

IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION FOR THE
SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF
OTHER STATES

PURSUANT TO THE 2004 UNITED STATES – MOROCCO FREE TRADE AGREEMENT

ICSID Case No. ARB/18/29

BETWEEN:

**THE CARLYLE GROUP L.P., CARLYLE INVESTMENT MANAGEMENT L.L.C.,
CARLYLE COMMODITY MANAGEMENT L.L.C., AND OTHERS
(Claimants)**

v.

**KINGDOM OF MOROCCO
(Respondent)**

REJOINDER MEMORIAL ON JURISDICTION

Public Version

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I. Introduction

1. Pursuant to the Tribunal's Procedural Order No. 1 of July 1, 2019 and Procedural Order No. 4 of January 20, 2020, Claimants (indicated in bold herein) hereby submit their rejoinder memorial in response to Respondent's Reply on Objections to Jurisdiction and Admissibility ("Reply").¹
2. The Reply is an astonishingly over-the-top, beyond-the-pale attempt to mislead, confuse, and distract this Tribunal by means of both Respondent's usual inflammatory rhetoric and stunning new misstatements and distortions, including, as demonstrated in the accompanying second legal opinion of Professor Christoph Schreuer, outright fabrications of case law and legal opinions which show a blatant disrespect for the integrity of these proceedings. The purpose of Respondent's efforts is obvious: to prevent Respondent from ever having to face the merits of this proceeding and Claimants from having a fair opportunity to be heard in this forum. Indeed, Respondent has spent its submissions on jurisdiction desperately picking at stray factual and legal threads, magnifying and twisting their significance, all in hopes of avoiding the substance of Claimants' claims. Respondent has also repeatedly accused Claimants of withholding documents and hiding evidence even though Claimants have provided all of the documents relevant to jurisdiction and more. These tactics are fatally flawed and cannot succeed.
3. The sole determination that the Tribunal must make at this juncture is whether it has jurisdiction over Claimants' claims—which it plainly does. To do so, the applicable burden of proof is a simple preponderance of the evidence/balance of probabilities standard, not any heightened standard of scrutiny. As stated in Claimants' Counter-Memorial, Respondent currently has the burden of proof to demonstrate that its objections to jurisdiction are well-founded. It will then be up to the Tribunal to determine whether the jurisdictional evidence put forth by Claimants is more likely than not to be true. And the hundreds of pages of Claimants' documents, witness testimony, and expert testimony certainly demonstrate that it is *more likely than not* that Claimants owned and/or controlled the Investments, and that those Investments possessed the characteristics of an investment covered by the FTA. No matter what minute, discrete details Respondent is attempting to raise as a distraction, the complete factual picture—when stripped of Respondent's various speculations, mischaracterizations, and fabrications—unequivocally supports a finding of jurisdiction.
4. Put simply, the Investments begin and end with Claimants. The Investments never would have existed without Claimants' involvement. There is no other hidden player or missing link between the Investments and Claimants.

¹ Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in Claimants' Counter-Memorial on Jurisdiction ("Counter-Memorial").

5. For example, Claimants' ownership of the Investments through **Celadon Commodities Fund, LP** (the "**U.S. Onshore Feeder**") is unmistakable. As explained in Claimants' prior submissions, the **U.S. Onshore Feeder**, a Claimant, owned VMF Q1 (which held title to Commodities) through its ownership of 99.96% of the participating shares of the Master Fund, which in turn owned 100% of the participating shares of VMF Q1. In addition, Claimants **Celadon Partners** and **CCM** were vested with "full and exclusive authority to manage and control" the **U.S. Onshore Feeder's** Investments.² Respondent, however, attempts to minimize such clear ownership and control by wrongly trying to attribute significance to the fact that a large portion of the limited partnership interests in the **U.S. Onshore Feeder** were held by the [REDACTED] [REDACTED] as of August 7, 2015. That fact, however, is irrelevant because the limited partnership interests held by [REDACTED] did not give rise to *any* control over the business or operation of the **U.S. Onshore Feeder**. Respondent's expert does not, and cannot, dispute this. The evidence is clear that Claimants—not [REDACTED]—controlled the Investments, and [REDACTED] involvement was limited to being a source of investment funds (which Respondent now admits³ is irrelevant for purposes of jurisdiction).
6. Similarly, Respondent repeatedly asserts that State Street Bank and Trust Company ("State Street") likely held title to the Commodities as of August 2015, citing Granting Clause I of the 2014-1 Indenture whereby 2014-1 "[g]rant[ed] to the Trustee, for the benefit and security of the Holders of the Senior Notes[and other secured parties] . . . all of its right, title and interest in . . . Commodities." But even on the face of this provision, Respondent is plainly wrong. The language clearly states that State Street held title *on behalf of the Notes holders* (some of whom were **CCM's** own employees), not that it held title on its own behalf. The remainder of Granting Clause I further affirms that point by stating that "[s]uch Grant[] [is] made *in trust* to secure the Senior Notes."
7. Respondent's focus on [REDACTED] and State Street is therefore a complete red herring. Moreover, implicit in Respondent's assertions is that the proper claimants against the sovereign nation of Morocco should be individual pensioners and noteholders. This is an altogether absurd proposition aimed at deflecting attention away from the entities that are actually Claimants in this proceeding.
8. Notwithstanding Respondent's attempts to deflect and distract, Claimant **CCM's** control over the Investments is also incontestable. The unequivocal language of

² U.S. Onshore Offering Memorandum (CZ-0037) 16 ("([T]he General Partner [**Celadon Partners**] is vested with the full and exclusive authority to manage and control the Partnership's business and investments. . . . The General Partner has delegated the authority to manage the Partnership's portfolio to the Investment Manager [**CCM**] pursuant to the Investment Management Agreement.").

³ Reply, para 127 ("Morocco does not contest for present purposes that it does not matter where the capital that funds an investment comes from.").

the various investment management agreements gave CCM “*complete* discretion” concerning investment decisions and the authority to “exercise *all* rights, powers, privileges and other incidents of ownership or possession” with respect to the Investments.⁴ CCM’s overall business centered on commodities, and its employees wielded their collective investment management expertise to set up the U.S. and Cayman investment vehicles that were part of the transactions with SAMIR. It was CCM that directed all of the investment activities of the investment vehicles (including VMF Q1, 2014-1, and 2015-1) at all times. Because Respondent cannot help acknowledging this fact, the most it is able to say in response is that the investment management agreements contemplated the possibility of terminating CCM from its role as investment manager, and that each investment vehicle’s board of directors had oversight over CCM’s activities.

9. That the investment management agreements included the *option* to terminate CCM as investment manager, however, is totally irrelevant because CCM, in fact, was never terminated. The investment management agreements also expressly granted CCM full power of attorney and investment-making authority for as long as the agreements were in place, which they were as of August 2015. CCM was further granted the right to “exercise all rights, powers, privileges and other incidents of ownership or possession” and the duty to “procure any action” to protect the Investments, including filing legal proceedings. As for the investment vehicles’ directors, they were *effectively* nominal, notwithstanding the lack of a legal distinction between “regular” directors and “nominal” directors under Cayman Islands law. By fully delegating their discretion over the Investments to CCM, the directors ceded control over the Investments to CCM, and in doing so, did not flout but instead upheld their duties by ensuring that those with the relevant investment management expertise—i.e., CCM’s employees—were in charge of the Investments.
10. To reiterate, *Claimants* set up the investment vehicle structures, negotiated the agreements with SAMIR, obtained funding and directed such funding towards purchasing Commodities, and made the decisions to exercise Claimants’ contractual rights to close out Transactions. Neither the investment vehicles used for the SAMIR Transactions nor any Investments facilitated by such vehicles would exist if not for Claimants’ collective actions. At the end of the day (indeed, as of over a year and half before the RFA was submitted), Claimants held the economic interests in the Investments and are the only ones that can pursue recovery for the losses at issue. In other words, Claimants—and no one else—are the ones left “holding the bag” in the wake of the Government’s improper actions. And, by arguing (albeit without any basis in the FTA) that Claimants could have claimed for their losses had they not used investment vehicles incorporated in a third state, Respondent all but admits that the Investments at issue belong to Claimants. Notwithstanding Respondent’s efforts to overcomplicate and

⁴ U.S. Onshore Feeder Investment Management Agreement § 5(a) (CZ-0035) (emphasis added); VMF Q1 Investment Management Agreement § 2(b) (CZ-0047) (emphasis added).

obfuscate, the facts are clear: the Investments cannot be separated from the Claimants.

11. Yet, at the heart of Respondent’s arguments is the notion that the Cayman investment vehicles (i.e., VMF Q1, 2014-1, and 2015-1) were the only ones who had ownership and/or control of the Investments. That is absurd and simply untrue based on the documentary and testimonial evidence. Indeed, the idea that those Cayman entities made the Investments in a vacuum and were the only ones involved in the Transactions completely ignores the pivotal role of the *U.S.* Claimants that set up the investment structure, provided funds, controlled all aspects of the Transactions and/or had clear ownership interests in the Investments.
12. In addition, Respondent’s view also blatantly ignores the general unity of the investment, which, as stated by Professor Schreuer in his first opinion, is a principle “consistently adhered to” by investment tribunals.⁵ Indeed, this Tribunal must reject Respondent’s invitations to view each aspect of the Investments and each Claimant in isolation—especially given the intertwined nature of Claimants’ corporate structure and investment vehicle structure. With respect to the characteristic of contribution, for example, Claimants’ commitment of capital or other resources must be considered as a whole. And contrary to Respondent’s forced interpretations of the terms “concretely” and “make” in Article 10.27 of the FTA, there is simply no “active” investor requirement. Accordingly, each Claimant’s level of “activity” with respect to the Investments is irrelevant. Collectively, Claimants plainly made cognizable contributions to the Investments.
13. The characteristics of duration (if applicable at all) and risk also must be viewed holistically. As to risk in particular, Respondent is incorrect that risk is inherently tied to contribution. There is nothing in the FTA that supports Respondent’s position. Rather, adopting Respondent’s interpretation would make the plain language separately identifying “commitment of capital or other resources” on the one hand and “assumption of risk” on the other, wholly superfluous. What matters is that Claimants collectively incurred various types of risk from the Investments—the risk of losing the physical Commodities, the risk of market volatility, and the risk of government interference (such as that by Morocco). Therefore, regardless of whether one Claimant was more safeguarded against risk than another Claimant, the Investments overall involved sufficient risk to render them protected investments under the FTA.
14. Relatedly, Respondent suggests that only the Cayman entities were the ones directly injured by the Moroccan government’s actions, and argues that FTA Article 10.15.1 requires Claimants to have suffered only direct losses, not losses that were incurred by their investment vehicles. As further explained below,

⁵ First Legal Opinion by Christoph Schreuer (“First Schreuer Legal Opinion”), para 60.

Respondent's position is not only unsupported by the plain language of the FTA, but it is also based on precedents of the International Court of Justice ("ICJ") that even the ICJ itself has acknowledged are inapplicable to contemporary investment law governed by treaties and, thus, this very arbitration. Moreover, as a factual matter, Claimants—who had clear ownership interests and/or controlled the entire investment from start to finish—certainly suffered losses as a result of the Moroccan government's actions.

15. Another one of Respondent's central contentions is that control without an ownership interest does not give rise to standing under the FTA. In support of its position, Respondent goes so far as to misquote the FTA as stating that "an investment is an asset that an investor '*owns and controls*,'"⁶ as opposed to what it actually says, which is "owns *or* controls." However, the Tribunal must reject Respondent's attempts to blatantly misrepresent and otherwise eschew the unambiguous language of the FTA on this issue. Although Claimants have established their ownership interests in the Investments, control without an ownership interest is also clearly sufficient under the FTA. There is no need to defer to purported U.S. accounting principles on "control," as argued by Respondent's experts, especially since Respondent itself admits that such standards "are not directly applicable to treaty interpretation" (Reply, para 72). As explained at length in Claimants' Counter-Memorial and by Professor Schreuer, the plain language of the FTA allows for ownership *or* control. Applicable case law also supports this position.
16. Given that control alone is sufficient under the FTA, and in light of Claimants' unquestionable ownership interests, the factual questions raised about the precise amount of Commodities that each Carlyle investment vehicle actually held title to on a specific date is an irrelevant one for jurisdictional purposes. From a jurisdictional perspective, the fact that they held such Commodities at all is more than sufficient. Respondent's multi-page deep-dive into the custodian certificates and Sleeve Transactions is another meaningless distraction from the jurisdictional inquiry and one more appropriate for a future damages phase.
17. Moreover, while Respondent begins its Reply by once again flinging ad hominem attacks and baselessly accusing Claimants of taking a "misleading approach to their submissions" (Reply, Section I.D.), Claimants have never hidden anything about the nature of the Transactions or Claimants' corporate structure. Each and every document necessary to determine jurisdiction has been produced. In addition, Claimants have provided ample witness testimony rebutting Respondent's position from the very individuals who, as employees of Claimants during the relevant time, made the Investments. Respondent's contention that such testimonial evidence is deficient because it is not documentary evidence is absurd and unsupported by any principle of international law. There is simply no

⁶ Reply, para 294 (bolding added); *see also id.* para 296.

hierarchy of evidence wherein documentary evidence is ranked higher or more acceptable than testimonial evidence.

18. Respondent seems to forget that the parties are in a pre-discovery jurisdictional phase. Because the question before the Tribunal goes to jurisdiction—a *threshold* inquiry in any legal proceeding—with each submission, Claimants disclosed what was necessary and sufficient to establish *jurisdiction*. For example, when submitting Claimants’ Memorial and Claimants’ Observations, Claimants did not believe (and still do not believe) that the offering memoranda for the **U.S. Onshore Feeder** and Offshore Feeder were relevant to the jurisdictional question. However, when these documents were identified and implicitly requested by Respondent, Claimants provided them—notwithstanding that the documents are redundant of the foundational documents for both entities and the investment management agreements (all of which Claimants provided). To the extent any peripheral documents were not produced it was because Claimants were unable to locate them. That is *not* an indication that Claimants were being evasive, but rather, a reflection of the reality that **CCM** (which maintained all of the relevant documents) was largely driven out of business as a result of the loss of Claimants’ Investments. Ironically, notwithstanding its accusations about Claimants’ production of documents, it is Respondent, not Claimants, who has access to the documents relating to the Moroccan government’s conduct in connection with SAMIR, SAMIR’s bank accounts, and local distributors, that will confirm what Claimants have been saying all along.
19. Respondent’s histrionics attempt to conceal that it is again *Respondent* that is evasive and misleading in its submissions, but the truth is made evident by the increasing level of incendiary rhetoric and distortion of both the facts and applicable law. Indeed, Respondent is bold enough not only to misquote tribunal opinions (such as the Award in *Helnan v Egypt*), but also to fabricate references to opinions that Professor Schreuer never wrote. And although the Reply claims to “supplement[], rather than repeat[], the arguments developed” in Respondent’s Jurisdictional Memorial, Respondent, in fact, repeats prior arguments while avoiding engaging with several of Claimants’ rebuttals. For example, Respondent insists that the governing law of an agreement and the place of its enforcement determine whether the contract can be considered “in the territory” of the host State. Yet, in doing so, Respondent relies primarily on a decision of the Singapore Court of Appeal, *for the third time*,⁷ without identifying the principle of international law (or the source of such principle) that the Singapore court was purportedly applying. Instead, Respondent deflects by accusing Claimants of insufficiently distinguishing the facts of the case. Morocco also completely

⁷ See Reply, para 162; see also Application for Bifurcation, para 76 (introducing the *Swissbourgh Diamond Minds v Lesotho* case); Jurisdictional Memorial, para 120 (discussing the *Swissbourgh* case in depth).

ignores Claimants' points regarding the *Mason v Korea*⁸ case, which clearly support Claimants' position that **Celadon Partners** and **CCM** "controlled" the Investments here and, thus, have standing.

20. Respondent is also quick to adopt inconsistent positions regarding principles of treaty interpretation and international law as it pleases. For example, whereas Respondent condescendingly critiques Professor Schreuer's references to dictionary definitions of "control" by stating that "*dictionaries alone are not necessarily capable of resolving complex questions of interpretation,*"⁹ Respondent itself has put forth several forced readings of the FTA based primarily on dictionary definitions.¹⁰ As another example, Respondent wrongly rejects certain of Professor Schreuer's conclusions based on case law, arguing that "the wording of the FTA is a *lex specialis*" that trumps case law.¹¹ Yet, Respondent itself disregards the plain language of FTA Article 10.27 to infer a purported duration requirement in conformity with the so-called *Salini* test—which Claimants previously have argued to be meritless because "the FTA is *lex specialis* and prevails over any case law-created requirement."¹² This kind of subjective reasoning is also without merit and demonstrates that, in Respondent's world, only Respondent's reasoning is truth, and Claimants' reasoning (even if similar or analogous) is simply fake news. Respondent's gamesmanship should not and cannot prevail in these proceedings.
21. Finally, Respondent's newest campaign of distraction and disinformation revolves around whether SAMIR refined Claimants' crude oil prior to the Moroccan government taking over the SAMIR facility in August 2015, an issue that was raised in an insurance coverage matter brought by **CCM** and other plaintiff entities in New York state court. In fact, the plaintiffs in the insurance case vehemently contest, and are currently appealing, the court's summary judgment

⁸ *Mason Capital L.P. (USA), Mason Management LLC (U.S.A.) v Republic of Korea*, PCA Case No. 2018-55 ("*Mason v Korea*"), Decision on Respondent's Preliminary Objections (22 December 2019) (CS-0120).

⁹ Reply, para 205-06 (emphasis in original) (citation omitted).

¹⁰ See Jurisdictional Memorial, para 160 (referring to the definition of "make" in the *Shorter Oxford Dictionary*); *id.*, para 164 (referring to the definition of "concrete" in the *Shorter Oxford Dictionary*); Reply, n 425 (referring to the definition of "standing" in *Black's Law Dictionary*)

¹¹ Reply, para 311 (rejecting as an unacceptable "generalization[]" Professor Schreuer's observation that the majority of investment law cases "indicate that it is not necessary for an investor to participate actively in the establishment of the investment" and that "[a] mere passive ownership of the investment will suffice.").

¹² Observations, n 99.

findings. At best, the issue is potentially pertinent to the merits/damages phase in this proceeding, but it simply has no bearing on jurisdiction here.¹³

22. As part of its campaign to discredit Claimants, Respondent implies that this arbitration somehow conflicts with the insurance case. These efforts, however, are meritless. First, the FTA expressly allows an investor to pursue an insurance claim independently of a treaty claim.¹⁴ In addition, Respondent's allegation is wholly incorrect and deeply unfair to Claimants, who seek justice, not double recovery. Over years of delays, SAMIR and the insurers on one side have claimed that Carlyle's losses were the result of the Moroccan government's actions, while Respondent on the other side has refused to engage in the merits of this proceeding and instead launched this needlessly protracted and costly fight about jurisdiction. The reality is that, in 2016, it became clear that SAMIR had refined Carlyle's oil without consent prior to August 2015, but when Respondent took over the SAMIR facility in August 2015, it directed the disposition of even more oil and refined products that it knew belonged to Carlyle. Respondent also froze SAMIR's bank accounts and swept funds that it knew belonged to Carlyle. This arbitral proceeding, thus, is about making the Moroccan government account for its own wrongful actions and the impact of those actions on the loss of the value of Claimant's entire investment in Morocco.
23. In short, Claimants have more than sufficiently made good-faith efforts to present the facts and the law as they are. Respondent, by contrast, has done nothing but lead the Tribunal down a rabbit hole of superfluous documents, inaccurate charts, and misleading "expert" reports¹⁵ in a desperate attempt to avoid being held accountable for its actions. It is now time for the Tribunal to parse through

¹³ SAMIR's tanks indisputably held crude oil and refined products as of August 7, 2015. *See infra* para 60.a. Therefore, the question of how much of those commodities were part of Claimants' Investments is plainly a damages/merit issue.

¹⁴ Article 10.19.7 of the FTA states: "A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract."

¹⁵ Notwithstanding Mr. Travers' disclaimer that any legal opinion he offers "is limited to Cayman Islands law only," he devotes much of his Supplemental Report to commenting on various contracts that he expressly acknowledges are not governed by Cayman Islands law. *See, e.g.*, Travers Supp. Report, para 2.3.4 ("[I]t seems to me, **although [the Onshore Feeder Limited Partnership Agreement] is not a Cayman Islands law governed document**, that the following key terms and conditions, *inter alia*, applied to the management and governance of the Onshore Feeder[.]" (emphasis added)); *id.* para 2.3.6 ("[I]t seems to me, **although [the Onshore Feeder Investment Management Agreement] is not a Cayman Islands law governed document**, the following key terms and conditions, *inter alia*, applied to the provision of the services by CCM to the Onshore Feeder and Offshore Master Fund[.]" (emphasis added)). Similarly, although Versant Partners, LLC caveats that "[n]othing in [their] conclusions or opinions stated [in their report] is intended to address the parties' respective legal arguments" (Versant Report, para 11), Respondent states that Versant has "set out their analysis of the position [regarding the international law concept of "control"] under relevant accounting rules." Reply, para 72.

Respondent’s misstatements and untruths and evaluate the undisputed/indisputable facts in light of the correct legal principles—which will demonstrate that it is proper (and indeed, necessary) for the Tribunal to exercise its jurisdiction here. Respondent’s jurisdictional objections must all be rejected.

II. Statement of Facts

24. Because Respondent has attempted to direct the Tribunal to so many irrelevant facts (or what it presumes to be “facts”) and mischaracterized numerous others, Claimants hereby take this opportunity to differentiate between the undisputed and indisputable *relevant* facts, on the one hand, and Respondent’s various misstatements, mischaracterizations, and other distortions of fact, on the other.

A. Undisputed/Indisputable Facts

25. For purposes of determining jurisdiction, there are three key facts that should be beyond dispute: (1) the Claimant **U.S. Onshore Feeder (Celadon Commodities Fund, LP)** contributed investment funds and had ownership interests in the Investments through its ownership of VMF Q1; (2) Claimant **CCM** was in complete control of the Investments at all times; and (3) all of the Claimants are connected as part of the investment structure and through it, participated in the Investments.

i. *The U.S. Onshore Feeder Contributed Capital to the Investments and Had Ownership Interests in the Investments*

26. It is indisputable that the **U.S. Onshore Feeder**, a Claimant, directly contributed funds to VMF Q1, which it used to fund four of the sixteen open Transactions with SAMIR and acquire over \$68.5 million of Commodities.¹⁶ In addition, the **U.S. Onshore Feeder**, through VMF Q1, purchased \$76.9 million of crude oil that **CCM** swapped for refined products in an additional three of the sixteen Transactions with SAMIR.¹⁷

27. Respondent complains that Claimants have not provided any information as to how the three swaps were financed.¹⁸ However, this information has been available to Respondent since Claimants’ Memorial filed on July 31, 2019. As

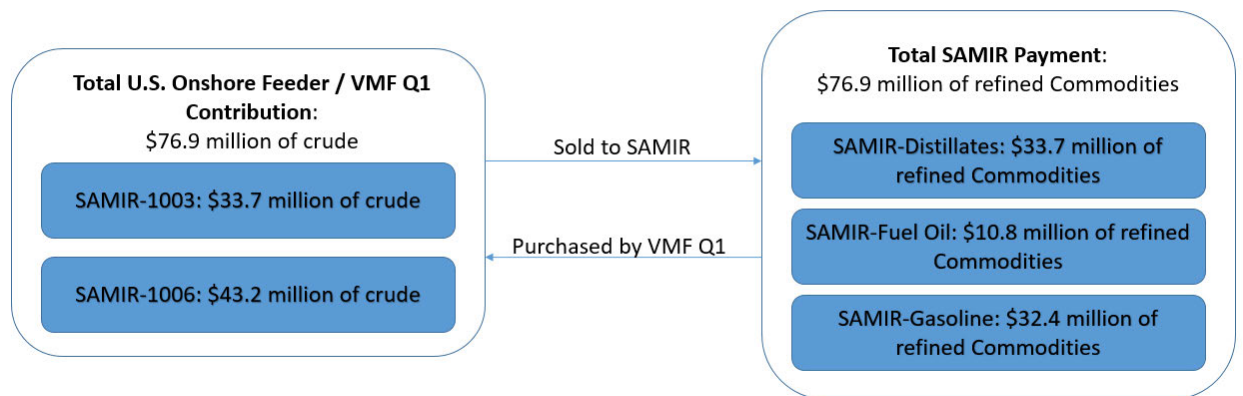
¹⁶ Counter-Memorial, para 26. Respondent acknowledges that “debits from Q1 to 2014-1 on or around the date on which VMF Q1 signed four of the MCTA Confirmations” show that VMF Q1 committed funds raised by the **U.S. Onshore Feeder** for certain of the Investments. Reply, para 83. *See also* Counter-Memorial Annex A; Brokerage Statements for LC Funding (C-0061-ENG). These debits show that the **U.S. Onshore Feeder**, through VMF Q1, contributed \$68.5 million toward letters of credit used to purchase the Commodities.

