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MEMORANDUM

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Re.	Derivative Transactions / Morocco	
Date	13 April 2017	

Dear Sir,

This memorandum provides a brief description of the general legal framework in respect of the following forms of derivative transactions:

(i) Foreign exchange transactions;

(ii) Interest rate transactions; and

(iii) Commodity transactions.

(each an "**Authorised Derivative Transaction**", and together, "**Authorised Derivative Transactions**").A short description of the general rights and obligations of the Moroccan Banks, the Central Bank (*Bank-Al-Maghrib*) and the Foreign Exchange Office (*Office des Changes*) is provided in Annex 1.

This Memorandum does not constitute a legal opinion with respect to any issues set forth herein and is intended merely to provide guidelines with respect to derivatives-related issues under Morrocan Law.

We authorise you to forward this memorandum to ISDA's members or to give them access to it through your website.

We have addressed those issues which, according to our experience, are most commonly raised by clients.

Our discussion details the following:

- Authorised Derivative Transactions in Morocco (**1.**);
- Derivative transactions versus financial instruments: practical analysis (**2.**);
- Capacity of Moroccan counterparties ("**Moroccan Counterparties**") to enter into Authorised Derivative Transactions with a foreign bank not incorporated in Morocco ("**Foreign Bank**") (**3.**);
- Licences or other authorisations required for a Foreign Bank to enter into non pre-authorised derivative transactions (*i.e.* derivative transactions other than which are not aAuthorised Derivative Transactions, which are "pre-authorised" under Moroccan regulations) with Moroccan Counterparties ("**Non Pre-Authorised Derivative Transactions**") (**4.**);
- Recognition of cash collateral arrangements under Moroccan law (**5.**);
- Enforceability of English law governed contracts in Morocco (**6.**);
- The effect of insolvency on the enforceability of close-out netting provisions (**7.**);
- Modifications to the ISDA Master Agreement be considered when dealing with entities incorporated in Morocco (**8.**); and
- Legal reform for derivatives in Morocco: law n°42-12 relating to the market for exchange traded derivatives (**9.**).

1. AUTHORISED DERIVATIVE TRANSACTIONS IN MOROCCO

Pursuant to the provisions of a Dahir dated 10 September 1939 and of a National Decree (*Arrêté Résidentiel*) dated 18 May 1940, any export of funds (such as the retention of foreign currencies abroad, the expatriation of any intangible rights or securities, etc.), FX transactions (including any dealing in foreign currencies versus other foreign currencies) and the trade of gold, are prohibited unless they are specifically authorised by the Minister of Finance or, since 1958, the Foreign Exchange Office.

Over the years, and in particular since the mid-1990s, Morocco has nonetheless liberalised a number of derivative transactions.

Licensed Moroccan Banks are permitted, under certain conditions, to enter into Authorised Derivative Transactions with foreign counterparts. The list of Authorised Derivative Transactions are currently limited to foreign exchange transactions (**1.1.**), interest rate transactions (**1.2.**), commodity derivative transactions (**1.3.**), as detailed below.

In our opinion, only Authorised Derivatives Transactions strictly meeting the above criteria are freely negotiable with Moroccan counterparts and are not subject to the prior authorisation of the Foreign Exchange Office or of the Central Bank. It should be kept in mind though that purely speculative derivative transactions, even if it falls within the definition of an Authorised Derivative Transaction, will not be permitted due to its speculative nature.

As regards other types of derivatives transactions, we are not aware of any other provisions of general application under Moroccan law that would prevent or restrict their conclusion between Moroccan Banks provided that they are not purely speculative in nature. Such transactions, if to be concluded with a foreign counterparty, would however be subject to the prior authorisation of the Foreign Exchange Office.

1.1 Foreign exchange transactions

1.1.1 Forward Currency Purchases and Sales (*Opérations de change à terme, operations à terme devises contre devises*)

According to article 157 and *seq* of the General Instruction on Foreign Exchange Transaction (the « **Foreign Exchange Office General Instruction** »), dated 31 December 2013 these hedging derivative transactions may be entered into by the Moroccan Banks, acting for their own account or for the account of Moroccan Counterparties, where such Moroccan counterparty can evidence the existence of transactions which must be settled between Moroccan residents and non-residents, to the exclusion of any transaction of a speculative nature.

According to article 157 and *seq* of the Foreign Exchange Office General Instruction and to the Central Bank Circular n°136/DOMC/07 dated 9 August 2007, the duration of these hedging derivative transactions is freely negotiable between the parties.

1.1.2 Currency Swap Transactions

(a) Currency Swap Transactions (not involving **MAD**)

According to article 158 of the Foreign Exchange Office General Instruction, these hedging derivative transactions may be entered into by the Moroccan Banks, acting for their own account or for the account of Moroccan Counterparties, where such Moroccan counterparty can evidence the existence of a debt denominated in foreign currency, either where the Moroccan counterparty is the debtor or the creditor.

(b) Currency Swap Transactions (involving MAD)

According to article 158 of the Foreign Exchange Office General Instruction, these hedging derivative transactions may be entered into by the Moroccan banks, acting for the account of Moroccan entities subject to public service contract financing (*financements concessionnels*) granted by foreign government, foreign public institutions or international development finance institutions, which entail at least, a 25% non repayable component. This applies only to financings concluded after the date of publication of this circular.

According to the Central Bank Circular n°136/DOMC/07 dated 9 August 2007, Moroccan banks, acting for their own account or for the account of Moroccan Counterparties, are authorised to enter into currency swap transactions (both involving and not involving MAD) which terms and conditions are freely negotiable with their clients.

