements [**“R”**]:

2.1 “R1”: IDENTIFICATION OF EACH DOCUMENT OR DESCRIPTION OF A NARROW AND SPECIFIC CATEGORY²

13. If the request is for a particular Document, the description must be sufficiently detailed as to identify the requested Document.

14. If the request is for a category of Documents, the following additional requirements must be met:

- a clear and well defined characterization of a narrow and specific category must be provided;

² Art. 3.3 (a) (i) and (ii) IBA Rules.

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- circumstantial evidence of the putative existence of the category must be marshalled;
 - the name of the person, authority or entity which has issued the category of Documents must be provided; and
 - the initial and the final date of the period, during which the Documents belonging to the category were issued, must be identified.
15. Any request which does not comply with these requirements shall be rejected *in limine*.
- 2.2 “R2”: RELEVANT AND MATERIAL³**
16. The requesting Party must prove that the Documents are relevant to the case and material to its outcome and identify the specific paragraph in the submission(s) for which evidentiary support by way of document production is requested.
17. Any request which does not comply with this requirement shall be rejected *in limine*.
18. The following Documents will, as a general rule, be considered relevant:
- referred to in other Documents that have already been submitted,
 - mentioned in witness statements or in expert reports, or
 - relied upon by experts to prepare their expert reports (but excluding working papers used by experts).
19. It is not for a Party to disprove, by way of document requests directed to the counterparty, allegations for which the counterparty bears the burden of proof, since failure to discharge such burden will by itself lead to dismissal. Production with the purpose of disproving the counterparty’s allegations will only be ordered in exceptional circumstances.
20. Any analysis by the Tribunal regarding the relevance and materiality of requested Documents is made *prima facie*, without prejudging any final decision that the Tribunal may adopt once all evidence has been marshalled.

³ Arts. 3.3 (b) and 9.2 (a) IBA Rules.

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2.3 “R3”: NOT IN THE POSSESSION, CUSTODY OR CONTROL OF THE REQUESTING PARTY⁴

21. The requesting Party must state that the Documents sought are not in its possession, custody or control, and explain why it assumes that the Documents are in the possession, custody or control of the counterparty.
22. The request will be rejected if the Documents are located in the premises or under the control of a third party, to which the requesting Party has access. Similarly, a Document shall be considered to be in possession of the requesting Party if it is already on the record of the arbitration or if it is publicly available (and the counterparty is not in a significantly more favorable position to obtain such Document).
23. Documents which are located on the premises or under the control of a third party, to which the requested Party has access, shall generally be considered to be in its “possession, custody or control”, unless otherwise proven by the requested Party.

3. OBJECTIONS

24. The IBA Rules provide for a number of objections to the production of Documents. Further to alleging failure to satisfy any of the previously established requirements (R1 to R3), a Party may object to a request for production in the following cases [“O”]⁵:

3.1 “O1”: LEGAL OR SETTLEMENT PRIVILEGE⁶

25. A requested Party may invoke privilege with regard to Documents prepared by or addressed to counsel, containing legal advice, and given or received with the expectation that such Documents would be kept confidential.
26. In general, a Document needs to meet the following requirements in order to be granted special protection under legal privilege⁷:
 - The Document has to be drafted by a lawyer acting in his or her capacity as lawyer;
 - A relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;
 - The Document has to be made for the purpose of obtaining or giving legal advice;

⁴ Art. 3.3 (c) (i) and (ii) IBA Rules.

⁵ Art. 3.5 IBA Rules.

⁶ Art. 9.2 (b) IBA Rules.

⁷ *Vito G. Gallo v. The Government of Canada*, NAFTA-UNCITRAL, Procedural Order No. 3, April 8, 2009, para. 47.

