

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)**

**COUNTER-MEMORIAL ON JURISDICTION**

22 JUNE 2020

WEIL, GOTSHAL & MANGES LLP  
*Counsel for Claimants*

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## I. Preliminary Statement

1. Pursuant to the Tribunal’s Procedural Order No. 1 of July 1, 2019 and Procedural Order No. 4 of January 20, 2020, Claimants\* hereby submit their memorial in response to Respondent’s Memorial on Objections to Jurisdiction and Admissibility (“Jurisdictional Memorial”).
2. Respondent’s Jurisdictional Memorial is replete with incendiary rhetoric and false and misleading statements of both fact and law, all seemingly aimed at persuading the Tribunal that the mere multiplicity of Respondent’s arguments—duplicative and meritless though they may be—warrants dismissal of this case. These efforts must be rejected. Claimants clearly meet the necessary requirements of the US-Morocco Free Trade Agreement (“FTA”) and the ICSID Convention, and are entitled to proceed with their case on the merits. Indeed, while Respondent alleges that Claimants’ claim is based on “obfuscation,” as demonstrated below, it is Respondent, not Claimants, who has been engaged in obfuscation.
3. With regard to the facts, Respondent’s assertion of a purported “concealment strategy” by Claimants regarding their corporate and fund structures, and Respondent’s conclusions about the “true position” of Claimants and these structures, are pure fiction and totally at odds with the detailed evidence provided by Claimants. Indeed, Respondent has totally mischaracterized Claimants’ corporate relationships, as well as both Claimants’ contributions to, and ownership and/or control of, the resulting investments. To begin with, all of the relevant documents show that Claimant **Carlyle Commodity Management L.L.C.** was not a mere “arms’-length advisor,” as Respondent alleges, but the entity with complete control of all the investments in question. Respondent’s expert on Cayman Islands law does not even attempt to rebut these facts, nor could he. As another example, Respondent overlooks the fact that Claimant **Celadon Commodities Fund, LP** (the “**U.S. Onshore Feeder**”) has a clear ownership interest in the investments at issue. Furthermore, Claimants’ documents, which number in the hundreds of pages, and the testimony of their fact and expert witnesses show that, contrary to Respondent’s assertions, their investments do not meet the definition of “repo transactions,” and the transactions were not “financings;” rather, each transaction involved a “true sale” resulting in a bona fide transfer of title to the commodities in question. These same documents and testimony also show that there was absolutely no nefarious or deceptive motive behind the Claimants’ corporate structure, as Respondent suggests.
4. Respondent’s misstatements of the law are equally egregious, beginning with the patently false statement that Claimants bear the burden of proof with regard to Respondent’s jurisdictional objections, and followed by unsupported and misleading arguments

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\* Claimants in these proceedings are indicated in bold in this Counter-Memorial. One of the Claimants, **The Carlyle Group L.P.**, completed its conversion from a Delaware limited partnership to a Delaware corporation named The Carlyle Group Inc., effective January 1, 2020. *See* The Carlyle Group Inc. Form 8-K, dated 31 December 2019, p 2 (C-0048-ENG). **The Carlyle Group L.P.** and The Carlyle Group Inc. are the same entity under Delaware law. Therefore, all references herein to “**The Carlyle Group L.P.**” are to the entity known as The Carlyle Group Inc. for periods on or after January 1, 2020.

concerning the legal requirements for establishing standing. Respondent's forced readings of various terms in the FTA and the ICSID Convention, such as "investor," "control," and "concretely," among others, are deeply flawed. As demonstrated below and in the accompanying opinion of Christoph Schreuer, it is indisputably Respondent's burden to prove the facts upon which its objections to jurisdiction are based, not vice-versa. Similarly, Respondent's assertions concerning the elements necessary to be considered an investor under the law are full of errors and misleading statements. Thus, for example, although Claimants easily satisfy each element of the so-called *Salini* test invoked by Respondent to establish standing (i.e., contribution, duration, and risk), there is no requirement, particularly under the FTA, that all elements of such "test" be met. Nor is it relevant under the FTA what the origin of the contribution is or what the nature of the particular risk is. Respondent's statements to the contrary are simply not supportable under the FTA, the ICSID Convention, or pertinent investment case law. And, as to duration, though not a requirement under the Treaty at all, Claimants clearly satisfy this factor anyway.

5. Similarly, as to Respondent's Objections Nos. 2, 3, and 4, which reiterate Respondent's fundamentally flawed positions on ownership and control, Respondent also resorts to misstatements of law and obfuscation. Although Respondent argues that the investments at issue were devoid of *any* ownership or control by *any* of the Claimants, nothing could be further from the truth. For example, it is indisputable that the **U.S. Onshore Feeder**, among other Claimants, has an ownership interest in the investments at issue. Moreover, a plain reading of the FTA and relevant case law shows that Claimants also clearly have the control necessary to satisfy the requirements for standing.
6. Respondent's assertion that Claimants' investments are jurisdictionally deficient because they are not located "in the territory of Morocco" is also legally off the mark. It is uncontested that the commodities at issue were located physically in Morocco, and according to the FTA and the vast majority of investment case law, financial instruments, such as Claimants' put options, are not even required to be located physically in the territory of the host State.
7. Respondent's Objection No. 4 that jurisdiction is lacking because Claimants did not make or attempt to make an "active" investment in Morocco in a "concrete" manner is also an exercise in legal invention. There is simply no requirement in the FTA or in the case law that an investment be either "active" or "concretely made" in the manner described and insisted on by Respondent. Nor does Respondent provide adequate support for its position to the contrary, preferring instead to speculate with regard to what it believes was intended rather than focus on the actual language of the FTA. Indeed, in these circumstances, to impose such a fictitious requirement on this case would not only be inappropriate but would also set a dangerous precedent for future investment cases.
8. In short, none of Respondent's jurisdictional arguments is worthy of serious consideration, much less of being sustained. Rather, they represent Respondent's misguided aspiration that hope should somehow triumph over law and experience. That cannot and should not happen in this case. All jurisdictional issues in this case must be decided in accordance with both the language of the applicable documents and the FTA

and consistent with the relevant case law. Respondent’s objections fail to do this and must be rejected. Notwithstanding Respondent’s attempt to complicate and confuse the issues, the Tribunal unquestionably has jurisdiction over this proceeding.

## II. Statement of Facts

### A. History and Overview of Claimants’ Investments

9. As explained in Claimants’ prior submissions, between February and August 2015, Claimants<sup>1</sup> and SAMIR entered into twenty-six transactions (collectively, the “Transactions” or “Investments”)—sixteen of which remain open and unpaid. These sixteen transactions involved, among other things, the storage of crude oil and refined products (the “Commodities”) in tanks at SAMIR’s refinery in Morocco, pursuant to which Claimants acquired over 900,000 metric ton equivalents of Commodities in the aggregate.<sup>2</sup> This arbitration concerns Claimants’ loss of those Commodities and the proceeds thereof, contributing to a net loss of over US\$390 million (without interest), due to Morocco’s improper actions beginning in August 2015.<sup>3</sup>
10. Also, as Claimants repeatedly have stated from the beginning,<sup>4</sup> *every aspect of the Investments was controlled at all times by Claimant **Carlyle Commodity Management L.L.C.** (“CCM”) from its offices in New York City in the United States.*<sup>5</sup> CCM, formerly known as Vermillion Asset Management, LLC (“VAM”), operated within the Global Market Strategies business unit of Claimant **The Carlyle Group, L.P.** (“The

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<sup>1</sup> Pursuant to Claimants’ accompanying submission to ICSID, Carlyle Investment Management L.L.C. (“CIM”) is withdrawing as a claimant. Accordingly, Claimants will not be responding to Respondent’s Objection No. 5, which, as Respondent expressly admits, was untimely filed. *See* Jurisdictional Memorial, paras 15.6, 201. Although Claimants maintain that CIM is a proper party, CIM was named as a claimant for the sake of inclusiveness, and is not a necessary party. Its withdrawal is being done in the interests of streamlining these jurisdictional proceedings, avoiding unnecessary contentiousness, and simplifying the issues before the Tribunal.

<sup>2</sup> Expert Report of Richard E. Walck (“Walck Report”), para 6.

<sup>3</sup> *See id.*, para 82.

<sup>4</sup> *See, e.g.*, Request for Arbitration, para 11 (“At all relevant times, CCM acted as the exclusive investment adviser to Celadon Commodities, Ltd., **Celadon Commodities Fund LP**, and VMF, and thus exercised control over the investment and other business decisions made by these entities.”); Claimants’ Memorial, para 11 (“At all relevant times, CCM acted as the exclusive investment adviser to Celadon Commodities, Ltd., **Celadon Commodities Fund, LP**, and VMF, and thus exercised control over the investments and other business decisions made by these entities.”); Claimants’ Observations on Respondent’s Application for Bifurcation, para 69.i. (“CCM . . . served as the *sole* investment advisor to the Celadon and Notes Entities, including VMF Q1. In its capacity as advisor, CCM *fully* controlled the investment decisions of the Celadon and Notes Entities by, *inter alia*, determining the specific collateral to be purchased, managing payments, engaging in hedging transactions, and exercising all of the Entities’ rights of ownership with respect to the Commodities.” (italics in original)).

<sup>5</sup> Witness Statement of Christopher Zuech, dated 19 June 2020 (“2020 Zuech Statement”), para 4; *see also* Witness Statement of David Johnson, dated 19 June 2020 (“Johnson Statement”), para 4.

**Carlyle Group**”),<sup>6</sup> and traded the Commodities, engaged in hedging transactions, arranged for the transportation and storage of the Commodities, and signed all necessary documents on behalf of investment vehicles that were set up by **CCM** to facilitate the Investments.<sup>7</sup> One of the investment vehicles utilized by **CCM** was **Celadon Commodities Fund, LP** (i.e., the **U.S. Onshore Feeder**). As described in more detail herein, the **U.S. Onshore Feeder** directly contributed capital used to make the Investments and had a significant ownership interest in the Commodities stored at SAMIR.

11. The Investments were governed by various documents, including a Master Commodity Transaction Agreement (“MCTA”), a Commodities Storage Agreement (“CSA”), a \$600M MCTA Term Commitment Letter (“Commitment Letter”), a Summary of Terms and Conditions for Crude Oil Purchase and Sale Transaction(s) (“Terms and Conditions”), and deal-specific transaction confirmations (“Confirmations”) (collectively, the “Investment Agreements”).<sup>8</sup> **CCM** personnel signed all of the Investment Agreements on behalf of the investment vehicles that **CCM** used for the Investments.<sup>9</sup>
12. **CCM** first identified SAMIR as a potential counterparty in October 2014.<sup>10</sup> Prior to entering into the arrangement, **CCM** employees conducted diligence of SAMIR and thoroughly investigated the business climate in Morocco—including consulting with Moroccan counsel—before agreeing to enter into the Investments.<sup>11</sup> Entering into the Investments was subject to the approval of certain employees of **CCM** and certain employees of Claimant **The Carlyle Group**.<sup>12</sup> Based on the due diligence, the Investments were approved in December 2014.<sup>13</sup>
13. Prior to the first Transaction, the Foreign Exchange Office, a branch of the Kingdom of Morocco’s Ministry of Finance, granted its express approval of SAMIR’s entry into the Investments. In the letter affirming its approval, the Foreign Exchange Office

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<sup>6</sup> 2020 Zuech Statement, para 3; *see also* Witness Statement of Michael J. Petrick, 31 July 2019 (“Petrick Statement”), para 3.

<sup>7</sup> 2020 Zuech Statement, para 4; *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).

<sup>8</sup> *See* Amended and Restated Master Commodity Transaction Agreement, 22 June 2015 (MO-0003), Amended and Restated Commodities Storage Agreement, 22 June 2015 (MO-0004), \$600M MCTA Term Commitment Letter, 22 June 2015 (MO-0005), Summary of Terms and Conditions for Crude Oil Purchase and Sale Transaction(s) (MO-0006), and deal-specific transaction confirmations (*see, e.g.* SAMIR-1007 Confirmation (MO-0007)).

<sup>9</sup> *See id.*; 2020 Zuech Statement, para 4.

<sup>10</sup> Witness Statement of Matthew Olivo, dated 31 July 2019 (“Olivo Statement”), para 6.

<sup>11</sup> *Id.*; 2020 Zuech Statement, para 6.

<sup>12</sup> *See* 2020 Zuech Statement, para 6.

<sup>13</sup> *Id.*; Olivo Statement, para 7.

specifically acknowledged SAMIR's intention "to enter into an agreement with the US company Vermill[i]on Asset Management – VAM" (now known as **CCM**), and noted that, pursuant to the arrangement, "the SAMIR company must transfer ownership of the imported crude oil shipments . . . to VAM."<sup>14</sup> In addition to obtaining this general approval of the overall arrangement with **CCM**, SAMIR sought and obtained the Moroccan Foreign Exchange Office's endorsement prior to entering into each individual Transaction.<sup>15</sup>

14. **CCM** and SAMIR both operated under the assumption that the Investments would be part of a long-term relationship spanning a number of years. SAMIR confirmed this understanding in the Commitment Letter, signed by SAMIR on June 22, 2015, and addressed to **CCM**.<sup>16</sup> In the Commitment Letter, SAMIR affirmed that the Investments would continue until "at least" 2018.<sup>17</sup> It was critical to **CCM** that the Commitment Letter confirm SAMIR's long-term level of commitment, so that **CCM** could secure capital to issue long-term debt instruments.<sup>18</sup> Moreover, even after the Moroccan Government froze SAMIR's accounts in August 2015, SAMIR representatives reaffirmed their commitment to the Investments by repeatedly assuring **CCM** that they were working towards a resolution with the Government, and that business between the parties would resume once those negotiations were concluded.<sup>19</sup>
15. Over a period of six months beginning in February 2015, **CCM** committed over US\$390 million to the Investments via letters of credit. **CCM** raised this capital through two separate structures of investment vehicles: (1) the Celadon Entities and (2) the Notes Entities.
  - (a) The Celadon Entities, as further detailed in paragraphs 20-23 below, are investment vehicles set up to generate returns on investments made by **CCM** clients.<sup>20</sup> The Celadon Entities are comprised of four entities: two feeder funds, (i) Claimant **Celadon Commodities Fund, LP** (i.e., the **U.S. Onshore Feeder**) and (ii) Celadon Commodities Fund, Ltd. (the "Offshore Feeder"), which contribute capital to the (iii) "Master Fund," Celadon Commodities, Ltd. The Master Fund in turn utilizes (iv) VMF Special Purpose Vehicle SPC – Q1 Segregated Portfolio ("VMF Q1") to hold investments.

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<sup>14</sup> Morocco Customs and Exchange Office Letter (16 Jan 2015) (MO-0002).

<sup>15</sup> Claimants' Memorial, paras 37-38; *see also* Olivo Statement, para 10; [REDACTED]

<sup>16</sup> *See* 2020 Zuech Statement, para 13; Commitment Letter (MO-0005).

<sup>17</sup> Commitment Letter (MO-0005).

<sup>18</sup> *See* 2020 Zuech Statement, para 13.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*, para 15.



- (b) The Notes Entities consist of two issuers of debt instruments (“Notes”): Carlyle Global Market Strategies Commodities Funding 2014-1, Ltd. (“2014-1”), and Carlyle Global Market Strategies Commodities Funding 2015-1, Ltd. (“2015-1”).<sup>21</sup>

16. **CCM** first set up the Celadon Entities to raise capital by selling limited partnership interests in the **U.S. Onshore Feeder**,<sup>22</sup> and later set up the Notes Entities to raise additional funds by selling Notes secured by the Commodities.<sup>23</sup> Each of the Celadon Entities and Notes Entities signed investment management agreements with **CCM** that gave **CCM** complete control of all day-to-day investment decisions.<sup>24</sup> **CCM** used the capital raised by both the **U.S. Onshore Feeder** and the Notes Entities to purchase the Commodities.

B. The Mechanics of Claimants’ Transactions with SAMIR

17. For each Transaction with SAMIR, a **CCM** employee, on behalf of the investment vehicle VMF Q1, signed a transaction confirmation that specified a purchase date on which **CCM** would commit capital by posting an irrevocable letter of credit in favor of a Commodities supplier.<sup>25</sup> After the bank chosen by **CCM** issued the letter of credit, the Commodities supplier drew down on the letter of credit and delivered the Commodities to the SAMIR refinery in Morocco.<sup>26</sup> Title to the Commodities passed from the supplier, through SAMIR, to VMF Q1.<sup>27</sup> The Investment Agreements confirmed that the Investments were “true sales” of the Commodities, involving the “absolute transfer of the entire legal and beneficial interest.”<sup>28</sup> The Investment Agreements,<sup>29</sup> the Forbearance Agreement,<sup>30</sup> and various other warehouse certificates and pledge agreements signed by

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<sup>21</sup> **CCM** also intended next to release a 2016-1 series of Notes and to continue issuing yearly Notes supported by the Commodities stored at SAMIR. However, the 2016-1 Notes were never issued due in large part to the Moroccan Government’s actions. *Id.*, n 4.