Furthermore, the Currency Swap Transactions (both involving and not involving MAD) should be concluded in accordance with the provisions of an ISDA or FBF-type contract.

1.1.3 Currency Options (both involving and not involving MAD)

According to article 158 of the Foreign Exchange Office General Instruction, the hedging instruments must be prepared by the Moroccan Counterparties, to the exclusion of any instrument prepared abroad. With respect to currency to currency options, the Moroccan Banks have to use the Moroccan inter-bank market and may only use the international market if the inter-bank market does not provide for the appropriate cover.

According to the Moroccan Central Bank circular n°3/DOMC/2005, the duration of the currency option may not exceed one year.

With respect to currency to currency options, the Moroccan Banks are required to use the Moroccan inter-bank market and may only use the international market if the Moroccan inter-bank market does not provide the appropriate cover.

The conditions under which currency options may be concluded by Moroccan Banks with Moroccan Counterparties are as follows:

(i) The currency of reference must be euro or US dollar;

(ii) Put and call options may only be made pursuant to the European method (*i.e.*: at maturity date, also known as a *vanilla* option), and their term may not exceed one year;

(iii) The hedging instruments must be prepared by the Moroccan Counterparties, to the exclusion of any instrument prepared abroad;

(iv) Authorised hedging transactions must be concluded under an IDSA master agreement, a copy of which must be notified to the *Direction des Opérations Monétaires et des Changes* of the Central Bank (the "**DOMC**").

In addition to satisfaction of each of the four conditions above, Moroccan Banks are also required to report annually to the DOMC the details of their currency option exposures.

1.2 Interest Rate Swaps, Cap Transactions and Forward Rate Agreements

Pursuant to article 165 and *seq* of the Foreign Exchange Office General Instruction, these hedging derivative transactions may be entered into by the Moroccan Banks, acting for the account of Moroccan Counterparties which entered into financing abroad, where such Moroccan counterparties can evidence the existence of an underlying foreign commercial and/or financial transaction, which justifies the conclusion of the derivative transaction.

Such hedging instructions are however limited to Interest Rate Swaps, Cap Transactions and Forward Rate Agreements ("**FRAs**"), collectively referred to as "**Authorised Interest Rate Transactions**". Any other type of interest rate-related derivative transaction is excluded.

The conditions for the Authorised Interest Rate Transactions to be freely concluded by Moroccan Banks are as follows:

(a) The hedging instrument must be backed by commercial and/or financial transactions of the Moroccan counterparty with no open rate position for the Moroccan Banks; and

(b) The maturity date must be either 6 or 12 months, except for Interest Rate Swaps, which may have up to a 2-year maturity date.

The Central Bank has yet to issue a circular to define its own conditions applicable to interest rates-related Authorised Interest Rate Transactions.

1.3 Commodity derivative transactions

Pursuant to the provisions of article 160 of the Foreign Exchange Office General Instruction, as completed by the Circular of the Central Bank n° D8/DTGR/04 of 16 January 2004, economic operators (such as banks, insurance companies, statutory corporations, certain state-owned entities, ordinary trading entities) are authorised to cover, on the international market, risks of price fluctuations over certain commodities of agricultural, energy or mining nature (including precious metals) that are, or may be, traded on a secondary market[1].

According to the Circular 08/DTGR of the Central Bank, the duration of the commodity derivatives should have a maturity corresponding to the transactional or business cycle pertaining to each client (extraction, production, import, export).

Moroccan Banks are authorised to make transfers relating to hedging instruments on the international market subject to the following conditions:

(i) The hedging against the risk of price fluctuation must be directed through a Moroccan Bank (although orders may be made directly by the customer), upon the presentation of any document detailing the coverage sought;

(ii) The total amount of hedging operations may not exceed the average business income through the import or export of the relevant commodity for the past three years;

(iii) The hedging operations must be connected to an underlying "real" commercial transaction duly evidenced by the subscription to import or export titles and have terms corresponding to the activity cycle proper to each customer, to the exclusion of any operation that may be speculative in nature; and

(iv) All income generated by the hedging must be repatriated and exchanged on the exchange market within one month from the date its payment becomes due.

When hedging operations require the opening of accounts in foreign currency in the books of a Moroccan Bank or a Foreign Bank, Moroccan Banks are authorised to open such accounts, subject to the following conditions:

(i) The accounts to be opened in Morocco or abroad must be dedicated solely to the management of hedging operations in accordance with the aforementioned conditions, to the exclusion of any operation that would not be linked to the hedging of the price fluctuation;

(ii) The accounts must record in full the flow of funds relating to the hedging of the price risk including the guarantee deposit, margin calls, premiums received as well as any other amount paid or received in relation to the hedging operation;

(iii) The accounts to be opened abroad must be opened in the name of a Moroccan Bank; and

(iv) Credits benefiting the Moroccan counterparty must be repatriated and exchanged on the exchange market within one month from the date its payment becomes due.

[1] The Foreign Exchange Office General Instruction does not detail which types of derivatives can be entered into with respect to commodities. However, swaps commodities and options commodities are usually concluded by Moroccan Banks

Please note that:

(i) Set-off of positions on different types of commodities are not authorised;

(ii) Positions must be expressed in standard measuring units (kilograms, etc.) and converted on the commodity's cash trading value. The conversion into MAD is performed on the basis of the cash exchange rate of the Central Bank as of the closing of the market; and

(iii) The minimum funds required to perform hedging operations is equal to 15% of the net position on each commodity, increased by 3% of the gross position.