¹⁷ Witness Statement of Christopher Zuech, dated 16 November 2020 (“Third Zuech Witness Statement”), para 21; Counter-Memorial, para 27.

¹⁸ Reply, para 40.2.

Claimants’ expert, Richard Walck, explained in his first expert report, in closing out two Transactions, SAMIR-1003 and SAMIR-1006, on June 4, 2015, CCM traded \$76.9 million of crude oil owned by VMF Q1 (and indirectly owned by the **U.S. Onshore Feeder**) for an equivalent value of refined products.¹⁹ Pursuant to the confirmations for the resulting swaps, VMF Q1 took title to \$76.9 million of refined Commodities that were ultimately expropriated by Respondent.²⁰ Diagram A below illustrates how CCM swapped crude oil contributed by the **U.S. Onshore Feeder** (through VMF Q1) for refined products.

Diagram A: Swap Transaction



28. The **U.S. Onshore Feeder** committed over \$60 million to purchase Commodities through letters of credit, and over \$70 million worth of crude oil to swap for refined Commodities, for a total of over \$130 million committed to the Investments.²¹ The value of the **U.S. Onshore Feeder’s** contribution and loss was independently verified by Carlyle’s auditors, who noted in the 2015 audited financial statement for the Master Fund that “VMF Q1 has a realized loss of

¹⁹ First Expert Report of Richard E. Walck (“First Walck Report”), para 72. An email from Matt DelMazio (CCM) to SAMIR documented the swap investments. *Id.*; RW-0050. Closeout confirmations were provided for SAMIR-1003 in the amount of \$33,676,801 (*see* RW-0051) and for SAMIR-1006 in the amount of \$43,258,900 (*see* RW-0052). In exchange for closing SAMIR-1003 and SAMIR-1006, the parties opened three transactions: SAMIR-Distillates (RW-0053), SAMIR-Fuel Oil (RW-0054), and SAMIR-Gasoline (RW-0055).

²⁰ *See* First Walck Report Table 1; *see also* Versant Report Figure 1 (noting \$76.94 million of Commodities acquired as part of the swaps).

²¹ Third Zuech Witness Statement, para 22.

\$136,750,088” on assets that SAMIR either used or disposed of without **CCM’s** permission.²²

29. VMF Q1’s loss is borne ultimately by the **U.S. Onshore Feeder**. As Claimants explained in their Counter-Memorial, the relevant documents clearly show that the **U.S. Onshore Feeder** held nearly all of the participating shares of the Master Fund, which in turn owned 100% of the participating shares of VMF Q1.²³ The participating shares of the Master Fund entitled the **U.S. Onshore Feeder** to participate pro rata in the profits and losses of the Master Fund, and to redeem the shares against the net assets of the Master Fund.²⁴ Similarly, the participating shares of VMF Q1 conferred upon the Master Fund the right to participate in the surplus assets of the company and the right to receive dividends.²⁵ As a result of Respondent’s wrongful actions with respect to the Commodities, the Master Fund’s shares of VMF Q1 lost nearly all of their value, and in turn, the **U.S. Onshore Feeder’s** shares of the Master Fund lost value.²⁶ In fact, according to Christopher Zuech, the Chief Operating Officer of **CCM**, it was these losses that forced **CCM** to unwind the Celadon structure.²⁷
30. Respondent does not dispute that VMF Q1 contributed capital to the Investments.²⁸ Instead, Respondent disputes that such funds committed by VMF Q1 were received from the **U.S. Onshore Feeder** and complains that Claimants “provide no evidence for [their] assertions” to that effect.²⁹ Respondent’s position, however, is plainly false. That the funds flowed from the **U.S. Onshore Feeder** to VMF Q1 has been made clear in (i) the witness statement of Mr. Zuech, as well as (ii) the audited financial statements available to Respondent since Claimants filed their Observations on Bifurcation almost a year ago.³⁰
31. As explained in Mr. Zuech’s third witness statement filed with this submission, the 2015 audited financial statement for the **U.S. Onshore Feeder** shows that in 2015, the **U.S. Onshore Feeder** invested substantially all of its assets, a total of

²² *Id.*; 2015 Master Fund Audited Financial Statement (C-0034-ENG) 28.

²³ Counter-Memorial, para 21.

²⁴ *Id.* para 22.

²⁵ *Id.*

²⁶ Third Zuech Witness Statement, para 23.

²⁷ *Id.*

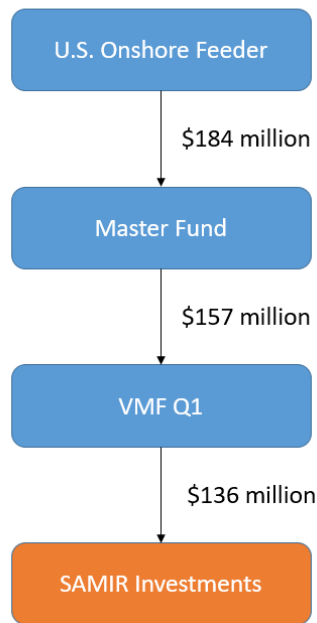
²⁸ Reply, para 79 (“[F]unds for the Transactions originated from . . . with respect to a further four Transactions, Q1”).

²⁹ Reply, para 84; *see also* Counter-Memorial, para 55.

³⁰ Claimants’ Observations, para 69(iii) & nn 71–72.

\$184 million, in the Master Fund.³¹ The audited financial statement for the Master Fund, in turn, shows that the value of the Fund’s net assets for 2015 was \$184 million—funds coming overwhelmingly from the **U.S. Onshore Feeder**, with a small amount coming from the Offshore Feeder, an entity wholly owned by Claimants **TC Group** and **TC Group Investment Holdings**.³² The Master Fund’s audited financials further show that, in 2015, the Fund invested 85.61% of its net assets, a total of \$157 million, in VMF Q1.³³ Of this \$157 million, **CCM** used \$136 million to purchase Commodities.³⁴ Diagram B, below, shows the flow of funds from the **U.S. Onshore Feeder** into the Investments.

Diagram B: Flow of Funds from the U.S. Onshore Feeder



³¹ Third Zuech Witness Statement 24; 2015 U.S. Onshore Feeder Audited Financial Statement (C-0032-ENG) 4.

³² Third Zuech Witness Statement 24; 2015 Master Fund Audited Financial Statement (C-0034-ENG) 5; Counter-Memorial, para 21.

³³ Third Zuech Witness Statement 24; 2015 Master Fund Audited Financial Statement (C-0034-ENG) 6. The August 2015 Investor Register for VMF Q1 shows that at the time of Morocco’s breach and thereafter, the Master Fund was the sole investor in VMF Q1—meaning that, as Claimants have consistently stated, substantially all of the funds in VMF Q1’s accounts came from the **U.S. Onshore Feeder**. VMF Q1 Investor Register (8/01/2015-8/31/2015) (C-0053-ENG); Third Zuech Witness Statement, para 24; *see also* Counter-Memorial, para 21.

³⁴ Third Zuech Witness Statement 24; 2015 Master Fund Audited Financial Statement (C-0034-ENG) 28.

32. Respondent attempts to divert attention away from the **U.S. Onshore Feeder** by claiming that ██████ not the **U.S. Onshore Feeder**, had “almost all of the economic interest in any investments made by Q1 as of 7 August 2015.”³⁵ Yet, this is a grossly false oversimplification of the relevant facts. Once ██████ invested funds in the **U.S. Onshore Feeder**, the funds became part of the **U.S. Onshore Feeder’s** assets, which were “fully utilized in the [U.S. Onshore Feeder’s] investment program.”³⁶ ██████ retained no discretion to manage the **U.S. Onshore Feeder’s** assets (rather, CCM was “responsible for the management of the Partnership’s investments and assets”).³⁷
33. Respondent also argues that, with respect to the **U.S. Onshore Feeder’s** ownership of VMF Q1, “simply establishing that a Claimant owned participating shares is not enough alone to establish that it owned the underlying company.”³⁸ In reaching this erroneous conclusion, Respondent relies on its expert’s interpretation of the term “participating shares” instead of looking to the agreements that expressly spell out the function of the participating shares and the **U.S. Onshore Feeder’s** ownership of VMF Q1.³⁹
- ii. *CCM Completely Controlled the Investments at All Times*
34. Respondent and its experts do not dispute that “certain powers were delegated”⁴⁰ to CCM as investment manager to Cayman investment vehicles VMF Q1, 2014-1, and 2015-1. However, Respondent continues to ignore that the investment management agreements, the other overwhelming documentary evidence, and testimonial evidence from the individuals who actually carried out the SAMIR Transactions all confirm that *every aspect of the Investments was controlled at all*

³⁵ Reply, para 84.

³⁶ U.S. Onshore Feeder Offering Memorandum (CZ-0037) 10.

³⁷ *Id.*

³⁸ Reply, para 62.4.

³⁹ *See* Counter-Memorial, para 22 & n 50.

⁴⁰ Versant Report, para 152.

times by CCM from its offices in New York City in the United States.⁴¹ Respondent calls this “exaggerated,”⁴² but the plain facts indicate otherwise.

35. As Mr. Zuech explained, **CCM** formed the Celadon Entities (including VMF Q1)⁴³ and the Notes Entities (i.e., 2014-1 and 2015-1) to raise capital that **CCM** would use to purchase Commodities.⁴⁴ It is an indisputable fact that each of the Celadon Entities and the Notes Entities entered into a management agreement with **CCM** granting **CCM** “complete discretion in investment and reinvestment” of the investment vehicles’ accounts.⁴⁵ Moreover, none of the Celadon Entities or the Notes Entities had any employees of their own and, due to the delegation of authority to **CCM** in the investment management agreements, they were incapable of making investment decisions independent of **CCM**.⁴⁶
36. Respondent does not, and cannot, deny that documents submitted by Claimants plainly show that **CCM** employees were the ones who first identified SAMIR as a counterparty, negotiated and finalized the Investment Agreements, and corresponded with SAMIR on behalf of the investment vehicles.⁴⁷ **CCM** employees also agreed with SAMIR on the terms of the individual Commodities Transactions, and signed both the applications for the letters of credit to fund the

⁴¹ Counter-Memorial, para 10; *see also* U.S. Onshore Feeder Investment Management Agreement § 5(a) (CZ-0035) (“the [**U.S. Onshore Feeder**] hereby grants [**CCM**] complete discretion in investment and reinvestment of the Account.”); Master Fund/Offshore Feeder Investment Management Agreement § 5(a) (CZ-0041) (same). *See also* 2014-1 Portfolio Management, LLC § 1 (C-0024-ENG); 2015-1 Portfolio Management Agreement, § 1 (C-0025-ENG); VMF Special Purpose Vehicle SPC Investment Management Agreement, para 2 (C-0026-ENG).

⁴² Reply, paras 35.2, 328.

⁴³ As explained in Claimants’ Counter-Memorial, the Celadon Entities are comprised of four entities: (i) the **U.S. Onshore Feeder** (Claimant **Celadon Commodities Fund, LP**), (ii) the Offshore Feeder (Celadon Commodities Fund, Ltd.), (iii) the Master Fund (Celadon Commodities, Ltd.), and (iv) VMF Q1. *See* Counter-Memorial, para 15(a).

⁴⁴ Witness Statement of Christopher Zuech, dated 19 June 2020 (“Second Zuech Witness Statement”), para 15.

⁴⁵ Reply, para 67; Counter-Memorial, para 20; U.S. Onshore Feeder Investment Management Agreement § 5(a) (CZ-0035); Master Fund/Offshore Feeder Investment Management Agreement § 5(a) (CZ-0041) (same). *See also* 2014-1 Portfolio Management, LLC § 1 (C-0024-ENG); 2015-1 Portfolio Management Agreement, § 1 (C-0025-ENG); VMF Special Purpose Vehicle SPC Investment Management Agreement, para 2 (C-0026-ENG).

⁴⁶ Third Zuech Witness Statement, para 19.

⁴⁷ Counter-Memorial, paras 11–12.

purchase of the Commodities, and the transaction confirmations, on behalf of the investment vehicles.⁴⁸

37. Tellingly, the Foreign Exchange Office, a branch of the Kingdom of Morocco's Ministry of Finance, even believed that **CCM**—not the investment vehicles—was SAMIR's true counterparty in the Investments.⁴⁹ The Foreign Exchange Office noted that under the Investments, “the SAMIR company must transfer ownership of the imported crude oil shipments ... to VAM”⁵⁰ (now known as **CCM**).⁵¹
38. The entire purpose of the Celadon Entities and the Notes Entities was to allow investors to defer to **CCM**'s investment management expertise and to have **CCM** in full control of the Investments. Investors in such investment vehicles understood that their returns were based solely on the decisions of **CCM**.⁵²
39. The Offering Memorandum for the **U.S. Onshore Feeder** (the document used to solicit investors for the fund) provides that **CCM** “is responsible for the management of the [**U.S. Onshore Feeder**'s] investments and assets” and describes the expertise of the principal employees of **CCM**, the individuals tasked with making the Investment decisions.⁵³ Likewise, the offering memoranda for the 2014-1 and 2015-1 Notes provide that **CCM** employees, including Mr. Zuech, “manage and control the day-to-day ordinary course of business operations of the Portfolio Manager and have sole authority to make investment decisions for the Issuer.”⁵⁴ Accordingly, outside investors understood that **CCM** would make all decisions concerning the Investments.
40. Faced with the foregoing evidence that **CCM** controlled every aspect of the Investments, Respondent attempts to mislead the Tribunal by selectively quoting language from the investment management agreements that purportedly curtails **CCM**'s control.⁵⁵ For example, Respondent claims that under the investment management agreements relating to the Celadon Entities, **CCM** lacked the

⁴⁸ *Id.*

⁴⁹ Counter-Memorial, para 13.

⁵⁰ *Id.*; Morocco Customs and Exchange Office Letter (16 Jan 2015) (MO-0002).

⁵¹ See 2017 The Carlyle Group, LP 10-K (C-0037-ENG) 2 (“‘Vermillion’ refers to our commodities advisor and business advised by **Carlyle Commodity Management L.L.C. [CCM]**, which was formerly known as Vermillion Asset Management [VAM] until August 2015.”).

⁵² Third Zuech Witness Statement, para 17.

⁵³ U.S. Onshore Feeder Offering Memorandum (CZ-0037) 10–12.

⁵⁴ 2014-1 Offering Memorandum (C-0029-ENG) 69; 2015-1 Offering Memorandum (C-0030-ENG) 80.

⁵⁵ See Reply, para 71.

“authority to bind, obligate or represent” those entities, conveniently leaving out the statement “[e]xcept as provided in this agreement.” (emphasis added). Indeed, what the agreement expressly provides is that CCM had “full and exclusive authority to manage and control the [investment vehicles’] business and investments,”⁵⁶ and explicitly authorized CCM to “purchase and/or sell commodities . . . and to act for the [investment vehicles] in all matters necessary or incidental to such transactions.”⁵⁷ Respondent attempts to pull the same trick with respect to the VMF Q1 Investment Management Agreement, claiming that CCM has “no authority to act for or to represent [VMF Q1] in any way”⁵⁸ while omitting the qualifier to this statement: “**unless otherwise expressly authorized.**”⁵⁹ The VMF Q1 Investment Management Agreement, too, expressly authorizes CCM to *inter alia* “[t]rade, invest, re-invest and otherwise manage the Assets,” and to “possess, purchase, sell, transfer . . . or otherwise deal in, and to exercise all rights, powers, privileges and other incidents of ownership or possession with respect to the Assets.”⁶⁰

41. Nevertheless, without basis, Respondent argues that the Cayman investment vehicles themselves were truly in control of the Investments.⁶¹ Specifically, Respondent repeatedly asserts that CCM was an “agent” or “independent contractor” of VMF Q1, 2014-1, and 2015-1,⁶² and that CCM’s relationship with the vehicles was “merely contractual.”⁶³ There is no dispute that CCM’s role as investment manager was founded on the terms of the investment management agreements. However, it is clear both from the terms of these agreements, as well as from the perfectly consistent course of dealing between CCM and SAMIR, that the vehicles ceded to CCM **all decision-making authority** and authorized CCM to “act for” and “bind” the vehicles regarding all aspects of the Investments.⁶⁴
42. In fact, CCM was the *only* entity capable of making decisions on behalf of VMF Q1, 2014-1, and 2015-1, because, as the Respondent does not dispute, these

⁵⁶ *Id.* para 71.1.

⁵⁷ U.S. Onshore Feeder Investment Management Agreement § 5(a) (CZ-0035).

⁵⁸ Reply, para 71.3.

⁵⁹ VMF Q1 Investment Management Agreement § 8 (CZ-0047).

⁶⁰ *Id.* § 2.

⁶¹ Reply, paras 67.4, 70.

⁶² *Id.* para 67.3.

⁶³ *Id.* para 3.2.2.

⁶⁴ Third Zuech Witness Statement, para 18.

investment vehicles *had no employees*.⁶⁵ Respondent does not, and cannot, point to a single investment decision purportedly directed or executed by the investment vehicles themselves.

43. And, although it is true that the investment vehicles each had a board of independent directors who maintained an oversight function over the general involvement of **CCM**,⁶⁶ it is equally true that each board fully delegated investment-making discretion and authority to **CCM** via the investment management agreements.⁶⁷ Notably, the VMF Q1 Investment Management Agreement gave **CCM** “sole authority and responsibility for the investment and reinvestment of the Assets,” leaving the VMF Q1 directors with no authority to make decisions with respect to the Investments.⁶⁸
44. Respondent criticizes the notion that the directors played a “nominal” role, arguing that “[u]nder the Cayman Islands law, there is no recognized concept of a nominal or passive director.”⁶⁹ However, as Respondent’s expert admits, “the area of directors’ duties under the Cayman Islands law has not been codified.”⁷⁰ Therefore, it is unclear what, if any, weight should be given to Respondent’s assertion. Moreover, Claimants do not contend that the directors of the investment vehicles had no role whatsoever. Rather, because **CCM** was delegated all investment decision-making authority and the right to protect the resulting investments, the fact is that the directors’ role vis-à-vis the *Investments* (even if not the investment vehicles themselves) was effectively nominal. Respondent conflates the issue of control over the Investments with control over the vehicles—but what matters here is that **CCM** clearly had control over the Investments.
45. Respondent also contends that because VMF Q1 and 2014-1 could terminate their relationship with **CCM** with notice, they retained control over the Investments

⁶⁵ Counter-Memorial, paras 23–24.

⁶⁶ See, e.g., VMF Q1 Investment Management Agreement (CZ-0047) § 3(b) (“The Investment Manager will submit such periodic reports to the Directors regarding the Investment Manager’s activities. . . .”); 2014-1 Portfolio Management Agreement (C-0024-ENG) § 1(a)(iii) (“[the portfolio manager shall] provid[e] to the Company . . . such information as may be reasonably required . . . to enable the Company . . . to prepare and deliver reports. . . .”); 2015-1 Portfolio Management Agreement (C-0025-ENG) § 1(a)(vii) (same).

⁶⁷ Third Zuech Witness Statement, para 19. It should be noted (and Respondent does not dispute) that the **U.S. Onshore Feeder** is structured as a limited partnership and does not have directors.

⁶⁸ VMF Q1 Investment Management Agreement (CZ-0047) § 1 (emphasis added).

⁶⁹ Reply, para 70.

⁷⁰ Supplemental Travers Report, para 2.1.2.

themselves.⁷¹ However, the undisputed fact remains that none of the Celadon Entities or the Notes Entities *ever* terminated their retention of CCM as investment manager.⁷² Moreover, the mere possibility that CCM could *possibly* be removed from its role does nothing to undermine the control that CCM, in fact, exercised for the entirety of the Investments.⁷³

46. Finding no support for its position in the documents or testimony, Respondent turns to a domestic accounting analysis in a last-ditch effort to undermine CCM's clear control.⁷⁴ Respondent admits, however, that the accounting standards "are not directly applicable to treaty interpretation."⁷⁵ And, as discussed below, the FTA and relevant legal precedent make clear that CCM satisfies the requirements of control under the treaty. Nevertheless, even if the Tribunal were to consider Respondent's accounting analysis, Respondent's findings are flawed and do nothing to undermine the basis of CCM's control of the Investments.
- a. First, Respondent notes that CCM did not control the investment vehicles through a majority of voting interests, and that CCM's relationships with the vehicles were those of an "agent" or "independent contractor."⁷⁶ These are irrelevant points because CCM's control was granted contractually per the clear language of the relevant agreements, and, as carried out in practice, was beyond question.
 - b. Second, Respondent argues that CCM lacked control because its role as investment manager could be terminated for cause.⁷⁷ This, too, is an irrelevant point because the investment vehicles never terminated CCM's role as investment manager, and CCM retained its control for the full duration of the operation of the Investments.⁷⁸

⁷¹ Reply, para 67.3.

⁷² Third Zuech Witness Statement, para 19.

⁷³ In addition, none of the directors of the Cayman investment vehicles ever limited the amount of investment funds available to CCM. *Id.*

⁷⁴ Reply, paras 73–75.

⁷⁵ *Id.* para 72.

⁷⁶ *Id.* paras 74.1, 74.3.

⁷⁷ *Id.* para 74.2.

⁷⁸ Third Zuech Witness Statement, paras 18-19; Witness Statement of David Johnson, dated 19 June 2020, para 4.

- c. Finally, Respondent contends that **CCM** took no risk in the Investments and was indemnified against any losses.⁷⁹ However, **CCM** had a vested financial interest in the success of the Investments in order to retain its position as investment manager, earn its fees, build its business, and further its reputation.⁸⁰

iii. *All of the Claimants Participated in the Investments*

47. As established above, **CCM** controlled the Investments through its role as investment manager and the **U.S. Onshore Feeder** invested funds used to purchase Commodities. Respondent does not dispute the roles played by the remaining Claimants: **Celadon Partners**, **TC Group**, **TC Group Investment Holdings**, and **The Carlyle Group**. To summarize:
- a. **Celadon Partners** serves as the general partner of the **U.S. Onshore Feeder**; as such, it is responsible for the management and day-to-day operations of the **U.S. Onshore Feeder**, and in turn, collects an incentive fee from the **U.S. Onshore Feeder**.⁸¹ **Celadon Partners** appointed **CCM** to control and manage the **U.S. Onshore Feeder's** investments.⁸²
 - b. **TC Group** controlled at least 83% of the economic interest of **CCM** and **Celadon Partners** at all relevant times, including as of August 2015.⁸³ Since January 1, 2018, **TC Group** has controlled 100% of the economic interest in **CCM** and **Celadon Partners**.⁸⁴ At all times, **TC Group** and **TC Group Investment Holdings** held at least a portion of the limited partnership interests of the **U.S. Onshore Feeder**.⁸⁵ Also, at all times, **TC Group** and **TC Group Investment Holdings**, together, controlled 100% of the Offshore Feeder.⁸⁶
 - c. Finally, **The Carlyle Group** serves as the ultimate parent to all of the other Claimants, giving it indirect ownership and control over the other Claimants

⁷⁹ Reply, paras 74.4–74.5.

⁸⁰ Third Zuech Witness Statement para 15.