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- The lawyer and the client, when giving and/or obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.
27. A requested Party may also invoke privilege regarding Documents prepared in connection with settlement negotiations⁸, including:
- Oral or written statements submitted to the other side during negotiations,
 - Internal Documents prepared specifically for negotiations, and
 - Drafts or final versions of any settlement agreements.
28. If the requested Party raises an objection under O1 and, if challenged, the Tribunal confirms it, the requested Party shall deliver the requested Documents with the privileged information redacted.
29. In those cases in which the asserted privilege cannot be adequately safeguarded through redaction, the requested Party, instead of delivery, may choose to disclose the existence and characteristics of the Document in a “**Privilege Log**”, drafted in accordance with Annex II,
- identifying the date, the issuer, the recipient of the Document,
 - providing a summary description of the Document, plus
 - an explanation of the reasons which justify that the Document be withheld in full.
30. Any discussion will be settled by the Tribunal.

3.2 “O2”: PRODUCTION IS UNREASONABLY BURDENSOME⁹

31. The requested Party may object to the production of Documents on the basis that such production would impose an unreasonable burden on it. In making its decision, the Tribunal will weigh the time and cost of producing the Documents against their expected evidentiary value. The Tribunal may also reduce the scope of production to avoid unreasonable burden.

3.3 “O3”: LOSS, DESTRUCTION OR INEXISTENCE¹⁰

32. The requested Party may object to the production of Documents if it shows, with reasonable likelihood, that they have been lost, destroyed, or do not exist for other reasons.

⁸ Art. 9.3 (b) IBA Rules.

⁹ Art. 9.2 (c) IBA Rules.

¹⁰ Art. 9.2 (d) IBA Rules.

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33. In such case, the Tribunal shall take note of the requested Party's declaration. The requesting Party may make the inferences it deems appropriate in its following written submission.

3.4 "O4": TECHNICAL OR COMMERCIAL CONFIDENTIALITY¹¹

34. A Party may request that a Document should not be produced, alleging compelling grounds of technical or commercial confidentiality.
35. If the requested Party raises an objection under O4 and, if challenged, the Tribunal confirms it, the requested Party may request a reasonable confidentiality undertaking from the counterparty, to protect the confidentiality of the Documents. Absent such agreement, the requested Party shall deliver the Documents with the confidential information redacted.
36. In those cases in which the confidential information cannot be adequately safeguarded by a confidentiality undertaking or through redaction, the requested Party, instead of delivery, may choose to disclose the existence and characteristics of the Document in a Privilege Log, drafted in accordance with Annex II,
- identifying the date, the issuer, the recipient of the Document,
 - providing a summary description of the Document, plus
 - an explanation of the reasons which justify that the Document be withheld in full.
37. Any discussion will be settled by the Tribunal.

3.5 "O5": SPECIAL POLITICAL OR INSTITUTIONAL SENSITIVITY¹²

38. A Party may request that a Document should not be produced, alleging compelling grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution).
39. If the requested Party raises an objection under O5 and, if challenged, the Tribunal confirms it, the requested Party may request a reasonable confidentiality undertaking from the counterparty, to protect the sensitive information. Absent such agreement, the requested Party shall deliver the Documents with the political or institutionally sensitive information redacted.
40. In those cases in which sensitive information cannot be adequately safeguarded by a confidentiality undertaking or through redaction, the requested Party, instead of

¹¹ Art. 9.2 (e) IBA Rules.

¹² Art. 9.2 (f) IBA Rules.

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delivery, may choose to disclose the existence and characteristics of the Document in a Privilege Log, drafted in accordance with Annex II,

- identifying the date, the issuer, the recipient of the Document,
- providing a summary description of the Document, plus
- an explanation of the reasons which justify that the Document be withheld in full.

41. Any discussion will be settled by the Tribunal.

3.6 “O6”: PRODUCTION WOULD AFFECT THE FAIRNESS OR EQUALITY OF THE PROCEDURE¹³

42. Documents will not be ordered to be produced when the Tribunal finds considerations of procedural economy, proportionality, fairness or equality of the Parties that it determines to be compelling.

4. PROCEDURE

4.1 DPS RESPONSE

43. On the date identified in the Procedural Calendar, each Party shall return directly to the counterparty the initial DPS (without copying the Tribunal), indicating which requests it will voluntarily comply with, and which requests it objects to [**“DPS Response”**],

- arguing that such requests do not meet any or some of the Requirements R1 through R3; or
- raising one or more of the Objections O1 through O6.