<sup>22</sup> *Id.*, para 15.

<sup>23</sup> *Id.*, para 18.

<sup>24</sup> *See id.*, paras 4, 15-16, 19.

<sup>25</sup> *Id.*, para 8; Olivo Statement, para 12; *see also, e.g.*, SAMIR-1001 Confirmation (C-0018-ENG); Letters of Credit (C-0045-ENG).

<sup>26</sup> 2020 Zuech Statement, para 8; Olivo Statement, para 12.

<sup>27</sup> 2020 Zuech Statement, para 8; Olivo Statement, para 12; *see also* MCTA (MO-0003) § 3(d) §; CSA § 3(a) (MO-0004).

<sup>28</sup> 2020 Zuech Witness Statement, para 10; MCTA §§ 3(g), 16(d) (MO-0003).

<sup>29</sup> *See* CSA § 3(a) (MO-0004) (“The Custodian acknowledges that VM Party has full exclusive title . . . of the Commodities”).

<sup>30</sup> Forbearance Agreement (MP-0013). Following the wrongful disposal of Commodities from SAMIR’s tanks, Carlyle representatives negotiated a Forbearance Agreement with SAMIR to ensure full payment for the Commodities. *See* Witness Statement of Christopher Zuech, dated 31 July 2019 (“2019 Zuech

SAMIR all confirmed that the Commodities stored in SAMIR's tanks belonged to CCM's investment vehicles.<sup>31</sup>

18. Claimants had a put option, but not an obligation, to resell the Commodities to SAMIR at a fixed price plus a premium at a later date within an "Exercise Period" specified in the confirmation (the "Put Right").<sup>32</sup> After SAMIR received notice that the Put Right was being exercised, SAMIR signed a closeout confirmation and paid the strike price of the Put Right.<sup>33</sup> When SAMIR paid, title to the Commodities passed from VMF Q1 to SAMIR.<sup>34</sup>
19. Given this structure, the Investments utilized options contracts, not repurchasing (or so-called repo) contracts.<sup>35</sup> In a typical "repo" transaction, the counterparty has an

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Statement"), para 25. Under the terms of the Forbearance Agreement, signed on October 1, 2015, Carlyle agreed to refrain from taking immediate legal action against SAMIR, and, in exchange, SAMIR agreed to make a series of payments to Carlyle. In the Forbearance Agreement, SAMIR affirmed that the Commodities were "the property of Carlyle" and that SAMIR "does not have any ownership or property right, title or interest in or to Commodities." See Forbearance Agreement (MP-0013). [REDACTED]

<sup>31</sup> See, e.g., Pledge Over Commodities, 2014-1 (C-0049-ENG); Pledge Over Commodities, 2015-1 (C-0049-ENG); 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).

<sup>32</sup> 2020 Zuech Statement, para 10; Olivo Statement, para 14; see also SAMIR-1007 Provisional Transaction Confirmation (MO-0007).

<sup>33</sup> 2020 Zuech Witness Statement, para 11; SAMIR-1007 Closeout Confirmation (MO-0008). The strike price of the Put Right (i.e., the price at which the put could be exercised) was derived from several elements, including the purchase price of the Commodities in the individual transaction confirmation, a transaction premium, and the time from Claimants' original purchase to the exercise of its Put Right. See Walck Report, para 12; Terms and Conditions (RW-0056).

<sup>34</sup> 2020 Zuech Statement, para 11; Olivo Statement, para 15; see also CSA §§ 3(a), 7(a)(iv) (MO-0004); MCTA § 3(e) (MO-0003).

<sup>35</sup> See Standard & Poor's Presale Report, p 5 (RE-0002) ("All of the commodity purchase agreements include a provision granting the issuer the right to sell the commodity back to the original seller (a 'purchase put right') to facilitate the loan's repayment. The issuer can exercise its purchaser put rights at any time during the loan's tenor (e.g. the last date when the issuer can exercise the purchaser put right is the last day of the loan). Under the purchase agreements, the seller also has the right to request that the issuer sell the commodity back to them, which the issuer may reject. If the issuer rejects the request, it must pay the seller its original purchase haircut, plus a premium."). As noted by Claimants' expert, Rory Walck, although the Standard & Poor's document incorrectly refers to the transactions as "loans," it "went to considerable length to describe the many ways in which the Carlyle-SAMIR transactions were not, in fact, loans, including acknowledging that the transaction involved the purchase of commodities by Carlyle; that the transaction included a put right; that Carlyle was not obligated to resell the commodities to SAMIR; and that in the event SAMIR tendered payment and requested delivery of the commodities, Carlyle could reject SAMIR's request." Second Expert Report of Richard E. Walck, 15 June 2020

obligation to repurchase the securities.<sup>36</sup> By contrast, under the Investment Agreements with SAMIR, CCM had the right (i.e., the Put Right) to sell the Commodities to SAMIR—but *not an obligation* to do so.<sup>37</sup>

C. Claimants' Corporate Structure as of August 2015

i. *Claimants Owned and/or Controlled VMF Q1 and the Other Celadon Entities*

20. As noted above, CCM first raised capital for the Investments using the Celadon Entities, a fund structure comprising the **U.S. Onshore Feeder**, the Offshore Feeder, the Master Fund, and VMF Q1. Specifically, prior to August 2015, a CCM client, the U.S. state of Maryland's pension fund ("Maryland"), purchased limited partnership shares in the **U.S. Onshore Feeder**, a Delaware Limited Partnership.<sup>38</sup> Holding the limited partnership interests did not give rise to "control over the business or operation of the [**U.S. Onshore Feeder**] or any power to bind the [**U.S. Onshore Feeder**]." <sup>39</sup> Rather, the **U.S. Onshore Feeder's** general partner,<sup>40</sup> Claimant **Celadon Partners, LLC** ("**Celadon Partners**"), and the investment manager, CCM, were vested with "full and exclusive authority to

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("Second Walck Report"), para 15 n16. As Mr. Walck concludes, Claimants' "structured commodity transactions, from a financial and accounting perspective, are clearly complex hedged commodity and derivatives transactions, not simple repurchase agreements." *Id.*, para 18.

<sup>36</sup> See 2020 Zuech Statement, para 10; Association of International Certified Professional Accountants (AICPA), *Audit and Accounting Guide: Investment Companies* § 3.08 (2019) ("Because a repo between the two specific parties involved is not transferable, a repo has no ready market.") (RW-0071).

<sup>37</sup> See MCTA § 3(e) (MO-0003); see also Walck Report, para 11.

<sup>38</sup> 2020 Zuech Statement, para 15; see also U.S. Onshore Feeder Investor Register (08/01/2015 – 08/31/2015) (C-0051-ENG). As of August 2015, Maryland held 99.97% of the limited partnership interests in the **U.S. Onshore Feeder**, and Claimants **TC Group, L.L.C.** and **TC Group Investment Holdings, L.P.** held the remaining nominal interest. *Id.* In 2016, prior to the filing of this arbitration, Maryland redeemed its interests in the **U.S. Onshore Feeder**, leaving **TC Group, L.L.C.** and **TC Group Investment Holdings, L.P.** with control of 100% of the limited partnership interests in the **U.S. Onshore Feeder**, as noted in Claimants' Observations. Claimants' Observations, para 69.v n 78.

<sup>39</sup> U.S. Onshore Feeder LP Agreement § 2.02 (CZ-0034).

<sup>40</sup> **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**. U.S. Onshore Feeder LP Agreement § 2.02 (CZ-0034). In accordance with its Partnership Agreement, **Celadon Partners** appointed CCM to control and manage the **U.S. Onshore Feeder's** investments. U.S. Onshore Feeder Investment Management Agreement § 5 (CZ-0035).

manage and control the [**U.S. Onshore Feeder's**] business and investments, including to pursue [its] investment objectives.”<sup>41</sup>

21. Pursuant to such authority, **CCM** used the funds raised by the **U.S. Onshore Feeder** to purchase some of the Commodities<sup>42</sup> through VMF Q1, a segregated portfolio created by **CCM**.<sup>43</sup> The **U.S. Onshore Feeder** invested all of its capital in the **CCM**-managed Master Fund<sup>44</sup> and thereby owned 99.96% of the Master Fund's participating shares.<sup>45</sup> (The remaining 0.04% was held by the Offshore Feeder,<sup>46</sup> a Cayman entity actively managed and controlled by **CCM**<sup>47</sup> and wholly owned by Claimants **TC Group, LLC** (“**TC Group**”) and **TC Group Investment Holdings, LP** (“**TC Group Investment**”).

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<sup>41</sup> 2020 Zuech Statement, para 15; U.S. Onshore Offering Memorandum p 16 (CZ-0037); 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.”).

<sup>42</sup> See *infra* para 27 for a discussion on the source of funding for each Commodities purchase. The express purpose of the Celadon Entities was to channel funds from the **U.S. Onshore Feeder** through the Master Fund to be used by **CCM** for commodities investments that would generate returns for the **U.S. Onshore Feeder's** investors. Master Fund Board Resolutions, dated 7 November 2007, para 8 (C-0052-ENG) (“It is proposed therefore that both the Offshore Feeder, the **Onshore Feeder** and such other funds and accounts shall trade through the [Master Fund]”).

<sup>43</sup> See 2020 Zuech Statement, para 16.

<sup>44</sup> *Id.* (“The **US Onshore Feeder** invested substantially all of its assets in participating shares of [the Master Fund]”); U.S. Onshore Feeder LP Agreement, p 3 (CZ-0034); U.S. Onshore Feeder Offering Memorandum, p 2 (CZ-0037). Like the **U.S. Onshore Feeder**, the Master Fund was created by **CCM**, and the Master Fund's nominal directors signed an investment management agreement granting **CCM** “complete discretion in the investment and reinvestment” of the Master Fund's accounts, including the authority to “purchase and/or sell commodities.” Master Fund/Offshore Feeder Investment Management Agreement § 5(a) (CZ-0041). The Master Fund had two directors, chosen by **CCM's** attorneys to serve nominal roles. 2020 Zuech Statement, n 8. In fact, by resolution of the Master Fund board of directors, Chris Zuech, Chief Operating Officer of **CCM**, was authorized “to sign for and on behalf of the [Master Fund]” in his “absolute discretion.” Master Fund Board Resolutions, dated 29 November 2007, para 11 (C-0052-ENG).

<sup>45</sup> See 2014 Celadon Commodities Fund, LP Audited Financial Statement § 1 (CZ-0036) (“The percentage of the Master Fund owned by the [**U.S. Onshore Feeder**] at December 31, 2014, was 99.96%”); see also 2015 Celadon Commodities Fund, LP Audited Financial Statement §1 (C- 0032-ENG); Master Fund Investor Register (1 August 2015 – 31 August 2015) (CZ-0038).

<sup>46</sup> See 2014 Celadon Commodities Fund, Ltd. Audited Financial Statement § 1 (CZ-0042) (“The percentage of the Master Fund owned by the [Offshore Feeder] at December 31, 2014, was 0.04%”); see also 2015 Celadon Commodities Fund, Ltd. Audited Financial Statement §1 (C-0033-ENG); Master Fund Investor Register (1 August 2015 – 31 August 2015) (CZ-0038).

<sup>47</sup> See Offshore Feeder/Master Fund Investment Management Agreement, p 1 (CZ-0041)

**Holdings**)<sup>48</sup>) In turn, the Master Fund owned 100% of the participating shares in VMF Q1.<sup>49</sup>

22. The participating shares of the Master Fund entitled the **U.S. Onshore Feeder** to vote, 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.<sup>50</sup> 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.<sup>51</sup>
23. **CCM** personnel signed the MCTA and the Confirmations with SAMIR on behalf of VMF Q1, so that after **CCM** committed capital to an Investment, title to the Commodities transferred to VMF Q1.<sup>52</sup> Also, since VMF Q1 faced SAMIR in the Confirmations, SAMIR directed all payments related to the Investments to VMF Q1's bank account.<sup>53</sup> Like the other Celadon Entities, VMF Q1 had no employees, and VMF Q1's nominal directors signed an investment management agreement authorizing **CCM** to "exercise all rights, powers, privileges and other incidents of ownership or possession" with respect to the assets nominally held by VMF Q1.<sup>54</sup>

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<sup>48</sup> Offshore Feeder Investor Register (08/01/2015-08/31/2015) (CZ-0039). There have been no outside investors in the Offshore Feeder since the time of the SAMIR transactions and through the present date; only **Claimants TC Group (Delaware) and TC Group Investment Holdings (Delaware)** hold interests in the Offshore Feeder.

<sup>49</sup> 2014 Master Fund Financial Statement (CZ-0044) § 8 ("As of December 31, 2014, the Fund owns 100% of the participating shares on [VMF Q1]"); *see also* VMF Q1 Investor Register (8/01/2015-8/31/2015) (C-0053-ENG).

<sup>50</sup> Master Fund Certificate of Association § 19.2 (CZ-0043) ("a Participating Share shall confer upon the holder thereof the right to participate in the surplus assets of the Company. . ."). The Master Fund Directors signed a resolution authorizing the issuance of the participating shares on 29 November 2007, according to terms set forth in the Offering Memorandum for the Offshore Feeder. Master Fund, Board Resolutions, dated 29 November, 2007 (C-0052-ENG) ("the form and terms of the [Offshore Feeder] Offering Memorandum be and the same hereby are approved"). The Offshore Feeder Offering Memorandum in term specifies that participating shares are redeemable against the net asset value of the fund issuing the shares ("a Shareholder has the right to require the redemption of any or all of its Shares of the Fund for an amount equal to the Series Net Asset Value per Share"). Offshore Feeder Offering Memorandum, p 4 (CZ-0040).

<sup>51</sup> VMF Special Purpose Vehicle SPC Articles of Association § 4.2 (CZ-0045); VMF Q1 Board Resolutions, dated 8 November 2011, p 1 (CZ-0046) (issuing participating shares).

<sup>52</sup> 2020 Zuech Statement, para 17.

<sup>53</sup> *See* 2020 Zuech Statement, para 22; Email from O. Cherkaoui (4 August 2015) (MO-0017).

<sup>54</sup> VMF Q1 Investment Management Agreement § 2(b) (CZ-0047).

ii. *Claimants Owned and/or Controlled the Notes Entities*

24. To secure investment capital in addition to the funds raised via the **U.S. Onshore Feeder, CCM** formed 2014-1 and 2015-1, the Notes Entities.<sup>55</sup> Like the Celadon Entities, the Notes Entities had no employees, and the nominal directors, selected by **CCM's** attorneys, had no role in the Investments.<sup>56</sup> Each Notes Entity issued debt instruments (“Notes”) which authorized **CCM**, as portfolio manager, to purchase Commodities with funds raised by the Notes.<sup>57</sup> The holders of the Notes have the right to receive interest payments and recover the principal value of the Notes.<sup>58</sup>
25. [REDACTED] Moreover, even prior to and during the time of the Transactions, Carlyle CLO Coinvestors, L.P. (“CLO LP”), a Delaware entity indirectly controlled by Claimant **TC Group**,<sup>60</sup> owned a portion of the subordinated equity tranches of the Notes issued by 2014-1 and 2015-1.<sup>61</sup> Further, at all times, **CCM** had the duty to “procure any action” to protect the Investments.<sup>62</sup>
26. As noted above, **CCM** used funds from the Notes Entities, along with funds from the Celadon Entities, to purchase the Commodities.<sup>63</sup> **CCM** added 2014-1 as a party to the

<sup>55</sup> 2020 Zuech Statement, para 18.

<sup>56</sup> *Id.*, para 19; *See* 2014-1 Articles of Association, p 25 (CZ-0048) & 2015-1 Articles of Association, p 20 (CZ-0049).

<sup>57</sup> 2020 Zuech Statement, paras 18-20; *see* 2014-1 Indenture § 3.2 (CZ-0050); 2015-1 Indenture § 3.2 (CZ-0051).

<sup>58</sup> 2014-1 Indenture § 7.1 (CZ-0050); 2015-1 Indenture § 7.1 (CZ-0051). As of August 2015, the vast majority of the holders of the Notes were U.S. investors. Johnson Statement, para 5.