⁸¹ Counter-Memorial, para 20 & n 40; *see also* Travers Supplemental Report, para 2.3.4.b-2.3.4.c.

⁸² Counter-Memorial, para 20 & n 40.

⁸³ *Id.* para 29.

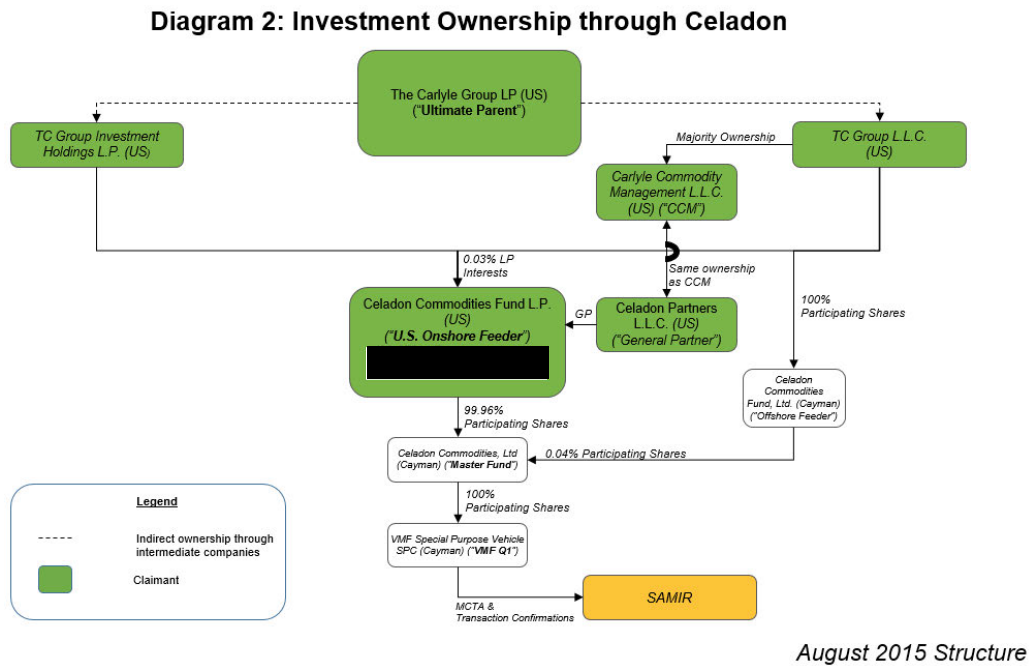
⁸⁴ *Id.*

⁸⁵ Counter-Memorial, para 20 & n 38.

⁸⁶ *Id.*

and their Investments.⁸⁷ CCM was an entity within the Global Market Strategies business unit of **The Carlyle Group** that served as **The Carlyle Group's** exclusive commodities trading platform.⁸⁸ It is also undisputed that **The Carlyle Group** indirectly owned and controlled **TC Group** and **TC Group Investment Holdings**.⁸⁹

48. Based on the above, all of these entities clearly participated in the overall investment operation. The role of each of the Claimant entities is illustrated in Diagram 2, below (a full-size version is attached to Claimants' submission as Annex A):



49. Respondent makes no attempt to dispute the structure depicted in Diagram 2 above, since it is fully supported by the documents. Respondent instead argues that **TC Group** and **TC Group Investment Holdings** had only a “nominal interest” in the **U.S. Onshore Feeder** as of August 2015.⁹⁰ Yet, regardless of how one characterizes the limited partnership interest held by **TC Group** and **TC Group Investment Holdings**, it is undisputed that they had such interest as of the relevant time.

⁸⁷ *Id.* para 30.

⁸⁸ *Id.*

⁸⁹ Counter-Memorial, para 30 & n 75.

⁹⁰ Reply, para 64.

50. Respondent also fixates on the fact that ██████████ in the **U.S. Onshore Feeder** as of August 2015.⁹¹ As Respondent puts it, ██████████ limited partnership interests unquestionably reflect an “economic stake” in the **U.S. Onshore Feeder**.⁹² However, this does nothing to undermine Claimants’ standing since the **U.S. Onshore Feeder** is itself a Claimant. Further, as discussed above, ██████████ did not exercise control over the funds it invested in the **U.S. Onshore Feeder**.⁹³ Rather, the control of the funds rested with the **U.S. Onshore Feeder** itself, with its general partner, **Celadon Partners**, and with **CCM**.

B. Respondent’s Misstatements, Mischaracterizations, and Distortions of Fact

51. Respondent’s Reply and other submissions to date contain numerous misstatements, mischaracterizations, and distortions of fact that are intended to draw the Tribunal away from the plain and indisputable (often undisputed) facts laid out above. Those misstatements, mischaracterizations, and distortions are set forth below.

52. First, Respondent asserts that the Investments were not true sales of the Commodities, but rather “repo transactions” in which Claimants provided credit-based financing by means of a loan for SAMIR’s purchase of Commodities.⁹⁴ Respondent’s assertion is based solely on misleading and misrepresented evidence, such as a citation to what it claims is “Claimants’ own presentation to SAMIR,”⁹⁵ when such presentation was, in fact, prepared by SAMIR for its own board of directors, before the Investment Agreements were finalized and executed. The diagram therein is also overly simplified, as it illustrates neither Claimants’ put option nor the hedging of the transaction via Claimants’ sale of futures contracts.⁹⁶ Even so, regardless of how the presentation labels the Transactions in shorthand or what key details are missing, the diagram plainly recognizes Vermillion Asset Management (n/k/a **CCM**) as the true counterparty to SAMIR and reflects the transfer of title to the crude from SAMIR to **CCM** in the first instance.

⁹¹ *Id.* para 20 & n 38.

⁹² Reply, para 65. Indeed, if holding limited partnership shares in the **U.S. Onshore Feeder** gives rise to a clear “economic stake,” the ownership of even 0.03% should support the standing of **TC Group** and **TC Group Investment Holdings**.

⁹³ *See supra* para 32.

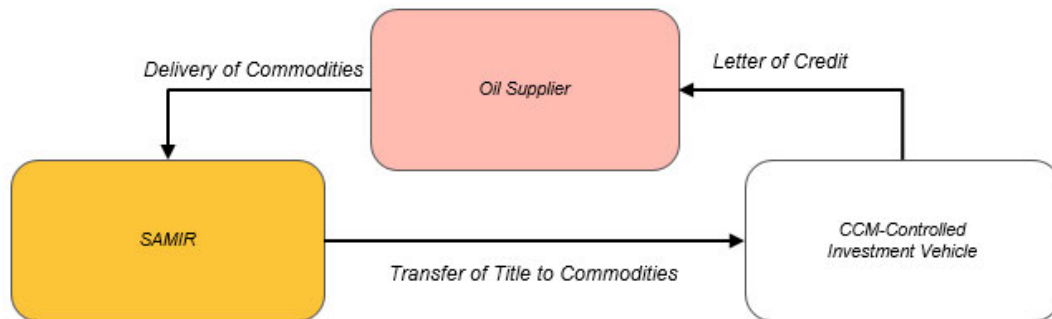
⁹⁴ Reply, para 39.

⁹⁵ *Id.* para 43.4.

⁹⁶ Third Walck Report, para 9.

53. Indeed, the governing Investment Agreements expressly state that there was an absolute transfer of the entire legal and beneficial interest to **CCM's** investment vehicles.⁹⁷ At no point did **CCM** or any of the other Claimants engage in credit-based transactions with **SAMIR**.⁹⁸ Rather, the Investment Agreements expressly state that **CCM's** vehicles owned the Commodities that **CCM** purchased and stored in **SAMIR's** tanks, and **SAMIR** could not use or remove the Commodities unless it first paid for them or obtained **CCM's** written consent.⁹⁹
54. As part of the overall investment structure, **CCM's** investment vehicle, VMF Q1, maintained “full exclusive title” to the Commodities and “remain[ed] the sole owner of the Commodities” until **SAMIR** “unconditionally and irrevocably paid” for the Commodities “in full.”¹⁰⁰ Indeed, the Investment Agreements disavowed the very notion that the Transactions functioned as credit-based financing: “[e]ach Transaction [is] a sale of the Commodities by [SAMIR] to [CCM's investment vehicle] and not a transfer of the Commodities to [the vehicle] as security for a loan.”¹⁰¹
55. Although Respondent chooses to ignore such express terms of the Investment Agreements and the way the Investments worked as a whole, the basic mechanics of the transactions are undisputed, and illustrated below in Diagrams 3 and 4:

Diagram 3: Initial Deal



⁹⁷ Counter-Memorial, para 17.

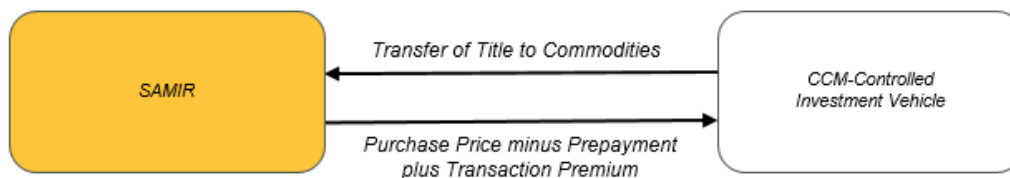
⁹⁸ Third Zuech Witness Statement, para 5.

⁹⁹ *Id.* para 8; Amended and Restated CSA §§ 3(b), 4(a), 9.2(b) (CZ-0003).

¹⁰⁰ *See* Third Zuech Witness Statement, para 8; Amended and Restated MCTA § 3(e) (CZ-0002); Amended and Restated CSA §§ 1.1, 3(a), 5(b), 9.1 (CZ-0003).

¹⁰¹ *See* Third Zuech Witness Statement, para 5; CZ-0002 (Amended and Restated MCTA) § 16(a).

Diagram 4: At Closeout



56. Per the above diagrams and the evidence submitted by Claimants:
- a. It is undisputed that the investment vehicles as directed by **CCM** contributed funds from the United States to issue letters of credit in favor of crude oil suppliers.¹⁰²
 - b. It is undisputed that the letters of credit were used to purchase Commodities from the suppliers, who then delivered the commodities to SAMIR.
 - c. It is undisputed from the transaction confirmations that VMF Q1 took title to the Commodities as part of the Investments, and that the **U.S. Onshore Feeder** had nearly 100% ownership in the Master Fund, which in turn owned 100% of VMF Q1.¹⁰³
 - d. It is undisputed that the Commodities were stored at SAMIR.
 - e. And finally, it is undisputed that, under the terms of the Investment Agreements, **CCM** had the option to sell the Commodities back to SAMIR in exchange for the purchase price and transaction premium. On this point, Respondent makes the irrelevant comment that there was no question that **CCM** would exercise its right to sell the Commodities to SAMIR because if it failed to sell the Commodities to SAMIR, it would owe SAMIR a “settlement differential.”¹⁰⁴ However, as explained in the MCTA and by Mr. Zuech, **CCM** would owe the settlement differential only if SAMIR *requested to purchase* the Commodities and **CCM** refused—a scenario that never arose in the course of the Transactions.¹⁰⁵

¹⁰² Memorial, para 25; Third Zuech Witness Statement, paras 21-22.

¹⁰³ See Reply, para 43.2 (“the lender (Q1), took title to the Commodities and exchanged that title for cash at maturity”).

¹⁰⁴ *Id.* para 40.1.

¹⁰⁵ See Third Zuech Witness Statement, para 7.

57. In addition, Claimants' expert, Mr. Walck, continues to attest to the complex features of the SAMIR Transactions that set them apart from true repurchase agreements:

[Respondent's experts from Versant Partners] acknowledge that a commodity transaction may incorporate options, as the SAMIR – Carlyle transactions did. Other factors introducing additional complexity include the need to provide for storage of the commodities, the risk of environmental harm, and the risk of commodity price fluctuation.

. . . . [By contrast,] none of the attributes listed for a simple repurchase agreement of securities, *including the use of a standardized agreement*, is present in the SAMIR – Carlyle transactions.¹⁰⁶

58. Accordingly, the Investments were significantly different from a mere credit-based financing between Claimants and SAMIR, and Respondent's mischaracterizations of the Transactions should be disregarded.
59. In any event, the distinction Respondent attempts to draw is also irrelevant for purposes of jurisdiction. There are a number of ICSID tribunals that have recognized pure financial instruments as protected investments.¹⁰⁷ Assuming *arguendo* that the Transactions here involved a credit-based financing/debt component, such component would still be part of Claimants' "Investments" under subsection (c) of the definition of "investment" in Article 10.27 of the FTA: "bonds, debentures, other debt instruments, and loans."¹⁰⁸ In section 16(d) of the

¹⁰⁶ Third Walck Report, paras 6-7 (emphasis in original).

¹⁰⁷ See, e.g., *Abaclat and Others (Case formerly known as Giovanna a Beccara and Others) v The Argentine Republic*, ICSID Case No. ARB/07/5 ("*Abaclat v Argentina*") Decision on Jurisdiction (4 August 2011) paras 367, 371 (CL-0078-ENG) (holding that the claimants' purchase of security entitlements in Argentinean bonds constitute an "investment" under the relevant BIT and Article 25 of the ICSID Convention); *Ambiente Ufficio v Argentina*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) para 510 (CL-0080-ENG) (finding that "the bonds/security entitlements at stake in the present proceedings are investments made in the territory of Argentina for the purposes of Art. 1(1) of the Argentina-Italy BIT"); *Fedax N.V. v The Republic of Venezuela*, ICSID Case No. ARB/96/3 ("*Fedax v Venezuela*"), Decision on Jurisdiction (11 July 1997) (CS-0044) (holding that promissory notes issued by the Government of Venezuela and held by the claimant qualified as an investment under the ICSID Convention and the Venezuela-Netherlands BIT).

¹⁰⁸ Claimants acknowledge that the footnote to subsection (c) of the definition of "investment" in FTA Article 10.27 states, "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." However, Claimants have clearly demonstrated that the Transactions were much more than a mere sale of goods from SAMIR to Claimants, and Respondent has not proven otherwise. Respondent also erroneously argues that, in the event the Tribunal finds the Transactions to be financings, then Chapter 12 of the FTA, not Chapter 10, would apply to the Investments. See Reply, para 44, n 88. On that basis, Respondent contends that the Tribunal lacks jurisdiction *ratione materiae* on the minimum standard of

MCTA, in addition to agreeing that “each purchase of Commodities shall constitute and be treated as a true sale” by SAMIR to Carlyle, the parties further agreed that even if (and contrary to the agreements and intent of the parties), the Transactions were mistakenly deemed financings, Carlyle’s initial payment for the Commodities would be considered a debt or loan such that Carlyle would be entitled to the proceeds of any unauthorized sale of such Commodities.¹⁰⁹

60. Second, to support its position that Claimants may have lacked title to the Commodities on August 7, 2015, because the crude oil had already been processed, Respondent points to a recent New York state trial court decision regarding an insurance dispute between Carlyle and certain insurance carriers who insured the Commodities stored at SAMIR (the “Insurance Litigation”).¹¹⁰ However, contrary to Respondent’s unsupported claim that the Insurance Litigation was “based upon precisely the same underlying facts” as this arbitration, the Insurance Litigation centered around the language of an insurance contract that is wholly inapplicable here. In this proceeding, Respondent will be held accountable for its role in Claimants never receiving payment for its Commodities. Moreover, the New York court’s findings—that it was somehow undisputed that Carlyle-related entities including CCM consented to the takings at SAMIR without payment—are contrary to the evidence and are, in fact, vigorously disputed. Carlyle does not believe that the summary judgment decision, rendered during the height of COVID and with a substantial jury trial looming, will withstand scrutiny by the appellate court.¹¹¹
- a. Respondent cites language from opposing counsel in the Insurance Litigation that “once [the Commodities] got into storage in the tanks, it was immediately

treatment claim because (i) the provisions in Chapter 10 apply to measures adopted or maintained by Morocco as described in Chapter 12 only to the extent Chapter 10 is incorporated into Chapter 12, and (ii) Article 10.5 is not expressly incorporated into Article 12.2(b). *Id.* What Respondent fails to explain, however, is why Chapter 12 of the FTA would be applicable in the first place. Per Article 10.2.3 of the FTA, Chapter 10 does not apply to “*measures adopted or maintained by a Party* to the extent that they are covered by Chapter Twelve (Financial Services).” FTA, art. 10.2.3 (emphasis added). Typical state measures under Chapter 12 would be State measures regulating the insurance business, financial institutions, etc., and Respondent has not identified which measures adopted or maintained by Respondent would be covered by Chapter 12 and be at issue in this case—nor can it. Indeed, the measures at issue here are clearly related to Chapter 10, i.e., the taking of Claimants’ Investments through Morocco’s seizure of the SAMIR refinery and the freezing of SAMIR’s bank accounts containing moneys owed to Claimants, not to financial institutions. Accordingly, Respondent’s line of reasoning is completely misplaced and meritless, and any request to brief the issue and drive up costs needlessly should be rejected.

¹⁰⁹ See MCTA, § 16(d).

¹¹⁰ See Reply, para 46.

¹¹¹ See Third Zuech Witness Statement, paras 8, 10 (Carlyle did not consent to SAMIR refining Carlyle’s Commodities without consent).

used by SAMIR.” This is patently a matter of insurers’ preferred facts, is heavily disputed, and is not relevant to jurisdiction here. Furthermore, Respondent’s contention that there were no Commodities in SAMIR’s tanks and thus that “Morocco could not have expropriated Commodities which did not exist” is flatly untrue. SAMIR’s own tank stock report, dated August 9, 2015, reveals that at the time of the breach, SAMIR had over 80,000 metric tons of crude in its tanks in addition to over 300,000 metric tons of refined product.¹¹² SAMIR continued to send CCM periodic tank reports until December 2015, which showed that the Commodities in SAMIR’s tanks were still being refined, even after the Government of Morocco had halted operations at SAMIR and blocked the port, preventing SAMIR from receiving new shipments of commodities.¹¹³ In December 2015 and March 2016, CCM commissioned Intertek to perform independent investigations of SAMIR’s tanks. Intertek’s investigations confirmed that SAMIR’s tanks contained crude oil and product through March 2016.¹¹⁴

- b. Respondent’s allegation that the Commodities were refined with Claimants’ consent is flatly contradicted by the evidence. As Mr. Zuech explained in his first witness statement, in September 2015, when Claimants discovered that SAMIR had been refining additional Claimants’ Commodities *without* consent, CCM wrote a letter to SAMIR confirming that “[CCM] did not authorize disposition of any of the Commodities . . . and we expressly prohibit and do not authorize the future release of any Commodities without payment therefor in accordance with the Agreements.”¹¹⁵ In response, SAMIR *admitted* to refining the Commodities without consent and explained that the government of Morocco “froze SAMIR’s bank accounts on or about August 7, 2015” and “directly or indirectly . . . expropriated Commodities . . . from SAMIR’s custodial possession”¹¹⁶

61. Claimants reiterate that the New York court’s findings have nothing to do with the jurisdictional issues before the Tribunal. The fate of the Commodities stored at SAMIR and of the proceeds related to the sale of Claimants’ Commodities (including their refined products) is plainly an issue of the merits, which should be addressed at that stage, not now.

¹¹² SAMIR Tank Report (9 August 2015) (CZ-0062). In December 2015, Mr. Zuech discussed this point in person with Morocco’s Minister of Finance, Mohamed Boussaid. Witness Statement of Christopher Zuech, dated 31 July 2019 (“First Zuech Witness Statement”), para 33 & CZ-0026; Third Zuech Witness Statement, para 9.

¹¹³ Third Zuech Witness Statement, para 9.

¹¹⁴ *Id.*; See 16 December 2015 Intertek Report (CZ-0063); 10 March 2016 Intertek Report (CZ-0064).

¹¹⁵ First Zuech Witness Statement, paras 15, 22 & CZ-0015.

¹¹⁶ *Id.* para 26 & CZ-0017.

62. Third, Respondent’s discussion of the sleeve transactions—the internal transactions in which **CCM** transferred title to the Commodities between VMF Q1, 2014-1, and 2015-1—is a red herring.¹¹⁷ It is not at all relevant for purposes of jurisdiction how much each of the investment vehicles held title to what portion of the Commodities at the time of Morocco’s breach. Rather, the facts show each of them did hold such title to substantial quantities of those Commodities. And further, as explained below, all that is needed for jurisdiction is that Claimants committed capital for the purchase of Commodities through the **U.S. Onshore Feeder**, and that Claimants controlled every aspect of the Transactions through **CCM**.
63. Finally, Respondent mischaracterizes the purpose of the custodian certificates and the role of State Street Bank and Trust Company, the trustee of the Notes. SAMIR signed custodian certificates confirming that the Commodities in its tanks belonged to the investment vehicles.¹¹⁸ As explained by Mr. Zuech, these certificates were merely “belt-and-suspenders” documents that in no way superseded the role of the transaction confirmations, which are the primary documents of title for the Commodities.¹¹⁹ Respondent’s comment that the certificates are “infrequent” is precisely the reason why **CCM** relied on the transaction confirmations, and not the certificates, in recording the Investments with SAMIR.¹²⁰
64. Respondent also contends that State Street held title to Commodities as of August 2015. Claimants have never disputed that under the terms of the indenture, **CCM** was obligated to transfer title of the Commodities securing the Notes to the trustee.¹²¹ Indeed, the fact that **CCM** arranged for the title transfer is a testament to **CCM**’s control over the Investments. But the unambiguous terms of the indentures make obvious that any “title” that State Street held was in its capacity

¹¹⁷ Moreover, Respondent’s complaints regarding Claimants’ alleged non-production of the VM MCTA and its significance are baseless. Reply, para 40.4. After having made additional efforts to retrieve the document, Claimants have produced the “VM MCTA” governing the sleeve transactions, and it does nothing to undermine Claimants’ position. Indeed, the VM MCTA only confirms Mr. Zuech’s earlier testimony about the sleeve transactions—that they served to transfer title to the Commodities among VMF Q1 and the Notes Entities. See Second Zuech Witness Statement, para 22; VM MCTA § 3(c) (CZ-0065) (“Title to the Commodities shall pass to Purchaser upon payment of the Initial Payment to Seller.”).

¹¹⁸ Counter-Memorial para 17; Warehouse Certificate, 2014-1, dated June 15, 2015 (C-0050-ENG); Warehouse Certificate, Q1, dated June 15, 2015 (C-0050-ENG); Warehouse Certificate, 2015-1, dated August 10, 2015 (C-0050-ENG).

¹¹⁹ Third Zuech Witness Statement, para 11.

¹²⁰ *Id.*

¹²¹ Counter-Memorial, para 21 n 48.

as the trustee, i.e., *on behalf of* the Notes holders, in *trust*.¹²² As with all of Respondent's other superfluous, baseless points, there is nothing about the arrangement with State Street that undermines Claimants' standing.¹²³

III. Burden of Proof

65. Respondent blatantly mischaracterizes Claimants' position concerning the proper apportionment of the burden of proof, accusing Claimants of relying on a "false premise that the jurisdiction of an investment tribunal is to be presumed unless the respondent can disprove it."¹²⁴ To the contrary, Claimants agree that they initially had the burden to establish a prima facie case for jurisdiction—and with their opening submissions, they did so.¹²⁵ Claimants' actual point, as explained in their Counter-Memorial, is that it is Respondent that now has the burden to prove its *positive objections* to jurisdiction.¹²⁶ This is a well-established principle of international law, and certainly not a ploy that is part of some "secretive and opaque approach" to Claimants' case that Respondent imagines out of nowhere.¹²⁷
66. Indeed, in addition to the tribunals that rendered the decisions already identified in Claimants' Counter-Memorial,¹²⁸ the United States has raised this principle in

¹²² Third Zuech Witness Statement, para 12; 2014-1 Indenture at 2 (CZ-0050); 2015-1 Indenture at 2 (CZ-0051).