Finally, please note that, pursuant to Section D of the Circular n° 08/DTGR/04 of the Central Bank, all hedging operations initiated by Moroccan Banks on behalf of their customers or for their own account must be the subject of an ISDA or FBF-type contract and include the following provisions:

(i) representations and warranties;

(ii) events of default;

(iii) conditions for the calculation of damages in case of early termination;

(iv) conditions for the transfer of operations;

(v) compensation from the flow of funds; and

(vi) specify a competent jurisdictions for the settlement of any disputes.[2]

Moroccan Banks will also have various reporting obligations as required by the Foreign Exchange Office and the Central Bank.

In our experience, we have seen a number of questions (listed below) put to the Moroccan Central Bank regarding commodity derivative transactions, but unfortunately, these remain outstanding:

(i) Can Moroccan banks enter into commodity derivative transactions for their own account as well for the account of clients?

(ii) Can Moroccan banks enter into commodity derivative transactions with foreign "non-bank" entities?

(iii) Can Moroccan banks enter into any type of commodity derivative transactions?

(iv) Can Moroccan "non-bank" entities enter into commodity derivative transactions directly with a Foreign Bank or a foreign "non-bank" entities?

(v) Can Moroccan banks enter into OTC commodity transactions as well as on a regulated market?

[2] Section D of Circular 08

2. DERIVATIVE TRANSACTIONS *VERSUS* FINANCIAL INSTRUMENTS: PRACTICAL ANALYSIS

2.1 General principles of the applicable regime

Pursuant to relevant Moroccan foreign exchange regulations, Moroccan residents (whether natural persons or legal entities) are not permitted to invest in non-Moroccan entities without prior approval of the Foreign Exchange Office, except for a number of very specific exemption regimes detailed in the applicable regulations.

Pursuant to article 794 and *seq* of the Foreign Exchange Office general instruction dated 16 November 2011 (the "**General Instruction**"), Moroccan banks are authorised to invest in OECD countries, the European Union and the Arabic Maghreb Union, in foreign currencies for their own account or on behalf of insurance and reinsurance companies, retirement organisms and collective investment scheme organisms, into debt instruments (*titres de créance*) and/or financial instruments listed or traded on regulated markets.

Investments in other countries do not benefit from a general authorization provided for by the applicable regulations and shall only be possible provided a specific authorization is obtained in that respect from the Foreign Exchange Office.

The nature of the investments and the conditions and modalities under which such investments may be carried out by the banks acting for their own account are provided for in Circular 134 of the Central Bank (*Bank Al Maghrib*) (the "**Circular 134**").

Pursuant to Circular 134, licensed Moroccan banks are authorized to invest abroad, in the countries of the OECD, of the European Union and of the Arabic Maghreb Union, for their own account or on behalf of insurance and reinsurance companies, retirement organisms and collective investment scheme organisms, into sovereign securities ("*titres souverains*"), securities of multilateral financial institutions and financial instruments listed or traded on regulated markets for a maximum duration of five (5) years.

Please note that the list of securities is not the same in both article 794 and *seq* of the Foreign Exchange Office and Circular 134 as the list of authorized investments provided for in Circular 134 does not expressly contain debt instruments ("*titres de créance*").

2.1.1 Financial instruments

Foreign exchange regulations give no definition of "*financial instruments*" applicable to determine the kind of products in which Moroccan banks, insurance and reinsurance companies and retirement organisms could freely invest.

The notion of «financial instrument" is scarcely used. As of today, the core concept under Moroccan law remains that of «securities" (*valeurs mobilières*) defined under Article 2 of the Dahir n° 1-93-211 dated 21 September 1993 relating to the Moroccan Stock Exchange Act as:

(a) shares and other instruments or rights giving access or that may give access, directly or indirectly, to the share capital or voting rights, transferable by way of recording or handing over; and

(b) debt securities representing a general claim over the assets of the issuing entity, transferable by way of recording or handing over, excluding negotiable instruments *(effets de commerce*) and cash certificates (*bons de caisse*).

Although an official of Bank-Al-Maghrib (the Moroccan Central Bank), approached on an no name basis, confirmed that listed options may freely be acquired by a Moroccan bank as they are considered as financial instruments listed or traded on regulated markets, we would highly recommend that Bank-Al-Maghrib as well as the Foreign Exchange Office be approached in writing to confirm such position.

Please be advised that such confirmation is particularly recommended given the fact that the General Instruction is unclear as:

- on the one hand, article 794 of the General Instruction provides that licensed Moroccan banks are authorized to invest abroad in the countries of the OECD, of the European Union and of the Arabic Maghreb Union, in foreign currencies for their own account, into financial instruments listed or traded on regulated markets, and

- on the other hand, article 157 and *seq* the General Instruction enumerates limitatively the derivative transactions which may be freely entered into by Moroccan counterparties; any other derivative transaction being subject to the prior approval of the Foreign Exchange Office.

  The authorised derivative transactions listed in the General Instruction are as follows: forward currency purchases and sales (*opérations de changes à terme, opérations à terme devises contre devises*), currency swap transactions (both involving and not involving MAD), currency options (both involving and not involving MAD), interest rate swaps, cap transactions and forward rate agreements, commodity derivative transactions.