<sup>59</sup> [REDACTED]

<sup>60</sup> Carlyle CLO GP, L.L.C. (“CLO GP”), also a Delaware entity, is the General Partner of CLO LP and, as General Partner, has the power to “own . . . any assets” of CLO LP, “collect all sums due to [CLO LP], including the assertion by all advisable means of [CLO LP’s] right to payment[,]” and “hold legal title to all real and personal property” of CLO LP. Carlyle CLO Coinvestors, L.P. Partnership Agreement §§ 4.2(c), (e), (q) (C-0054-ENG).

<sup>61</sup> *See* Carlyle CLO Coinvestors, L.P. Subscription Agreement for 2014-1 Subordinated Notes (C-0055-ENG); Carlyle CLO Coinvestors, L.P. Subscription Agreement for 2015-1 Subordinated Notes (C-0056-ENG).

<sup>62</sup> 2020 Zuech Statement, para 19; 2014-1 Indenture § 7.5(a) (CZ-0050); 2015-1 Indenture § 7.5(a) (CZ-0051)

<sup>63</sup> 2020 Zuech Witness Statement, para 20.

MCTA via a separate joinder agreement dated January 16, 2015,<sup>64</sup> and added 2015-1 as a party to the MCTA via a separate joinder agreement dated June 30, 2015.<sup>65</sup> CCM personnel applied on behalf of 2014-1 for the letters of credit used to purchase the Commodities, and CCM used a 2014-1 bank account to wire funds for the letters of credit.<sup>66</sup> CCM also signed the Commodities Storage Agreement on behalf of 2014-1.<sup>67</sup>

iii. *CCM Allocated Title to the Commodities between VMF Q1, 2014-1 and 2015-1*

27. CCM transferred funds from VMF Q1 and 2015-1 to a bank account in 2014-1's name and used the funds to purchase the Commodities.<sup>68</sup> Thirteen out of the sixteen Investments at issue in this arbitration were funded by letters of credit.<sup>69</sup> Annex A lists the thirteen Transactions funded by letters of credit along with the entity that provided the initial funding. The remaining three Investments were crude for product swaps, in which CCM traded crude oil for refined products stored in SAMIR's tanks.<sup>70</sup>
28. As noted above, once the supplier delivered the Commodities to SAMIR and drew on the letter of credit, title to the Commodities initially passed to VMF Q1.<sup>71</sup> Under the Investment Agreements, CCM had the option to transfer title to the Commodities from VMF Q1 to 2014-1 and 2015-1 through "Sleeve Transactions," in order to provide collateral to support the Notes.<sup>72</sup> CCM documented the Sleeve Transactions with internal confirmations.<sup>73</sup> As a result of the Sleeve Transactions, VMF Q1, 2014-1 and 2015-1 each held title to Commodities that were expropriated by the Government of Morocco.<sup>74</sup>

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<sup>64</sup> August 10, 2018 Letter from Claimants to ICSID attaching Exhibits C-4 – C-8, p 41 of 121 (C-0015-ENG) (Exhibit C-5 containing, *inter alia*, the executed joinder agreement, dated January 16, 2015, making Carlyle Global Marketing Strategies Commodities Funding 2014-1, Ltd. a "VM Party" for purposes of the Master Commodity Transaction Agreement (C-0015-ENG p 41 of 121); and (iv) the executed joinder agreement, dated June 30, 2015, making Carlyle Global Marketing Strategies Commodities Funding 2015-1, Ltd. a "VM Party" for purposes of the Master Commodity Transaction Agreement (C-0015-ENG p 48 of 121)).

<sup>65</sup> *Id.*, p 48 of 121 (C-0015-ENG).

<sup>66</sup> *Id.*; *see also* Letter of Credit Applications (C-0045-ENG).

<sup>67</sup> 2020 Zuech Statement, para 21

<sup>68</sup> *Id.*

<sup>69</sup> *See* Walck Report, para 32.

<sup>70</sup> *See id.*, para. 23.

<sup>71</sup> 2020 Zuech Statement, para 22.

<sup>72</sup> *See id.*

<sup>73</sup> *Id.*; Sleeve Transaction Documentation (C-0057-ENG).

<sup>74</sup> 2020 Zuech Statement, para 23.

iv. *The Upper Carlyle Entities Owned and/or Controlled the Other Claimants*

29. Claimant **TC Group** controlled at least 83% of the economic interest of **CCM** and **Celadon Partners**, which has the same owners as **CCM**, at all relevant times (including as of August 2015).<sup>75</sup> Since January 1, 2018, **TC Group** has controlled 100% of the economic interest in **CCM** and **Celadon Partners**.<sup>76</sup> Together with Claimant **TC Group Investment Holdings**, **TC Group** controls 100% of the Offshore Feeder.<sup>77</sup>
30. Claimant **The Carlyle Group** serves as the ultimate parent to all of the other Claimants,<sup>78</sup> giving it control over the other Claimants and their Investments. Claimant

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<sup>75</sup> See 2015 The Carlyle Group, LP 10-K, p 86 (C-0058-ENG) (“Effective July 1, 2015, . . . [TC Group’s] economic interest [in CCM] increased to approximately 83%.”); see also 2020 Zuech Statement, para 15, n 6.

<sup>76</sup> As noted in Claimants’ Observations, “Beginning in July 2015 in connection with the departure of certain [CCM] principals and the restructuring of its operations, our economic interests were increased in stages to currently 88%” as of year-end 2017. Claimants’ Observations, para 69.v., n 76. The 88% figure accounts for two former Carlyle employees who each once held a 6.25% stake in **CCM**, but whose interest in the company was “redeemed and cancelled, as of January 1, 2018, leaving **TC Group, LLC** as the sole holder of all beneficial ownership of **CCM** as of the time of the commencement of this arbitration.” *Id.*

<sup>77</sup> See Offshore Feeder Investor Register (08/01/2015-08/31/2015) (CZ-0039).

<sup>78</sup> See Exhibit C-2 to RFA, p3 (C-0016-ENG); see also C-0059-ENG. Exhibit C-0059-ENG reflects Carlyle’s corporate structure at all times relevant to this dispute. Exhibit CZ-0039 is taken directly from **The Carlyle Group’s** publicly-filed Form S-1, which was filed on September 6, 2011, and remains effective notwithstanding the conversion from **The Carlyle Group L.P.** to The Carlyle Group Inc. on January 1, 2020. See The Carlyle Group L.P., Form S-1, p 3 (C-0044-ENG); The Carlyle Group Inc. Form 8-K, dated 31 December 2019, 2 (C-0048-ENG). As noted earlier, **The Carlyle Group L.P.** and The Carlyle Group Inc. are the same entity under Delaware law. *Id.* As shown in Exhibit C-0059-ENG, and as more fully described on p 80 of The Carlyle Group’s Form S-1, Carlyle Holdings I GP Inc. and Carlyle Holdings II GP L.L.C. are wholly-owned subsidiaries of **The Carlyle Group L.P.** The Carlyle Group L.P., Form S-1, p 80 (C-0044-ENG); C-0059-ENG. In the S-1, Carlyle Holdings I GP Inc., is shown as general partner for Carlyle Holdings I L.P., and Carlyle Holdings II GP L.L.C., in turn, is shown as general partner for Carlyle Holdings II L.P. The Carlyle Group L.P., Form S-1, p 80 (C-0044-ENG). Carlyle Holdings I L.P. and Carlyle Holdings II L.P. (together, “Carlyle Holdings”) are described in the S-1 as each issuing partnership units equal to the number of common units that **The Carlyle Group L.P.** issued. *Id.* The S-1 also describes **The Carlyle Group L.P.** as benefitting from the income of Carlyle Holdings and Carlyle Holdings I, LP as holding 100% of the LLC shares and as the sole member of **TC Group**. *Id.* The S-1 also shows Carlyle Holdings II, L.P. as the general partner of **TC Group Investment Holdings**. *Id.* For the avoidance of doubt, the following entities shown sitting under **The Carlyle Group L.P.** in the S-1 are not involved in the Investments at issue in this arbitration: Carlyle Holdings III GP L.P., Carlyle Holdings III L.P., TC Group Cayman, L.P., and TC Group Cayman Investment Holdings L.P.

Following the conversion on January 1, 2020, Carlyle Holdings II L.P. transferred all of its assets to Carlyle Holdings II L.L.C. The Carlyle Group Inc. Form 8-K, dated 31 December 2019, 2 (C-0048-ENG). Furthermore, following the conversion, CG Subsidiary Holdings LLC, which is wholly owned by



**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.<sup>79</sup>

v. *Respondent's Diagrams of Claimants' Corporate Structure and Investments are Incomplete and Misleading*

31. It should be clear from the above explanation of Claimants' corporate structure and the structure of Claimants' Investments that Annexes A and B to Respondent's Jurisdictional Memorial contain incomplete and misleading renderings of the actual facts. Among other errors in Respondent's Annex A, which purports to provide a "simplified" corporate structure chart:

- (a) Respondent depicts the "Financing Structure" as including only 2014-1. This is completely erroneous (an error that infects Respondent's entire presentation) for two main reasons: (1) the depiction of the purported "Financing Structure" is wrong to the extent it suggests that only the Notes issuers (specifically, only 2014-1) provided funding for the Investments when, in fact, the **U.S. Onshore Feeder** (through VMF Q1) also provided funding for the Investments<sup>80</sup>; and (2) Respondent omits the fact that **CCM** used *both* 2014-1 and 2015-1 to issue Notes and thereby raise funds for the Investments.<sup>81</sup>
- (b) Respondent mischaracterizes the 2014-1 noteholders as "third party foreign investors" when in reality, the vast majority were U.S. investors.<sup>82</sup>
- (c) Respondent labels **CCM's** relationship with the Celadon and Notes Entities as merely "contractual." However, **CCM** *created* the Celadon and Notes Entities, and the foundational documents of these Entities expressly contemplated **CCM's** role as the active investment manager that would have control over the Investments.<sup>83</sup> Moreover, saying a relationship is contractual is not inconsistent with the concept of control.

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Carlyle Holdings I L.P. and Carlyle Holdings II L.L.C., serves as the sole member of **TC Group** and the general partner of **TC Group Investment Holdings**. *Id* at 4.

<sup>79</sup> Petrick Statement, para 3.

<sup>80</sup> *See supra* paras 16, 20-22.

<sup>81</sup> *See supra* paras 15, 24-28.

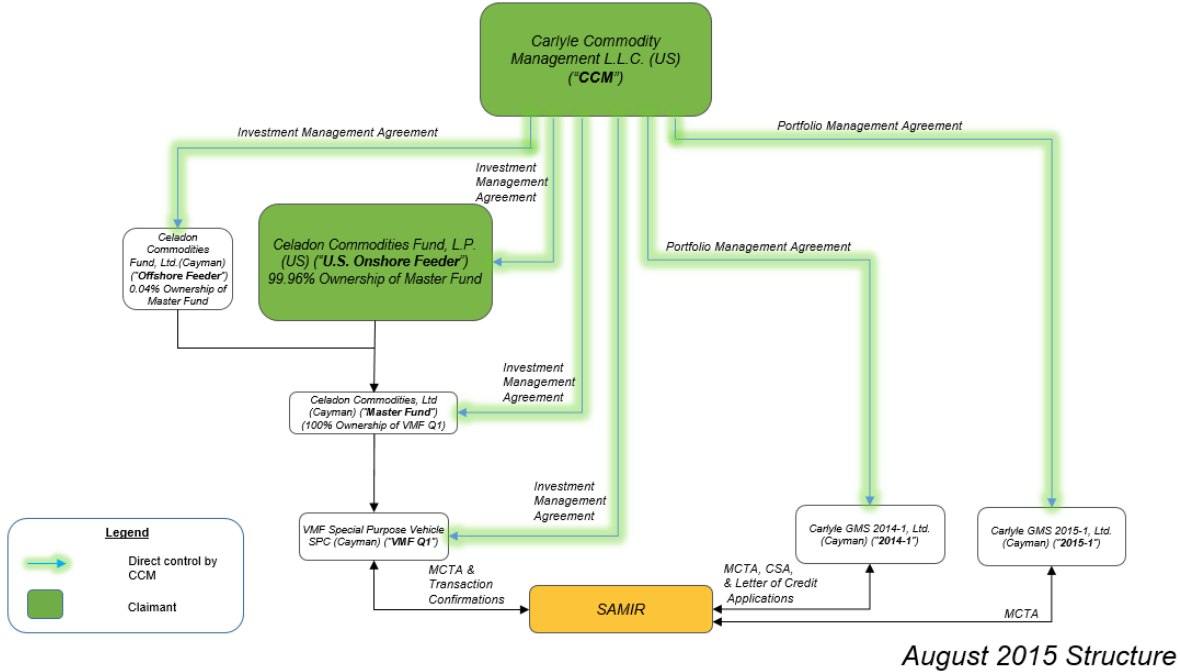
<sup>82</sup> *See* Johnson Statement, para 5.

<sup>83</sup> *See* VMF Q1 Written Resolutions § 2 (CZ-0046) ("[**CCM**] will be appointed as the investment manager to the Segregated Portfolio"); Master Fund Articles of Association § 6 (CZ-0043) ("The Directors may entrust to and confer upon [**CCM**] any of the functions, duties, powers and discretions exercisable by them as Directors . . . ."); Offshore Feeder Articles of Association § 6 (C-0060-ENG) (same); Onshore Feeder LP Agreement § 2.01 (CZ-0034) ("The General Partner shall have full and complete charge of all affairs of the Partnership" and "The General Partner may engage [**CCM**] to manage the [**U.S. Onshore Feeder's**] investments"); 2014-1 Indenture § 3.2(a) (CZ-0050) ("[**CCM**] . . .

To correctly illustrate the relationships of the Claimants with the Celadon and Notes Entities and, ultimately, the Investments, Claimants hereby offer the following diagrams, depicting Claimants' structure as of August 2015:

- Diagram 1, illustrating CCM's top-down control structure over the investment decisions of each investment vehicle via a series of investment and portfolio management agreements:

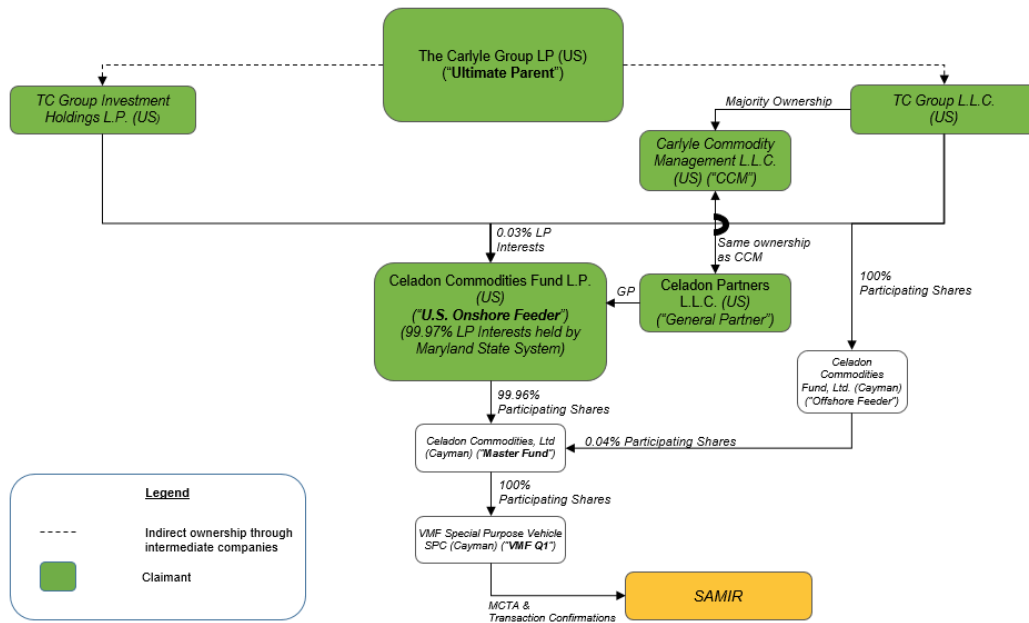
**Diagram 1: Investment Control through CCM**



shall cause the Trustee to obtain control over the Commodities purchased in accordance with the terms of this Indenture”); 2015-1 Indenture §3.2(a) (CZ-0051) (same).