¹²³ Respondent accuses Claimants of attempting to mislead the Tribunal with respect to the role of Carlyle Investment Management L.L.C. ("CIM"), which withdrew as a claimant from this proceeding. *See* Reply, para 6. That is patently false. In their Memorial, Claimants represented that CIM was the sole parent of 2014-1 and 2015-1 because CIM alone owned 100% of the economic interest in 2014-1 and 2015-1 through [REDACTED] Memorial, para 11. In their Observations on Respondent's Request for Bifurcation, Claimants clarified that CIM's position vis-à-vis 2014-1 and 2015-1 was due to its [REDACTED] over a year before Claimants filed their request for arbitration in July 2018. *See* Claimants' Observations, para 69(ii). And, as Claimants stated in their Counter-Memorial, CIM's withdrawal was done in the interests of streamlining the issues before the Tribunal, i.e., to avoid contentiousness regarding whether jurisdiction should be determined at the time of the breach versus at the time that the request for arbitration is filed. Counter-Memorial, n 1. None of these representations was made facetiously or with an intent to deceive. Rather, Claimants accurately conveyed all of the information available to it. In any event, Claimant **TC Group** is the managing partner of CIM, making it the indirect owner of [REDACTED]

¹²⁴ Reply, para 20.

¹²⁵ Counter-Memorial, paras 37, 40.

¹²⁶ *Id.* paras 37-39.

¹²⁷ Reply, para 21.

¹²⁸ Counter-Memorial, paras 38-39 (quoting *Pac Rim Cayman, LLC v The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction (1 June 2012) (CL-0053-ENG) and *Spence Int'l*

recent proceedings under the U.S.-Panama Trade Promotion Agreement (which contains nearly identical language to Chapter 10 of the FTA):

General principles of international law applicable to international arbitration are that a claimant has the burden of proving its claims, and ***if a respondent raises any affirmative defenses, the respondent must prove such defenses***. The standard of proof is generally ***a preponderance of the evidence***.¹²⁹

67. The principle is also clearly affirmed by the tribunals that Respondent itself cites.¹³⁰ For example, in *Michael Ballantine and Lisa Ballantine v Dominican Republic*, the tribunal stated:

At the jurisdictional level and in the context of the DR-CAFTA, the tribunal in *Pac Rim LLC v El Salvador* considered that “the Claimant has to prove that the Tribunal has jurisdiction” and “if there are positive objections to jurisdiction, the burden lies on the Party presenting those objections, in other words, here the Respondent”. The tribunal in *Berkowitz v Costa Rica* also expressly referred to Article 27(1) of the UNCITRAL Rules and considered that “the accepted principle in international proceedings, at least at a level of generality, is that ***the burden rests in the first instance with the party advancing the proposition or adducing the evidence***.”

Thus, the Tribunal concurs with the general approach followed by other DR-CAFTA tribunals and agrees with the tribunal’s opinion in *Pac Rim LLC v El Salvador* that “it is not bound to accept the facts necessary to support or deny jurisdiction as alleged by the Claimant and the Respondent respectively; that the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts); and that ***the Respondent has the burden to prove that its positive objections to jurisdiction are well-founded***.”¹³¹

Investment et al. v Republic of Costa Rica, ICSID Case No. UNCT/13/2, Interim Award (23 October 2016) (CS-0038)).

¹²⁹ *Omega Engineering LLC and Mr. Oscar Rivera v The Republic of Panama*, ICSID Case No. ARB/16/42, Submission of the United States of America (3 February 2020) para 45 (CL-0092-ENG) (emphasis added).

¹³⁰ Reply, para 21 n 29.

¹³¹ *Michael Ballantine and Lisa Ballantine v Dominican Republic*, PCA Case No. 2016-17, Award (3 September 2019) paras 509-510 (CL-0093-ENG) (emphasis added).

That the weight of Claimants' evidence in support of their standing will be considered by the Tribunal in its jurisdictional determination does not absolve Respondent of its burden.

68. With respect to evidence that Claimants have submitted in response to Respondent's objections, Claimants are not subject to any heightened standard of proof. Rather, the evidence put forth by Claimants up until the Tribunal's determination must be evaluated pursuant to a preponderance of the evidence/balance of probabilities standard, i.e., whether the evidence demonstrates that it is more likely than not that Claimants, in fact, owned and/or controlled the Investments, and that it is more likely than not that the Investments had the characteristics of an investment protected by the FTA.¹³²
69. To date, Claimants have provided sufficient evidence to prove that:
- a. They purchased Commodities in accordance with the Investment Agreements with SAMIR;
 - b. Those Commodities were stored in SAMIR's tanks in Morocco;
 - c. Title to the Commodities remained with CCM-managed investment vehicles unless and until SAMIR paid for them;

¹³² See, e.g., *Border and Transborder Armed Actions (Nicaragua v Honduras)*, I.C.J. Reports 1988, Jurisdiction and Admissibility, Judgment, (20 December 1988) 76 (CL-0094-ENG) ("The existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law to be resolved in the light of the relevant facts The question is whether in case of doubt the Court is to be deemed to have jurisdiction or not. . . . The Court will therefore in this case have to consider whether the force of the arguments militating in favour of jurisdiction is *preponderant*, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it.'" (emphasis added)); *Southern Pacific Properties (Middle East) Ltd. v Arab Republic of Egypt*, Decision on Jurisdiction, ICSID Case No. ARB/84/3 (14 April 1988) para 63 (CL-0095-ENG) ("Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if – but only if – the force of the arguments militating in favour of it is *preponderant*." (emphasis added)). See also *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award (3 March 2010), para 229 (CL-0096-ENG) ("The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities"); *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) para 177 (CL-0070-ENG) ("In general, the standard of proof applied in international arbitration is that a claim must be proven on the 'balance of probabilities.' There are no special circumstances that would warrant the application of a lower or higher standard of proof in the present case"). As explained by Nathan D. O'Malley in his book on the rules of evidence in international arbitration: "[t]he balance of probabilities standard generally calls for a claim to be upheld if the Tribunal is convinced by the evidence that the claim is more likely than not true." Nathan D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa 2012) 208 (CL-0097-ENG).

- d. Commodities were in the tanks at the time of the Moroccan Government’s actions at SAMIR. Similarly, a significant amount of money owed to Claimants was in SAMIR’s bank accounts at the time the Government froze SAMIR’s bank accounts;
 - e. The Investments were owned and/or controlled by Claimants; and
 - f. The Commodities/Put Rights and the transactions were in the territory of Morocco.
70. In light of all of this, it is ironic that Respondent complains that it “cannot be expected to have to hand proof” where the matters “are peculiarly within [the claimant’s] knowledge,”¹³³ given that Respondent is the one in possession of SAMIR’s and Morocco’s records (including SAMIR’s bank statements), and its only response to Claimants’ clear presentation of those very matters is to deny, distort, and disregard. Contrasting Claimants’ breadth of evidence with the complete lack of merit in Respondent’s jurisdictional objections, the Tribunal should have no trouble finding that it is more likely than not that Claimants’ facts, as alleged, are true and, thus, that the Tribunal has jurisdiction over Claimants’ claims.

IV. Response to Objection No. 1: Claimants Hold an “Investment” Within the Meaning of Article 25(1) of the ICSID Convention and FTA Article 10.27

- A. The So-Called *Salini* Test Is Not Required by Article 25(1) of the ICSID Convention or FTA Article 10.27
71. Despite Respondent’s extensive efforts to defend a rigid application of the so-called *Salini* test (or what Respondent calls the “deductive approach”¹³⁴), the reality is that the trend for over a decade now has been to reject that approach and to use the criteria articulated in *Salini* as mere guidance for evaluating the existence of a protected investment under Article 25(1) of the ICSID Convention—not as fixed jurisdictional requirements. Respondent’s one-off citation to the *Eyre & Montrose v Sri Lanka* decision¹³⁵ does not establish that

¹³³ Reply, para 21.

¹³⁴ *Id.* para 99.

¹³⁵ *Raymond Charles Eyre and Montrose Developments (Private) Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25 (“*Eyre & Montrose*”), Award (5 March 2020) (CS-0129). Claimants could not help noticing that among the counsel for the *Eyre & Montrose* claimants was Respondent’s current counsel in this case. Curiously, the claimant in *Eyre & Montrose* advanced most of the same arguments that Respondent facetiously dismisses here. For example, the claimant asserted the following:

there are cases “of a more recent vintage[] reflecting a convergence of opinion that has ossified into a *jurisprudence constante*,”¹³⁶ and can easily be rebutted with a string of ICSID case after ICSID case rejecting the so-called *Salini* test.¹³⁷

72. Indeed, what Respondent calls the “inductive approach” in some instances and the “intuitive approach” in others (i.e., the approach that rejects the application of fixed jurisdictional requirements) is, in fact, supported by the majority of the most recent case law.

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- with respect to the “so-called ‘*Salini* factors’”: they “should never have been implied into the ICSID Convention,” and if the term “investment” has any autonomous meaning in Article 25(1) of the Convention, it is just to exclude “obviously absurd” investment claims (para 165);
 - with respect to the purported “active” investment test: the reasoning of the president of the tribunal in *Standard Chartered Bank v Tanzania* is wrong (para 166);
 - with respect to *lex specialis*: the tribunal should respect the “well-known” rule of international law and “not import a requirement limiting its jurisdiction when the parties have not specified that requirement” in the applicable treaty (para 191);
 - *Barcelona Traction* is not applicable in the investor-State treaty context (para 182);
 - the investor may claim damages related to the assets of a company in which it holds shares (paras 227-30); and
 - indirect/beneficial ownership is protected by the underlying treaty, which broadly defines “investment” as “every kind of asset” (paras 206-13).

The above are all arguments made by Claimants in this case but now conveniently rejected by Respondent’s counsel.

¹³⁶ Reply, paras 103-04.

¹³⁷See, e.g., *Pantehniki S.A. Contractors & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) paras 37, 43 (CL-0085-ENG); *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8 (“*Inmaris v Ukraine*”), Decision on Jurisdiction (8 March 2010) (CL-0081-ENG); *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008) paras 312-18 (CL-0010-ENG); *Malaysian Historical Salvors SDN BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 April 2009) paras 75-79 (CL-0082-ENG). See also Second Legal Opinion of Christoph Schreuer (“Second Schreuer Legal Opinion”), para 11. Further, as stated in paragraph 46 of Claimants’ Counter-Memorial, ICSID case law has expressly denied any *jurisprudence constante* with respect to the so-called *Salini* test. See, e.g., *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) para 204 (CS-0061) (“Whether the so-called *Salini* test relied upon by the Respondent has any relevance in the interpretation of the concept of ‘investment’ under Article 25(1) of the ICSID Convention is very doubtful . . . **there is no such a ‘*jurisprudence constante*’ with respect to acceptance of the *Salini* test.** (emphasis added)).

73. As an example, an investment tribunal stated in February of this year:

As regards the so-called *Salini test*, the Tribunal notes that this test is a doctrinal and jurisprudential formulation. The Tribunal can only view the *Salini test* as ***subordinated to the applicable rules and principles of treaty interpretation, in particular the requirement to have regard of the ordinary meaning of the term “investment”***. The contours of this meaning, even with the aid of the *Salini test*, are broad. The Tribunal therefore agrees that the *Salini test* should be applied holistically, in accordance with the international law rules and principles of treaty interpretation, and not cumulatively.¹³⁸

74. Another example is the investment tribunal in *Standard Chartered Bank v Tanzania II*, which similarly held:

The Tribunal agrees with the observations of the recent ICSID decisions, that the *Salini Test* is a reformulation of the criteria set out by the tribunals in *Fedax* and *CSOB*, with the additional requirement that there should be some economic contribution to the host country. ***These Salini factors are not to be taken as prescriptive or dispositive but merely as indicative of typical elements that the Tribunal could consider*** in determining whether the subject matter from which the dispute has arisen is an ‘*investment*’ contemplated by the ICSID Convention. This flexible approach is consistent with the objective of ICSID Convention as set out in the Executive Director’s Report[.]¹³⁹

75. Even if there were certain tribunals in the last decade that chose to use the *Salini* criteria, such opinions do not move the needle. As Professor Schreuer notes:

Most tribunals that employ the *Salini* criteria use them as a convenient checklist. They see them as typical characteristics of an investment that may usefully be applied as a starting point for their analysis. ***But this is a far cry from accepting them as strict jurisdictional requirements.***¹⁴⁰

76. The extent to which Respondent is desperate to deny the true direction of the law and the fact that Professor Schreuer (one of the leading authorities, if not *the* leading authority, on the ICSID Convention) supports this “inductive”/“intuitive” approach is made even more apparent by its deliberate misquotation of two

¹³⁸ *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction (7 February 2020) para 294 (CS-0229) (emphasis added).

¹³⁹ *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania II*, ICSID Case No. ARB/15/41 (“*Standard Chartered Bank II*”), Award of the Tribunal (11 October 2019) para 200 (CS-0055) (emphasis added) (citations omitted).

¹⁴⁰ Second Schreuer Legal Opinion, para 12 (emphasis added).

arbitral decisions and its brazen fabrication of legal opinions by Professor Schreuer. As clarified by Professor Schreuer himself in his Second Legal Opinion submitted herewith, he did not, as Respondent falsely claims, submit a legal opinion on behalf of Egypt in the *Helnan v Egypt* case.¹⁴¹ The true, unaltered text of paragraph 77 of the tribunal’s decision that Respondent purports to quote refers to an “unchallenged *statement*,” not an opinion, by Professor Schreuer.¹⁴² Also, in that paragraph, the *Helnan v Egypt* tribunal was referring to Egypt’s position, not Professor Schreuer’s position.

77. Moreover, the referenced “statement” by Professor Schreuer does not run contrary to the position he is taking in the legal opinions actually submitted in this arbitration. Such statement, which comes from paragraph 122 on Article 25 of the well-known first edition of Professor Schreuer’s *The ICSID Convention: A Commentary*,¹⁴³ where he describes certain features typical of investments, concludes: “These features should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention.”¹⁴⁴ And, contrary to Respondent’s misrepresentations concerning the *Helnan v Egypt* tribunal’s analysis, the tribunal, in fact, correctly cited Professor Schreuer’s position on the matter:

the Contract qualifies as an “*investment*”, even though the above-mentioned criteria “*should not necessarily be understood as jurisdictional requirements but merely as typical characteristics of investments under the Convention*”, as pointed out by Prof. Ch. Schreuer.¹⁴⁵

78. Professor Schreuer also did not submit a legal opinion on behalf of Egypt in *Jan de Nul v Egypt*, as Respondent again falsely claims. Rather, he submitted an opinion on behalf of the claimant in that case.¹⁴⁶ Moreover, contrary to what

¹⁴¹ *Id.* paras 2-3.

¹⁴² *Helnan v Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objections to Jurisdiction (17 October 2006) para 77 (CS-0047) (emphasis added); *compare with* Reply, para 101 (claiming that the *Helnan v Egypt* tribunal said, “as summarized in an unchallenged opinion by Professor Ch Schreuer” (emphasis removed)).

¹⁴³ Second Schreuer Legal Opinion, paras 7-8 & n 9.

¹⁴⁴ Schreuer C., *The ICSID Convention: A Commentary*, 1st ed. (2001), Article 25, page 140, para 122 (CS-0054). As Professor Schreuer points out, the substance of this paragraph is echoed in the second edition of the same, as well as in the forthcoming third edition. Second Schreuer Legal Opinion, paras 8-9.

¹⁴⁵ Second Schreuer Legal Opinion, para 4 (emphasis in original); *see also Helnan v Egypt*, para 67 (CS-0047) (emphasis in original).

¹⁴⁶ Second Schreuer Legal Opinion, para 5.

Respondent said, at no point did the tribunal in *Jan de Nul* refer to the *Salini* elements as “strict” criteria.¹⁴⁷

79. Therefore, Respondent’s attempts to discredit Professor Schreuer are both disrespectfully underhanded and wholly meritless. Professor Schreuer’s position fourteen years ago and his opinion today are the same: the elements identified in the so-called *Salini* test are not jurisdictional requirements.¹⁴⁸
80. Respondent is also incorrect that the dominant “inductive”/“intuitive” approach is inconsistent with the directive in Article 31(1) of the Vienna Convention that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” It is, in fact, the exact opposite; nothing in the language of this provision requires tribunals applying it to adopt a singular, beyond-the-plain-language definition of a treaty term that otherwise has a broad definition within the treaty at issue.¹⁴⁹
81. Respondent’s twisted interpretations extend to Article 10.27 of the FTA. Completely disregarding the disjunctive “or” in the definition of “investment” in Article 10.27, Respondent claims that (a) because “investment” is defined as any “asset . . . that has the characteristics [i.e., plural] 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[,]” the investment at issue must have more than one of the three characteristics listed¹⁵⁰; and (b) because the definition uses the term “has” in “has the characteristics of an investment,” that somehow means that an asset must have *all* three characteristics.¹⁵¹ Neither reading makes any logical sense and both must be rejected.
82. First, although Claimants do not disagree with Respondent that the use of the plural term “characteristics” means that a covered investment must have “multiple qualifying characteristics in order to obtain treaty protection[,]”¹⁵² there is no basis for ignoring the disjunctive “or” to then conclude that the investment must possess more than one of the three specific example characteristics listed in the definition. All that the plural term indicates is that the asset at issue cannot have

¹⁴⁷ Reply, para 102; Second Schreuer Legal Opinion, para 6.

¹⁴⁸ *See also* Second Schreuer Legal Opinion, para 7.

¹⁴⁹ *Id.* para 15.

¹⁵⁰ Reply, para 115.

¹⁵¹ *Id.* para 116.

¹⁵² *Id.* para 115.

just one characteristic typical of protected investments (such as a one-time service contract).

83. Second, the use of the word “has” in no way indicates that the asset at issue must have the three example characteristics listed in the definition. While Respondent argues that the parties could have included limiting language such as “has some of” or “any of” but did not,¹⁵³ the limiting language that was, in fact, included in Article 10.27 is the disjunctive “or” that Respondent eschews. It is the “or” that signals that not all three are required.
84. At bottom, the erroneous idea that Respondent tries to convey through the foregoing tortured readings is that there is an “inherent meaning” to the term “investment” in Article 10.27 of the FTA which is comprised of the three example characteristics.¹⁵⁴ However, there is no such “inherent meaning.”¹⁵⁵
85. Because Article 25(1) of the ICSID Convention does not define the term “investment,” it does not contain any of the three example characteristics in an “objective” definition, as alleged by Respondent, much less all of them cumulatively. Further, not only does the FTA Article 10.27 definition use the disjunctive “or,” but it also notably omits any duration requirement, which is one of the main factors of the so-called *Salini* test.

¹⁵³ *Id.* para 116.

¹⁵⁴ *Id.* para 119.

¹⁵⁵ Contrary to Respondent’s assertions (Reply, para 119), the so-called *Salini* test is not widely adopted by non-ICSID tribunals either. For example, the tribunal in *Voltaic Network GmbH (Germany) v The Government of the Czech Republic* held:

The characteristics of duration, contribution, return and risk, relied upon by the Respondent, may be relevant to assess jurisdiction under ICSID, **although even in that context they are ‘not at all absolute.’** However, under the ECT and the BIT, ownership and control of the asset is sufficient.

Voltaic Network GmbH (Germany) v The Government of the Czech Republic, PCA Case No. 2014-20, Award (15 May 2019) para 206 (CL-0098-ENG) (emphasis added, citations omitted). Other non-ICSID tribunals have reached similar conclusions. See also *Anglia Auto Accessories Ltd. v Czech Republic*, SCC Case No. V2014/181, Final Award (10 March 2017) para 150 (CL-0099-ENG) (“As a preliminary matter, the Tribunal does not deem it necessary to inquire into the question whether the requirements of a contribution, certain duration and an element of risk are met in this instance, given that this arbitration was brought under the SCC Arbitration Rules, not the ICSID Arbitration Rules.”); *Energoalliance Ltd. (Ukraine) v The Republic of Moldova*, UNCITRAL, Award (23 October 2013) para 241 (CL-0100-ENG) (“[T]he already mentioned *Salini* test, as it is known, is a reduced set of indicators of an investment previously proposed C. Schreuer, who cautioned, though, that ‘these features should not necessarily be understood as jurisdictional requirements’ under the Washington Convention. Accordingly, such criteria, in principle, could hardly serve as universal limitations in respect of admissibility of arbitration mechanism for settlement of investment disputes.” (citation omitted)).

86. The parties to the FTA specifically chose the language therein for a reason. Taking Respondent’s reasoning, the parties easily could have replicated the requirements of the so-called *Salini* test—and in a cumulative way (i.e., using the connector “and” instead of “or,” and expressly including duration in the list of characteristics)—but they did not. Those were deliberate choices on the part of the drafters. In fact, former U.S. State Department BIT negotiator Kenneth Vandavelde has explained that the United States has long been sensitive to defining “investment” because, on the one hand, an overly narrow definition might inadvertently exclude “new forms of investment the protection of which is consistent with U.S. foreign investment policy . . . simply because the drafters failed to anticipate their creation,” but on the other hand, not defining the term at all could open up the risk that investment tribunals may impose their own overly narrow interpretations.¹⁵⁶ Therefore, the FTA as written reflects the end result of the United States’ careful attention to the definition of “investment” and its longstanding emphasis on maximizing flexibility for investors.
87. The more aggressively Respondent tries to twist the language to suggest that the drafters of the FTA intended to create either a rigid standard equivalent to the so-called *Salini* test or an even more stringent standard according to Respondent’s own interpretation of *Salini*, the more obvious it becomes that FTA Article 10.27 intended the exact opposite. The plain language of the FTA and the rules of interpretation in Article 31(1) of the Vienna Convention support this approach. For Respondent’s narrow interpretation of the definition of “investment” in FTA Article 10.27 to be accepted, the additional requirements would have to be written clearly in the FTA, which is simply not the case.
88. In short, Respondent is wrong about the binding and limiting nature of the so-called *Salini* test on all fronts. Article 25(1) of the ICSID Convention, Article 31(1) of the Vienna Convention, and Article 10.27 of the FTA all do not require strict compliance with the criteria identified in *Salini*, and any asset at issue must be evaluated holistically to determine whether a protected investment exists.

B. The Claimants Contributed to the Investments

89. Faced with the basic international law principles in Claimants’ Counter-Memorial,¹⁵⁷ Respondent admits that the origin of the funds does not matter for purposes of determining whether Claimants made the necessary contribution.¹⁵⁸ However, Respondent continues to make the very argument that it appears to have

¹⁵⁶ Kenneth Vandavelde, *U.S. International Investment Agreements*, Oxford University Press Inc. (2009) 114 (CL-0101-ENG) (“Vandavelde”).

¹⁵⁷ Counter-Memorial, paras 51-54.

¹⁵⁸ Reply, paras 127-29.

acknowledged to be wrong by insisting throughout its entire submission¹⁵⁹ that *each* Claimant must either (i) directly contribute its own funds or (ii) direct funds¹⁶⁰ to the Investments in order to have standing. Faced with the glaring deficiency in its argument, Respondent now repackages its argument to claim that none of the Claimants satisfies the purported contribution requirement because, allegedly, none contributed its own capital or directed the capital that was contributed to the Investments.¹⁶¹

90. Respondent is still incorrect. As articulated by Professor Schreuer:

The addition of a new requirement that investors actively direct (rather than own or control) the funds, combines the non-existent origin of funds requirement with the equally non-existent requirement of an active investor (discussed below). *The combination of two fictitious requirements for the existence of an investment does not add up to a valid objection to jurisdiction.*¹⁶²

91. Further, as stated in Claimants' Counter-Memorial, the principle of the "general unity of the investment" requires that Claimants' commitment of capital be considered *as a whole*.¹⁶³ In this case, each of the Claimant entities involved had a role in the structure of the Investments and in the economic equation of the venture, and their contribution should not be dissected into disparate pieces as a means of circumventing jurisdiction:

a. Respondent acknowledges that the **U.S. Onshore Feeder**, through VMF Q1, committed funds to 2014-1 to fund four of the Transactions through letters of credit.¹⁶⁴ In addition, through VMF Q1, the **U.S. Onshore Feeder** contributed the crude oil to swap for refined Commodities in three transactions.¹⁶⁵ In total, through VMF Q1, the **U.S. Onshore Feeder** contributed over \$130 million in funds and Commodities.¹⁶⁶ As Mr. Zuech explained, the funds in VMF Q1's bank account all originated from the **U.S.**

¹⁵⁹ *Id.* paras 3.4, 14, 77-95, 130-32, 153, 288, 325-28.