3. CAPACITY OF THE MOROCCAN COUNTERPARTIES TO ENTER INTO AUTHORISED DERIVATIVE TRANSACTIONS / NON PRE-AUTHORISED DERIVATIVE TRANSACTIONS WITH FOREIGN BANK

The capacity of the Moroccan Counterparties (except the Central Bank) to enter into any Authorised Derivative Transactions/Non Pre-Authorised Derivative Transactions with Foreign Bank results from and is subject to the provisions of the circulars mentioned in Section 1 above.

4. LICENSES OR OTHER AUTHORISATIONS REQUIRED FOR FOREIGN BANK TO ENTER INTO AUTHORISED DERIVATIVE TRANSACTIONS / NON PRE-AUTHORISED DERIVATIVE TRANSACTIONS WITH THE MOROCCAN COUNTERPARTIES

Licences or other authorisations may be required for a Foreign Bank to enter into Authorised Derivative Transactions/Non Pre-Authorised Derivative Transactions with the Moroccan Counterparties.

5. RECOGNITION OF CASH COLLATERAL ARRANGEMENTS UNDER MOROCCAN LAW

5.1 Recognition of the title transfer of cash collateral under Moroccan law

Under a Credit Support Annex (the "**CSA**"), which is governed by English law, we understand that the transferor transfers full title ownership of the collateral to the transferee,

subject to a conditional obligation to return equivalent fungible assets in various circumstances or on default.

Under Moroccan law, so called title-transfer collateral arrangements are only effective in relation to outright sales, such as repurchase transactions or assignment of commercial receivables.

Please note that, under Moroccan law, there exists no further collateral arrangements (other than repurchase transactions or assignment of commercial receivables) duly recognised that would permit the outright transfer of ownership by an entity in order to secure its obligations under derivative transactions.

However, based on article 230 of the Dahir des Obligations et des Contrats dated 12 August 1913 ("Moroccan Civil Code") which provides that the choice of any foreign body of laws by a Moroccan party to govern a contract is possible under the freedom to contract provision3, we can consider that in case of enforcement of an arbitral award in Morocco rendered in connection with the CSA, the Moroccan judge will not apply the Moroccan law but rather verifies the compliance of the arbitral award with the Moroccan public order ("ordre public national") and the international public order or policy ("ordre public international").

Based on the above and a favourable application of the foreign law, the CSA title-transfer arrangement would be recognised by the Moroccan judge enforcing a foreign arbitral award rendered in connection with the CSA.

Nevertheless, given the absence of any doctrine or case law supporting the above position, we consider that there still exists a low risk of non-recognition of the transfer of title under the CSA by a Moroccan judge enforcing a foreign arbitral award if such arrangements were deemed to be against Moroccan public policy.

In case of liquidation of the Moroccan Bank, we consider that there exists a moderate risk of non-recognition of the title transfer by the liquidator.

5.2 <u>Conditions of recognition of the validity of a foreign security interest created under a foreign law</u>

Moroccan courts will recognise the validity of a security interest (such as a cash pledge) / guarantee created under a foreign law (assuming it is valid under the law governing the documents) and declare the security collateral arrangement / guarantee binding and enforceable in Morocco, provided that such agreement complies with the Moroccan mandatory rules (*règles d'ordre public*) and with Moroccan public policy (*bonnes moeurs*).

However, the grant of security interest by a Moroccan entity in favour of a foreign entity may be subject to the prior approval of the Foreign Exchange Office. Please note the following two cases:

(a) <u>In the event the collateral needs to be transferred from Morocco to a foreign country by the Moroccan Bank:</u>

Pursuant to Foreign Exchange regulations, prior approval needs to be obtained from the Foreign Exchange Office in order for a Moroccan resident to be able to transfer the collateral located in Morocco to a non-resident party.

3 However, in order to be binding and enforceable in Morocco, such contract should comply with Moroccan public policy provisions ("*règles d'ordre public*")

(b) In the event the collateral is located outside Morocco:

If the cash is held outside of Morocco by the Moroccan Bank, prior approval of the Foreign Exchange Office is not required. However, it is recommended that the foreign bank obtains a representation whereby the Moroccan Bank represents that it lawfully holds the cash outside of Morocco, i.e. in accordance with the Foreign Exchange regulations.

6. ENFORCEABILITY OF ENGLISH LAW GOVERNED CONTRACTS IN MOROCCO

The choice of any foreign body of laws to govern a contract is possible under the freedom to contract provisions of Article 230 of the Moroccan Civil Code, subject to the mandatory provisions of Moroccan law.

As such, the Central Bank or the Commercial Bank or, as the case may be, Moroccan Counterparties could freely choose English law to govern the Authorised Derivative Transactions and Non Pre-Authorised Derivative Transactions concluded with a Foreign Bank.

Parties are also entitled to insert an international arbitration clause into their contract (see. Art. 327 and seq of the Moroccan Code of Civil Procedure as amended by the Dahir dated 30 November 2007 promulgating the law n°08-05 relating to arbitration) and, provided that said parties are commercial entities (commerçants), a commercial jurisdiction clause (see Art. 12 of the Dahir dated 12 February 1997 creating commercial jurisdictions). Therefore, submission to English Courts under the jurisdiction clause would also be upheld.

However, the opinion set out above relating to the validity of the submission by the parties to the jurisdiction of the English courts are not to be read as statements that all the procedures of such courts (such as discovery of documents or the compulsion of witnesses) will be available against the Moroccan Counterparties.

Also, it should be underlined that Morocco has ratified the Convention of New York on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958).