- and Diagram 2, illustrating Claimants’ clear ownership interests in the Investments via the **U.S. Onshore Feeder** and the Celadon Entities.<sup>84</sup>

**Diagram 2: Investment Ownership through Celadon**



August 2015 Structure

32. Respondent’s Annex B—which illustrates the Transactions with SAMIR as involving none of the Claimants—is also rife with inaccuracies:

- Respondent indicates that only 2014-1 provided the “letter of credit/cash” to the third-party supplier, but this is once again incorrect because both VMF Q1 and 2015-1 also contributed funds to obtain the letters of credit involved in the

<sup>84</sup> Full-size versions of Diagrams 1 and 2 are attached to Claimants’ submission as Annex B. For the avoidance of doubt, Diagrams 1 and 2 depict Claimants’ structure in August 2015. Claimants previously submitted diagrams with their Observations on Bifurcation which accurately depict the Claimants’ structure at the time this arbitration was filed in July 2018. Claimants’ Observations, para 68; Exhibit C-0020-ENG. Claimants note that certain aspects of Claimants’ structure have changed since August 2015. First, with respect to the Celadon Entities, in 2016, Maryland redeemed its limited partnership interests in the **U.S. Onshore Feeder**, leaving **TC Group** and **TC Group Investment Holdings** with control of 100% of the limited partnership interests in the **U.S. Onshore Feeder**. See *supra* n 38. Second, **TC Group** increased its interest in **CCM** and **Celadon Partners** from 83% as of August 2015, to 88% at year-end 2017, to 100% as of January, 1, 2018. See *supra* n 75-76. And finally, with respect to the Notes Entities, as of August 2015, outside investors held the 2014-1 and 2015-1 Notes, [REDACTED]. See *supra* para 25 n 58.

Investments.<sup>85</sup> Nearly all of the funds made available through VMF Q1 came from the **U.S. Onshore Feeder**, a Claimant.<sup>86</sup>

- (b) Respondent identifies only VMF Q1 and 2014-1 as being involved in the Transactions with SAMIR, but this is highly misleading since it omits that VMF Q1 and 2014-1 (as well as 2015-1) were investment vehicles actively managed and controlled by **CCM**, a Claimant.<sup>87</sup>
- (c) Respondent depicts transfers of title to the Commodities occurring between VMF Q1 and 2014-1 but wholly ignores **CCM's** role in effecting those transfers. At the time of purchase, title to the Commodities was first held by VMF Q1, and it was **CCM** that transferred title between VMF Q1, 2014-1 and 2015-1 pursuant to the Sleeve Transaction confirmations.<sup>88</sup> To close out each Investment, SAMIR would pay the original purchase price, minus prepayment, plus a transaction premium, to VMF Q1, and only then would title to the Commodities pass to SAMIR.<sup>89</sup>

By deliberately isolating and fixating on the investment vehicles alone, Respondent presents an incomplete picture of the structure of the Investments. Respondent's Annex B does not even mention **CCM** and suggests through the use of terms such as "maturity" and "interest" that the transactions at issue were mere financings. Claimants offer the following Diagrams 3 and 4 to demonstrate that, contrary to Respondent's depictions, the Investments were true transfers of title to a **CCM**-controlled vehicle:

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<sup>85</sup> *See supra* para 27. Respondent incorrectly asserts that the structure of the Investments under the MCTA required VMF Q1 to pay for the Commodities directly, but that, in the actual transactions, the purchase price was paid from an account in the name of 2014-1. Jurisdictional Memorial, paras 27-30. Respondent's point is a non-issue and can be easily explained by the fact that **CCM** added 2014-1 to the MCTA as a VM Party by joinder, and the MCTA contemplated that **CCM** could use *any* VM Party—whether VMF Q1, 2014-1, or 2015-1—to purchase the Commodities. *See supra* para 26.

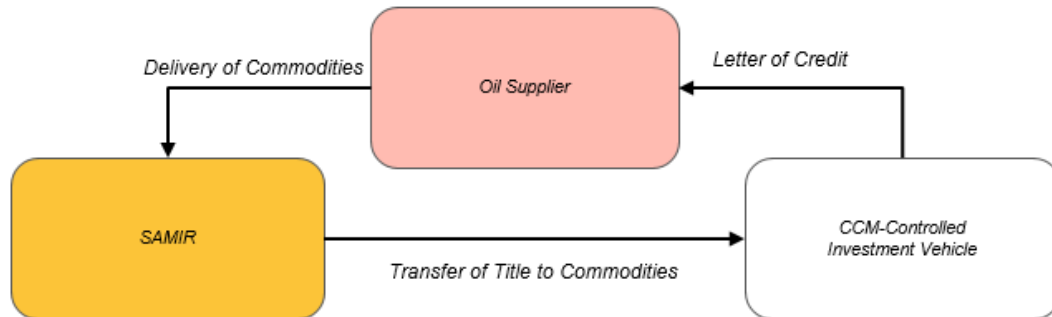
<sup>86</sup> *See supra* para 21.

<sup>87</sup> *See supra* paras 20, 24.

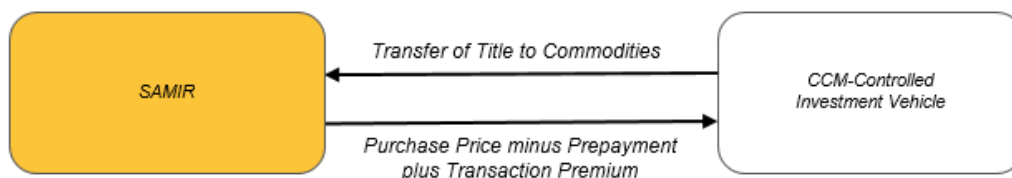
<sup>88</sup> *See supra* para 28.

<sup>89</sup> *See supra* para 18.

**Diagram 3: Initial Deal**



**Diagram 4: At Closeout**



vi. *Respondent's Comparison of Claimants with the Mason v. Korea Claimants is Flawed*

33. Respondent's extensive discussion of the *Mason v. Korea* case is misplaced, given that the tribunal in that case found *squarely against* the respondent.<sup>90</sup> Indeed, the *Mason* tribunal rejected Korea's request to dismiss the claim of a U.S. entity for losses incurred by a related Cayman fund, and declared that the entity, which was the general partner of the fund, "owned and controlled" the investment in question and, thus, had standing.<sup>91</sup> As a legal matter, *Mason* offers strong support for Claimants' standing on the basis of ownership and control, as further explained below.

34. However, in a misguided attempt to preemptively distinguish *Mason* from the facts underlying Claimants' claims here, Respondent wrongly compares the evidentiary record in this proceeding with the one in *Mason*.<sup>92</sup> First, Respondent mistakenly argues that, unlike the *Mason* Claimants, Claimants here have not submitted witness statements from

<sup>90</sup> Jurisdictional Memorial, paras 78-82.

<sup>91</sup> *Mason v. Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections (22 December 2019) para 249 (RL-0022).

<sup>92</sup> Jurisdictional Memorial, para 78.

senior employees of the relevant general partner, **Celadon Partners**.<sup>93</sup> However, just as the Mason Claimants' employees were employed by the same entity in *Mason v. Korea*, so were all of the employees of **Celadon Partners** employed by **CCM**.<sup>94</sup> This included Chris Zuech, who was both Chief Operating Officer of **CCM** and a partner in **Celadon Partners**.<sup>95</sup> Mr. Zuech's testimony, as well as all of the evidence on record, fully supports that **Celadon Partners** and **CCM** controlled the Investments of the Celadon structure in much the same way that the general partner in *Mason* controlled the stock investments of the claimants in *Mason*.<sup>96</sup>

35. Second, Respondent accuses Claimants of failing to provide shareholder registers of the relevant entities and the register of foreign investors, as the *Mason* claimants did.<sup>97</sup> However, shareholder registers are not even applicable to this proceeding because of the nature of the investments at issue, which Respondent has glaringly overlooked. Specifically, the claimants in *Mason* purchased stock, while the Investments here involved the purchase of physical Commodities. Indeed, it is because the *Mason* claimants' investments were stock that the *Mason* tribunal examined shareholder registers reflecting the *Mason* claimants' purchase of Samsung shares in order to evaluate ownership and control. Here, Claimants have indeed produced the documents supporting Claimants' purchase of the Commodities—the MCTA, the CSA, letter of credit applications, and transaction confirmations, all executed by **CCM** personnel<sup>98</sup>—but because these documents do not support a conclusion favorable to Respondent, Respondent chooses to dismiss them.
36. In short, Respondent's reliance on *Mason v. Korea* is deeply flawed and unpersuasive for three reasons: (1) the outcome in *Mason* squarely supports Claimants' legal positions in the present proceeding; (2) Claimants have certainly submitted documents and witness testimony equivalent to the evidence submitted by the *Mason* claimants which establish the standing of **Celadon Partners** and **CCM** (among the other Claimants) based on their control of the Investments; and (3) the purported shortcomings of Claimants' evidentiary

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<sup>93</sup> Jurisdictional Memorial, para 81.2.3.

<sup>94</sup> *See Mason v. Korea*, para 36.

<sup>95</sup> 2020 Zuech Statement, para 3. Mr. Zuech was also an investor in the Notes. *See id.*, n 12.

<sup>96</sup> *Compare Mason v. Korea*, Decision on Respondent's Preliminary Objections, p 12 ("The management control and the conduct of the business of the Partnership shall be vested exclusively in the General Partner") with U.S. Onshore Feeder LP Agreement §2.01(a) ("[**Celadon Partners**] shall have full and complete charge of all affairs of the Partnership"); *see also* U.S. Onshore Feeder Investment Management Agreement § 5 ("[the **U.S. Onshore Feeder**] hereby grants [**CCM**] complete discretion in the investment and reinvestment of the Account").

<sup>97</sup> *Id.* para 81.2.1.

<sup>98</sup> *See* Amended and Restated Master Commodity Transaction Agreement, 22 June 2015 (MO-0003), Amended and Restated Commodities Storage Agreement, 22 June 2015(MO-0004), Letter of Credit Applications (C-0045-ENG), and deal-specific transaction confirmations (*see, e.g.* SAMIR-1007 Confirmation (MO-0007)).

record here, as compared with the record in *Mason*—namely, Claimants’ purported failure to provide shareholder registers—is merely the result of the obvious factual difference that Claimants’ Investments involve commodities, not stock. Therefore, Respondent’s arguments with respect to *Mason* should not play any role in the Tribunal’s consideration and understanding of the facts here.

### III. Respondent Bears the Burden of Proof With Respect to its Jurisdictional Objections and Has Failed to Do So

37. As a threshold matter, Respondent, rather than Claimants,<sup>99</sup> bears the burden of proof with respect to its jurisdictional objections. Investment tribunals consistently have held that, while a claimant may have the initial burden of proving jurisdiction, the burden will shift after the claimant has presented its jurisdictional case, and the respondent will then have the burden of proof with respect to its objections to jurisdiction.<sup>100</sup>
38. The tribunal in *Pac Rim Cayman v. El Salvador*, for example, held the following:

As far as the burden of proof is concerned, in the Tribunal’s view, it cannot here be disputed that the party which alleges something positive has ordinarily to prove it to the satisfaction of the Tribunal. At this jurisdictional level, . . . the Claimant has the burden to prove facts necessary to establish jurisdiction (as it positively asserts); and . . . **the Respondent has the burden to prove that its positive objections to jurisdiction are well-founded.**<sup>101</sup>

39. In *Spence v. Costa Rica*, the tribunal likewise affirmed that, once claimants have proved the facts in support of jurisdiction, “the burden will shift to the Respondent to show why, despite the facts as proved by the Claimants, the Tribunal lacks jurisdiction.”<sup>102</sup>
40. Here, it should be apparent from Claimants’ prior submissions—and even more so after the present submission—that this Tribunal has jurisdiction over Claimants’ claims. As previously explained and as further detailed herein, Claimants’ Commodities and Put Rights are covered by the FTA and the ICSID Convention because they have the characteristics of protectable investments, including (among other things) the commitment of hundreds of millions of U.S. dollars of capital and Claimants’ undisputed expectation of gain or profit. Claimants, too, are covered by the FTA because they each directly or indirectly owned and/or controlled the Investments. Because they are protected investors with protected investments, Claimants have established jurisdiction in

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<sup>99</sup> See Jurisdictional Memorial, paras 5-7.

<sup>100</sup> See Legal Opinion of Christoph Schreuer (“Schreuer Legal Opinion”), paras 9-10.

<sup>101</sup> *Pac Rim Cayman, LLC v. The Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdiction (1 June 2012) paras 2.11, 2.15 (CL-0053-ENG) (emphasis added).

<sup>102</sup> *Spence Int’l Investments et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (25 October 2016) para 239 (CS-0038).

this proceeding, and they have consistently presented facts and provided hundreds of supporting documents in doing so.

41. Still, in an apparent effort to overcomplicate the jurisdictional analysis, Respondent asks for further, unnecessary documents concerning Claimants and their Cayman investment vehicles.<sup>103</sup> Although the documents Respondent seeks are unnecessary for the Tribunal’s decision on jurisdiction, to the extent they are available and have some modicum of relevance, Claimants hereby submit the additional documents requested in Annex C to the Jurisdictional Memorial, as further detailed in Annex C below.<sup>104</sup>
42. It is now Respondent’s burden to prove that its objections to jurisdiction are sufficiently “well-founded” to defeat jurisdiction—and for the reasons stated herein, Respondent has utterly failed to do so.

#### **IV. Claimants Hold “Investments” Within the Meaning of the FTA and the ICSID Convention (Response to Objection No. 1)**

##### **A. Claimants’ Commodities and Contractual Rights Plainly Have the Characteristics of an Investment**

43. Respondent’s first objection should be rejected because it is factually without merit and because it is based on the erroneous legal proposition that “FTA Article 10.27 and Article 25(1) of the ICSID Convention place substantive restrictions on the concept of ‘investment.’”<sup>105</sup> Article 10.27 of the FTA defines “Investment” as “every asset that an investor owns or controls, directly or indirectly, that ***has the characteristics of an investment***, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, ***or*** the assumption of risk.” (emphasis added). The use of the disjunctive “or,” as opposed to an inclusive “and,” is significant because it indicates that the identified characteristics—i.e., the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk—are sample indicators, not necessary elements, of a qualifying investment. In other words, although the presence of such indicators may lead to the determination that the investment at issue is a cognizable investment under Article 10.27 of the FTA, the absence of one indicator does not and should not necessarily lead to the opposite conclusion. The FTA’s definition of “Investment” is much broader and more fluid than Respondent suggests,<sup>106</sup> and a proper understanding of the facts makes clear that Claimants’ Commodities and Put Rights unequivocally “[have] the characteristics of an investment.”
44. Article 25(1) of the ICSID Convention also does not command strict compliance with a fixed set of jurisdictional requirements, including the so-called *Salini* test. The criteria

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<sup>103</sup> See Jurisdictional Memorial, Annex C; see also Travers Report, para 3.4.

<sup>104</sup> Annex C lists the documents available to Claimants that satisfy the requests of Respondent’s Annex C.

<sup>105</sup> See Jurisdictional Memorial, Heading III.A (emphasis in original).

<sup>106</sup> See, e.g., Jurisdictional Memorial, paras 85-86, 88.



considered in *Salini v. Morocco* (contribution, duration, risk, and possibly, contribution to the host State’s development<sup>107</sup>) were actually first articulated in *Fedax v. Venezuela*<sup>108</sup>—rendering the “*Salini* test” a misnomer. Notwithstanding Respondent’s repeated invocation of *Salini*, the purported “test” is, in fact, a “non-binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention.”<sup>109</sup>

45. As the sole arbitrator in *Pantechniki v. Albania* stated, “*Salini* made a respectable attempt to describe the characteristics of investments. Yet broadly acceptable descriptions cannot be elevated to jurisdictional requirements unless that is their explicit function.”<sup>110</sup>

Indeed, the clear trend among investment tribunals in the last decade has been to view the criteria as indicators, not jurisdictional requirements.<sup>111</sup>

46. For example, the tribunal in *Philip Morris v. Uruguay* unequivocally stated:

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.**

. . . .

[T]he four constitutive elements of the *Salini* list do not constitute jurisdictional requirements to the effect that the absence of one or the other of the[] elements would imply a lack of jurisdiction. They are typical features of investments under the ICSID Convention, not ‘a set of mandatory legal requirements’. As such, they may assist in identifying or excluding in extreme cases the presence of an investment but **they cannot defeat the broad and flexible concept of investment**

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<sup>107</sup> Schreuer Legal Opinion, para 27.

<sup>108</sup> *Fedax N.V. v. Republic of Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/96/3 (11 July 1997) (CL-0003-ENG).