¹⁶⁰ *Id.* para 127.

¹⁶¹ *Id.* para 131.1-131.3.

¹⁶² Second Schreuer Legal Opinion, para 17 (emphasis added).

¹⁶³ First Schreuer Legal Opinion, para 60.

¹⁶⁴ Reply, para 131.2.

¹⁶⁵ *See supra* para 26; Third Zuech Witness Statement, para 21.

¹⁶⁶ *See supra* para 28.

Onshore Feeder.¹⁶⁷ Therefore, the **U.S. Onshore Feeder** directly contributed its own funds to the Transactions.

- b. **CCM** directed investment funds (including those from the **U.S. Onshore Feeder**) through VMF Q1, 2014-1, and 2015-1 to make the Investments.¹⁶⁸ As investment manager for the three Cayman investment vehicles,¹⁶⁹ with full discretion and authority over all of their investment decisions, **CCM** also contributed its management expertise to the Investments (as more fully described above).¹⁷⁰
- c. As the general partner of the **U.S. Onshore Feeder**, **Celadon Partners** also contributed its investment management expertise to the **U.S. Onshore Feeder** and, in return, earned an incentive fee. In addition, it is indisputable that **Celadon Partners** had the authority to direct (and did, in fact, direct) the **U.S. Onshore Feeder's** funds to be committed to the Investments, and that it also delegated such authority to **CCM** under the VMF Special Purpose Vehicle SPC Investment Management Agreement (C-0026-ENG).
- d. **TC Group** and **TC Group Investment Holdings** each invested money that went to the Investments and also held limited partnership shares in the **U.S. Onshore Feeder**.
- e. **The Carlyle Group**, as the ultimate parent, indirectly owned and controlled a portion of the shares of the **U.S. Onshore Feeder** through its subsidiaries, **TC Group** and **TC Group Investment Holdings**.

Consequently, it is clear that Claimants collectively committed capital or other resources, including by contributing their own funds, directing funds, or providing management expertise to the Investments.

- 92. Regarding Claimants' contribution of the Commodities themselves, Respondent contends that no such contribution can be recognized because (i) such assets allegedly did not belong to Claimants; (ii) the Commodities "cannot simultaneously exist as a contribution and the resulting asset"; and (iii) Claimants

¹⁶⁷ Second Zuech Witness Statement, para 16; Third Zuech Witness Statement, para 24.

¹⁶⁸ See *supra* para 56.a.; Second Zuech Witness Statement, paras 14, 21; Third Zuech Witness Statement, para 17.

¹⁶⁹ See 2014-1 Portfolio Management Agreement (C-0024-ENG); 2015-1 Portfolio Management Agreement (C-0025-ENG); VMF Special Purpose Vehicle SPC Investment Management Agreement (C-0026-ENG).

¹⁷⁰ See *supra* paras 38-39; Third Zuech Witness Statement, paras 17,19.

have not identified which Claimant held title to the Commodities on the date of Respondent's breach.¹⁷¹ On all three counts, Respondent is wrong.

93. As to Respondent's first and third points above, Claimants, in fact, owned and/or controlled the Commodities, as explained *supra* paras 29-31, 34-47. Therefore, Claimants had the right and ability to contribute (and, in fact, did contribute) the Commodities themselves to the Investments, especially as to the product swaps that constitute three of the sixteen open Transactions at issue. The question of which particular vehicle owned or controlled by Claimants held title to which specific Commodities on a particular date is not a relevant test for jurisdiction and should be addressed in a damages phase of this proceeding.
94. As to Respondent's second point, Respondent attempts to support its position by citing paragraph 110 of the decision in *Malicorp v Egypt*, in which the tribunal stated that "contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived."¹⁷² Based on this statement, Respondent argues that the Commodities cannot, at the same time, constitute both Claimants' contribution and Claimants' assets because "a contribution is something that a putative investor puts forward in order to acquire an asset under the FTA."¹⁷³ But that is precisely the point. Here, the Commodities were first the result of Claimants putting forward investment funds and expertise, and then they were themselves put forth to produce their own assets—that is, the contractual rights derived from the Investment Agreements such as the Put Rights, as well as the proceeds resulting from the unauthorized sale of the Commodities.
95. Therefore, overall, Claimants clearly made sufficient contributions for their Investments to qualify as investments under the FTA and the ICSID Convention.

C. Claimants' Investments Were Of Sufficient Duration

96. Claimants reiterate that Article 10.27 of the FTA does not contain a duration requirement. As stated above, the fact that Article 10.27 of the FTA refers to all of the primary characteristics identified in *Salini* (i.e., commitment of capital, expectation of gain or profit, and the assumption of risk) except for duration¹⁷⁴ is

¹⁷¹ Reply, para 132.1-132.3 (emphasis in original).

¹⁷² *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 February 2011) para 110 (CS-0060).

¹⁷³ Reply, para 132.2 (emphasis in original).

¹⁷⁴ *Salini* also stated that the benefit for the economy of the host country was a characteristic to consider, but it has been a controversial factor and less accepted in the case law. See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd Edition) (2012) 75 (CL-0089-ENG) ("The most controversial criterion has been the need for a contribution to the development of the host state").

telling. Had the FTA’s drafters intended to make compliance with the so-called *Salini* test—including the purported duration requirement in particular—a necessity for jurisdiction, they could have done so. Instead, the drafters decided to depart from *Salini* not only by making the list of example characteristics non-exhaustive and separated by the disjunctive “or,” but also by excluding a reference to duration altogether.

97. Even if a duration requirement were to be implied in Article 10.27 of the FTA (although there is no basis for doing so), however, Claimants would meet it. In *Mason v Korea*, a case under the U.S.- Korea FTA (Article 11.28 of which is virtually identical to Article 10.27 of the FTA here), the tribunal held that, assuming a duration requirement could be implied in the U.S.-Korea FTA,¹⁷⁵ the claimant met it because the evidence demonstrated that the claimant intended to hold onto the investment for a longer term. As the tribunal stated:

In the absence of an explicit requirement of duration in the FTA, ***there are no clear indications which duration is to be deemed sufficient.*** Assuming (but not deciding) that an implicit duration requirement exists, the Tribunal agrees with the flexible approach adopted by other tribunals, as formulated by the *Romak v Uzbekistan* tribunal:

The Arbitral Tribunal does not consider that, as a matter of principle, there is some fixed minimum duration that determines whether assets qualify as investments. Short-term projects are not deprived of ‘investment’ status solely by virtue of their limited duration. ***Duration is to be analyzed in light of all of the circumstances, and of the investor’s overall commitment.***

....

The Tribunal gathers . . . that when Mason started investing the duration of the investment was difficult to assess but that Mason expected this to be ‘more of an open ended, long term investment’.

....

The Tribunal considers that ***a holistic approach is warranted*** when looking at the individual buy and sell executions. In the Tribunal’s view, Claimants have satisfactorily explained that such buy and sell executions merely constituted price optimizations that are part of Mason’s overall

¹⁷⁵ As a threshold matter, the *Mason* tribunal declined to decide whether a duration requirement was implied in the U.S.-Korea FTA, noting: “The Tribunal is aware that the ***non-exhaustive*** list of characteristics of an investment in Article 11.28 of the FTA does not include any requirement as to the duration of an investment. Yet the Tribunal need not rule on this legal issue as the General Partner fulfils any implicit requirement suggested by Respondent.” *Mason v Korea*, para 226 (CS-0120) (emphasis added).

investment strategy and do not contradict its intention to hold the [investment] for a longer period of time.¹⁷⁶

98. Here, too, to the extent any duration requirement is implied in the FTA, the duration of Claimants' investment operation should be evaluated holistically. Indeed, Respondent is plainly unable to rebut the well-established principle of the unity of the investment; nor is it able to make up for the clear lack of a universal minimum duration requirement (as evidenced by *Mason v Korea* and other pertinent case law).¹⁷⁷ Instead, Respondent attempts to double down on its argument that each individual Claimant's involvement and each discrete transaction was allegedly limited in time.¹⁷⁸ Respondent continues to be wrong, however, for several reasons.
99. First, whether binding or not, the Commitment Letter reflects the clear intention of the parties to engage in a long-term commitment, which did not ultimately come to fruition, of a minimum of three years. Such intent, even if not ultimately realized, is sufficient under international law.¹⁷⁹
100. Second, the structure of the Investment Agreements and the complexity of the Transactions—as attested to by Respondent's own experts¹⁸⁰—speak for themselves. The Investments did not involve, and were not intended to involve, a simple sale of goods with virtually no duration. Rather, they were structured products that involved leaving transactions open for at least 90 days, as part of an overall investment operation that was intended to last *at least three years*.
101. Third, Respondent's reference to the findings of the Insurance Litigation court is particularly misleading. As noted above, the findings of the New York state trial court were with respect to the excess insurance carriers' motion for summary judgment, where the parties disputed coverage under an excess insurance policy. The court did not provide the insurance plaintiffs with the opportunity to argue the contested facts before a jury, and the decision is currently being appealed in part because the insurance plaintiffs vehemently dispute the court's understanding and summary evaluation of the facts.

¹⁷⁶ *Id.* paras 228, 234, 244 (CS-0120) (emphasis added) (citations omitted).

¹⁷⁷ *See* Counter-Memorial, para 62.

¹⁷⁸ Reply, paras 139-40.

¹⁷⁹ *See, e.g., Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02 (“*Deutsche Bank*”), Award (31 October 2012) para 304 (CL-0002-ENG) (“The Hedging Agreement commitment was for twelve months. . . . The fact that it was terminated after 125 days is irrelevant.”).

¹⁸⁰ Versant Report, paras 61 ss.

102. Assuming *arguendo* that some of the crude oil was refined soon after entering SAMIR's tanks,¹⁸¹ that does not mean that the duration of the Investments reached a "vanishing point," as Respondent claims.¹⁸² To be clear, as explained above, Claimants' Investments are not limited to crude oil; rather, they also include refined products¹⁸³ and Claimants' contractual rights under the Investment Agreements.¹⁸⁴ Not only does Respondent's argument fail to take into account any of the refined products that were part of the Commodities bought by Claimants and kept in SAMIR's tanks, but it also does not take into account Claimants' clear entitlement to the proceeds of unauthorized sales of Commodities that were subject to the Transactions.¹⁸⁵ Therefore, no matter what the extent of unauthorized refining at the SAMIR facility, the intended duration of the investment operation did not change.
103. For the foregoing reasons and also those set forth in Claimants' Counter-Memorial, Respondent is wrong that there is any duration requirement in Article 10.27 of the FTA. However, even if the Tribunal were to imply one (which it should not), Claimants' Investments were still of sufficient duration to satisfy any such requirement.

D. Claimants Assumed Risk In Connection With the Investments

104. Respondent is perhaps most egregiously misguided in its presentation of the characteristic of "the assumption of risk." Respondent's two asserted principles—neither of which is supported by any case law—are: (1) risk is

¹⁸¹ To be clear, any such refining would have been done *without* Carlyle's express consent, and both Claimants and the plaintiffs in the Insurance Litigation fully contest that SAMIR, either before or after the Moroccan government stepped in, was given any type of consent. In fact, on September 15, 2015—a month after Morocco seized the refinery—CCM wrote a letter to SAMIR affirming that "[CCM] did not authorize disposition of any Commodities . . . and we expressly prohibit and do not authorize the future release of any Commodities without payment." First Zuech Witness Statement paras 15, 22 & CZ-0015. Respondent has consistently failed to grasp that, as explained in *supra* para 27, three of the sixteen Transactions at issue in this arbitration were crude-for-product swaps. And, indeed, the swaps occurred precisely to address the situation of *unauthorized* refining of oil by SAMIR. In other words, two prior transactions for crude oil (SAMIR-1003 and SAMIR-1006) were closed out by opening three new transactions and swapping the value of the crude oil SAMIR had improperly refined with refined product in SAMIR's tanks. See First Walck Report, paras 23, 32. Accordingly, Claimants vehemently deny that there was any established practice of refining crude oil upon arrival (i) without proper payment by SAMIR and (ii) with Claimants' implied consent.

¹⁸² Reply, para 140.

¹⁸³ Memorial, para 27; Counter-Memorial, para 9.

¹⁸⁴ RFA, paras 36-40; Memorial, para 2.

¹⁸⁵ Under the MCTA, SAMIR remains liable to Claimants for any shortfall in the amount owed to Claimants, a fact the Moroccan government knew. See MCTA § 11(b) (MO-0003).

inherently tied to contribution, and lack of sufficient contribution necessarily means lack of any assumption of risk; and (2) only “operational” or “investment” risk is sufficient risk. Both are unfounded.

105. As to its first false principle, Respondent argues that risk is “inherently” tied to contribution because “[t]he key feature of risk is exposure to downside,” which, allegedly, can only be possible if a contribution was made.¹⁸⁶
106. Nothing in the language of the FTA, however, supports Respondent’s correlation between contribution and risk. As stated several times, an “investment” under the FTA is any “asset . . . 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.” If Respondent’s position were even marginally true, there is no reason why the drafters of the FTA would have left this supposed connection to be surmised from a tortured, contestable reading of the current definition, rather than explicitly stating, at a minimum, “the commitment of capital or other resources . . . *and* the assumption of risk” or something like “the commitment of capital or other resources *and associated risk*.”
107. Indeed, the plain language of the FTA demonstrates that the opposite of Respondent’s purported principle is true. By using a disjunctive list, it is clear that the parties to the FTA meant to adhere to a more flexible, holistic view of qualifying investments—requiring at least one, but not all, of the example characteristics in the list—such that it is entirely conceivable that if an investment involved the commitment of capital with the expectation of gain or profit, the assumption of risk would no longer be a necessary jurisdictional consideration. To endorse Respondent’s purported principle would be to strip the term “or” of all meaning, which would be contrary to the far more well-known principle of treaty interpretation that presumed intentions of the treaty parties should not be used to override the explicit language of a treaty.¹⁸⁷
108. In any event, even under Respondent’s unfounded theory of assumption of risk, Claimants have, in fact, sufficiently assumed risk in connection with the Investments because, as discussed above, they sufficiently committed capital and other resources to the Investments.¹⁸⁸

¹⁸⁶ Reply, para 143.

¹⁸⁷ See *Louis Dreyfus Armateurs SAS v The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction (22 December 2015) para 145 (CL-0102-ENG); *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v Kingdom of Belgium*, ICSID Case No. ARB/12/29, Award (30 April 2015) para 166 (CL-0103-ENG).

¹⁸⁸ See *supra* paras 89-95.

109. As to Respondent’s second false principle, Respondent repeats its baseless arguments from prior submissions that only “operational” or “investment” risk qualifies as a risk demonstrating the existence of an investment. Respondent’s argument, however, is once again unsupported by the actual language of the FTA, which does not require a qualifying investor to assume any particular kind of risk.¹⁸⁹ Respondent further undermines its own position by acknowledging that its narrow interpretation is not even reflected in *Salini*.¹⁹⁰ Indeed, the very treatise that Respondent frequently relies upon notes that “[o]f the *Salini* criteria, that of risk perhaps has been applied the *most laxly* by ICSID tribunals.”¹⁹¹ Further, the case that Respondent cites in support of its interpretation, *Eyre & Monroe v Sri Lanka*, in fact, held that the qualifying risk could be “anticipated or unanticipated changes to market conditions, economic factors and/or political influences affecting the commercial transaction in the area of the investment.”¹⁹²
110. Respondent contends that, although it “does not purport to exclude sovereign risk,” the “critical indication of an investment is that it reflect the kinds of risks associated with investments, namely an uncertainty of return.”¹⁹³ This is a cyclical argument: Respondent contends that risk is a necessary characteristic of a qualifying investment, but the requisite type of risk is one typical of qualifying investments. There is also no legal reason—nor does Respondent present one—why an “uncertainty of return” can arise solely from a so-called operational risk.¹⁹⁴ Practically speaking, the types of risk assumed by the Claimants clearly entailed, at the very least, an “uncertainty of return”; as stated by Professor Schreuer, Claimants “incurred the risk of losing their crude oil. This risk was particularly severe in view of the fact that SAMIR was in physical control of the crude oil stored in SAMIR’s tanks, but which belonged to Claimants.”¹⁹⁵

¹⁸⁹ Not surprisingly, Respondent also has been unable to point to any evidence that either the United States (whose model BIT the FTA follows) or Morocco ever sought to identify in the FTA the specific types of risk (e.g., operational, commercial, or sovereign) that an investor must assume in order to have a qualifying investment.

¹⁹⁰ Reply, para 144.

¹⁹¹ Y Banifatemi & E Edson, ‘Article 25(1)’, in J Fouret et al (eds), *The ICSID Convention, Regulations, and Rules: A Commentary* (Edward Elgar 2019) 119, para 2.36 (RL-0029) (emphasis added).

¹⁹² *Eyre & Monroe*, para 293.

¹⁹³ Reply, para 148.

¹⁹⁴ Professor Schreuer also notes that, to the extent the so-called *Salini* test were to “offer a distinguishing feature to delimit [an investment] from a sale it would not be risk but duration.” Second Schreuer Legal Opinion, para 23.

¹⁹⁵ First Schreuer Legal Opinion, para 82.

111. The fact that Claimants negotiated for certain safeguards against risk does not mean that, under international law, they assumed *no* risk in connection with their Investments.¹⁹⁶
112. At bottom, Respondent’s arguments concerning risk are rooted in its erroneous core beliefs (notwithstanding well-established international law principles and Respondent’s express concessions) that (i) the origin of funds matters for jurisdictional purposes and (ii) investments should be viewed according to their discrete parts and participants rather than in accordance with the unity of the investment. Once those two false premises are rejected, it is clear that Claimants’ Investments unquestionably ended up involving a high degree of risk given the actions taken by the Moroccan government. Indeed, in light of the basic fact that Claimants sustained over \$390 million in losses on the Transactions, saying that Claimants took on no risk is simply ludicrous.
113. For the foregoing reasons, Claimants’ Investments are covered investments under Article 10.27 of the FTA and Article 25(1) of the ICSID Convention, Respondent’s first objection remains baseless, and the Tribunal should find jurisdiction over Claimants’ claims.

V. Response to Objection No. 2: Claimants Directly or Indirectly Own and/or Control the Investments “In the Territory” of Morocco for Purposes of FTA Article 10.27

A. Claimants’ Contractual Rights Were Investments “In the Territory” of Morocco

114. Respondent appears to concede that Claimants’ Commodities were “in the territory” of Morocco, but it continues to insist that Claimants’ contractual rights (including the Put Rights) were not so because, allegedly, “international law will determine the location of [intangible] assets by reference to (a) the proper law of the contract, and (b) the place of enforcement of the contract.”¹⁹⁷ And after three submissions, Respondent’s primary legal support for this speculative claim remains a decision of the Singapore Court of Appeal in *Swissbourgh Diamond Mines v Lesotho* case.¹⁹⁸
115. Although Respondent takes issue that “[i]n the Counter-Memorial, the Claimants do not address *Swissbourgh* directly[,] [n]or is it mentioned in Professor

¹⁹⁶ Respondent is also plainly incorrect that “Claimants’ corporate structure” was designed to guarantee that “none of them incurred any qualifying investment risk.” Reply, para 151. Although there may have been certain tax benefits associated with particular aspects of Carlyle’s corporate structure (which is extremely common for businesses with complex corporate structures), Claimants were not, in fact, shielded from the type of risks inherent in their Investments by virtue of their structure. As stated above, Claimants were still exposed to the risks of the loss of their Commodities and the value thereof, the volatility of the markets, and Morocco’s interference with the Investments.

¹⁹⁷ Reply, para 159.

¹⁹⁸ *Id.* para 162.

Schreuer's report,"¹⁹⁹ there simply was, and is, no need to do so. *Swissbourgh* may be dismissed out of hand because (i) this Tribunal has no obligation whatsoever to rely upon or defer to a ruling of a judicial tribunal of a non-Party state,²⁰⁰ and (ii) Respondent also has yet to even articulate which principle of international law the Singaporean court was allegedly applying, since there is no decision by an international tribunal that could serve as the basis for the finding of the domestic court, let alone the series of decisions necessary to create a principle of international law.²⁰¹

116. As for Respondent's reliance on *Bayview v Mexico*, it is *Respondent*—not Claimants—that has put forth a “misreading of that decision[.]”²⁰² Claimants are well aware that the case also addressed intangible rights (i.e., the *Bayview* claimants' water rights), not just claimants' physical farms and irrigation facilities. But it is wholly improper to analogize the water rights granted to the *Bayview* claimants by the State of Texas to Claimants' Put Rights and other contractual rights pursuant to the Investment Agreements with SAMIR. For one, whereas Claimants' contractual rights arose from a private agreement between Claimants and a non-governmental entity, a U.S. state government was involved in the creation of the *Bayview* claimants' water rights; to that end, it was likely very easy for the *Bayview* tribunal to conclude that the nexus of the investment was more clearly with the U.S. than with Mexico. Moreover, Claimants' contractual rights were tied to Commodities that were physically located *in Morocco*, whereas the *Bayview* claimants' water rights were tied to water physically located in Texas.²⁰³
117. The tribunal in *Deutsche Bank v Sri Lanka* rejected the same argument that Respondent is trying to advance here (i.e., that the governing law of an agreement determines the territoriality of the contract right), and held that the law governing the financial instrument at issue (English law) did not undermine the nexus with the territory of the host State (Sri Lanka).²⁰⁴ In reaching its conclusion, the tribunal emphasized the global nature of the claimant's business and the centrality of London to financial transactions in particular, explaining:

The reality of today's banking business is that major banks operate all over the world. The fact that one particular subsidiary or branch does the

¹⁹⁹ *Id.*

²⁰⁰ As previously stated in Claimants' Observations, n 97.

²⁰¹ As stated in the Counter-Memorial, n 252.

²⁰² Reply, para 163.

²⁰³ See *Bayview Irrigation District et al v United Mexican States*, ICSID Case No. ARB(AF)/05/01, Award (19 June 2007) para 110 (CS-0135).

²⁰⁴ *Deutsche Bank*, para 291 (CL-0002-ENG).

paperwork does not mean that the financial instrument is located in the country concerned. Here, the preliminary engagement took place in Sri Lanka and it is there too that the investment had its impact. The fact that various Deutsche Bank branches all over the world, including Singapore, participated in the preparation and finalization of the investment, does not alter this conclusion. Nor does the fact that the parties selected English law and English jurisdictions in their agreement. It is a reality of modern banking that London is the world's first financial place. Its courts have great experience in financial transactions and its law in that area offers great security to bankers and investors. It is the reason why, notwithstanding the territory where the investment takes place, parties to financial transactions often select English law and the English courts in their agreements.²⁰⁵

118. Respondent rejects the *Deutsche Bank* tribunal's reasoning, arguing that "[i]rrespective of the reason that the parties to the hedge selected English law and English courts to govern their agreement, the effect of that choice was to place the hedge outside of Sri Lanka's jurisdiction – and thereby to preclude it from being an investment 'in the territory' of Sri Lanka."²⁰⁶ Respondent insinuates that the jurisdictional issue was "manifestly wrongly decided"²⁰⁷ as a result, but fails to provide any support for that contention other than its own indignation that the *Deutsche Bank* tribunal failed to adopt Respondent's view of the world.
119. Contrary to Respondent's assertions, *Deutsche Bank* is both correctly decided and analogous to the present case, and should not be disregarded as Respondent suggests.
120. As noted in Claimants' Counter-Memorial and the First Legal Opinion of Professor Schreuer, contractual rights frequently have been deemed an investment notwithstanding the lack of a physical presence in the territory of the host State.²⁰⁸ As stated by Professor Schreuer:

²⁰⁵ *Id.* Here, too, it is important to note that New York is not only where Claimants are located and where the Transactions were first conceived of, operationalized, overseen, and controlled by Claimants, but it is also a world financial capital, rendering it a natural choice for certain of the Investment Agreements' governing law.