The amount of the award would be converted into local currency for the purpose of enforcement of such foreign judgment (or, as the case may be, foreign arbitral award) in Morocco. This creates an exchange risk for Foreign Bank.

7. THE EFFECT OF INSOLVENCY ON THE ENFORCEABILITY OF CLOSE-OUT NETTING PROVISIONS

7.1 Enforceability of set-off provisions

The set-off of claims between any Moroccan counterparty (except the Central Bank) and a foreign entity is prohibited, based on the provisions of article 4 of the Foreign Exchange Office General Instruction.

This prohibition would, in our view, apply to all types of derivative transaction, (*i.e.* both Authorised Derivatives Transactions and Non Pre-Authorised Derivative Transactions), and would thus impact the enforceability of set-off or netting under such transactions. The prior approval of the Foreign Exchange Office would therefore be required to render netting and set-off clauses (such as under the ISDA Master Agreement) enforceable in any derivatives transactions (*i.e.* Authorised Derivatives Transactions or Non Pre-Authorised Derivatives Transactions).

We note that, while the Central Bank directive n°8/DTGR/04 dated 16 January 2004 provides that the ISDA documentation should contain certain elements including the "compensation for flow of funds", our view is that the prior approval of the Foreign Exchange Office is in practice still required to enforce "set-off".

7.2 The effect of insolvency on close out netting provisions (*i.e.* early termination provisions)

With respect to insolvency, the enforceability of close-out netting provisions also depends on the counterparty concerned, be it the Central Bank (**a**.), the Moroccan Banks (**b**.), the private sector entities (**c**.) or the public sector entities (**d**.).

In any event, please note:

(i) there are no specific prohibitions on the bringing of claims against Moroccan Counterparties by foreign creditors;

(ii) the payment of the net termination amount in a foreign currency would be enforceable under Moroccan law, subject however to the provisions of paragraph 7.1 above and to the prior approval of the Foreign Exchange Office; and

(iii) it would be possible to file a claim based on a foreign currency in local insolvency proceedings against Moroccan Banks, private sector entities or public sector entities; provided, however, that the nominal amount of such claim would be converted into local currency for the purpose of such proceedings. This would thus create an exchange risk for the Foreign Bank.

(a) Central Bank

The Central Bank is not subject to any bankruptcy, composition, moratorium, rehabilitation or other insolvency-related laws or proceedings.

(b) Moroccan Banks

Moroccan Banks are subject to a specific set of insolvency provisions provided for by the provisions of the Banking Law. which excludes the application of Book V, Titles I and II of the Commercial Code dealing with internal prevention of insolvency and general insolvency proceedings.

Pursuant to Article 59 of the Banking Law, whenever the management or the financial position of a Moroccan Bank does not offer sufficient guarantees concerning solvency, liquidity or profitability, or when its internal control system shows serious deficiencies, The Central Bank may order that Moroccan Bank remedy the deficiencies within a given time frame [4]
In such cases, the Central Bank may require that a restructuring plan be presented to it, together with, if necessary, a report from an independent expert detailing actions taken, measures contemplated and a schedule for their implementation.

Pursuant to Article 62 of the Banking Law, the Governor of the Central Bank may, further to the opinion of the Credit Establishments Disciplinary Commission (*Commission de*

[4] Pursuant to the provisions of Articles 105 and seq. of the Banking Law, a nationwide guarantee fund exists, in addition to guarantee funds that may be in place within in Moroccan Banks to indemnify customers, up to a certain level (which has yet to be determined) in case of unavailability of their deposits or any other funds. All Moroccan Banks are bound to contribute to such guarantee fund, which is managed by the Central Bank.

discipline des établissements de crédit), appoint a temporary receiver (*administrateur provisoire*) whenever, *inter alia*, measures proposed in the aforementioned restructuring plan are deemed insufficient to ensure the viability of the Moroccan Bank.

(i) *Temporary receivership*

The temporary receiver must, within the time frame set forth by the Central Bank, (a) prepare a report detailing the nature, origin and importance of the difficulties experienced by the Moroccan Bank, as well as measures likely to allow for its restructuring, or (b) propose its complete or partial transfer, or (c) its liquidation, if it appears that the situation is irrevocably compromised.

Based on this report, the Central Bank may decide to allow the continued operations of the Moroccan Bank concerned, if it is of the opinion that there are serious possibilities for restructuring.

From the time the temporary receiver is appointed, the management, supervisory and executive organs of the Moroccan Bank are suspended and all powers vested in them are transferred to the temporary receiver.

According to article 91 of the Banking Law, the temporary receiver may petition the president of the competent court to cancel any payment, asset transfer, guarantees or sureties, made during the 6-month period prior to its appointment, whenever it appears that such transactions were not entered into as current operations of the Moroccan Bank or were made to reduce its assets.

It is important to note that, notwithstanding any legal provision or contractual stipulation (of an ISDA agreement, for example), no termination of ongoing contracts, concluded with customers or third parties (such as a Foreign Bank), may take place based solely on the Moroccan Bank being placed under temporary receivership.

Given the fact that titles I and II of Book V of the Commercial Code relating to difficulties of companies (*Les difficultés de l'entreprise*) (Articles 546 to 618) do not apply to Moroccan Banks, the temporary receiver, could not benefit during the restructuring plan from the "cherry-picking" provisions of Article 573 (Book V, Title II) of the Commercial Code, allowing for the temporary receiver to decide which ongoing transactions shall be terminated and which shall be performed.