<sup>109</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) (CL-0081-ENG); *see also 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); *MCI Power Group, LC and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) para 165 (CL-0083-ENG); *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award (13 March 2009) paras 236-38 (CL-0084-ENG).

<sup>110</sup> *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) para 43 (CL-0085-ENG).

<sup>111</sup> *Id.* paras 37, 43.

**under the ICSID Convention to the extent it is not limited by the relevant treaty, as in the present case.**<sup>112</sup>

47. Similarly, in *GEA v. Ukraine*, the tribunal deemed the so-called *Salini* test “problematic” to the extent “transactions are to be presumed excluded from the ICSID Convention unless each of the [four] criteria are satisfied.”<sup>113</sup> The tribunal in *Abaclat v. Argentina* also warned against interpreting the *Salini* criteria as “creat[ing] a limit[] which the Convention itself nor the Contracting Parties to a specific BIT intended to create.”<sup>114</sup>
48. Given the clear absence of a restrictive framework in the FTA and the ICSID Convention, Respondent’s attempt to artificially limit the Tribunal’s power to exercise jurisdiction should be rejected.
49. Even assuming that the characteristics identified in the FTA’s definition of “Investment” serve as jurisdictional requirements—which they do not—Claimants’ Commodities and Put Rights, in fact, have all of those characteristics. Indeed, Respondent does not even purport to contest the fact that Claimants expected gain or profit from their Investments, which is one characteristic expressly identified in the FTA. And, as further explained below, Claimants’ Investments also clearly involved “the commitment of capital or other resources” and “the assumption of risk,” and notwithstanding Respondent’s erroneous articulation of a purported duration requirement, Claimants’ Investments were of a sufficiently long and committed duration as well.

*i. Claimants Contributed Funds and Commodities to the Investments*

50. As stated in Claimants’ prior submissions, the Investments plainly involved the commitment of capital via the issuance of more than US\$390 million in letters of credit which were then used to purchase the Commodities. Respondent argues that the letters of credit do not qualify because the funds underlying them purportedly came only from 2014-1, a non-claimant, and that all of the Claimants otherwise were allegedly “passive” in the investment process. Respondent is plainly incorrect on both counts.
51. As a threshold matter, contrary to Respondent’s assertions,<sup>115</sup> it is well established that the origin of the funds underlying the letters of credit is irrelevant as a matter of

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<sup>112</sup> *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) paras 204, 206 (CS-0061) (emphasis added).

<sup>113</sup> *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) para 314 (CL-0004-ENG).

<sup>114</sup> *Abaclat et al. v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction (4 August 2011) para 364 (CL-0078-ENG).

<sup>115</sup> See Jurisdictional Memorial, para 89.1.

international law.<sup>116</sup> Neither the FTA nor the ICSID Convention contains a requirement concerning the origin of the funds. Instead, what matters is that the funds were, in fact, used to make the investments at the direction of a qualifying investor. As explained by Professor Schreuer, “[t]he decisive criterion for the existence of a foreign investment is... the nationality of the investor. An investment is a foreign investment if it is owned or controlled by the foreign investor.”<sup>117</sup>

52. Numerous investment tribunals have found the origin of funds to be immaterial.<sup>118</sup> For example, in *Teinver S.A. v. Argentina*, the investments at issue were facilitated by funds that the claimants had received from a non-claimant pursuant to a purchase agreement between the non-claimant and claimants’ subsidiary. The tribunal held that the origin of those funds was “irrelevant, as the funds were contributed as a result of the obligations undertaken by [claimants’ subsidiary] and Claimants under the [purchase agreement]. This is consistent with other cases where tribunals have found that the actual source of the funds is irrelevant provided that these were contributed by the investor.”<sup>119</sup>
53. The extent to which the origin of funds is a non-issue is illustrated by tribunals finding that:
- *It does not matter whether the claimant contributed any of its own money to the investment*, as per *Saipem v. Bangladesh*.<sup>120</sup> There, the tribunal rejected Bangladesh’s argument that no protectable investment existed because claimant never “actually put its own money into the project” at issue, expressly holding that “the origin of the funds is irrelevant.”<sup>121</sup>
  - *It does not matter whether the claimant contributed funds originating from within, rather than outside of, the host State*, as per *Tokios Tokelès v. Ukraine*.<sup>122</sup> There, the majority of the tribunal held that neither the ICSID Convention nor the BIT at issue included a requirement that capital used by a foreign investor must originate in its State of nationality or from otherwise outside the host State.<sup>123</sup> Instead, the

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<sup>116</sup> See C. Schreuer et al. ‘The ICSID Convention: A Commentary’ (2nd Edition) (2009) para 184 (CS-0042) (“Tribunals have generally found the origin of capital used in investments immaterial.”).

<sup>117</sup> Schreuer Legal Opinion, para 56.

<sup>118</sup> See Schreuer Legal Opinion, paras 52-57.

<sup>119</sup> *Teinver S.A. v. Argentina*, ICSID Case No. ARB/09/1, Award (21 July 2017) para 254 (CL-0086-ENG).

<sup>120</sup> *Saipem v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction (21 March 2007) (CS-0020).

<sup>121</sup> *Id.*, paras 103, 106.

<sup>122</sup> *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 April 2004) (CS-0068).

<sup>123</sup> *Id.*, paras 72-74.

tribunal concluded that “[t]he investment would not have occurred but for the decision by the Claimant to establish an enterprise in Ukraine and to dedicate to this enterprise financial resources under the Claimant’s control. In doing so, the Claimant caused the expenditure of money and effort from which it expected a return of profit in Ukraine.”<sup>124</sup>

- *It does not matter whether the claimant contributed funds from multiple sources located in different States, not including its State of nationality*, as per *Cortec v. Kenya*.<sup>125</sup> There, the tribunal rejected Kenya’s argument that because the funds for the investments came from Australian, South African, and Canadian sources and not from the British claimants, they were not entitled to bring a claim under the UK-Kenya BIT. The tribunal stated: “It is well established in arbitral law that the ‘origin of funds’ issue is not a valid objection. The UK companies hold the shares. Through their corporate network money was invested in Kenya.”<sup>126</sup>

54. The irrelevance of the origin of funds is further reflected in the drafting history of the ICSID Convention. As explained by Claimants’ expert, Christoph Schreuer, during the drafting of the ICSID Convention, the Chairman explicitly rejected the argument that the nationality of the investment was more important than that of the investor, citing the difficulty of distinguishing between qualifying and non-qualifying investments on that basis.<sup>127</sup> As a result, the ICSID Convention, as finalized, solely focuses on the nationality of the *investor*. Here, because the Investments at issue were made by Claimants from the U.S. with ownership and/or control over the Investments, there is not even a need to take into account the source of the funds facilitating the Investments.
55. But even assuming (solely for the sake of argument) that the origin of the funds were relevant to the jurisdictional analysis, Respondent is patently incorrect that “all evidence adduced by the Claimants reflects financing for [the Investments] coming from 2014-1” alone.<sup>128</sup> Although the letters of credit each listed a 2014-1 bank account, some of the funds therein, in fact, were contributed by VMF Q1.<sup>129</sup> Virtually all such funds were received from the **U.S. Onshore Feeder**, which, in turn, received virtually all of those

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<sup>124</sup> *Id.*, para 78.

<sup>125</sup> *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award (22 October 2018).

<sup>126</sup> *Id.*, at para. 271.

<sup>127</sup> Schreuer Legal Opinion, para 45.

<sup>128</sup> Jurisdictional Memorial, para 32.

<sup>129</sup> See 2020 Zuech Statement, para 21. Respondent cites to an email from Matt Olivo, a former CCM employee, to point out that “the primary source of funding” for the Transactions came from 2014-1. See Jurisdictional Memorial, para 63.2 (quoting MO-0001). However, the rest of the quoted sentence—which Respondent conveniently omits—states that Claimants “also **need[ed]** to have Q1 involved” due to the way the Transactions were structured. See MO-0001 (emphasis added).

funds from the U.S. state of Maryland’s pension fund.<sup>130</sup> In short, funds used for the Investments were indisputably from a Claimant via a U.S. source.

56. Respondent also blatantly mischaracterizes Claimant **CCM** as “a mere service provider that was not directly connected to the alleged investment operations of [VMF] Q1 and 2014-1.”<sup>131</sup> It was **CCM**—not VMF Q1 or 2014-1, neither of which had any employees of its own or a board of directors with any authority to direct its investment decisions—that committed the funds from the **U.S. Onshore Feeder** and *both* Notes Entities to the Transactions with SAMIR.
57. As explained in Section V below, **CCM** was (and is) the entity with complete control over the day-to-day investment decisions of the Celadon Entities and the Notes Entities.<sup>132</sup> Respondent’s own expert, Anthony Travers, fully acknowledges that **CCM** was appointed as the “true and lawful agent . . . with full authority” to implement the Investments “without any necessary further approval” of the Cayman entities.<sup>133</sup> Accordingly, **CCM**’s contribution to the Investments is clear: the US\$390 million of capital put towards the Investments was done so at the direction of **CCM**.
58. Separately, Respondent overlooks the fact that, aside from involving the letters of credit, the Investments also involved a commitment of tangible commodities. Indeed, the entire arrangement with SAMIR hinged on the purchase of, and option to resell, Claimants’ Commodities. Claimants’ contribution of the Commodities thus qualifies under Article 10.27 of the FTA, which does not limit qualifying contributions to only monetary ones but instead expressly refers to a “commitment of capital or other resources.” (emphasis added).
59. Moreover, investment tribunals that have examined CAFTA-DR<sup>134</sup> language identical to this language in the FTA have recognized that the contribution does not need to be monetary.<sup>135</sup> In *Aven et al. v. Costa Rica*, for example, the tribunal held:

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<sup>130</sup> See *supra* para 20 & n28.

<sup>131</sup> Jurisdictional Memorial, para 89.4.

<sup>132</sup> See 2014-1 Portfolio Management Agreement § 1 (C-0024-ENG); 2015-1 Portfolio Management Agreement § 1 (C-0025-ENG); VMF Special Purpose Vehicle Investment Management Agreement, para 2 (C-0026-ENG).

<sup>133</sup> Travers Report (10 April 2020) para 5.12.4.

<sup>134</sup> The Dominican Republic-Central America Free Trade Agreement (“CAFTA-DR”) was concluded between the United States and its Central American neighbors: Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.

<sup>135</sup> See, e.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012) para. 297 (CL-0002-ENG) (stating “contribution can take any form. It is not limited to financial terms but also includes know how, equipment, personnel and services.”) (emphasis added); *L.E.S.I. S.p.A. & Astaldi S.p.A. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Decision on Jurisdiction (12 July 2006) para. 73(i) (CL-0087-FR) (finding that the

[The Treaty] ***does not restrict an investment to monetary contributions***. When the Treaty defines ‘Investment’ in Article 10.28, it states that the term means ‘every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’. Thus, the Treaty ***expressly acknowledges*** that the investment may be in the form of a commitment of capital ***or other resources*** or the assumption of risk.<sup>136</sup>

The *Aven* tribunal also observed that, among the categories of potential investments expressly identified in Article 10.28 of CAFTA-DR, “intellectual property rights” was a type of investment that would not necessarily involve the contribution of capital but rather the “creativity and effort to develop” them.<sup>137</sup> Accordingly, the tribunal found that, although there had been no evidence of any monetary contribution by the claimants, their contributions of “marketing and real estate development experience” to the investments at issue, i.e., a tourism project, constituted the qualifying contributions.<sup>138</sup> Here, Claimants’ contribution of *tangible* resources (i.e., their Commodities) is even more concrete and obvious than the contribution of the *Aven* claimants’ contribution of intangible resources, and should be similarly recognized by this Tribunal as a qualifying contribution.

60. That said, **CCM** also contributed intangible resources in the form of its investment management expertise, which was expressly recognized as a qualifying category of “other resources” by the tribunal in *Mason v. Korea*.<sup>139</sup>
61. In sum, Claimants made a substantial contribution to the Investments by committing capital, physical commodities, and expertise, and Claimants’ Investments are thus clearly qualifying investments under the FTA and the ICSID Convention.

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contributions could “consist of loans, materials, works, services, *as long as they have an economic value*. In other words, the contractor must have committed some expenditure, *in whatever form*, in order to pursue an economic objective”).

<sup>136</sup> *Aven et al. v. Costa Rica*, ICSID Case No. UNCT/15/3, Final Award (18 Sept. 2018) para 254 (CL-0088-ENG).

<sup>137</sup> *Id.* para 255.

<sup>138</sup> *Id.* paras 253, 258.

<sup>139</sup> *See Mason*, para 207 (RL-0022).

ii. *Claimants Committed to a Long-Term Business Arrangement with SAMIR*

62. As an initial matter, Respondent admits that the FTA does not expressly require a minimum duration.<sup>140</sup> Thus, Respondent instead argues (citing no authority) that “a duration requirement remains a settled part of the jurisprudence surrounding ICSID Article 25(1),” and lobs a misguided accusation that Claimants are asking the Tribunal to ignore Article 25(1) of the ICSID Convention in favor of Article 10.27 of the FTA.<sup>141</sup> That is not Claimants’ position. Claimants merely have argued that the purported minimum period of two to five years mentioned in *Salini v. Morocco* is not controlling and is not reflected in the express terms of the FTA.<sup>142</sup> Further, it is well known that the original drafters of the ICSID Convention eschewed the imposition of any durational minimum.<sup>143</sup> ICSID tribunals also have refrained from mandating any minimum length of time for compliance, generally accepting that qualifying investments can cover “anything from a couple of months to many years.”<sup>144</sup> In short, any evaluation concerning the duration of an investment is “highly fact specific,”<sup>145</sup> and, in any event, under the present facts, Claimants’ Investments plainly covered a sufficient duration typical of qualifying investments.
63. Respondent attempts to obfuscate the issue first by attempting to quantify the purported duration of each Claimant’s involvement (or what Respondent believes to be each Claimant’s involvement) in the Investments. For example, Respondent argues that the **U.S. Onshore Feeder** “will only have been exposed to the [Investments] at most for a scintilla of time” and that **CCM’s** involvement “was limited in time, and certainly did not involve any significant period of exposure to risk in Morocco.”<sup>146</sup> This line of reasoning is faulty because the duration of an investment is not measured by the actual duration of a claimant’s involvement but by the intended duration of its overall commitment.<sup>147</sup>

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<sup>140</sup> See Jurisdictional Memorial, para 92 (“The requirement of a minimum duration does not appear expressly in the non-exclusive list of potential investment characteristics in the definition of ‘investment’ in FTA Article 10.27.”).

<sup>141</sup> Jurisdictional Memorial, para 95.

<sup>142</sup> See Claimants’ Observations, para 81 & n 101.

<sup>143</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd Edition) (2012), p 65 (CL-0089-ENG); see also Banifatemi & Edson (RL-0027), para 2.37.

<sup>144</sup> Banifatemi & Edson (RL-0027), para 2.37 (quoting *Deutsche Bank*).

<sup>145</sup> *Id.*

<sup>146</sup> Jurisdictional Memorial, para 100-100.2.

<sup>147</sup> See, e.g., *Deutsche Bank v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (31 October 2012) paras 303-304 (CL-0002-ENG) (“Duration is to be analysed in light of all the circumstances, and of the investor’s overall commitment.”); *Mason*, para 288 (RL-0022) (same); see also Banifatemi & Edson (RL-0027), para 2.37 n 87 (“[I]t is the intended and not the actual duration that is relevant.”).

64. Respondent similarly attempts to confuse the Tribunal by measuring the duration of specific transactions within Claimants' Investments, as opposed to the intended duration of the overall operation. Respondent asserts that, "at best what the Claimants can show is that VMF Q1 had entered into an umbrella agreement that gave it the choice – but not the obligation – to enter into a series of short-term [transactions], intended to average 90 days."<sup>148</sup> By focusing on each transaction individually, Respondent deliberately ignores the well-established principle of "the general unity of an investment."<sup>149</sup> This principle provides that, even if an investment operation consists of several discrete transactions and activities, it must still be evaluated as a single, integrated investment for purposes of determining jurisdiction.<sup>150</sup>
65. In the seminal case *CSOB v. Slovakia*, the general unity principle was explained as follows:
- An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.<sup>151</sup>
66. In *Inmaris Perestroika v. Ukraine*, the tribunal was presented with claims on behalf of multiple Inmaris companies involved in interrelated boat charter contracts in Ukraine. At the jurisdictional stage, Ukraine urged the tribunal "to examine the specific investments claimed by each individual would-be [c]laimant under each contract." The tribunal rejected Ukraine's suggestion and held that "[i]t is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy the definition requirements of the BIT and the ICSID Convention."<sup>152</sup>
67. Therefore, regardless of whether each individual Transaction either was intended to span or actually spanned an average of 90 days, that length of time is not the determinative measure of the duration of Claimants' entire investment arrangement with SAMIR.
68. Respondent's argument that "the entire scheme was only on foot for approximately six months"<sup>153</sup> is also disingenuous because the wrongful actions of the Government cut the parties' arrangement short. Indeed, investment tribunals faced with similar arguments

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<sup>148</sup> Jurisdictional Memorial, para 102.