²⁰⁶ Reply, para 180 (emphasis in original).

²⁰⁷ *Id.* para 181.

²⁰⁸ See, e.g., *Nova Scotia Power Incorporated (Canada) v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1), Excerpts of the Award of April 30, 2014 made pursuant to Article 53(3) of the ICSID Arbitration (Additional Facility) Rules of 2006, para 130 (CS-0126) ("A contractual right by its very nature has no fixed abode in the physical sense, for it is intangible. However, **a lack of physical presence is not per se fatal to meeting the territoriality requirement**; intangible assets, with no accompanying physical in-country activities, have been accepted as investments for the purposes of

Where the document providing the basis of consent refers to investment in the territory of the State, a certain degree of flexibility is appropriate. ***Not all investment activities are physically located on the host State. This is particularly true of financial instruments*** If a treaty includes loans and claims into money in its definition of investments, it would be unrealistic to require a physical presence in or a transfer of funds into the host State.²⁰⁹

121. Nevertheless, because Respondent characteristically does not have any legal support based on relevant investor-State case law or even case law involving other types of international tribunals, it resorts to an unpersuasive language-based argument.²¹⁰ Primarily, Respondent argues that its position is validated by the definition of “territory” in Article 1.3 of the FTA (listing general definitions for the FTA overall) because it is “physically-bounded” as to the United States.²¹¹ Although Respondent admits that the definition does not mention Morocco at all, it insists that the U.S.-specific definition should still “appl[y] *mutatis mutandis*” to Morocco,²¹² citing to all the different instances that “territory” is used in Article 10 of the FTA.²¹³
122. Respondent’s reasoning makes no logical sense. Claimants do not contest that the “territory” of the United States or Morocco under the FTA is a physical space. The issue, rather, is whether the word “in” within the phrase “in the territory” triggers any requirement under the FTA (or in the case law) for an *intangible* asset—which, by nature, has no physical form—to have a physical presence in said physical territory. There is, in fact, no such requirement, and the definition of “territory” in Article 1.3 of the FTA does not mandate otherwise. In addition,

bilateral investment treaties by many tribunals.” (emphasis added)). *See also* First Schreuer Legal Opinion, paras 98-110.

²⁰⁹ C. Schreuer, *The ICSID Convention: A Commentary*, 2nd Edition, 2009, Article 25, para 197 (CS-0042) (emphasis added). The definition of “investment” in Article 10.27 of the FTA corresponds exactly with the hypothetical treaty described by Professor Schreuer, i.e., it includes “(c) bonds, debentures, other debt instruments, and loans” and “(d) futures, options, and other derivatives” among the list of covered investments. (CL-0104-ENG)

²¹⁰ Reply, paras 165-66.

²¹¹ *Id.* para 165. As Respondent notes, Article 1.3 of the FTA defines “territory” as: “with respect to the United States: (a) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico; (b) the foreign trade zones located in the United States and Puerto Rico; and (c) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources[.]” FTA art. 1.3.

²¹² Reply, para 165.

²¹³ *Id.* para 166.

the majority of tribunals that have encountered contractual rights (including those arising from financial instruments) have soundly rejected Respondent's position. They have instead adopted the flexible approach described by Professor Schreuer, and found that such rights were qualifying investments "in the territory" of the host State.²¹⁴

123. Ultimately, Respondent has neither a valid interpretation of a relevant FTA provision nor applicable case law to support its position. Therefore, this Tribunal is not obligated to take into consideration any scholarly criticism of, or dissenting opinions to, the leading decisions on the issue.²¹⁵ At bottom, the link between Morocco's territory and Claimants' Put Rights and other contractual rights is undeniable because Claimants' rights are inextricably intertwined with the physical Commodities that Respondent implicitly concedes—as it must—were "in the territory" of Morocco.²¹⁶
124. Respondent attempts to negate this intertwinement by highlighting that the Commodities and Put Rights allegedly have been claimed as "separate investments."²¹⁷ Once again, Respondent's argument is rooted in its erroneous core belief that the Investments must be viewed as discrete, isolated parts rather than as a comprehensive whole in accordance with the established, overriding principle of the unity of the investment. The reality is that Claimants' Put Rights simply cannot exist without the Commodities. As noted in Claimants' prior submissions, the Investments cover not only the physical Commodities (whether crude oil or refined products),²¹⁸ but also the "Transactions"²¹⁹ and "contractual rights such as the Put Right."²²⁰ Therefore, for the purposes of jurisdiction, Claimants' "Investments" include all aspects of the Transactions, such as the Commodities, the Put Rights and other contractual rights, and the value thereof. The fact that they were defined as "Investments" in the plural, instead of one singular "Investment," is a negligible matter of semantics; it merely reflects Claimants' decision to highlight how different parts of the overall arrangement between SAMIR and Claimants fall into multiple categories of protected

²¹⁴ See First Schreuer Legal Opinion, paras 104-06, 109.

²¹⁵ Reply, paras 169-77.

²¹⁶ It should also be noted that Respondent does not dispute that the Commodities Storage Agreement with SAMIR, governing the storage of Claimants' Commodities at SAMIR's refinery, was governed by Moroccan law and therefore was indisputably "in the territory" of Morocco. Jurisdictional Memorial, paras 112.1, 127-28.

²¹⁷ Reply, para 185.1.

²¹⁸ Memorial, para 2; Counter-Memorial, para 9.

²¹⁹ See RFA, para 39; Memorial, para 2.

²²⁰ See Memorial, para 27; Claimants' Observations, para 58.

investments under Article 10.27 of the FTA, the detailed facts of which are themselves insignificant to the jurisdictional determination.

125. Respondent's arguments contesting the existence of any benefit to Morocco from the Investments²²¹ also fail and are preposterous. It is undeniable that an arrangement that allowed for the smooth operation of the only refinery in the country was beneficial for the local economy. Although Respondent suggests that the country had other sources of oil,²²² it cannot so easily dismiss SAMIR's importance (and in turn, the importance of a reliable and continuous supply of crude oil and refined products that Claimants' Investments provided and were expected to continue to provide). Indeed, even if the local market did not depend entirely on locally refined products at the time of Claimants' Transactions and Respondent's breach, strategically, the economic importance of having a domestic refinery was substantial because the country chose not to be dependent on imports alone. In addition, the local refinery provided jobs, which in turn had an impact on the overall Moroccan economy. Moreover, Respondent admits that it also benefitted from collecting taxes from SAMIR.²²³ Therefore, claiming that Claimants' Investments did not benefit the local Moroccan economy is baldly disingenuous.
126. The fact that, in the cases on which Claimants rely, the State was more directly involved in the transaction at issue is completely irrelevant, since the principle articulated and affirmed by the various tribunals was made irrespective of the involvement of the host State.²²⁴ For example, with respect to financial instruments, the tribunal in *Abaclat v Argentina* did not consider at all that the host State was directly involved, but held instead that "the relevant question is where the invested funds [were] ultimately made available to the Host State and [whether] they support[ed] the latter's economic development[.]"²²⁵

²²¹ Reply, paras 186-89.

²²² *Id.* para 189.

²²³ *Id.* para 188.

²²⁴ *Id.* para 187. Moreover, there is no question that Morocco's Foreign Exchange Office was actively involved in the Transactions here. See Counter-Memorial, para 13; Morocco Customs and Exchange Office Letter (16 Jan 2015) (MO-0002).

²²⁵ *Abaclat v, Argentina*, para 374 (CS-0027). See also *Fedax v Venezuela*, para 41 (CS-0044) ("It is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere. In fact, many loans and credits do not leave the country of origin at all, but are made available to suppliers and other entities.... The important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs."); *Inmaris v Ukraine*, paras 123-24 (CL-0081-ENG) ("As the *Fedax* tribunal noted, '[i]t is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere.'.... In the Tribunal's view, an investment may be made

127. In sum, Respondent’s “in the territory” objection is again based on brazen mischaracterizations of the case law and is otherwise devoid of any legal support for Respondent’s narrow and inventive interpretations of the requirement. Claimants’ Put Rights and other contractual rights were clearly tied to Morocco and benefited Morocco. Accordingly, Claimants’ Investments plainly satisfy this requirement.

B. Respondent’s Interpretation of “Control” is Unsupported by the FTA and Case Law

128. As stated in Claimants’ previous submissions, there is no basis to affirm that “‘control’ of an asset for the purposes of the definition of ‘investment’ in FTA Article 10.27 is rooted in concepts of ownership of that asset.”²²⁶ To the contrary, the United States has made clear that the term “control” within the phrase “own[ership] *or* control,” as used in U.S. BITs and Article 1117 of NAFTA (on which Article 10.15 of the FTA is modeled), was not given a particular definition on purpose, but control as used in the disjunctive must clearly mean something different from ownership:

Article 1117(1) does not include a definition of what constitutes ownership or control, whether direct or indirect, of the enterprise. As the United States has previously explained, the omission of a definition for ‘control’ in the NAFTA 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.²²⁷

129. Indeed, the United States’ case-by-case approach has been adopted since at least the mid-1980s, when the United States stopped including a definition of “control”

in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself.” *CSOB v The Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction (24 May 1999) para 78 (CS-0088) (“The Tribunal notes, in this connection, that while it is undisputed that CSOB’s loan did not cause any funds to be moved or transferred from CSOB to the Slovak Collection Company in the territory of the Slovak Republic, a transaction can qualify as an investment even in the absence of a physical transfer of funds.”)

²²⁶ Reply, para 194. In addition, Respondent is out of line by blatantly misquoting FTA Article 10.27 as stating that “an investment is an asset that an investor ‘owns *and* controls.’” Reply, para 294 (emphasis added). That is plainly not the case, as FTA Article 10.27 unequivocally uses the phrase “owns *or* controls.” FTA art. 10.27 (emphasis added).

²²⁷ *B-Mex LLC and Others v United Mexican States*, ICSID Case No. ARB (AF)/16/3 (“*B-Mex v United Mexican States* U.S. Submission”) Third Submission by the United States of America (21 December 2018) para 10 (CL-0105-ENG).

in its model BITs.²²⁸ Since that time, the United States has also made clear that “control” could be based on factors other than equity ownership in the investment. For example, the U.S. transmittal letters to Congress of BITs that were based on the 1994 Model BIT, stated the following:

Indirect ownership or control could be through other, intermediate companies or persons, including those of third countries. ***Control is not specifically defined in the Treaty***; ownership of over fifty percent of the voting stock of a company would normally convey control, but in many cases the requirement could be satisfied by less than that proportion, ***or by other arrangements***.²²⁹

130. Had the United States and its counterparties intended otherwise, it would have been very easy to include a minimum ownership requirement in a definition for the term “control” in NAFTA, the US Model BIT of 2004, and subsequent treaties adopting similar language; however, no such definition was included.²³⁰ This is also true for the FTA at issue here.²³¹ Accordingly, the United States clearly intended to provide flexibility regarding the “control” requirement in Article

²²⁸ As explained by Mr. Vandeveld, the first two model U.S. BITs, in 1982 and 1983, defined “own or control” broadly to mean “ownership or control that is direct or indirect, including ownership or control exercised through subsidiaries or affiliates, wherever located.” See Vandeveld at 125 (CL-0101-ENG).

²²⁹ See <https://www.trade.gov/bilateral-investment-treaties> (including BITs with Albania, Azerbaijan, Bahrain, Bolivia, Croatia, Georgia, Honduras, Jordan, and Mozambique). Two earlier BITs also suggested that “control” was not limited to equity ownership. First, the U.S.-Poland BIT (negotiated in 1989-90) defined “control” as “having a substantial interest in or ***the ability to exercise substantial influence over the management and operation of an investment***, [provided that] a substantial influence will not be deemed to exist ‘solely as a result of a contractual relationship for the provision of goods or services or the extension of commercial credits in connection with such contracts.’” See Vandeveld at 128 (CL-0101-ENG) (emphasis added). Second, a protocol to the U.S.-Russia BIT (signed in 1992 and ratified by only the United States) required a case-by-case determination of control, but also expressly referred to three extremely broad factors to be considered in the determination, among others: “a substantial interest in the investment, ***the ability to exercise substantial influence over the management and operation of the investment***, and the ability to exercise substantial influence over the composition of the managing body.” See *id.* at 129-30 (CL-0101-ENG) (emphasis added).

²³⁰ See, e.g., CAFTA, Articles 10.16 and 10.28, available at https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf; 2004 United States Model Bilateral Investment Treaty, Articles 1 and 24 available at https://ustr.gov/archive/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf.

²³¹ In addition to the absence of any definition of “control” in the FTA, let alone one mandating an ownership interest, another indication that the United States did not intend to limit “control” to an ownership interest can be inferred from the definition of “state enterprise” in Article 1.3 of the FTA. That definition provides that the term means “an enterprise owned, ***or controlled through ownership interests***, by a Party.” FTA Article 1.3 (emphasis added). Had the Parties intended to include a similar limitation in the definition of “investment,” they could have easily replicated this language—but they did not.

10.27 of the FTA, and it is simply untrue that Claimants must meet some minimum ownership interest to benefit from the protections of the treaty.²³²

131. The lack of any basis for Respondent’s position—whether in the plain language of the FTA, in the history of the United States’ treaty negotiations and its publicly stated positions, or under international law—is made evident by the fact that Respondent resorts to accounting principles under the International Financial Reporting Standards (“IFRS”) and the U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) for its self-serving conceptualization of “control.”²³³ Such accounting principles, however, not only are of dubious relevance and applicability to the interpretation of the FTA specifically (which Respondent appears to acknowledge²³⁴), but their overall purpose and framework also has nothing to do with determination of standing under any treaty.
132. As Mr. Walck explains, the IFRS and the U.S. GAAP expressly state that their objectives are, respectively, “to establish principles for the presentation and preparation of consolidated financial statements” and to “present, primarily for the benefit of the owners and creditors of the parent, the results of operations and the financial position of a parent and all of its subsidiaries as if the consolidated

²³²By contrast, the Australia-Hong Kong BIT contains the following definition of investment, which expressly provides for an ownership interest requirement:

“investment” means every kind of asset, owned or controlled by investors of one Contracting Party and admitted by the other Contracting Party subject to its law and investment policies applicable from time to time . . .

For the purposes of this Agreement, *a physical person or company shall be regarded as **controlling a company or an investment if the person or company has a substantial interest in the company or the investment.*** Any question arising out of this Agreement concerning the control of a company or an investment shall be resolved to the satisfaction of the Contracting Parties

Agreement between the Government of Hong Kong and the Government of Australia for the Promotion and Protection of Investments, entered into force on 15 October 2003, Article 1(e), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/152/download> (emphasis added).

Moreover, notwithstanding this language, the tribunal in *Philip Morris Asia Ltd. v Australia* essentially construed the treaty so as to eliminate the requirement. Specifically, the tribunal considered the foregoing definition and concluded that “the most plausible reading of ‘substantial interest’ may be the Respondent’s suggestion ‘that the putative investor must have a **right or power over an asset** which is sourced in a legal arrangement, and which is capable of being exercised in some significant way that affects the economic returns from and disposition of the asset.’” See *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (17 December 2015) para 502 (CS-0040) (emphasis added); see also First Schreuer Legal Opinion, para 143.

²³³ Reply, paras 195-97.

²³⁴ *Id.* para 72 (“[T]hese standards are not directly applicable to treaty interpretation . . .”).

group were a single economic entity.”²³⁵ Put simply, Mr. Walck concludes: “Accounting rules are intended to enable financial statement users to reach informed conclusions about accounting data, not to evaluate standing under an FTA.”²³⁶ Therefore, the fact that “control” has a specific meaning in the IFRS or the U.S. GAAP does not have—and should not have—any bearing on these proceedings. Rather, what qualifies as “control” under the FTA is a matter of treaty interpretation.

133. In a desperate attempt to somehow make the U.S. GAAP-specific concept of “control” relevant, Respondent tries to compare the accounting approach of the U.S. GAAP to the “Understanding” that the Parties to the Energy Charter Treaty (“ECT”) concluded with respect to Article 1.6 thereof, noting that some of the elements listed in the Understanding that should be taken into account to determine whether an investment is “controlled, directly or indirectly” by an investor, relate to ownership.²³⁷ However, as pointed out by Professor Schreuer,²³⁸ Respondent omits the first part of the Understanding that states: “For greater clarity as to whether an Investment made in the Area of one Contracting Party is controlled, directly or indirectly, by an Investor of any other Contracting Party, ***control of an Investment means control in fact, determined after an examination of the actual circumstances in each situation. In any such examination, all relevant factors should be considered . . .***”²³⁹ Therefore, under the ordinary meaning of the Understanding’s terms, control is not legal control but *de facto* control. In addition, *all* relevant factors should be considered in determining whether such *de facto* control exists and not, as Respondent suggests, simply whether there is an equity interest.
134. Respondent’s other last-ditch effort to steer this Tribunal away from the only logical interpretation of the phrase “own or control” is an illogical hypothetical scenario. Specifically, Respondent argues that adopting Claimants’ position on control and recognizing that contractually delegated control satisfies the FTA requirement would allow a U.S. CEO or investment manager of a Moroccan company to bring a claim against Morocco under the FTA.²⁴⁰ Respondent’s scenario is plainly not the situation at hand, as the U.S. Claimants here own and/or control the Investments without a locally incorporated Moroccan company. Moreover, Claimants’ position would not, in fact, automatically apply to the

²³⁵ Third Walck Report, paras 11-12 (emphasis removed).

²³⁶ *Id.* para 25.

²³⁷ Reply, paras 196-97.

²³⁸ Second Schreuer Legal Opinion, para 42.

²³⁹ Understanding with respect to Article 1(6), 34 ILM 375 (1995) (CS-0232) (emphasis added).

²⁴⁰ Reply, para 202.

situation described by Respondent. Given the FTA’s flexibility regarding the “control” requirement, as noted above, any tribunal faced with that situation would still need to evaluate all of the relevant facts before it to reach a determination on jurisdiction that is consistent with the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁴¹

135. Turning briefly to discuss Respondent’s assertions regarding case law on the issue:
- a. *Thunderbird Gaming v Mexico, B-Mex v United Mexican States*: Respondent accuses Professor Schreuer of “not engag[ing] with Morocco’s understanding of [these] decisions,” but in reality, it is *Respondent* that does not engage with *Claimants’* understanding of the decisions as stated in their Counter-Memorial. As noted, both cases cited by Respondent were brought under NAFTA Article 1117, where the jurisdictional question was whether the claimant had standing to bring the claim on behalf of a locally incorporated entity.²⁴² That is not the issue here, and Respondent conveniently ignores this critical distinction. Also, as noted in Claimants’ Counter-Memorial, the two cases convey the fact that, with respect to a claim brought on behalf of a locally incorporated entity, *de facto* control—regardless of the size of the ownership interest—can constitute “control,” and it is Claimants’ position that the same principle should be adopted here.²⁴³
 - b. *Aguas del Tunari, S.A. v Republic of Bolivia*: As explained by Professor Schreuer (and as Respondent itself highlights), the *Aguas del Tunari* tribunal evaluated a very different treaty definition from the one at issue here; whereas the issue in this arbitration is whether Claimants “owned or controlled” the Investments, the issue in *Aguas del Tunari* was whether the claimant was a “national of a Contracting Party,” which factored in the question of whether nationals controlled the legal person at issue.²⁴⁴ Therefore, the case is easily distinguishable. Further, it bears noting that, in dicta, the tribunal separately acknowledged that control also could be based on rights conveyed by agreements.²⁴⁵

²⁴¹ Article 31(1) of the Vienna Convention.

²⁴² Counter-Memorial, para 81.

²⁴³ *Id.*

²⁴⁴ Second Schreuer Legal Opinion, para 44; Reply, para 198.

²⁴⁵ *Aguas del Tunari, S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/03 (21 October 2005) para 264 (CL-0233-ENG); see Second Schreuer Legal Opinion, paras 45-46.

- c. *Vacuum Salt v Ghana*: Respondent argues that the *Vacuum Salt* tribunal held that an individual’s “20 per cent stake in the claimant combined with his significant participation in its management was not sufficient to establish ‘foreign control’ for the purposes of Article 25(2)(b) of the ICSID Convention.”²⁴⁶ As Professor Schreuer notes, this is a blatant mischaracterization of the decision, as the *Vacuum Salt* tribunal, in fact, determined that the individual did not exercise “significant management powers” (in Respondent’s words)—and it was the absence of managerial control that led the tribunal to find a lack of control.²⁴⁷
- d. *Myers v Canada*: Respondent argues that *Myers v Canada* is distinguishable from Claimants’ case because (a) the individual that facilitated SDMI’s control of Myers Canada held an ownership interest in Myers Canada that allowed him to direct Myers Canada’s activities; and (b) SDMI contributed funds and technical support to Myers Canada and, in turn, anticipated a share of Myers Canada’s profits.²⁴⁸ As Respondent asserts: “although SDMI and Myers Canada were mere affiliates, their relationship was, in reality, far deeper[.]”²⁴⁹

Contrary to Respondent’s interpretation, however, most of those features are exactly why *Myers* is analogous to Claimants’ case. First, as in *Myers*, the individuals here that were tasked with managing and operating the Cayman investment vehicles were individuals/officials acting for **CCM**, the investment manager. For example, Mr. Zuech, the Chief Operating Officer of **CCM** and partner of the **U.S. Onshore Feeder**, signed the Investment Agreements on behalf of all of the investment vehicles.²⁵⁰ **CCM** employees also negotiated the Investment Agreements with SAMIR and oversaw all of the subsequent Transactions, including as signatories to the transaction confirmations.²⁵¹ Second, as described above, the **U.S. Onshore Feeder** and **CCM** contributed funds and investment management expertise to the Investments, and in turn, they were obvious direct beneficiaries; the **U.S. Onshore Feeder** had a clear ownership interest in VMF Q1, and **CCM** was entitled to fees pursuant to the investment management agreements with each of VMF Q1, 2014-1, and 2015-1. **The Carlyle Group** and the remaining Claimants, too, were positioned to

²⁴⁶ Reply, para 201.

²⁴⁷ Second Schreuer Legal Opinion, para 48 (quoting the tribunal as stating: “It is significant that nowhere does there appear to be an material evidence that Mr. Panagiotopoulos either acted or was materially influential in a truly managerial rather than technical or supervisory vein.”).

²⁴⁸ Reply, para 215.

²⁴⁹ *Id.* para 214.2.

²⁵⁰ See Second Zuech Witness Statement, paras 3-4.

²⁵¹ *Id.*, para 5.

benefit from the success of the Investments because the overall success of their investments is a pillar of their business. Third, similar to SDMI and Myers Canada, the relationship between Claimants and the investment vehicles was “far deeper” than that between detached affiliates or related companies. All of the Claimants and the investment vehicles were involved in the Investments as a result of the way they were structured. All decisions related to the investment vehicles, and in turn, the Investments, were made in New York at the offices of CCM.²⁵² And CCM, in particular, was the “face” of the Transactions vis-à-vis the Moroccan Government.²⁵³

136. In sum, Respondent’s insistence on reading an ownership requirement into the term “control” still has no basis in international law, and the Tribunal must reject Respondent’s position. Article 10.27 of the FTA is clear that there is no such ownership requirement, and the applicable case law does not mandate one either.

C. Claimants Directly or Indirectly Owned and/or Controlled the Investments At All Times

137. As Claimants discussed at length in their Counter-Memorial²⁵⁴ and in Section II above, Respondent is simply wrong that Claimants have not demonstrated any ownership or control of the Investments. To reiterate:
- a. **The U.S. Onshore Feeder** has unquestionably, at all times, owned VMF Q1 through its ownership of 99.96% of the participating shares of the Master Fund, which in turn owned 100% of the participating shares of VMF Q1.
 - b. **TC Group and TC Group Investment Holdings** have been limited partners of the **U.S. Onshore Feeder** at all times. **TC Group** also has held at least an 83% ownership interest in **CCM** at all times.
 - c. **Celadon Partners** has been the general partner of the **U.S. Onshore Feeder** at all times, imbuing it with an ownership interest in the **U.S. Onshore Feeder** as well as control over its day-to-day operations.
 - d. **The Carlyle Group** is the ultimate parent of all of the other Claimants and, thus, has indirect ownership and control over the other Claimants and the Investments.
138. As to **CCM** specifically, all of the documentary and testimonial evidence make clear that **CCM** fully possessed the authority to make and control the Investments through VMF Q1, 2014-1, and 2015-1 in Morocco. Accordingly, **CCM** had the

²⁵² *Id.*, para 3.