The President of the relevant court must notify the Central Bank of any legal action against a Moroccan Bank that may result in the opening of a judicial liquidation proceeding against it.

(ii) *Liquidation proceedings*

Liquidation proceedings are carried out in accordance with the provisions of Book V, Title III of the Moroccan Commercial Code.

According to article 103 of the Banking Law, the liquidator may, during liquidation proceedings, petition the president of the competent court to cancel any payment, asset transfer, guarantees or sureties, made during the 6-month period prior to its appointment, whenever it appears that such transactions were not entered into as current operations of the Moroccan Bank or were made to reduce its assets. Only payments and deliveries of securities up to the date of the withdrawal of license, made within the framework of (a) the inter-banking

settlement systems or (b) pursuant to financial instruments, may not be cancelled.

Pursuant to Article 573 of the Commercial Code (to which the Title III refers to), the receiver will be entitled to require selective performance of particular terminated transactions (*i.e.* the so-called risk of "cherry picking") during the liquidation proceeding. In general, receivers decide the continuation of agreements which are favourable to the insolvent company and the termination of the other agreements.

Based on the foregoing, insolvency proceedings specifically applicable to Moroccan Banks would have to be adequately covered by the derivatives transactions documentation to be technically enforceable against Moroccan Banks but, even so, the effect of close-out netting clauses may be countered by the receiver appointed by the Governor of the Central Bank during the so-called "cherry-picking" phase.

Even if the parties were to agree on automatic early termination clauses, of certain ISDA agreements for example, to apply upon certain insolvency events occurring within the insolvent Moroccan Bank, the receiver will be entitled to require selective performance of particular terminated derivatives transactions.

The close-out netting provisions, provided they are authorised, would however be enforceable in case of voluntary winding-up, amicable assignment, arrangement or composition with creditors, as these events of default do not fall under the scope of insolvency provisions of the Banking Law or of Moroccan Commercial Code.

It should be noted that any Moroccan Bank that has lost its license (voluntarily or when the Moroccan Bank has ceased operating for at least six months or no longer meets the conditions pursuant to which it was licensed) is liquidated. In such a case, the liquidator(s) is (are) appointed by the Governor of the Central Bank.

However, when the withdrawal of the license is made because the position of the Moroccan Bank is irrevocably compromised (or as a disciplinary measure), the Governor of the Central Bank must petition the president of the competent

court to order its judicial liquidation. By derogation to Article 568 of the Moroccan Commercial Code, the liquidator is appointed by the Governor of the Central Bank.

(c) Private sector entities

Insolvency laws to which private sector entities may be subject, and which are relevant for the purposes of this memorandum, are Article 560 *et seq.* of Dahir n° 1-96-83 dated 1st August 1996 constituting the Moroccan Commercial Code on recovery and judicial liquidation, as amended.

Proceedings under the Moroccan Commercial Code ("**Insolvency Proceedings**") would be initiated in respect of private sector entities whenever these counterparties have ceased payments, *i.e.* are unable to meet their debts as they fall due.

Under such circumstances, a judgment (the "**Initial Judgment**") would be rendered by the competent court in respect of the Moroccan counterparty. The Initial Judgment

would determine the date as of which the Moroccan counterparty would be deemed to have ceased its payments.

The date of cessation of payments (*cessation de paiement*) may be set as of the date of the Initial Judgment or, alternatively, may be deemed to have occurred up to 18 months before the date of such Judgment.

The Initial Judgment would appoint one or more judicial receivers (*syndic*) in respect of the private sector entities and the representative of the creditors of the said private sector entities.

The Initial Judgment would initiate an observation period during which the business of the private sector entities, would be continued and certain steps taken for their recovery. During the observation period, the private sector entities would be managed by or under the supervision of the receiver.

If no recovery can be achieved, the competent court could direct at any time the judicial liquidation of the Moroccan counterparty. The judicial liquidation of the Moroccan counterparty could also be directed by the competent court in the Initial Judgment.

As far as a termination by Foreign Bank of outstanding derivatives transactions is concerned, please note that pursuant to Article 573 of the Moroccan Commercial Code (applicable both in case of judicial recovery and judicial liquidation), the receiver will be entitled to require selective performance of particular terminated transactions (*i.e.* the so called risk of cherry picking).

In general, receivers decide the continuation of agreements which are favourable for the insolvent company and the termination of the other agreements. Article 571 of the Moroccan Commercial Code provides indeed that the Initial Judgment, does not have the effect of accelerating claims which have not matured as of the date of the Initial Judgment and Article 573 further provides that notwithstanding any legal or contractual provision to the contrary, no indivisibility, termination or rescission of a contract may result solely from the introduction of a judicial administration proceeding (*redressement judiciaire*).

It is however difficult to anticipate what the reaction of a receiver would be in practice, as there is no published Moroccan case law dealing with this issue in the context of derivatives transactions.

The contracting party may ask the receiver to formally ascertain whether he intends to continue an agreement. The absence of reply of the receiver within one month (without any possible extension) results in the automatic termination of the said agreement.

Further, Article 575 of the Moroccan Code of Commerce provides that debts arising after the initiation of a judicial recovery ("*redressement judiciaire*") must be paid in priority to all other claims, whether secured or unsecured.

The provisions of Article 682 (Book V, Title IV) of the Moroccan commercial code (among other provisions) might constitute a barrier to the enforceability of close out netting provisions as it provides that the court might declare as void any agreements entered into for consideration, any payments made by the Moroccan counterparty, any grant of securities made subsequent to the date of cessation of payments (*cessation de paiements*).