<sup>149</sup> Schreuer Legal Opinion, paras 60-61.

<sup>150</sup> *Id.*

<sup>151</sup> *CSOB v. Slovakia*, Decision on Jurisdiction (24 May 1999) para 72 (CS-0088) (footnote omitted).

<sup>152</sup> *Inmaris Perestroika Sailing Maritime Services GmbH*, para 92 (CL-0081-ENG).

<sup>153</sup> Jurisdictional Memorial, para 101.



have soundly rejected them, and the Tribunal here should do the same. For example, in *Deutsche Bank v. Sri Lanka*, the claimant had an oil hedging agreement with Ceylon Petroleum Corporation (“CPC”), a State-owned oil company.<sup>154</sup> The claimant alleged that Sri Lanka had breached the Germany-Sri Lanka BIT because, among other reasons, the State’s Central Bank and Supreme Court “intervened to make it impossible for Deutsche Bank (and other banks) to recover from CPC the moneys owed to it under the Hedging Agreement” when oil prices decreased sharply in 2008.<sup>155</sup> Sri Lanka argued that the hedging agreement did not comply with the requisite duration of an investment because the agreement “might have lasted twelve months at most,” possibly three months if the oil prices had not sharply decreased, but in any event, it “in fact lasted for only 125 days before it was unilaterally terminated by Deutsche Bank London.”<sup>156</sup> The tribunal rejected such argument and concluded:

The Arbitral Tribunal is persuaded that the duration criterion is satisfied in this case. ***The Hedging Agreement commitment was for twelve months.*** Moreover, Deutsche Bank had already spent two years negotiating the Agreement. The fact that it was terminated after 125 days is irrelevant.<sup>157</sup>

69. Here, the Commitment Letter between Carlyle and SAMIR unequivocally evidences that Claimants committed to engage in a long series of commodities transactions for a minimum of *three years*.<sup>158</sup> Perhaps it is for this reason that Respondent’s misleading and selective recitation of the Commitment Letter is particularly egregious. Respondent claims that the letter “was ‘*not intended to be and is not binding on [ . . . ] any [ . . . ] person*’ [and it] did not commit CCM – much less any other Claimant – to any specific duration of investment operation whatsoever.”<sup>159</sup> Correctly cited, however, the Commitment Letter expressly states that it “constitutes a commitment *by Samir* to enter into transactions with [CCM] under the MCTA during the Term (as defined [in Section 1(a)]) and is not intended to be and is not binding on [CCM] or any other person.” Section 1(a) obligates SAMIR to “maintain transactions open under the MCTA . . . in the minimum amount of the Commitment *until at least June 30, 2018* (the ‘Term’).”<sup>160</sup>

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<sup>154</sup> *Deutsche Bank* (CL-0002-ENG).

<sup>155</sup> *Id.* para 423.

<sup>156</sup> *Id.* paras 238-39.

<sup>157</sup> *Id.* para 304 (emphasis added).

<sup>158</sup> Commitment Letter (MO-0005).

<sup>159</sup> Jurisdictional Memorial, para 103 (italics in original).

<sup>160</sup> Commitment Letter (MO-0005) (emphasis added). In addition, SAMIR reaffirmed the binding nature of the Commitment Letter in the aftermath of the Moroccan Government’s improper actions in August 2015. Indeed, SAMIR representatives reiterated their commitment to the Investments by repeatedly assuring Claimants that they were working towards a resolution with the Government, and that the Transactions would resume once those negotiations were concluded. *See* 2020 Zuech Statement, para 13.

70. The clear implication of requiring SAMIR’s commitment in the first place is that Claimants had every intent to maintain a long-term, mutually beneficial relationship over the same amount of time, i.e., at least three years.<sup>161</sup> Claimants devoted considerable time, money, and expertise to establishing an investment structure that was meant to facilitate many transactions with SAMIR on a continuing basis. In turn, SAMIR’s three-year minimum commitment was critical to the Transactions because Claimants’ ability to secure capital via the issuance of additional notes was contingent on such commitment.<sup>162</sup> And without adequate capital, the Transactions with SAMIR would not have been feasible.<sup>163</sup>
71. Therefore, properly viewing Claimants’ Investments in their totality, the conclusion should be clear: Claimants expected to engage in a long-term arrangement with SAMIR and committed to doing so. Accordingly, Claimants’ Investments plainly were of a sufficient duration and are qualifying investments under the FTA and the ICSID Convention.

*iii. Claimants Assumed Various Risks in Connection with the Investments*

72. Since “[t]he very existence of [this] dispute [is] seen as an indication of risk” for purposes of international law,<sup>164</sup> it is absurd for Respondent to argue that Claimants assumed no risk in connection with its Investments. Indeed, several investment tribunals (including even *Salini v. Morocco*) have recognized that risk is inherently a part of any long-term, complex commercial relationship such as the one between Claimants and SAMIR.<sup>165</sup> Further, because Respondent’s arguments concerning Claimants’ purported lack of risk are tied to its faulty arguments concerning Claimants’ purported lack of contribution,<sup>166</sup> they are fundamentally baseless.

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<sup>161</sup> 2020 Zuech Statement, para 13.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* para 24.

<sup>164</sup> C. Schreuer, *The ICSID Convention: A Commentary*, 2nd Edition, 2009, para 163 (CS-0042); *see also Fedax*, para 40 (CL-0003-ENG) (“Nor can the Tribunal accept the argument that, unlike the case of an investment, there is no risk involved in this transaction: the very existence of a dispute . . . evidences the risk that the [investor] has taken.”).

<sup>165</sup> *See Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, Case No. ARB/00/4, Decision on Jurisdiction (31 July 2001) para 56 (CL-0007-ENG) (noting that an investment “that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the [investor].”); *see also, e.g., Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction (16 June 2006), para 92 (CL-0008-ENG) (“[T]here can be no question that an operation of such magnitude and complexity involves a risk.”).

<sup>166</sup> Jurisdictional Memorial, paras 105-08.

73. As explained above, Claimants, in fact, made contributions of capital and/or Commodities toward the Investments.<sup>167</sup> As such, they assumed both the risk of the physical loss of their crude oil (which they suffered here as they lost a substantial part of their Investments) and the risk of the diminution in value of Claimants' Commodities in the event they were forced to sell the Commodities to a party other than SAMIR, in which case Claimants also may have had to incur other costs, including, for example, transportation costs.<sup>168</sup>
74. To the extent Respondent reiterates its prior argument that only an "operational" risk qualifies under Article 25(1) of the ICSID Convention, Respondent is plainly incorrect. In *Quiborax v. Bolivia*, for example, the tribunal recognized "market, financial and political risks" as qualifying risks.<sup>169</sup> Even in *Salini v. Morocco*, a case heavily relied upon by Respondent, the tribunal expressly acknowledged that risks undertaken by investors may encompass several types of risks, including commercial and sovereign risk:

With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. The [c]laimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.<sup>170</sup>

75. Professor Schreuer observes that "[t]he exclusion of sovereign risk from a test for the existence of an investment would be particularly illogical" given that "[a] central objective of international investment law is to shield foreign investments against sovereign interference by the host State."<sup>171</sup> Here, where the Moroccan Government

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<sup>167</sup> See *supra* Section III.A.

<sup>168</sup> Respondent also attempts to overcomplicate the issue by evaluating the level of the risk undertaken by each Claimant individually based on the perceived level of contribution of each Claimant to the Investments. This, however, is not the appropriate inquiry. As with the other criteria, the principle of "the general unity of an investment" means that the question should be whether the Investments overall involved the assumption of risk. See, e.g., *Holiday Inns v. Morocco*, Decision on Jurisdiction (12 May 1974) (CS-0087).

<sup>169</sup> *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012) para 234 (CS-0114).

<sup>170</sup> *Salini*, para 55 (CL-0007-ENG).

<sup>171</sup> Schreuer Legal Opinion, para 81.

fully interfered with Claimants' Investments, and Claimants indisputably lost their physical Commodities, proceeds thereof, and related Put Rights, it would run counter to the purpose of the FTA to summarily reject the clear sovereign risk at play and to deny protections to Claimants on that basis. Claimants assumed cognizable risk in connection with the Investments, and Claimants' Investments are and should be treated as protected investments under the FTA and the ICSID Convention.

76. In sum, Claimants' Investments involved the commitment of capital and other resources (namely, Claimants' Commodities), a minimum commitment of three years to the arrangement with SAMIR, and the assumption of the risk associated with the potential—and actual—loss of Claimants' Commodities or the value thereof. Based on at least one or more of these indicators, Claimants' Investments plainly “[have] the characteristics of an investment” for purposes of the FTA and the ICSID Convention, and this Tribunal has jurisdiction over this proceeding.

**V. Claimants Have Standing Under the FTA Because Claimants Owned and/or Controlled the Investments At All Times (Response to Objections Nos. 2, 3 and 4)**

77. Respondent's second, third, and fourth objections all contain meritless challenges to Claimants' ownership and/or control of the Investments as “investors” under Article 10.27 of the FTA. For example, Respondent asserts that Claimants are not qualifying “investors” under Article 10.27 because (i) Claimants allegedly did not hold title to the Commodities; (ii) Claimants, as shareholders of the Cayman entities, allegedly did not “own[] or [have] a direct interest” in the Investments; and (iii) Claimants allegedly had no “direct rights” to the Investments. In making these assertions, Respondent not only mischaracterizes the applicable law but it also utterly ignores basic, obvious facts, such as that the **U.S. Onshore Feeder** indirectly owned the Investments through VMF Q1 and that **CCM** exercised complete control over the Investments. As explained further below, Respondent also makes a frivolous and incorrect temporal argument based on a purported lack of evidence that Claimants “in fact had any relationship with Q1 or 2014-1 as at 7 August 2015.”<sup>172</sup> Because all of Respondent's arguments lack merit both legally and factually, Respondent's second, third, and fourth objections should be rejected.

**A. Control of the Investments is Sufficient to Establish Standing**

78. Several of Respondent's arguments incorrectly assume that each Claimant must demonstrate ownership of the Investments in order to demonstrate control and thereby establish standing.<sup>173</sup> Although, as established clearly below,<sup>174</sup> Claimants have

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<sup>172</sup> Jurisdictional Memorial, para 135; *see infra*, para 100.

<sup>173</sup> *See, e.g., id.* para 130 (“Claimants cannot now contend that they owned or controlled the Commodities when they were allegedly expropriated by Morocco in August 2015 [because] they had already been sold by Q1 to 2014-1.”); para 182 (“[W]here control has been considered a relevant touchstone, it has always been based on some ownership interest that falls short of 100 per cent ownership.”).

<sup>174</sup> *See infra*, paras 102, 104.

demonstrated ownership, the assumption that it is a necessary requirement is flatly contradicted by the plain language of the FTA. Under Article 10.27, a qualifying “investor” includes “an enterprise constituted or organized under the law of a Party” that “has made an investment in the territory of the other Party.” A qualifying “investment” is any “asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.”<sup>175</sup> Therefore, in order for a claimant to be a qualifying investor under Article 10.27 of the FTA, it must own or control, directly or indirectly, a qualifying investment.<sup>176</sup>

79. The use of the disjunctive “or” between the terms “owns” and “controls” demonstrates that the FTA considers the two terms to be “conceptually distinct, and that control is not a mere function of ownership.”<sup>177</sup> Although it is true that a majority shareholder of a company often is presumed to control the entity, this is not the case where there are special circumstances (such as strong evidence of a lack of actual control) that “create doubts about the owner’s control.”<sup>178</sup> Accordingly, ownership or lack thereof is not determinative of the control inquiry.
80. Rather, control is a flexible concept that “must be evaluated on a case-by-case basis,”<sup>179</sup> and other factors, such as special voting rights, management rights, and the exercise of expertise, may lead to a finding of control.<sup>180</sup> As explained in Claimants’ Observations, investment tribunals have recognized that *de facto* control, in lieu of legal control, is sufficient to support jurisdiction under treaties that, like the FTA, refer to ownership and control separately using the disjunctive “or.”<sup>181</sup>
81. Respondent attempts to distinguish the *Thunderbird v. Mexico* and *B-Mex. v. Mexico* cases from the present case by arguing that the respective tribunals “saw the idea of ‘control’ as dependent on some form of co-existing ownership” and that “[b]y the same token, it is clear that ‘control’ as it appears in FTA Article 10.27 is implicitly a reference to a shareholder or other equity owner (such as a beneficial owner) who has some proprietary stake in the entity (or chose in action) said to be controlled that is less than 100 per cent but which can, through other means, demonstrate the ability to direct the

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<sup>175</sup> FTA Art. 10.27 (CS-0001).

<sup>176</sup> See Schreuer Legal Opinion, para 115.

<sup>177</sup> *Id.*

<sup>178</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (2 November 2015) para 104 (CL-0064-ENG); *Caratube Int’l Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 February 2014) para 271 (CL-0065-ENG).

<sup>179</sup> *Italba Corp. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/16/9, Award (22 March 2019) para 254 (CS-0139).

<sup>180</sup> See, e.g., Schreuer Legal Opinion, paras 122-42.

<sup>181</sup> See Claimants’ Observations, paras 61-63.

actions of the relevant entity.”<sup>182</sup> Respondent’s interpretation, however, fails to take into account that, in both cases, the respective tribunals were applying Article 1117 of NAFTA in order to determine whether the claimant had standing to bring the claim on behalf of the locally incorporated entity. (Article 1117 of NAFTA provides that “[a]n investor of a Party, ***on behalf of an enterprise of another Party*** that is a juridical person ***that the investor owns or controls directly or indirectly***, may submit to arbitration under this Section a claim that the other Party has breached an obligation.”) Claimants here are not bringing a claim on behalf of a locally incorporated company pursuant to Article 10.15.1(b) of the FTA (which is the parallel provision to Article 1117 of NAFTA), but on their own behalf pursuant to Article 10.15.1(a). And the language in Article 10.27 of the FTA is quite clear: a qualifying investor may bring a claim on its own behalf in respect of a protected “investment,” which is any “asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment.” In any event, what the two cases against Mexico show is that, even in cases where the claimant is bringing a claim on behalf of a locally incorporated entity, tribunals have accepted that “control” could mean both *de facto* and legal control.<sup>183</sup>

82. Further, contrary to Respondent’s arguments, there is clear legal authority supporting the position that control, even in the absence of ownership, is sufficient to establish standing. In *Myers v. Canada*, a case under Chapter 11 of NAFTA,<sup>184</sup> the claimant, S.D. Myers, Inc. (“SDMI”), was a U.S. corporation owned by various individuals of the Myers family. The claimant sought to expand its waste disposal operations in Canada and established a Canadian affiliate, S.D. Myers (Canada) Inc. (“Myers Canada”) to do so. SDMI did not own any shares in Myers Canada, but the two companies were owned and managed by the same individuals from the Myers family. Canada argued that Myers Canada was not a valid “investment” and SDMI was not a valid “investor” under NAFTA because SDMI did not own or control Myers Canada. The tribunal dismissed Canada’s argument and considered SDMI as a protected investor under NAFTA:

Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs. The Tribunal’s view is reinforced by

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<sup>182</sup> Jurisdictional Memorial, para 184 (emphasis in original).

<sup>183</sup> See *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Arbitral Award (26 January 2006) para107 (CL-0067-ENG); *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award (19 July 2019) para 205 (CL-0068-ENG); see also Schreuer Legal Opinion, paras 200-01.