²⁵³ *Id.*, para 12.

²⁵⁴ Counter-Memorial, paras 100-10.

exclusive ability to oversee all of the technical details of those operations, without having to consult **Celadon Partners** or any of the investment vehicles' boards of directors for anything relating to the Transactions. Such authority remained in place for the entire investment operation from the moment the Transactions with SAMIR first began through the time of the Moroccan Government's improper actions.²⁵⁵

139. Accordingly, Respondent's second objection fails, and the Tribunal should find jurisdiction over Claimants' claims.

VI. Response to Objection No. 3: Claimants Have Standing With Respect to the Assets and/or Losses of VMF Q1, 2014-1, and 2015-1

140. As to its third objection, Respondent wrongly accuses Claimants of "missing the mark," relying for support on mischaracterizations and distortions to argue that Claimants did not suffer the kinds of losses that under the FTA and international law are sufficient to confer standing on them. Once again, however, these efforts are totally without merit. As demonstrated below, Respondent's allegations lack legal support and ignore the true facts of this case. Specifically, Respondent's interpretation of Article 10.15.1(a) of the FTA is flatly contrary to the plain language and ordinary meaning of its terms, and therefore, also contrary to the interpretation mandated by Article 31(1) of the Vienna Convention. In addition, Respondent's position is based on (i) the *Barcelona Traction* case and similar International Court of Justice precedents that Professor Schreuer and the ICJ itself have plainly indicated do not apply in contemporary investment law contexts, such as this arbitration; and (ii) case law that is both distinguishable from the present case and completely outweighed by case law finding the exact opposite. Finally, to the extent double recovery is a concern that might justify Respondent's meritless position, it is a non-issue here: not only have Claimants suffered substantial losses as a result of Respondent's breach, but they are also the only entities that can possibly bring a claim for such a breach.

A. Claimants Are Entitled to Claim Losses Relating to the Assets of VMF Q1, 2014-1, and 2015-1

141. The first prong of Respondent's third objection is that Claimants purportedly do not have standing to claim damages with respect to assets owned by the Cayman investment vehicles, VMF Q1, 2014-1, and 2015-1, on behalf of the overall Investments. Respondent does not contest that the FTA allows indirect investments but continues to deny the applicability of the FTA to Claimants'

²⁵⁵ See 2014-1 Portfolio Management Agreement (C-0024-ENG), 2015-1 Portfolio Management Agreement (C-0025-ENG), and VMF Special Purpose Vehicle SPC Investment Management Agreement (C-0026-ENG). Further, as more fully discussed above, Respondent's emphasis on the role of ██████████ and State Street, and the amount of Commodities left in SAMIR's tanks after August 7, 2015, are all red herrings that do not affect any of the above facts establishing Claimants' ownership and/or control of the Investments.

Investments by asserting that indirect claims may be brought only with respect to any shares held in Claimants' investment vehicles, not any assets held by those vehicles.²⁵⁶

142. As usual, Respondent's position is refuted by the weight of the case law. As stated in Professor Schreuer's first opinion and reiterated in his second, there is an extensive list of tribunals that have found that "indirect investors enjoy protection not merely in respect of their shareholding but also with respect to the assets of the company they own or control indirectly."²⁵⁷ Respondent attempts to reject Claimants' citations to *Mera Investment Fund v Serbia* and *Bernhard von Pezold v Zimbabwe*—both cases in which the tribunals held that a shareholder with interests in a company's assets could also bring claims pertaining to such assets²⁵⁸—by claiming that those tribunals based their decisions on "specific preambular wording in the relevant BITs" that is not present in the FTA.²⁵⁹ That is a wholly inaccurate and impermissibly narrow reading of those cases. In *Mera*, in addition to the preamble of the relevant BIT, the tribunal also carefully considered the "broad asset-based definition" of "investment" in the treaty, and held that (i) there was nothing in the treaty's language "which would preclude a finding that the Claimant can bring a claim in respect to underlying assets of its subsidiary" and (ii) "[t]he fact that the BIT does not expressly anticipate such claims does not suggest that such claims should be excluded."²⁶⁰ Similarly, in

²⁵⁶ Reply, paras 243, 257.

²⁵⁷ Second Schreuer Legal Opinion, para 56; *see also, e.g., Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment (1 September 2009) (CS-0024), para 108 ("[E]ven where a foreign investor is not the actual legal owner of the assets constituting an investment, or not an actual party to the contract giving rise to the contractual rights constituting an investment, that foreign investor may nonetheless have a [protectable] financial or commercial interest in that investment"); *Continental Casualty Co. v The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction (22 February 2006) para 79 (CS-0177); *Telefonica S.A. v Argentina*, Case No. ARB/03/20, Decision on Jurisdiction (25 May 2006) paras 71, 81 (CS-048); *Anglo-American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (18 January 2019) para 213 (CS-0234) ("[B]oth Anglo American's indirect shareholding in [the locally incorporated company] and its indirect participation in the assets of [that company] are investments protected by the Treaty.").

²⁵⁸ *See* Counter-Memorial, paras 91-92.

²⁵⁹ Reply, paras 253, 256.

²⁶⁰ *Mera Investment Fund Limited v Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction (30 November 2018) paras 126-27 (CS-0086). As Professor Schreuer notes, Respondent's assertion that *Mera* is "*obiter*" because the claimant's claim was framed as a diminution of share value claim, is wrong. The *Mera* claimant clearly indicated that its claim was for both the impairment of the value of its shares in the investment vehicle at issue and of the value of the investment vehicle's assets. Second Schreuer Legal Opinion, para 58; *Mera*, para 117.

Von Pezold, the tribunal unquestionably relied on the broad definition of “investment” in the relevant treaty.²⁶¹

143. Respondent’s excessive reliance on the *Postova banka v Greece* decision is also rendered meaningless because the text of the FTA places no limitation of the sort that the *Postova banka* tribunal endorsed.
144. In the face of a similar claim for the losses relating to company assets and a similar objection from Spain, the tribunal in *Antin v Spain* upheld jurisdiction, noting that the treaty at issue only referred to “direct or indirect control or ownership” and that “nowhere in its text or in the context of the [treaty] is there a requirement that only the real and ultimate owner or beneficiary may submit claims to arbitration.”²⁶² Spain’s citation to *Postova banka* did not persuade the tribunal otherwise, and the tribunal disregarded the decision on the basis that the facts of the two cases were “substantially different” from one another.²⁶³ Here, the Tribunal should do the same. As with the treaty in *Antin*, the FTA similarly does not contain anything in its text that requires the “ultimate owner or beneficiary” to bring a claim, but instead expressly allows any investor that directly or indirectly owns or controls the investment to have standing.
145. Respondent also argues that “Claimants here have not attempted to establish that under Cayman and/or Moroccan law, a shareholder has a right to claim with respect to the assets of a company.”²⁶⁴ Respondent’s belief that Claimants have any such obligation is based on BIT cases under the Netherlands-Polish BIT (*Enkev v Poland*) and the Polish-Greece BIT (*Postova banka*). Putting aside that these cases were based on different facts and very different treaties,²⁶⁵ Article 10.21 of the FTA expressly provides that the governing law with respect to disputes under Article 10.15.1(a) is the FTA and applicable rules of international law. Since Article 10.15.1(a) of the FTA does not have any limitation on the type of damages that a qualifying investor with a qualifying investment may claim, and the rules of international law that are actually applicable do not restrict a claimant from claiming damages in the case of indirect investments, as explained further below, any Cayman or Moroccan domestic laws on the issue do not preclude a U.S. investor’s right to bring a claim under the FTA. To find the opposite would

²⁶¹ *Bernard von Pezold v Zimbabwe*, para 322 (CL-0070-ENG).

²⁶² *Antin Energia Termosolar B.V. v The Kingdom of Spain*, ICSID Case No. ARB/13/31 (15 June 2018) paras 262-271 (CS-0236).

²⁶³ *Id.* para 271.

²⁶⁴ Reply, para 250.

²⁶⁵ See Counter-Memorial, para 93.

be equivalent to holding that a State can use its domestic law to violate its obligations under international law.²⁶⁶

B. Claimants Are Entitled to Claim Losses Relating to the Losses of VMF Q1, 2014-1, and 2015-1

146. The second prong of Respondent’s third objection is that FTA Article 10.15.1(a) allegedly requires Claimants to have suffered only direct losses rather than “losses reflected from damage suffered in the first instance by a subsidiary”²⁶⁷ (based on the International Court of Justice precedents in *Barcelona Traction* and *Diallo*²⁶⁸), and that Claimants purportedly have not demonstrated such direct losses. Respondent falsely accuses Claimants of “fail[ing] to analyse the text and function of FTA Article 10.15.1(a); and, in particular, the requirement that a claimant that purports to bring a claim on its own behalf must plead that it has ‘*incurred loss or damage.*’”²⁶⁹ But there is no such failure of analysis by Claimants here; rather, *Respondent* is the one that does not understand the text and function of FTA Article 10.15.1(a), relying on inapplicable precedents and implying non-existent, extraneous meanings into the plain language of the treaty.

i. *The Plain Language of FTA Article 10.15.1 Does Not Prohibit Recovery by a Claimant for Losses Relating to an Entity Incorporated in a Third State*

147. To address Respondent’s erroneous presentation of Claimants’ claims and the applicable law, the analysis must begin with a review of the text of Article 10.15.1 of the FTA.

148. In relevant part, Article 10.15.1 of the FTA states:

SUBMISSION OF A CLAIM TO ARBITRATION

In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, *on its own behalf*, may submit to arbitration under this Section a claim

²⁶⁶ See Article 27 of the Vienna Convention on the Law of Treaties (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

²⁶⁷ Reply, para 264.

²⁶⁸ *Id.* paras 266-67.

²⁶⁹ *Id.* para 264 (emphasis in original).

(i) that the respondent has breached (A) an obligation under Section A, ...

and

(ii) ***that the claimant has incurred loss or damage by reason of, or arising out of, that breach...***²⁷⁰

149. Respondent, disregarding other language in the treaty concerning direct or indirect ownership, claims that the reference to “incurred loss or damage” in Article 10.15.1(a)(ii) means that “a prospective claimant must identify loss and damage that has accrued to it directly[.]”²⁷¹ This interpretation is simply unsupported by the ordinary meaning of this provision, which requires only a “loss or damage *by reason of, or arising out of*” Respondent’s breach. Further, contrary to Respondent’s contentions, there is nothing in Article 10.15.1 that expressly prohibits a claimant from seeking recovery for direct losses suffered by an entity incorporated in a third State.²⁷² The mere fact that Article 10.15.1 is silent as to this possibility clearly does not mean that it is excluded.
150. At a high level, in the FTA, the United States and Morocco have expressly consented to bring claims to arbitration in accordance with the FTA (Article 10.16):
- a. The FTA permits a “claimant” (defined as “an investor of a Party that is a party to an investment dispute with the other Party”) to file claims arising from “investment disputes” (Articles 10.14-10.15).
 - b. Although “investment dispute” is not a defined term in the FTA, it has previously been defined in the 1994 U.S. Model BIT as “a dispute between a Party and a national or company of the other Party arising out of or relating to . . . an alleged breach of any right conferred, created, or recognized by this Treaty with respect to a covered investment.”²⁷³
 - c. A “covered investment,” in turn, is defined in Chapter 1, Article 1.3 of the FTA as, “with respect to a Party, an investment (as defined in Article 10.27 (Investment – Definitions)) in its territory of an investor of the other Party”

²⁷⁰ FTA, art. 10.15.1 (emphasis added).

²⁷¹ Reply, para 264.

²⁷² *Id.* para 262.

²⁷³ See Article IX of the U.S. 1994 Model BIT 506, available at: https://unctad.org/system/files/official-document/dite2vol6_en.pdf (emphasis added). There is no indication that the term means anything different in more recent investment treaties.

Accordingly, the Parties have consented to arbitrate *all* claims of alleged violations of Chapter 10, Section A, with respect to *any* covered investment (i.e., *any* assets of an investor of a Party that qualify as “investments” and which are owned or controlled, directly or indirectly, by the claimant). Thus, there is no basis to support Respondent’s position.

151. That there is nothing in Article 10.15.1 addressing the situation of an enterprise constituted in a third State in no way should preclude a claimant from claiming losses on its own behalf if the enterprise at issue is not locally incorporated. Indeed, Article 10.15.1 contains *no* limitation, whether express or implied, on the claims that can be brought by qualifying “investors” on their own behalf for qualifying “investments.”²⁷⁴ As noted above, qualifying “investments” are defined in Article 10.27 as “every asset that an investor *owns or controls, directly or indirectly*, that has the characteristics of an investment”²⁷⁵
152. Therefore, Respondent’s argument is not only unsupported by the literal language of Article 10.15.1(a) of the FTA, but it also makes no sense when read in conjunction with Article 10.27 of the FTA. Under Respondent’s theory, “investor[s] of a party” (United States investors in the territory of Morocco) with a perfectly valid “investment” (an asset owned or controlled, directly or indirectly, by such investors) could be left without any recourse under the FTA simply because they invested through an investment vehicle registered in a third country.²⁷⁶ And, in this case, such theory would leave no entity in a position to claim against Respondent for the losses sustained by the Moroccan government’s wrongful actions. This simply cannot be the intent of the drafters of the FTA nor a valid interpretation under Article 31(1) of the Vienna Convention. Claimants correctly represented in their Counter-Memorial that they have submitted claims on their *own* behalf based on their direct and indirect ownership and/or control of the Investments,²⁷⁷ and not to allow such claims would result in a great injustice.

²⁷⁴ See also Second Schreuer Legal Opinion, paras 69-70.

²⁷⁵ FTA art. 10.27 (emphasis added).

²⁷⁶ It is worth noting that Respondent all but admits that Claimants have valid investments under the FTA because Respondent implicitly acknowledges that the investment vehicles are, in fact, vehicles to facilitate *Claimants’* investments. Specifically, Respondent admits as follows: “The Claimants could easily have structured their affairs to remain within its parameters in this regard. They could have incorporated a Moroccan vehicle to serve as an enterprise for the purposes of Article 10.15.1(b). Or they could have kept all of their operations in the US, in which case a claim for direct loss under Article 10.15.1(a) would have been possible. Or, ***if they absolutely had to route their investments through a third state subsidiary***, they could have incorporated that subsidiary in any of the 50 plus states with which Morocco has an investment treaty presently in force.” Reply, para 278 (emphasis added); see also *id.* paras 277, 279.

²⁷⁷ Counter-Memorial, para 95.

ii. *The Barcelona Traction Rule Does Not Apply*

153. Respondent claims by bald assertion that FTA Article 10.15.1 “was specifically drafted to preserve the customary rule identified by the ICJ in *Barcelona Traction* and affirmed most recently in *Diallo*, viz.”—that only direct loss or damage suffered by the shareholders themselves is cognizable under international law.²⁷⁸ There is nothing in the FTA, however, that indicates that Respondent’s statement is true.
154. To the extent Respondent relies on submissions by the United States with similar arguments concerning NAFTA Articles 1116 and 1117, the respective models for FTA Article 10.15.1(a) (as described above, concerning claims on behalf of the claimant) and 10.15.1(b) (concerning claims on behalf of a locally incorporated enterprise), those submissions are inapposite because they focused on the difference between Articles 1116 and 1117, not anything in the language of Article 1116 (i.e., the parallel to FTA Article 10.15.1(a)) itself.²⁷⁹ Indeed, cases like *Bilcon v Canada* involved the question of whether NAFTA Article 1116 or 1117 was the appropriate basis for the claimant’s claim given that the claimant sought to claim on behalf of a locally incorporated enterprise.²⁸⁰ Because the present case does not concern an investment involving a locally incorporated subsidiary, Respondent’s discussions on the difference between Article 1116 and 1117 of NAFTA in cases under Article 1117 of NAFTA (including references to the United States’ submissions on the issue) are plainly misguided.²⁸¹
155. In addition, Respondent’s approach is inconsistent with the United States’ historical interpretation of NAFTA Articles 1116 and 1117. For example, the United States’ submissions in cases such as *Myers v Canada* and *Pope & Talbot v*

²⁷⁸ Reply, para 266 (emphasis in original); see also *Barcelona Traction*, para 47.

²⁷⁹ While there is contemporaneous commentary by a NAFTA negotiator on behalf of the United States that NAFTA Article 1117 was drafted to “resolve the Barcelona Traction problem” by allowing a claimant to claim for injury to its locally incorporated enterprise (Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, *The North American Free Trade Agreement: A New Frontier in International Trade & Investment in the Americas* 165, 177 (1994) (CL-0106-ENG)), there is **no similar commentary** regarding the specific purpose of NAFTA Article 1116. Therefore, there is no basis for reading into the FTA the restrictions proposed by Respondent.

²⁸⁰ See Second Schreuer Legal Opinion, paras 70-72.

²⁸¹ And, in any event, even the United States’ submissions regarding Articles 1116 and 1117 of NAFTA have recognized exceptions to the application of the *Barcelona Traction* rule. See, e.g., *B-Mex v United Mexican States* U.S. Submission, para 7 n 4 (CL-105-ENG) (“The United States notes that some authors have asserted or proposed exceptions to [the *Barcelona Traction*] rule.”); see also *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware Inc. v Government of Canada*, PCA Case No. 2009-04 (“*Bilcon v Canada*”), Submission of the United States of America (29 December 2017) para 6 n 11 (RL-0099).

Canada state that, where the qualifying investment is not a separate company, “**any damage to the investment will be a direct loss to the investor**, and the investor will have standing to bring a claim under Article 1116.”²⁸² Applying this interpretation to the FTA and Claimants’ Investments (which are *not* companies), it is clear that Claimants have standing to bring a claim under FTA Article 10.15.1(a).

156. As a more general matter, per Professor Schreuer, the ICJ “has acknowledged that its decisions, given in the context of diplomatic protection on the basis of customary international law, **do not apply in the framework of contemporary international investment law** which is dominated by treaties.”²⁸³ Indeed, investment tribunals (including NAFTA tribunals such as *GAMI v Mexico*) have “**consistently** stressed the inapplicability of *Barcelona Traction* to contemporary investment law.”²⁸⁴

²⁸² *S.D. Myers, Inc. v The Government of Canada*, UNCITRAL (“*S.D. Myers, Inc. v Government of Canada*”), Submission of the United States of America (18 September 2001) para 7 (CL-107-ENG); *Pope & Talbot, Inc. v Government of Canada*, UNCITRAL (“*Pope & Talbot (Seventh Submission)*”), Seventh Submission of the United States (6 November 2001), para 4 (CL-108-ENG). By contrast, where the qualifying investment is, in fact, a separate company, the U.S. submissions state that “any damage to the investment will be a *derivative* loss to the investor and the investor will have standing to bring a claim under Article 1117.” *Id.* (emphasis added). Through these statements, the U.S. submissions also make clear that Article 1117 was intended to complement, not restrict, the claims that could be brought pursuant to the broad language of Article 1116. In other words, Article 1117 was included to ensure that even an investor that made a qualifying investment through a *locally* incorporated company could recover damages suffered by such company. This is because, under the principles of State responsibility for injuries to aliens, a host State has certain responsibilities only to the nationals of *foreign* states, and, in the absence of Article 1117, it could be argued that a locally incorporated company has no standing to recover against the host State.

It also should be noted that, unlike the U.S. submissions in *Bilcon v Canada* or *GAMI v Mexico*, the U.S. submissions in *Pope & Talbot* and *Myers* do not contain any endorsement of, or arguments based on, the *Barcelona Traction* approach. See Submission of the United States in *S.D. Myers, Inc. v Government of Canada*, paras 6-10 (CL-107-ENG); *Pope & Talbot (Seventh Submission)*, paras 2-10 (CL-0108-ENG). Moreover, the *Pope & Talbot* tribunal specifically rejected Canada’s *Barcelona Traction* arguments. See *Pope & Talbot Inc. v The Government of Canada*, Arbitral Award (“*Pope & Talbot May 2002*”) Award in respect of Damages (May 31, 2002) paras 75-80 (CL-0109-ENG).

²⁸³ Second Schreuer Legal Opinion, para 66 (emphasis added).

²⁸⁴ *Id.* para 67 (emphasis added). See also, e.g., *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (25 September 2007) para 69 (CS-0188); *El Paso v Argentina*, Award, 31 October 2011 para 213 (CS-0025). In fact, in *GAMI v Mexico*, the tribunal expressly rejected the United States’ argument that the *Barcelona Traction* rule was applicable in the NAFTA Article 1116 context. See *GAMI Investments, Inc. v The Government of the United Mexican States*, UNCITRAL, Final Award (15 November 2004) paras 29-30 (CS-0203). The tribunal in that case also relied on the *ELSI* case affirming that the ICJ itself had accepted that U.S. shareholders of an Italian company could bring a claim against Italy for the alleged violation of the U.S.-Italy Friendship, Commerce & Navigation Treaty, arising from measures imposed on that company. See *id.* para 30. See

157. Further, many arbitral decisions under U.S. BITs and other similar BITs have departed from the *Barcelona Traction* rule by referring to the treaties' definitions of "investment" and dispute resolution clauses and thereby holding that shareholders have standing to assert claims for damages incurred by companies in which they hold shares.²⁸⁵ The language in NAFTA Article 1116(1), and in recent free trade agreements and BIT provisions modeled after it (such as FTA Article 10.15.1(a)), is not materially different from the language in the BITs at issue in those cases. It follows that Article 1116 of the NAFTA and equivalent provisions in subsequent U.S. investment treaties (including FTA Article 10.15.1(a)) were never intended to limit the types of claims that a protected investor could bring with respect to a qualifying investment.
158. As stated in Claimants' Observations and by Professor Schreuer, a helpful parallel can be found in the analysis of the tribunal in *Waste Management v Mexico*, a NAFTA case involving an investment made in Mexico through a holding company in the Cayman Islands.²⁸⁶ There, one issue before the tribunal was whether the claimant was bringing its claim under Article 1116 or Article 1117 of NAFTA.²⁸⁷ Yet, regardless of which Article the claim fell under, the tribunal saw

also Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy), Judgment (20 July 1989) available at: <https://www.icj-cij.org/public/files/case-related/76/076-19890720-JUD-01-00-EN.pdf>.

²⁸⁵ See First Schreuer Legal Opinion, paras 180-88; Second Schreuer Legal Opinion, para 56 & n 85 (citing *CMS Gas Transmission Company v The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction (17 July 2003) para 48 (CL-0072-ENG) ("The Tribunal therefore finds no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned"); *id.* para 68: ("the rights of the Claimant can be asserted independently from the rights of TGN and those relating to the License"). Confirmed in *CMS v Argentina*, paras 58–76 (CS-0188); *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (14 January 2004) para 60 (CS-0092) ("[T]he rights of the Claimants can be asserted independently from the rights of TGS or CIESA. ... the Claimants have a separate cause of action"); *Iurii Bogdanov, Republic of Moldova, Agurdino-Invest Ltd, Republic of Moldova, Agurdino-Chimia JSC, Republic of Moldova v Republic of Moldova*, Arbitral Award (22 September 2005) para 5.1 (CS-0204) ("The remedy that may be claimed by the Foreign Investor, therefore, is not limited to the damage directly affecting his rights as shareholder in the Local Investment Company, but extends to any losses affecting the assets of the Local Investment Company"); *Total S.A. v The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Jurisdiction (25 August 2006) para 74 (CS-02050) ("The protection that BITs afford to such investors is accordingly not limited to the free enjoyment of the shares but extends to the respect of the treaty standards as to the substance of their investments."); *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB 05/1, Award (22 August 2012) para 91 (CS-0149) ("[S]ome two-dozen previous investor-State tribunals have confirmed that the ICSID Convention, in concert with the definition of 'investment' offered by numerous BITs, allows shareholders to bring claims for harms to their investments in locally incorporated companies").