The enforceability of the netting and the close-out netting provisions against private sector entities may also be affected by the provisions of the Moroccan Commercial Code and in particular of Article 657, which prohibits payments in respect of debts that arose before the Initial Judgment.

Moroccan case law has nonetheless held (C.A.R., 3 IX 1940, R.A.C.A.R, T.X, p 573) that closely connected claims (*i.e.* if they derived from the same facts which gave rise to the reciprocal receivable and debt) could be set-off notwithstanding the opening of Insolvency Proceedings.

Under Articles 357 and 362 of the *Dahir des Obligations et des Contrats*, when two persons are each debtors of the other with respect to liquid (*liquides*) and payable (*exigibles*) debts for money or fungible goods, there is a set-off by operation of law (*compensation légale*), even in the absence of an express desire by the parties.

Although this case law was rendered in construing provisions of the former Moroccan Commercial Code (replaced in 1996), we believe that it may remain applicable under the current provisions. Therefore, in our opinion, closely connected claims, such as those under the particular derivatives transactions, may also give rise to possible set-off under the terms of the Commercial Code, subject to the general set-off prohibition (see our introduction to Section 4.1 above). It is however recommended, as a measure of caution, to declare the existence of the debt in accordance with the provisions of this code.

Although also subject to the general set-off prohibition, the close-out netting provisions (provided they are authorised) would be enforceable in case of voluntary winding-up, amicable assignment, arrangement or composition with creditors, as these events of default do not fall under the scope of insolvency provisions of the Banking Law or of Moroccan Commercial Code.

(d) Public sector entities

It is important in this context to distinguish between public establishments and commercial companies fully or partially owned by the Moroccan State.

Public establishments are not subject to the provisions of the Moroccan Commercial Code on recovery and judicial liquidation, as referred to in Article 4.2(c) above.

Commercial companies fully or partially owned by the Moroccan State are subject to the same rules as private entities. See paragraph 4.2 (c) above entitled Private sector entities.

8. MODIFICATIONS TO THE ISDA MASTER AGREEMENT TO BE CONSIDERED WHEN DEALING WITH ENTITIES INCORPORATED IN MOROCCO

We are of the opinion that:

(i) Part 3 (*Agreement to Deliver Documents*) should be amended to include all documents required depending on the type of counterparty.

(ii) Part 4 (*Additional representations*) should notably provide:

- *Foreign exchange regulations*. Party B will be deemed to represent to Party A that (i) the entering into of the Agreement (including the Schedule) and the Credit Support Document and (ii) the terms and conditions of the

Agreement (including the Schedule) does not constitute or result in a breach of any Moroccan foreign exchange regulations.

- *Non speculative purposes*. Party B will be deemed to represent to Party A that the Agreement (including the Schedule) is not entered into for speculative purposes and that Party B has complied with the laws and regulations and regulations applicable to it, including as the case may be, those relating to foreign exchange regulations.

- *Capacity*. Party B will be deemed to represent to Party A that it has the capacity, pursuant to its articles of association, by-laws and other constitutive documents, to enter into this Agreement (including the Schedule) and any Credit Support Document and any Transaction thereunder.

- *Hedging purpose*. Each Transaction governed by this Agreement has been, or will be, entered into in order to hedge one item of its balance sheet, or a homogeneous set of items of its balance sheet, and to exclusion of any speculative purpose. Each Transaction relates to a commercial in effect.

- *Authorisation*. Party B will be deemed to represent to Party A that it has obtained all authorisations and approvals required for the performance of the Agreement (including the Schedule) and the Credit Support Document, including inter alia any general or special authorisation form the foreign exchange office.

(iii) A section relating to telephone recording should be inserted: where each party consents to the recording of telephone conversations and agrees to obtain any necessary. Each Party should also agree that recording may be submitted in evidence in any proceedings and should waive any proceedings in that respect.

9. LEGAL REFORM FOR DERIVATIVES IN MOROCCO: LAW N°42-12 RELATING TO THE MARKET OF FUTURE FINANCIAL INSTRUMENTS

The law n° 42-12 relating to the financial futures market published on 20 May 2015 creates a long-awaited regulatory framework for derivatives transactions in Morocco by providing the fundamentals rules of organization, operation and control of this market.

Among the main changes is a clear protection against gaming and gambling requalification for the derivatives transactions.

We remain at your disposal should additional information be needed.

Yours sincerely,

Mariam Rouissi

ANNEX 1

SUMMARY PRESENTATION OF RIGHTS AND OBLIGATIONS OF MOROCCAN MONETARY AUTHORITIES AND MOROCCAN BANKS

1. The Foreign Exchange Office

The Foreign Exchange Office is a public entity with legal status and financial independence, under the supervision (*tutelle*) of the Ministry of Finance and Privatisation, which was originally created by the Dahir dated 7 February 1944 (later replaced by the Dahir dated 14 September 1944 and, finally, by the Dahir n° 1-58-021, which came into force on 7 February 1958).

Its main missions are:

(a) to enact regulatory measures relating to foreign exchange by authorising, in a general or specific manner, transfers abroad and the repatriation into Morocco of assets subject to a mandatory transfer (such as proceeds resulting from the export of goods and services);

(b) to identify and sanction infringements of the foreign exchange regulations; and

(c) to prepare statistics related to foreign exchange transactions, the balance of payments and the total external position.