<sup>184</sup> As noted in Claimants’ Observations, Article 1139 (Definitions) of NAFTA defines “investment of an investor of a Party,” as does the FTA, to mean an investment (as defined in Article 1139) that is “owned ***or*** controlled directly ***or*** indirectly by an investor of such Party.” NAFTA art 1139(j) (emphasis added) (CL-0066-ENG).

the use of the word “indirectly” in the second of the definitions [i.e., the definition of “investment of an investor of a Party”] quoted above.<sup>185</sup>

83. As noted by Professor Schreuer, Canada challenged the award before the Federal Court of Canada, but the Court also rejected Canada’s argument and held:

In this case, the Tribunal found as a fact that SDMI controlled Myers Canada. This control was not based on the legal ownership of shares, but on the fact that Mr. Dana Myers controlled every decision, every investment, every move by Myers Canada, and Mr. Myers did so as chief executive officer of SDMI.<sup>186</sup>

84. A similar approach was taken by the tribunal in *Société Générale v. The Dominican Republic*, which was governed by the France-Dominican Republic BIT.<sup>187</sup> The tribunal in that case found:

The Tribunal is next persuaded that the definition of investment under the Treaty Article I (1) relates protection not only to a formal ownership of shares or other such usual kind of transaction but also to a broader category of rights and interests of any nature. This allows for great flexibility in respect of the manner in which the investment is organized, and nothing suggests that the corporate structure chosen is contrary to this objective. As long as the business undertaken and the pertinent legal arrangements are lawful, as is the case here, there will be no reason to refuse the protections of the Treaty. This in the end is the reason why investment law has always searched for the economic interest underlying a given transaction and if it is compatible with the terms of the law and the Treaty, such interest is recognized as entitled to protection.<sup>188</sup>

85. In addition, in a number of cases, investment tribunals have found that it is sufficient that the investor is a beneficiary of the investment at issue even without formal ownership.<sup>189</sup> Here, it is obvious that Claimants are significant beneficiaries of the Investments since, as an investment fund, Claimants’ business depends entirely on the success of its investments. Indeed, Respondent’s expert, Mr. Travers, acknowledges that “it is often

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<sup>185</sup> *S.D. Myers, Inc. v. Gov’t of Canada*, UNCITRAL, Partial Award (13 November 2000) paras 227-31 (CL-0076-ENG).

<sup>186</sup> Federal Court Canada, 2004 FC 38, Reasons for Order (13 January 2004) para 67 (CS-0223); *see also* Schreuer Legal Opinion, para 247.

<sup>187</sup> *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction (19 September 2008) (RL-0053).

<sup>188</sup> *Id.* para 48.

<sup>189</sup> *See* Schreuer Legal Opinion, paras 248-54.

the case in practice . . . investor group[s] will be attracted to the fund by virtue of the investment performance of that specific investment manager.”<sup>190</sup>

86. Therefore, even assuming that some of the Claimants did not have ownership of the Investments, this Tribunal still has jurisdiction over them so long as they had control, whether legal or de facto. Because each of the Claimants had at least ownership (formal or beneficial) *or* control (direct or indirect) of the Investments, if not both, all are subject to jurisdiction in this proceeding.

B. Indirect, Rather Than Direct, Ownership or Control of the Investments is Sufficient to Establish Standing

87. Many of Respondent’s arguments also incorrectly assume that each Claimant must demonstrate a *direct* link to the Investments, whether via direct ownership or direct control. Again, the inclusion of both the term “directly” and the term “indirectly” in Article 10.27 clearly contradicts Respondent’s position. Although Respondent does not seem unaware of the plain text of the FTA,<sup>191</sup> it attempts to conceal its blatant disregard for it by wrongly framing the issue as purported legal limitations on the rights to the assets and losses of investment vehicles.
88. In one line of argument, Respondent asserts that only the investment vehicle, not any of its shareholders, may bring claims with respect to its assets because of the so-called default position that “a company is distinct from its shareholders.”<sup>192</sup> In a related line of argument, Respondent argues that Claimants, not their investment vehicles, must have “direct rights”—whether in the form of contractual rights or rights to directly hold title—with respect to the Investments.<sup>193</sup> Respondent is incorrect on both counts for multiple reasons.
89. First, Respondent’s reliance on the so-called default position—which purportedly supports a “logical corollary” that a shareholder of a company does not have standing to bring a claim concerning the company’s assets—is misplaced. Such “default position” does not apply in cases governed by broadly-worded investment treaties like the FTA.<sup>194</sup>

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<sup>190</sup> Travers Report, para 4.18.1.

<sup>191</sup> *See, e.g.*, Jurisdictional Memorial, para 216.

<sup>192</sup> *Id.* paras 137-52.

<sup>193</sup> *Id.* paras 153-57.

<sup>194</sup> Schreuer Legal Opinion, paras 155-58. Although Respondent cites to *HICEE v. Slovak Republic*, the origins of Respondent’s so-called default position are in fact in the International Court of Justice’s decision in *Barcelona Traction*. There, Belgium brought a diplomatic protection claim on behalf of certain nationals that owned an 88% shareholder interest in a Canadian company, which in turn owned Spanish subsidiaries that allegedly had been mistreated by the Spanish government. The ICJ held that, because the Canadian company’s rights had been more directly impacted, the Belgian shareholders were not the proper “investors” and Belgium could not assert the claim on their behalf. In doing so, the ICJ expressly recognized that its position was based on customary international law and averred that, in



Rather, where an investment treaty like the FTA treats shares in a company as a covered investment, it has been well established by investment tribunals that shareholders of entities affected by a breach of the treaty may bring claims against the offending State.<sup>195</sup> Indeed, the very case that Respondent cites for the “default position,” *HICEE v. Slovak Republic*, expressly recognizes that “[t]he true position . . . is that the admissibility of shareholder claims depends upon the provisions of the investment protection treaty in question, and that investment protection treaties very frequently make provision to allow for shareholder claims, either explicitly or by necessary implication. The position, in other words, is controlled by the treaty.”<sup>196</sup>

90. It follows that the “logical corollary” that is actually applicable here is that, if a claimant’s position as a shareholder also gives rise to interests in the company’s assets, the claimant may bring claims pertaining to those assets as *indirect* investments. In fact, several investment tribunals have recognized that, where (i) the applicable investment treaty protects indirect investments and (ii) the foreign investor either legally or factually controls a company, the investor is entitled to directly bring claims in respect of the assets of the company.
91. For example, in *Mera Investment Fund v. Serbia*, the claimant, a Cypriot investment holding company, sought to recover losses suffered by the claimant’s Serbian investment vehicle allegedly caused by the Serbian Government’s actions.<sup>197</sup> Serbia argued that the assets of the claimant’s Serbian investment vehicle were “not assets that were invested by

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contemporary international law, bilateral and multilateral treaties could provide for the protection of shareholders. *Barcelona Traction, Light and Power Co, Ltd (Belgium v. Spain)*, Judgment (5 February 1970) ICJ Reports (1970) 4 (CS-0146).

<sup>195</sup> See, e.g., *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award (10 February 1999) para 89 (CL-0071-FR) (holding that ICSID jurisprudence does not limit the right of standing to only legal entities that are directly affected by contested measures; the right extends to the shareholders of those entities who were bona fide investors); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction (17 July 2003) paras 48-52, 63-65, 69 (CL-0072-ENG) (finding no bar under either current international law or the applicable legal instruments in that case to allowing claims by shareholders independently from those of the corporation at issue, not even if those shareholders are minority or non-controlling shareholders); see also Claimants’ Observations, para 65, n 54. By attempting to distinguish between shareholders with claims in respect of their shares in an investment vehicle and shareholders with claims in respect of the assets of the vehicle (see Jurisdictional Memorial, para 146), Respondent essentially concedes that shareholders overall typically have standing under international law. For the reasons explained below, Respondent’s purported distinction does not exist in any event, as shareholders may bring claims arising out of a host State’s impairment of both the shares and the assets.

<sup>196</sup> *HICEE BV v. Slovak Republic*, PCA Case No 2009-11, Partial Award (23 May 2011) para 147 (RL-0005).

<sup>197</sup> *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction (30 November 2018) paras 129-30 (CS-0086).

a protected investor.”<sup>198</sup> The tribunal rejected Serbia’s argument, holding that the BIT at issue did not exclude indirect investments from the scope of protection and that there was “nothing in the language . . . which would preclude a finding that the Claimant can bring a claim in respect to underlying assets of its subsidiary.”<sup>199</sup> Observing that it was “not unusual that an investor, who wants to make an investment abroad, uses a company as a vehicle” to do so, the tribunal noted that “in situations where a shareholder controls the company that owns the assets in issue, tribunals may consider those underlying assets to be the investments of the shareholder.”<sup>200</sup> With respect to the claimant before it, the tribunal held that it had invested both in its subsidiary and also *through* the control thereof, and as such, it was entitled to “bring claims not only for the impairment of the value of its shares in its subsidiary, but also for the impairment of its subsidiary’s assets.”<sup>201</sup>

92. As another example, in *Bernhard von Pezold v. Zimbabwe*, German shareholders who indirectly owned commercial farms in Zimbabwe through a series of holding companies brought an action against Zimbabwe for the Government’s expropriation of the farmland.<sup>202</sup> Zimbabwe argued, as Morocco does here, that “international law traditionally tended to look unfavourably on shareholders bringing claims for damage to investments which they did not directly own.”<sup>203</sup> However, in recognition of contemporary international law permitting direct claims by a company’s shareholder in respect of the company’s assets, the tribunal expressly denied the application of such argument to the case: “Ultimately, for every tribunal it must be a matter of interpretation of the relevant BITs – and, in this case, the ICSID Convention – which determines who may bring proceedings for an alleged violation of the BIT in respect of a protected investment.”<sup>204</sup> Finding that the treaties at issue “contain[] no requirement that the investment be *directly* held or controlled,” that Article 25 of the ICSID Convention also “places no restriction on the type of investment which can give rise to an investment dispute,” and that the claimants had sufficiently demonstrated their control over the investment vehicles, the tribunal upheld their standing to bring direct claims concerning the vehicles’ assets.<sup>205</sup>
93. Even in the cases that Respondent relies on, the tribunals may have disallowed claims as to the assets of a company in which the claimants held an interest but did not deny such

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<sup>198</sup> *Id.* para 111.

<sup>199</sup> *Id.* paras 127-28.

<sup>200</sup> *Id.* paras 129-30.

<sup>201</sup> *Id.* paras 134-35.

<sup>202</sup> *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015) paras 157-58 (CL-0070-ENG).

<sup>203</sup> *Id.* para 319.

<sup>204</sup> *Id.* paras 321-22.

<sup>205</sup> *Id.* paras 322-26 (emphasis added).

claimants the right to bring *indirect* claims for damages suffered by the company. In *Poštová banka v. Greece*, the tribunal recognized that “a shareholder of a company incorporated in a host State may assert claims *based on measures taken against such company’s assets* that impair the value of the claimant’s shares.”<sup>206</sup> In *Enkev v. Poland*, the tribunal not only held that it had jurisdiction over the claimant’s claim in respect of the claimant’s shares in the company at issue, but it also expressly acknowledged that its decision to reject the claimant’s claim in respect of the assets of that company was based on the language of the Netherland-Poland BIT and Polish law,<sup>207</sup> not any fundamental principle of international law. Accordingly, the issue in Respondent’s cases—and whatever purported distinction Respondent attempts to draw between claims regarding shares versus claims regarding assets—is not one determinative of jurisdiction, but one potentially relevant to damages.<sup>208</sup>

94. Here, Article 10.27 of the FTA defines an “investment” as “***every*** asset that an investor owns or ***controls, directly or indirectly***” and an “investor” to include “an enterprise of a Party that . . . has made an investment in the territory of the other Party.” Therefore, it follows that *any* “enterprise of a Party” that directly or indirectly controls a qualifying asset may bring a claim under the FTA. It is thus of no legal consequence whether Claimants’ Investments were directly owned by the Cayman entities because, as further detailed below, Claimants in fact indirectly owned and/or controlled both the Cayman entities and the Investments made through them.
95. For the same reason, it is disingenuous for Respondent to argue that Claimants’ claims are barred on the ground that Claimants utilized Cayman investment vehicles and “[n]owhere in Article 10.15.1 is it provided that a claimant is entitled to submit a claim

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<sup>206</sup> *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award (9 April 2015) para 245 (RL-0006) (emphasis added); *see also, BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) para 216 (RL-0041) (holding that the tribunal had jurisdiction over the claimant’s claims of breach of the Argentina-U.K. BIT regarding its shareholding interest in the local companies); *El Paso Energy International Company v. Argentina Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) para 214 (CL-0015-ENG) (holding that the protected investment was only the shares in the Argentinian companies that belonged to claimant); *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award (22 August 2017) para 640 (RL-0010) (holding that the tribunal had jurisdiction over the claimant’s claim relating to the Rental Power Project near Karashi); *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction (18 July 2013) para 275 (RL-0009) (finding that the claimant had an investment in Bulgaria and stating that “[i]t is well accepted that it is not necessary, unless explicitly so provided, that an investor owns the majority of the shares of a company in order to be able to have its rights protected through the mechanisms of international investment protection.”); *Asian Agricultural Products LTD. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990) para 95 (CS-0003) (holding that the protection granted to the foreign investment in that case covered the value of the shareholding value of the local joint venture company).

<sup>207</sup> *Enkev Beheer B.V. v. Republic of Poland*, PCA Case No. 2013-01, First Partial Award (29 April 2014) paras 310, 313 (RL-0010).

<sup>208</sup> *See* Schreuer Legal Opinion, para 192.

on behalf of an investment vehicle in a third state.”<sup>209</sup> As a practical matter, Claimants reiterate that they have not, in fact, submitted claims on behalf of VMF Q1, 2014-1, or 2015-1; they have submitted claims “on [their] own behalf” based on their direct and indirect ownership and/or control of the Investments, as demonstrated further below. And, as a legal matter, a number of investment tribunals have found standing in cases with investment structures similar to that of Claimants, i.e., where the vehicles for the investments were incorporated in a third country but controlled by companies incorporated in a State party to the relevant investment treaty.<sup>210</sup>

96. In *Noble Energy v. Ecuador*, for example, claimant Noble Energy, Inc., a Delaware corporation, indirectly owned a Cayman Islands corporation called MachalaPower Cia. Ltda., which in turn held the investment at issue in Ecuador.<sup>211</sup> Ecuador argued that Noble Energy could not bring a claim for alleged mistreatment of MachalaPower because it did not directly make the investment nor did it own MachalaPower directly.<sup>212</sup> Concurring with various arbitral decisions that allowed indirect shareholders to bring claims under the applicable BIT, the tribunal rejected Ecuador’s position and held that the BIT at issue (which covered investments both owned or controlled directly and indirectly) and the ICSID Convention permitted Noble Energy’s claim, notwithstanding the fact that there were two intermediate layers (involving a Cayman Islands entity and a Delaware entity, respectively) between Noble Energy and Machala.<sup>213</sup> The tribunal noted that Noble Energy’s relationship with the investment was “not too remote” and that, “at all relevant times, Noble Energy has been the ultimate parent of all of the subsidiary companies involved in the arbitration.”<sup>214</sup>
97. Claimants’ relationships here, though complex, also are more than sufficiently close for purposes of standing under Article 10.27 of the FTA because the FTA expressly covers indirect investors. Indeed, as with Noble Energy in *Noble Energy*, Claimant **The Carlyle**

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<sup>209</sup> Jurisdictional Memorial, para 152.

<sup>210</sup> See, e.g., *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, (7 October 2003) (CL-0090-ENG) (upholding jurisdiction under U.S.-Kazakhstan BIT where U.S. claimants controlled investment vehicles incorporated in Bermuda to make the investments at issue in Kazakhstan); *Ronal S. Lauder v. Czech Republic*, 9 ICSID Report 66, Final Award (3 September 2001) paras 153-54 (CS-0193) (upholding jurisdiction under U.S.-Czech Republic BIT where U.S. claimant controlled a Dutch company, which in turn owned 99% of a Czech Republic company that was allegedly mistreated by the Czech Government); *Tza Yap Shum v. Republic of Peru*, Case No. ARB/07/6, Decision on Jurisdiction (19 June 2009) (CS-0197) (upholding jurisdiction under a China-Peru BIT where Chinese claimants made indirect investments in Peru via a company incorporated in the British Virgin Islands).

<sup>211</sup> *Noble Energy, Inc. and MachalaPower Cia. Ltda. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction (5 March 2008) paras 3-4, 80 (CL-0006-ENG).

<sup>212</sup> *Id.* para 71.

<sup>213</sup> *Id.* paras 75, 77, 82.

<sup>214</sup> *Id.*, para 82.

**Group** here has been the ultimate parent of all of the other Claimants in this arbitration, and should be recognized similarly as a proper indirect investor. Regardless of the nationality of the investment vehicles utilized to make the Investments at issue, Claimants are unquestionably U.S. entities that made qualifying investments through their direct *and indirect* ownership and/or control of such investment vehicles.