4.2 DELIVERY OF NON-CONTESTED DOCUMENTS

44. On the same date, each requested Party shall produce all documents which it has voluntarily accepted to deliver [the **“Non-Contested Documents”**]. Non-Contested Documents shall only be delivered to the requesting Party, without copying the Tribunal. The requesting Party may marshal any of these Non-Contested Documents as evidence with the following written submissions.

45. The requested Party should not deliver at this stage Documents for which it has raised an Objection; such Documents shall only be delivered (or a Privilege Log submitted) once the Tribunal has issued its decision.

¹³ Art. 9.2 (g) IBA Rules.

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4.3 DPS RESPONSE TO OBJECTIONS

46. On the date identified in the Procedural Calendar, the requesting Party shall file a response to Objections O1 through O6 raised by the counterparty. The requesting Party may withdraw or limit its requests based on the Objections raised.
47. The requesting Party shall formalize its response in the DPS [**“DPS Response to Objections”**].
48. For the avoidance of doubt, the requesting Party shall refrain from replying to the arguments raised by the requested Party regarding Requirements R1 to R3.
49. On that same date, each Party shall submit its DPS (including its own requests, the objections of the counterparty and its own responses to the objections) to the Tribunal.
50. When submitting the DPS to the Tribunal, the Parties are kindly requested to refrain from making additional submissions. Parties are expected to strictly adhere to the rules set out in the present Procedural Order.

4.4 DECISION ON DPS

51. The Tribunal will endeavour to issue its decision on the Parties’ respective DPS by the date established in the Procedural Calendar. Such decision will be formalized in the requesting Party’s DPS.

4.5 PRODUCTION OF CONTESTED DOCUMENTS OR PRIVILEGE LOG

52. Each Party shall produce all **“Contested Documents”**, in compliance with the decision adopted by the Tribunal, on the date established in the Procedural Calendar. Contested Documents shall only be delivered to the counterparty, without copying the Tribunal. The receiving Party may marshal any of such Contested Documents as evidence with the following written submissions.
53. The same rule shall apply, if the requested Party has raised, and the Tribunal has accepted, Objections O4 or O5 with regard to certain Documents, and the Parties have reached a confidentiality agreement.
54. Absent such agreement, or if Objection O1 has been pleaded and accepted, the requested Party shall deliver the Documents with the privileged information redacted.
55. In those cases in which the privileged information cannot be adequately safeguarded through redaction, the requested Party shall produce to the counterparty (without copying the Tribunal) a Privilege Log, drafted in accordance with Annex II,
 - identifying the date, the issuer, the recipient of the Document,

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- providing a summary description of the Document, plus
- an explanation of the reasons which justify that the Document be withheld in full.

4.6 DELIVERY OF AFFIDAVITS

56. On the same date, each Party will deliver to its counterparty and to the Tribunal, the following “**Affidavits**”:

- A first Affidavit signed by the chief legal officer of such Party drafted in accordance with Annex III, and
- A second Affidavit signed by the head external legal counsel to such Party drafted in accordance with Annex IV.

57. If a Party, without satisfactory explanation, and in contravention of the Tribunal’s instructions, fails to produce a Document, the Tribunal may infer that such Document is adverse to the interest of that Party. Likewise, if a Party, absent satisfactory explanation, fails to deliver any of the Affidavits, the Tribunal will make appropriate inferences.

5. ALLOCATION OF COSTS

58. In its decision on costs, the Tribunal will make a special allocation of costs with regard to the Document production exercise, taking into consideration the reasonableness of the Requests, the Objections, each Party’s willingness to produce the Documents under its control, and the relative success of each Party.

59. Parties shall identify separately in their statements of costs, the costs incurred in preparing their DPS Requests and DPS Responses, and the costs incurred in the search and production of the requested Documents.

On behalf of the Arbitral Tribunal,

[Signed]

Prof. Juan Fernández-Armesto
President of the Arbitral Tribunal
Date: November 13, 2019