²⁸⁶ Claimants' Observations, para 66; First Schreuer Legal Opinion, para 204; Second Schreuer Legal Opinion, paras 74-75.

²⁸⁷ *Waste Management Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3 ("*Waste Management*"), Award (30 April 2004) para 40 (CL-0013-ENG) ("The question of Waste Management's

no problem with an investment made through a third, non-NAFTA state: “There is no hint of any concern that investments are held through companies or enterprises of non-NAFTA States, if the beneficial ownership at relevant times is with a NAFTA investor.”²⁸⁸ The *Waste Management* tribunal also made clear that the possibility of claiming on behalf of an enterprise incorporated in the host State (as provided in, e.g., Article 1117 of NAFTA and Article 10.15.1(b) of the FTA) did not foreclose claims based on an investment made through an intermediary in a third State.²⁸⁹

159. In addition, as applicable to both Articles 1116 and 1117 of NAFTA, the *Waste Management* tribunal stated as follows:

Where a treaty spells out in detail and with precision the requirements for maintaining a claim, ***there is no room for implying into the treaty additional requirements***, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise. If the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having the nationality of one of the other Parties they could have done so. Similarly ***they could have restricted claims of loss or damage by reference to the nationality of the corporation which itself suffered direct injury***.²⁹⁰

160. The foregoing analysis reinforced the tribunal’s position that it is irrelevant that the direct injury was suffered by an entity incorporated in a third State, so long as beneficial ownership lies with the qualifying investor.
161. Respondent is also simply incorrect when it states that adopting Claimants’ position with respect to Article 10.15.1(a) would undermine FTA Article 10.25.2, which provides that payment of a damages award under FTA Article 10.15.1(b) is to be paid to the locally incorporated company—rather than the U.S. claimant—in

entitlement to claim under Articles 1116 or 1117 of NAFTA in respect of the present dispute involving Acaverde is an issue in the case.”).

²⁸⁸ *Id.* para 80 (CL-0013-ENG). Articles 1116 and 1117 of NAFTA served as a model for Article 10.15.1 of the FTA.

²⁸⁹ *Id.* para 84 (CL-0013-ENG) (“Article 1117 deals with the special situation of claims brought by investors on behalf of enterprises established in the host State. But it still allows such claims where the enterprise is owned or controlled ‘directly or indirectly’, i.e., through an intermediate holding company which has the nationality of a third State.”).

²⁹⁰ *Id.* para 85 (CL-0013-ENG) (emphasis added). With respect to Article 1116 of NAFTA, the *Waste Management* tribunal stated: “The nationality of the investment (as opposed to that of the investor) is irrelevant. . . . [I]t is sufficient that the investor has the nationality of a Party and has suffered loss or damage as a result of action in breach of one of the specified obligations” *Id.* para 83.

order to protect stakeholders in the company.²⁹¹ Contrary to Respondent’s assertions, nothing in Article 10.25 would prevent a tribunal with a derivative claim under Article 10.15.1(a) before it from awarding damages to the investor.²⁹²

162. Finally, the policy arguments that the United States has previously put forth in its submissions in support of a *Barcelona Traction* approach are not present here. For example, in *GAMI v Mexico*, the United States submitted that a *Barcelona Traction* approach would be warranted if it would ensure that (i) creditors’ rights vis-à-vis the investments at issue were respected, and (ii) there would not be any double recovery by both the shareholders and the company at issue.²⁹³
163. Since the Investments here are not the Cayman investment vehicles themselves, there are no actual or potential creditors whose rights may be affected by the adjudication of Claimants’ claims. Further, Claimants here (who had full control of the investment operation from start to finish) not only are effectively suffering all of the damages arising from Moroccan Government’s improper actions, but they are also the only ones who have any valid claims with respect to the Investments. The relevant investment management agreements specifically delegated all powers to the investment manager—that is, **CCM**—to bring the claims related to the Investments.²⁹⁴ Moreover, the **U.S. Onshore Feeder** unquestionably suffered direct financial loss as a result of Respondent’s conduct. The Master Fund’s 100% ownership of the participating shares in VMF Q1, and in turn, the **U.S. Onshore Feeder’s** 99.96% ownership of the participating shares in the Master Fund, were rendered almost valueless by the loss of over \$130

²⁹¹ Reply, para 270. Article 10.25.2 of the FTA states in relevant part: “[W]here a claim is submitted to arbitration under Article 10.15.1(b): (a) an award of restitution of property shall provide that restitution be made to the enterprise; (b) an award of monetary damages and interest, as appropriate, shall provide that the sum be paid to the enterprise”

²⁹² See, e.g., *Mondev International Ltd. (Can.) v United States of America*, ICSID ARB(AF)/99/2, (Award) (11 Oct. 2002) paras 84-86 (CL-0016-ENG) (noting that at the damages stage, a tribunal could treat an Article 1116 claim as if it had been brought under Article 1117 to prevent any unfair recovery); *Pope & Talbot* (May 2002) para 80 (“[T]he existence of Article 1117 does not bar bringing a claim under Article 1116”) (CL-0109-ENG) (citations omitted).

²⁹³ See *GAMI Investments Inc. v Mexico*, United States Submission (30 June 2003) 17-18 (CL-0110-ENG).

²⁹⁴ See, e.g., VMF Q1 Investment Management Agreement § 2(b) (CZ-0047) (authorizing **CCM** to “exercise all rights, powers, privileges and other incidents of ownership or possession” with respect to the assets held by VMF Q1); 2014-1 Portfolio Management Agreement § 1(a)(iv) (C-0024-ENG) (granting **CCM** the authority to “mak[e] determinations with respect to [2014-1’s] exercise (and exercise on behalf of [2014-1]) of any rights or remedies in connection with any portion of collateral and engaging and consulting with counsel and other professionals concerning such determinations”); 2015-1 Portfolio Management Agreement § 1(a)(iv) (C-0025-ENG) (same).

million.²⁹⁵ In addition, the substantial losses suffered due to Respondent's conduct drove CCM to unwind the entire Celadon entity structure in 2016.²⁹⁶

164. Accordingly, for the foregoing reasons, Respondent's third objection is meritless, and Claimants have standing in accordance with Article 10.15 of the FTA.

VII. Response to Objection No. 4: Claimants Have "Made" An Investment in Morocco for Purposes of FTA Article 10.27

165. Respondent's final set of misstatements of the law and contrived readings of the FTA can be found in its fourth objection, which continues to pursue the idea of the "active" investor requirement based on the definition in FTA Article 10.27 that an "investor" is one who "concretely attempts to make, is making or has made an investment in the territory of the other Party." As explained in prior submissions, there is no such "active" investor requirement, and Respondent's arguments toward this end are unfounded and should hold no weight in the tribunal's determination on jurisdiction.
166. Once again, Respondent primarily relies upon the *Standard Chartered Bank v Tanzania* case to support its proposition. In this case, the third time is not the charm, and Respondent still has no good response for why the case is applicable at all.
- a. In its Application for Bifurcation, Respondent first argued that the word "concretely" was "key" for establishing the existence of the alleged "active" investor requirement, and that this was purportedly made evident by the *Standard Chartered Bank* case where the tribunal stated: "[F]or an investment to be 'of' an investor . . . some activity of investing is needed"²⁹⁷
 - b. After Claimants pointed out that *Standard Chartered Bank* did not interpret the word "concretely" at all but was instead interpreting the preposition "of" in the phrase "investment of,"²⁹⁸ Respondent then pivoted towards emphasizing the word "made" in its Jurisdictional Memorial. There, it highlighted out-of-context language from the tribunal's decision that "the verb 'made' implies some action in bringing about an investment, rather than purely passive ownership."²⁹⁹

²⁹⁵ Third Zuech Witness Statement, paras 22-23.

²⁹⁶ *Id.* para 23.

²⁹⁷ Application for Bifurcation, paras 88-89.

²⁹⁸ Claimants' Observations, n 87.

²⁹⁹ Jurisdictional Memorial, paras 161-63, 169.

- c. In their Counter-Memorial, Claimants explained that the UK-Tanzania BIT at issue in *Standard Chartered Bank* contained a provision that jurisdiction over “any legal dispute arising between [a] Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former,” and that because the BIT used the verb “made,” rather than “own” or “hold,” to refer to the relationship between a qualifying investor and a protected investment, the tribunal held that, in order to be an “investment of” a contracting party, the investment had to be “made” by the investor rather than merely owned or held.³⁰⁰ Claimants also noted that Article 10.27 of the FTA, in fact, uses the words “own or control,” not just “made” to refer to the relationship between a qualifying investor and a protected investment.³⁰¹
- d. Now, in its Reply, Respondent admits that the focus of *Standard Chartered Bank* was on the phrase “investment of,” and that the only reason the term “made” was discussed was because the tribunal was forced to turn to other parts of the UK-Tanzania BIT to interpret the phrase “investment of,” especially since the words “own” or “hold” could not be found anywhere in the treaty.³⁰² Respondent’s only response is that “the unambiguous verb ‘made’ is included in the definition of ‘investment of a Party’” in FTA Article 10.27 and “[t]he fact that the verb ‘own’ is used elsewhere in the FTA is irrelevant.”³⁰³
- e. Respondent’s dismissive declaration of irrelevance is surprising. The verb “own” (and “control,” for that matter) is not in some discrete and inapplicable section of the FTA; rather, both words are in the definition of the term “investment” and establish what sort of relationship a qualifying investor must have with a protected investment under the FTA. The false hierarchy that Respondent attempts to create between the definition of the term “investor of a Party” and the term “investment” is simply unfounded. Indeed, Respondent cannot seriously argue that the phrase “owns or controls” is less important than the term “make” when one of its main (erroneous) legal arguments in support of its jurisdictional objections is that Claimants must demonstrate ownership of the Investments in order to demonstrate standing under the FTA. Further, if the purpose of the term “make” was the one that Respondent

³⁰⁰ Counter-Memorial, para 126.

³⁰¹ *Id.*

³⁰² Reply, para 291.

³⁰³ *Id.* para 292. To be clear, contrary to Respondent’s assumptions, the mere fact that Professor Schreuer may not have addressed a particular point made by Claimants hardly means that Professor Scheurer was not “prepared to support” that argument. *Id.* para 290. Respondent’s inference is simply disrespectful towards Professor Schreuer, who is an independent expert, as well as unfounded, as Professor Schreuer’s opinions are consistent with, and supportive of, Claimants’ arguments.

alleges, the definition of “investor of a Party” could just as easily have stated “hold, establish, or acquire” rather than “make” an investment. But the fact is, that is not what the Parties to the FTA did.

- f. Respondent also makes a cursory return to its “concretely” argument in the Reply, relying upon a non-binding domestic decision from the California Court of Appeal to argue that, grammatically, the term “concretely” applies to each of “attempts to make,” “is making,” and “has made.”³⁰⁴ But, as explained in Claimants’ Counter-Memorial and Professor Schreuer’s first legal opinion, the most logical view of the entire phrase (“concretely attempts to make, is making, or has made”) *under international investment law principles* is that “concretely” applies to only “attempts to make” given the case law surrounding pre-investment activities.³⁰⁵ Moreover, if Respondent is correct (though it is not) that the word “make” on its own conveys the purported “active” investor requirement, then the term “concretely” is a meaningless inclusion—which is perhaps why Respondent casts aside its “concretely” argument as “sterile” and “ancillary.”³⁰⁶ Finally, even as a matter of pure logic, there is simply no need to modify the term “make” with the term “concretely” to convey the concept of making an investment.

167. Respondent fares no better with its reliance upon *Blue Bank v Venezuela*, in that:

- a. In the underlying Barbados-Venezuela BIT, there was no definition of “investor”. Therefore, the determination of standing related to the definition of “investment,” which was defined as “every kind of asset ***invested by*** . . . companies of one Contracting Party in the territory of the other Contracting Party”³⁰⁷

³⁰⁴ Reply, paras 313-18.

³⁰⁵ See Counter-Memorial, paras 121-23; First Schreuer Legal Opinion, paras 225-27. By way of comparison, Article 11.28 of the U.S.-Korea FTA (concluded after the U.S.-Morocco FTA) includes a footnote explaining that “for greater certainty, . . . ***an investor ‘attempts to make’ an investment when that investor has taken concrete action or actions to make an investment***, such as channeling resources or capital in order to set up a business, or applying for a permit or license.” (Emphasis added). Similarly, Article 10.28 of the U.S.-Colombia FTA (also concluded after the U.S.-Morocco FTA) defines “investor of a Party” as including “an enterprise of a Party[] that ***attempts through concrete action to make***, is making, or has made an investment in the territory of another Party[.]” (Emphasis added). See <https://ustr.gov/trade-agreements/free-trade-agreements> for both free trade agreements.

³⁰⁶ Reply, para 318.

³⁰⁷ *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. 12/20, Award (26 April 2019) paras 156-58 (CS-0032). For this reason, Respondent’s reliance on this case renders Respondent’s higher esteem of the definition of “investor” over the definition of “investment” in the FTA all the more unconvincing.

- b. The claimant at issue was a corporate trustee that had “no interest of any nature whatsoever” and “extremely limited” power over the assets of the trust³⁰⁸; and
 - c. The tribunal engaged in no discussion at all of any “active” investment requirement—and in fact, the tribunal held that the claimant did not have standing notwithstanding its clearly “active” role in managing and administering the assets.
168. As to the cases cited by Professor Schreuer to reject Respondent’s proposition of an “active” investor requirement, Respondent claims that there are a handful that “actually support Morocco.”³⁰⁹ In his second legal opinion, however, Professor Schreuer details why Morocco is wrong as to each³¹⁰:
- a. *Gold Reserve Inc. v Venezuela*: Respondent claims that the *Gold Reserve* tribunal interpreted “make” in “any enterprise . . . who makes the investment in the territory of Venezuela” to require the claimant “to undertake a positive act in order to bring about the investment.”³¹¹ However, per Professor Schreuer, the tribunal made no such statement, nor can one reasonably be implied from the decision. Indeed, the sole focus of the decision was whether the acquisition of the investment through a corporate restructuring, as opposed to contributing capital directly into the investment, constituted “making” the investment.³¹²
 - b. *MNSS & RCA v Montenegro*: Respondent claims that the *MNSS & RCA* tribunal established that “on no view was it acceptable for a putative investor to be the passive beneficiary of others’ investment activities.”³¹³ Once again, Professor Schreuer notes that the tribunal neither directly made nor implied such a statement. To the contrary, the tribunal rejected the notion that “making an investment” required any additional investments or further activity with respect to a loan that already had been made.³¹⁴
 - c. *Flemingo v Poland*: Respondent purports to quote the *Flemingo v Poland* tribunal as allegedly saying that the *Standard Chartered Bank* decision “was

³⁰⁸ *Id.* paras 162, 167.

³⁰⁹ Reply, paras 303-10.

³¹⁰ Second Schreuer Legal Opinion, paras 80-84.

³¹¹ Reply, para 304-05.

³¹² Second Schreuer Legal Opinion, para 80.

³¹³ Reply, para 307.

³¹⁴ Second Schreuer Legal Opinion, para 81.

relevant ‘for bilateral investment treaties which require investments **be made in the territory of the host state.**’³¹⁵ However, as pointed out by Professor Schreuer, this is yet another misquotation by Respondent. The tribunal, in fact, stated, “*Standard Chartered Bank* **may be** relevant for bilateral investment treaties which require investments to be made **within** the territory of the host State”³¹⁶ Therefore, contrary to Respondent’s misrepresentations, the tribunal said only that *Standard Chartered Bank* “may be”—not “was”—relevant to a determination of the territoriality of the investment, not the question of whether the investment was “made” by the claimant.

- d. *Mera v Serbia*: Respondent claims that the *Mera* tribunal “impliedly concluded that mere passive ownership of the investments, independent of any actual investment activity, could not create an investor.”³¹⁷ Professor Schreuer points out once again that no such statement can be implied, and rather, the tribunal expressly stated that it was not convinced of any “activity” requirement for a qualifying investor.³¹⁸

169. In short, Respondent’s devious mischaracterizations and deliberate misquotations of the case law are once again made evident in Professor Schreuer’s cogent responses. Accordingly, Respondent’s desperate attempts to commandeer case law that is clearly against its position should be dismissed out of hand.
170. As stated in both Professor Schreuer’s two legal opinions and in his recent article, “The Active Investor,” the weight of the investment case law is opposed to an “active” investor requirement, and tribunals have frequently upheld standing where the claimant demonstrated mere ownership or control (whether or not required by the express language of the relevant treaty).³¹⁹
171. It also bears noting that this year, in Switzerland, a jurisdiction that is well known for being arbitration-friendly, the Swiss Federal Tribunal *annulled* an arbitral award on the basis that the arbitral tribunal had wrongly interpreted the BIT at issue as requiring the “active making” of an investment in exchange for consideration:

³¹⁵ Reply, para 308 (emphasis in original).

³¹⁶ *Flemingo Duty Free Shop Private Limited v The Republic of Poland* (12 August 2016) para 324 (CS-0210) (emphasis added).

³¹⁷ Reply, para 310.

³¹⁸ Second Schreuer Legal Opinion, para 84.

³¹⁹ See First Schreuer Legal Opinion, paras 209-24; Second Schreuer Legal Opinion, paras 79-84; Schreuer, “The Active Investor” 241-51 (CS-0239).

Le Tribunal arbitral veut priver la recourante, une société espagnole détenant une participation dans une société vénézuélienne, de la protection du TBI en raison du fait que ledit investissement a été initialement effectué par une société sise dans un État tiers avant d'être transféré à la recourante, une société dont tout porte à croire qu'elle a été constituée à des fins stratégiques. Or, rien ne permet de dégager du TBI la volonté des États contractants d'exclure pareil investissement de son champ d'application. En effet, ceux-ci ont non seulement prévu une définition particulièrement large et ouverte du terme 'investissement' mais ont également renoncé à inclure des dispositions instaurant des exigences supplémentaires visant à se prémunir contre la pratique du " treaty shopping " ou ayant pour objet la provenance des fonds investis alors même que pareilles clauses sont répandues dans la pratique de l'investissement international. ***Rien ne permet de déduire de la formule 'investis par des investisseurs' l'exigence d'un investissement actif devant impérativement avoir été effectué par l'investisseur lui-même en échange d'une contre-prestation. Bien au contraire, le TBI ne contient pas d'exigences allant au-delà de la détention par un investisseur d'une partie contractante d'actifs sur le territoire de l'autre partie contractante. Dès lors, le Tribunal arbitral ne peut être suivi lorsqu'il se fonde sur des conditions supplémentaires, dont il estime qu'elles ne sont pas remplies en l'espèce, pour se déclarer incompétent.***³²⁰

172. Finally, it is also telling that there are no U.S. BIT transmittal letters or FTA-related documents submitted to Congress, nor any contemporaneous commentary by U.S. negotiators of the FTA or other commentators, that emphasize the word “make” or indicate that there is some level of activity that a qualifying investor must meet.³²¹
173. In sum, there is no “active” investor requirement in Article 10.27 of the FTA or in the relevant case law, and all of the Claimants—including ones that were allegedly more “passive” in their involvement—have standing under Article 10.27 of the FTA. Accordingly, Respondent’s multiple references to the purported “passivity” of certain Claimants³²² should have no bearing whatsoever on this Tribunal’s determination.

³²⁰ *Clorox Spain S.L. v Bolivarian Republic of Venezuela*, Judgment of Swiss Federal Tribunal (25 March 2020) [French], para 3.4.2.7 (CL-0111-FR).

³²¹ See Vandeveldt at 154-55 (CL-0101-ENG); see also Lee M. Caplan & Jeremy K. Sharpe, *Commentary on the 2012 U.S. Model BIT*, Commentaries on Selected Model Investment Treaties, 755 (CL-112-ENG).

³²² See Reply, paras 325, 327.

VIII. Conclusion

174. Given the breadth and extent of Respondent's deliberate mischaracterizations of law and fact, brazen misquotations of the FTA's text, tribunal decisions, and legal opinions, false factual assumptions, and disrespectful fabrications, Respondent's jurisdictional objections simply cannot be taken seriously, and Claimants reserve the right to seek costs on this basis. As stated above, Respondent's jurisdictional challenges can only be viewed as a desperate attempt to exit from this arbitration at an early stage in order to avoid ultimate liability for its wrongful actions.
175. Claimants, on the other hand, have been waiting years to be made whole for the injustices suffered at the hands of the Moroccan government and their enormous loss of hundreds of millions of dollars. In good faith, they have presented the facts and the law as they are, and they should not be denied a fair opportunity to have the merits of their claims heard.
176. Therefore, for all of the foregoing reasons, as well as all of the reasons provided in Claimants' prior submissions on jurisdictional issues that are not repeated here, Respondent's jurisdictional objections should be rejected in their entirety.

Dated: November 16, 2020

Respectfully submitted,

/s/ Eric Ordway

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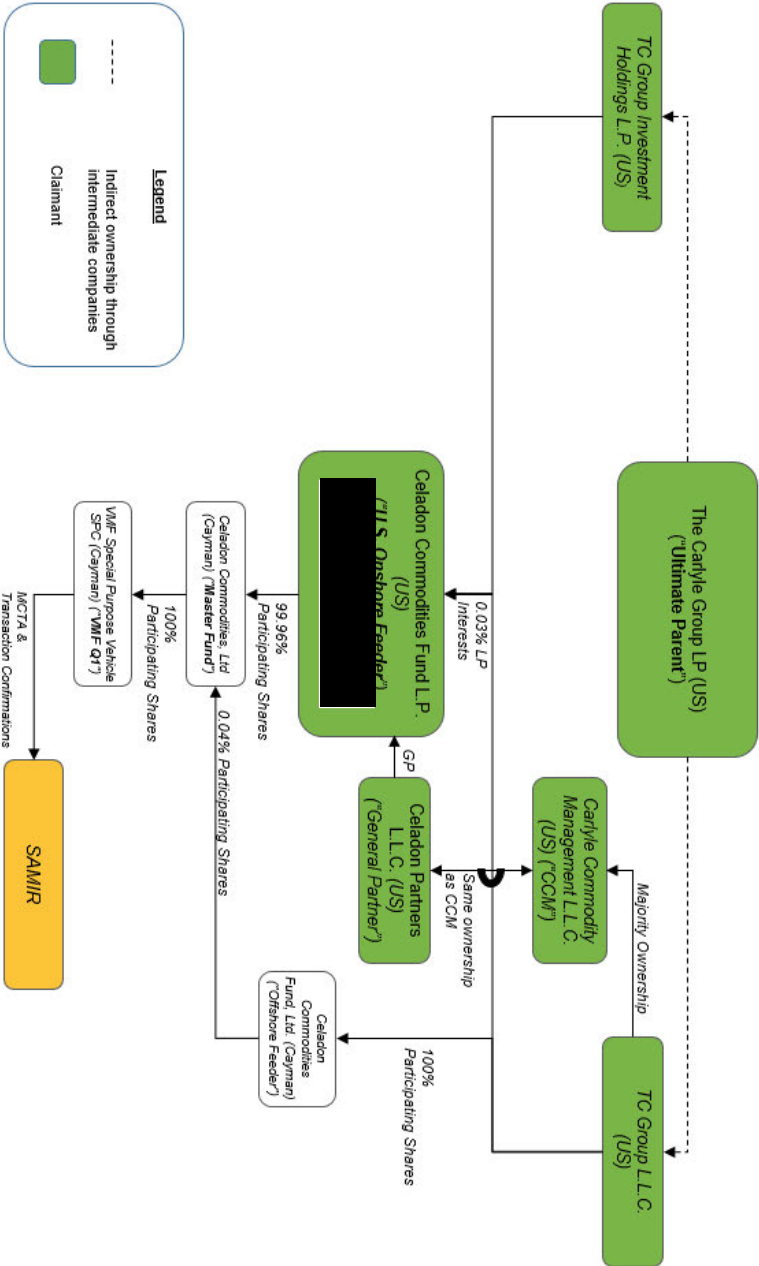
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**Annex A
Diagram 2**

Diagram 2: Investment Ownership through Celadon



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