

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

SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

1. On December 4, 2020, the United States submitted views to the Tribunal in the above-captioned arbitration pursuant to Article 10.19.2 of the United States-Morocco Free Trade Agreement (“U.S.-Morocco FTA” or “Treaty”). On March 4, 2021, the Tribunal invited the disputing parties and the United States to answer three sets of questions relevant to Articles 10.15.1(a) and 10.15.1(b) of the Treaty:

If loss or damage suffered by shareholders may be claimed under Article 10.15(1)(a), where the State expropriates the shareholders' ownership interests by expropriating the enterprise as a whole, is it correct that such loss or damage could also be claimed under Article 10.15(1)(b) by way of a claim on behalf of the enterprise for loss or damage incurred by that enterprise?

If the above is correct, is it also correct that in certain cases a claim can be brought either under Article 10.15(1)(a) or Article 10.15(1)(b) (or indeed both)? If yes, is this anomalous and/or does this impact on the asserted policy rationale that losses incurred by controlled enterprises can only be claimed under Article 10.15(1)(b)?

Is the possibility to claim under Article 10.15(1)(a) for the loss or damage suffered by the shareholder due to an expropriation of the enterprise as a whole, applicable when the protected investor owns the enterprise through one or more owned and/or controlled subsidiaries incorporated in third countries?

2. Views of the United States are hereby submitted pursuant to Article 10.19.2 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.

Question 1

3. No. In circumstances in which a shareholder may claim for loss or damage under U.S.-Morocco FTA Article 10.15.1(a) because the State expropriated an enterprise *as a whole*, it is not correct that such loss or damage (*i.e.*, the same, direct loss or damage) could also be claimed under Article 10.15.1(b).

4. As the United States has previously explained, an 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.¹ A State expropriates an enterprise “as a whole,” for example, when the State permanently takes over management and control of the business, completely destroying the beneficial and productive value of the shareholder's ownership of their company, and leaving the shareholder with shares that have been rendered useless.² This is conceptually distinct from, for example, an expropriation of all of the assets of the enterprise. In the former situation, only the shareholder suffers the direct loss or damage – the shareholder's ownership interest in the enterprise – and so only the shareholder may bring a claim (pursuant to Article 10.15.1(a)). Conversely, a State's expropriation of a corporation's property that does not result in the expropriation of the enterprise does not implicate a shareholder's direct rights, even if it reduces the value of the shares to zero.³

5. As the United States has long maintained with respect to analogous provisions of the NAFTA, Article 10.15.1(b) allows a shareholding investor to bring a claim on behalf of an enterprise of the respondent State that it owns or controls directly or indirectly, if “the host State were to injure that enterprise in a manner that *does not directly injure* the investor/shareholders” (*i.e.*, for indirect damage and loss).⁴ In the scenario described in the question, where the

¹ Under Article 10.6, 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.

² Supplemental Brief for the United States as Amicus Curiae at 1-2, *Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, No. 13-7169, 2018 WL 2981075 (D.C. Ct. App. June 13, 2018).

³ *Id.* at 10; *see Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. 3, ¶¶ 48, 52 (Second Phase, Judgment of Feb. 5) (rejecting notion of state responsibility for derivative shareholder claims concerning state action that allegedly “emptied [shares] of all real economic content”).

⁴ *GAMI Investments, Inc. v. United Mexican States*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 11 (June 30, 2003) (emphasis added); *William Ralph Clayton et al. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 10 (Dec. 29, 2017) (emphasis added); *see also*

enterprise is expropriated as a whole, the shareholders' ownership interest in their shares has been taken, they are injured directly and their loss is direct. Thus, such shareholding investors cannot also bring a claim for *any* loss on behalf of the wholly expropriated enterprise under Article 10.15.1(b).

6. This result is clear, moreover, when looking at other provisions of Chapter 10 of the U.S.-Morocco FTA. Article 10.17.2(b) provides that no claim may be submitted to arbitration under Article 10.15.1(b) unless it is accompanied by the claimant's and the enterprise's written waivers of any right to initiate or continue certain parallel legal actions; which waiver would be impossible as a practical matter to secure where the enterprise was expropriated as a whole. Additionally, Article 10.25 provides that where a claim is made under Article 10.15.1(b), any damages must be paid to the very enterprise which, in the scenario posited, the respondent State has expropriated as a whole.

Question 2

7. The view of the United States is that, respectfully, the premise of the first question is incorrect. A claim for direct loss by an investor shareholder as a result of the expropriation of an enterprise as a whole may not be brought alternatively under 10.15.1(b), or under both 10.15.1(a) and 10.15.1(b).

8. In some circumstances, it may be possible to bring a Chapter 10 claim under either Article 10.15.1(a), or 10.15.1(b), or both.⁵ This outcome is not anomalous, however, because the losses claimed would be of a different nature. For example, if a Treaty Party violated Article 10.7.1's requirement that it permit "all transfers relating to a covered investment to be made freely and without delay," the investor might be able to claim under Article 10.15.1(a) direct losses stemming from interference with its right to be paid corporate dividends. If the investor owns or controls the enterprise, it might also be able to claim under Article 10.15.1(b) indirect losses relating to its enterprise's inability to make payments necessary for the day-to-day conduct of the enterprise's operations. A minority or non-controlling shareholder under such a scenario, however, could submit only a claim for direct losses – the loss of dividends – under Article 10.15.1(a).

Question 3

9. The U.S.-Morocco FTA does not expressly address the situation where an investor "owns the enterprise through one or more owned and/or controlled subsidiaries incorporated in third countries." As explained above, direct losses suffered in circumstances where the enterprise of

International Thunderbird Gaming Corp. v. United Mexican States, NAFTA/UNCITRAL, Submission of the United States of America ¶¶ 4-9 (May 21, 2004).

⁵ Indeed, Article 10.24 (Consolidation), allows for two or more claims brought separately under Article 10.15.1, subparagraph (a) or (b), with a common question of law or fact and arising out of the same circumstances, to be consolidated in accordance with the details of that Article.

the respondent State is expropriated as a whole are suffered by the shareholders of that enterprise (whether such shareholders are natural or juridical persons). In unusual circumstances, whether a particular claimant has suffered such a loss may require a fact-based and case-specific inquiry.

Respectfully submitted,

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