Under its regulatory powers, the Foreign Exchange Office has undertaken a liberalisation process to allow Moroccan Banks to freely carry out most transfers abroad, including the payment of transactions relating to imports, exports, international transportation, insurance and reinsurance, foreign technical assistance, travel, schooling, medical treatment, savings, and of all other transactions deemed to be of a current nature (*opérations réputées courantes*).

Within the framework of this liberalisation process, the Foreign Exchange Office is responsible for ensuring the regularity, *ex-post facto*, of banking operations. Such control *a posteriori* is deemed necessary to avoid fraudulent transfers abroad and, as a consequence, to protect the foreign balance of payments relating to the Moroccan economy.

As a result, any transaction carried out by Moroccan resident entities (including the Moroccan Banks), especially those involving MAD, must receive the prior approval of the Foreign Exchange Office unless already approved within the framework of the various circulars issued by the said Foreign Exchange Office from time to time.

2. The Central Bank

The Central Bank is public entity with legal status and financial independence that was created by Dahir n° 1-59-233 dated 30 June 1959.

Dahir n° 1-59-233 was recently repealed and replaced by Law n° 76-03. Under Law n° 76-03, the Central Bank's fundamental missions are (i) to issue the local currency, (ii) to control the monetary market and (iii) to ensure the stability of prices, within the framework of the economic and financial policy of the Moroccan government, through the following instruments of monetary policy[5]:

(a) Final purchases and sales transactions, discount transactions and repurchase transactions; provided that such transactions are backed by negotiable public and private

[5] The Central Bank determines the terms and conditions applicable to the said instruments

debt securities denominated in MAD and that such securities are not acquired directly from the issuing parties;

(b) Advances to licensed banks, secured by appropriate guarantees;

(c) Fixed-term deposits with licensed banks;

(d) All foreign exchange transactions, both cash and forward; and

(e) Issue and buy back its own debt securities from market participants (such issue not being subject to laws and regulations pertaining to public issues).

In addition to the foregoing, the Central Bank may conclude any transaction in relation to:

(a) Gold;

(b) Foreign currencies and, more generally, any payment instrument denominated in foreign currency and used for international transfers;

(c) Assets denominated in foreign currencies (under demand deposit or time-deposit accounts);

(d) Commercial papers in order form, denominated in foreign currencies and drawn abroad, provided that such papers conform to conditions set forth by the Central Bank;

(e) Titles and securities issued or guaranteed by foreign States, as well as those issued by other central banks or international establishments; and

(f) Titles and securities issued by foreign financial entities.

The Central Bank may also:

(a) Open and hold demand deposit accounts and any other deposit accounts;

(b) Accept deposits of securities, precious metals and monies and rent safe deposit boxes;

(c) Carry out any receipt transactions on securities;

(d) Carry out any foreign exchange operations, both cash and forward;

(e) Carry out all banking operations on behalf of third parties, provided that the coverage of such operations is provided for by, or ensured to the satisfaction of, the Central Bank; and

(f) Obtain credit from, grant credits to, make loans to, or borrow from Foreign Banks, foreign or international monetary and financial establishments and, in doing so, request or demand any guarantees it deems appropriate.

Finally, the Central Bank may take all measures to facilitate the transfer of funds and must ensure the operations and security of the payment systems. In this framework, it has to ensure that set-off and payment/delivery systems provided for by financial instruments are secured and that norms applicable to such instruments are effective.

The Central Bank may not carry out transactions that are not specifically authorised by Articles 23 to 32 of Law n° 76-03, unless:

(a) such transactions are required to execute or settle transactions that are authorised by Law n° 76-03;

(b) such transactions are executed strictly for the sole benefit of its employees; or

(c) pursuant to the opinion of its board, the extension or improvement of bank services requires the Central Bank to deviate from, in whole or in part, the limitations set forth in Law n° 76-03 as regards to its operations.

In addition to the aforementioned transactions which may be carried out by the Central Bank itself, the Central Bank is also in charge of the operations of the banking system and the application of legal and regulatory provisions relating to the exercise and control of Moroccan Banks and related entities.[6]

As such, any transaction carried out by Moroccan Banks and related entities must be approved by the Central Bank, unless already approved within the framework (i) of the Banking Law or (ii) of the various circulars issued by the Central Bank from time to time in the application of the provisions of Banking Law.

1.3 The Moroccan Banks

Moroccan Banks are governed by the provisions of the Banking Law.

The Banking Law provides for a monopoly by Commercial Bank and other credit establishments to, on an ongoing basis, (i) receive funds from the public, (ii) carry out credit transactions and (c) make available to clients any payment instruments and manage such instruments.

Under Article 7 of the Banking Law, Commercial Bank may also carry out, subject to legal and regulatory provisions applicable, other operations that are considered as connected to their activities, such as:

(a) Foreign exchange transactions;

(b) Transactions on gold, precious metals and monies;

(c) The placement, subscription, purchase, management, custody and sale of securities, negotiable debt securities and any other financial product;

(d) The marketing and sale to the public of life insurance, assistance and loan insurance transactions;

(e) Intermediation regarding fund transfers;

(f) Advice and assistance regarding the management of estates;

(g) Advice and assistance regarding financial management, financial engineering and, generally, all services to facilitate the creation and development of business; and

(h) Rental transactions on movable assets and real properties, for those establishments that carry out, on an on-going basis, leasing transactions.

[6] Pursuant to Article 16 of the Banking Law, the Central Bank is not subject to the provisions of the Banking Law. It is therefore not subject to its own circulars