98. It is important to note that the corporate structure of the entities involved in the Investments is not uncommon for investment companies. Indeed, Respondent's expert notes in his report that one of the "most common" ways that investment funds might be structured is a master-feeder fund structure, and that "it appears that at the relevant time the Celadon Fund was structured as a *typical*" master-feeder fund.<sup>215</sup> Utilizing a master-feeder structure allows the investment company to access a larger and more diverse pool of investor groups through the individual feeder funds.<sup>216</sup> Those funds then "feed" investor cash to the master fund, which then applies the capital towards investments.<sup>217</sup> Therefore, denying standing to Claimants based on the complexity of their investment structure would set an undesirable precedent in the world of investment arbitration by encouraging the foreclosure of a significant percentage of the world's international investments from investment treaty protections.<sup>218</sup>
99. In sum, Respondent's various legal contentions are erroneous, and this Tribunal should not base its jurisdictional determination on Respondent's brazen misstatements of the law.

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

100. No credence should be given to Respondent's recitation of the allegedly relevant facts because several of Respondent's factual assertions are either blatantly wrong or deliberately misleading. For one, Respondent repeatedly accuses Claimants of providing no evidence that Claimants had any relationship with VMF Q1 or 2014-1 at the time of Morocco's breaches.<sup>219</sup> That is simply untrue, as Claimants already have provided the requisite documentation, including, among other things, audited financial statements that clearly reflect the **U.S. Onshore Feeder's** ownership of VMF Q1 throughout fiscal year 2015, as well as the portfolio management agreement between **CCM** and 2014-1 setting

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<sup>215</sup> Travers Report, paras 3.1, 3.6 (emphasis added).

<sup>216</sup> See Second Walck Report, para 21. Per the AICPA Audit and Accounting Guide for Investment Companies, as U.S. investment companies have sought to globalize their investor pool, the number of funds organized outside of the United States has grown substantially in recent years. *Id.*, para 23.

<sup>217</sup> *Id.* para 21.

<sup>218</sup> *Contra Société Générale*, para 48 (RL-0053) ("As long as the business undertaken and the pertinent legal arrangements are lawful, as is the case here, there will be no reason to refuse the protections of the Treaty.").

<sup>219</sup> See, e.g., Jurisdictional Memorial, paras 15.2, 41-46, 133-35.

forth **CCM's** complete control over the Investments.<sup>220</sup> For another, Respondent improperly mischaracterizes **CCM's** role as that of a simple “professional investment manager” even though the reality was that **CCM** orchestrated, managed, and controlled the entire arrangement with SAMIR on behalf of all of the Claimants. No matter how much Respondent attempts to obfuscate the issue, the truth remains: Claimants each directly or indirectly owned and/or controlled the Investments at all times, and thus, they have standing as “investors” under Article 10.27 of the FTA.

*i. Claimants Owned and/or Controlled the Investments Made Through VMF Q1*

101. As explained above, VMF Q1 is a **CCM**-created investment vehicle that is indirectly owned by the **U.S. Onshore Feeder**.<sup>221</sup> VMF Q1 had *no* employees, and VMF Q1 also only had nominal directors that authorized **CCM** instead to “exercise all rights, powers, privileges and other incidents of ownership or possession” in respect of VMF Q1’s assets.<sup>222</sup> But contrary to Respondent’s assertions, VMF Q1 unquestionably held title to the Commodities at the point of purchase<sup>223</sup>; the Investments would have made no sense otherwise, as there then would be no Put Rights to exercise with respect to those

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<sup>220</sup> Respondent incorrectly states that “the earliest evidence submitted by the Claimants is dated 31 December 2015.” Jurisdictional Memorial, para 135. While it is true that Claimants previously provided the 2015 Audited Financial Statements of the Celadon Entities and that such statements are *dated* December 31, 2015, those statements are drafted to reflect the status of the Celadon Entities for the entirety of fiscal year 2015, i.e., including during August 2015. Therefore, Claimants in fact have provided evidence of the corporate relationships as at August 7, 2015. But, for the avoidance of doubt, Claimants provide herewith the 2014 Audited Financial Statements of the Celadon entities to further confirm that there was no change in ownership allocation between fiscal year 2014 and fiscal year 2015. See 2014 U.S. Onshore Feeder Audited Financial Statements (CZ-0036); 2014 Offshore Feeder Audited Financial Statements (CZ-0042); 2014 Master Fund Audited Financial Statements (CZ-0044).

<sup>221</sup> See *supra* paras 20-21.

<sup>222</sup> VMF Q1 Investment Management Agreement § 2(b) (CZ-0047). Mr. Travers, Respondent’s expert, expressly affirms this by observing that “[a]ctual management of the investments [of VMF Q1] appears to have been delegated by the board to [**CCM**] with what are very possibly broad discretionary powers.” Travers Report, para 3.9. Mr. Travers further explains that “[s]pecial purpose vehicles are sometimes established as part of a fund structure in order to hold specific investments or assets or to carry out a particular transaction.” Travers Report, para 3.3.

<sup>223</sup> To the extent Respondent calls into question VMF Q1’s title to the Commodities because of 2014-1’s eventual ownership of the Commodities, it is a red herring. As explained above, **CCM** personnel signed the MCTA and the transaction confirmations with SAMIR on behalf of VMF Q1 so that, after **CCM** committed capital to the Investments, VMF Q1 held title to the Commodities at the point of purchase and retained title to a portion of it to this day. 2014-1 was given title to the Commodities after VMF Q1 because, in order for the notes issued by 2014-1 to be secured with collateral, the collateral—Commodities—had to be owned by 2014-1 at some point.

Commodities, nor would there be any need generally for a storage agreement with SAMIR.<sup>224</sup>

102. The express purpose of the Celadon Entities was to provide funds from the **U.S. Onshore Feeder** through VMF Q1 to be used by **CCM** for commodities investments (including the Investments effected through VMF Q1) that would generate returns for the **U.S. Onshore Feeder's** investors.<sup>225</sup> Against this background, all six Claimants have cognizable ownership and/or control interests in the assets and losses of VMF Q1:

- **U.S. Onshore Feeder (Delaware):** At all relevant times, the **U.S. Onshore Feeder** has owned 99.96% of the participating shares of the Master Fund, which in turn has owned 100% of the participating shares in VMF Q1. Ownership of the participating shares in VMF Q1 entitles the Master Fund to redeem the shares against the capital of VMF Q1, and ownership of the participating shares in the Master Fund entitles the **U.S. Onshore Feeder** to redeem the shares against the net assets of the Master Fund. Put simply, through the Master Fund, the **U.S. Onshore Feeder** owns VMF Q1.
- **CCM (Delaware):** As noted above and as further explained below, **CCM** was expressly appointed VMF Q1's sole investment manager, with "broad discretionary powers."<sup>226</sup> **CCM** also was expressly appointed with "complete discretion in investment and reinvestment" of the accounts of the **U.S. Onshore Feeder**, the Offshore Feeder, and the Master Fund.<sup>227</sup> Therefore, whatever day-to-day investment decisions were made by any of the Celadon Entities were made pursuant to **CCM's** control.
- **Celadon Partners (Delaware):** As the general partner of the **U.S. Onshore Feeder**, 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**. Accordingly, similar to the general partner in *Mason v.*

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<sup>224</sup> Respondent's suggestion that title to the Commodities may have "remained with SAMIR" is plainly refuted by the Investment Agreements, the Forbearance Agreement between Carlyle and SAMIR, warehouse certificates and pledge agreements in which SAMIR acknowledged that the Commodities in its tanks belong to Q1, 2014-1, and 2015-1, and numerous other written acknowledgments by SAMIR that all unequivocally acknowledge that Claimants (through their investment vehicles)—not SAMIR—owned the Commodities unless and until Claimants exercised their Put Rights. *See, e.g.*, Forbearance Agreement (MP-0013); ██████████ Pledge Over Commodities, 2014-1 (C-0049-ENG); Pledge Over Commodities, 2015-1 (C-0049-ENG).

<sup>225</sup> *See supra* para 15(a).

<sup>226</sup> Travers Report, para 3.9.

<sup>227</sup> *See* U.S. Onshore Feeder Investment Management Agreement § 5(a) (CZ-0035); Master Fund/Offshore Feeder Investment Management Agreement § 5(a) (CZ-0041).

*Korea*,<sup>228</sup> **Celadon Partners** both indirectly controlled and owned the Investments.

- **TC Group (Delaware) and TC Group Investment Holdings (Delaware)**: Each is a limited partner of the **U.S. Onshore Feeder**, with rights to the **U.S. Onshore Feeder's** investment returns flowing from the Transactions. Since the time of the SAMIR transactions and through the present date, both are also the only two investors in the Offshore Feeder, which holds 0.04% of the participating shares in the Master Fund (which, as noted above, entitles it 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). In addition, at all times, **TC Group** has held at least an 83% ownership interest in **CCM**. Therefore, **TC Group** and **TC Group Investment Holdings** each indirectly owned, and **TC Group** indirectly controlled, the Investments.
- **The Carlyle Group (Delaware)**: As the ultimate parent to all of the other Claimants, it has indirect ownership and control over the other Claimants and their Investments.<sup>229</sup>

The foregoing thus establishes that each of the Claimants directly or indirectly owned and/or controlled the Investments made through VMF Q1, and as such, each has standing as an “investor” under Article 10.27 of the FTA.

*ii. Claimants Owned and/or Controlled the Investments Made Through the Notes Entities*

103. A significant portion of Respondent’s Jurisdictional Memorial is dedicated to attempting to separate 2014-1 (and any rights to its assets and losses) from Claimants. This effort, however, is unavailing. As noted above, **CCM** formed the Notes Entities in order to secure additional investment capital for **CCM’s** investment activities.<sup>230</sup> As with VMF Q1, the Notes Entities had *no* employees, and their directors also were nominal and had *no* control or power over their investment decisions (indeed, the directors were selected by **CCM’s** attorneys).<sup>231</sup> Instead, **CCM** was authorized, as portfolio manager, to purchase commodities with funds raised by the Notes, and **CCM**, in fact, used funds from 2014-1 to make purchases of certain of the Commodities.<sup>232</sup> Further, at all times,

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<sup>228</sup> See *supra* para 33.

<sup>229</sup> See, e.g., *Noble Energy*, paras 82-83 (CL-0006-ENG) (“[A]t all relevant times, [the claimant] has been the ultimate parent of all of the subsidiary companies involved in the arbitration . . . [T]he Tribunal thus concludes that [the claimant] has standing under the ICSID Convention and the BIT . . .”).

<sup>230</sup> See *supra* para 24.

<sup>231</sup> See *id.*

<sup>232</sup> See *id.*



CCM had the duty to protect the Investments.<sup>233</sup> Therefore, Respondent's claim that "2014-1 never had any connection to any . . . Claimant entity" until 2017<sup>234</sup> is patently false.

104. In addition, at the time of the Transactions and Morocco's breach, Claimant **TC Group** indirectly controlled another Delaware-incorporated Carlyle entity that owned a portion of the subordinated equity tranches of the Notes. Ownership entitled the holder, CLO LP, to receive interest payments and recover the principal value of the notes, and such rights inured to the benefit of CLO LP's general partner, of which **TC Group** was and continues to be the sole member.<sup>235</sup> **TC Group**, therefore, is another Claimant with a clear connection to 2014-1 at the time of the breach, and, therefore, obviously prior to 2017.<sup>236</sup>
105. Finally, as noted above, Claimant **The Carlyle Group**, as the ultimate parent over all of the Claimants, plainly has indirect ownership and control over the other Claimants and their Investments.
106. Therefore, **CCM**, **TC Group**, and **The Carlyle Group** directly or indirectly owned and/or controlled the Investments made through the Notes Entities, and as such, each has standing as an "investor" under Article 10.27 of the FTA.

*iii. Every Investment Decision Was Under the Direct Control of Claimant Carlyle Commodity Management L.L.C.*

107. As part of its fourth objection, Respondent singles out **CCM** and feebly attempts to argue that it does not have standing because "as an investment advisor it . . . has no ownership or financial interest in the entities that it advises."<sup>237</sup> Respondent is plainly wrong because, as explained above, Article 10.27 of the FTA protects investors that have ownership or control of the investments, and the requisite control need not be derivative of any ownership interest. Control exists if the investor directs and manages investment decisions.<sup>238</sup> **CCM** is a qualifying "investor" because, at every stage of the Investments, it had direct control of all of the investment decisions at issue in this arbitration.

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<sup>233</sup> See *supra* para 25.

<sup>234</sup> Jurisdictional Memorial, para 130.

<sup>235</sup> See 2014-1 Indenture, Art. 2 (CZ-0050) (describing the rights of noteholders); 2015-1 Indenture, Art. 2 (CZ-0051); see also *supra* para 25.

<sup>236</sup> Note also that **TC Group** is the managing member of CIM, which has owned 100% of the Notes issued by the Notes Entities since July 2017. See Exhibit C-2 to Claimants' RFA, Carlyle Investment Management L.L.C. Resolution Authorizing Power of Attorney (C-0016-ENG). Accordingly, since July 2017, **TC Group** has indirectly owned 100% of the Notes.

<sup>237</sup> Jurisdictional Memorial, para 177.

<sup>238</sup> *Int'l Thunderbird* paras 101-10 (CL-0067-ENG); Schreuer Legal Opinion, para 147 ("Effective control through operation and management is the ultimate litmus test.").

108. In October 2014, **CCM** first identified SAMIR as a potential counterparty, and **CCM** employees conducted the due diligence preceding the decision to enter into the Investments. **CCM** personnel signed the Investment Agreements on behalf of investment vehicles, i.e., VMF Q1 and 2014-1, which **CCM** previously had created to raise investment funds. Given that VMF Q1 and 2014-1 (and later, 2015-1) had *no* employees of their own and only nominal directors, it was **CCM** that was given complete control over the investment decisions of each investment vehicle via a series of investment management agreements; **CCM** also wielded control over the day-to-day investment decisions of the other Celadon Entities. Pursuant to those agreements, **CCM** used the funds raised by both the **U.S. Onshore Feeder** and the Notes Entities to purchase the Commodities. For each Transaction, a **CCM** employee, on behalf of VMF Q1, signed a transaction confirmation with SAMIR, and, on the agreed-upon purchase date, **CCM** posted an irrevocable letter of credit in favor of a Commodities supplier; the supplier would then deliver the Commodities to the SAMIR refinery in Morocco, where it stayed unless and until **CCM** chose to exercise the Put Right. The closeout confirmation was signed by a **CCM** employee on behalf of VMF Q1.<sup>239</sup>

109. As Respondent's expert, Mr. Travers, notes:

“In the Cayman Islands it is typically the case that an investment manager, unlike an investment advisor, will have delegated to it pursuant to the terms of the investment management agreement by the directors of the fund discretionary investment decision making authority. This is distinct from the pure investment advisory agreement under which the decision with regard to investments remains with the board of directors of the fund and the investment advisor makes recommendations only.”<sup>240</sup>

By Mr. Travers' standards, **CCM** is clearly a prototypical investment manager with complete discretion over its investment vehicles' investment decisions rather than a mere investment advisor.<sup>241</sup>

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<sup>239</sup> 2020 Zuech Statement, para 22; SAMIR-1005 Re-Sleeve Confirmation (CZ-0058).

<sup>240</sup> Travers Report, para 4.18.2.

<sup>241</sup> For the avoidance of doubt, although Claimants have referred to **CCM** as an “investment advisor” in prior submissions, any difference between Claimants' use of the term “investment advisor” and Respondent's and Mr. Travers' use of the term “investment manager” is purely semantic. What matters is the actual role that **CCM** played. Claimants have always represented that **CCM's** role vis-à-vis the Celadon Entities and the Notes Entities involves substantially more control and management than does the role of the “pure” investment advisor that Respondent and Mr. Travers describe.

110. Given that CCM so clearly “dominated the . . . decision-making structure”<sup>242</sup> of the Investments, CCM directly controlled the Investments and indisputably has standing as an “investor” under Article 10.27 of the FTA.

## VI. Claimants’ Investments Were “In The Territory of Morocco” for Purposes of Article 10.27 of the FTA (Response to Objection No. 2.)

111. As part of its second objection, Respondent claims that Claimants’ Investments were not “in the territory of Morocco” for purposes of Article 10.27 of the FTA because (i) other than the CSA, the Investment Agreements are not governed by Moroccan law, and (ii) Claimants allegedly did not own or control the Commodities. Respondent’s objection should be soundly rejected.

112. First, Respondent offers no support for its contention that “[i]nternational law determines the *situs* of contractual obligations” by “the proper law of the contract” and “the place of enforcement of the contract”—i.e., the choice of law provisions of the contract.<sup>243</sup> The reference to *Bayview v. Mexico* is misplaced, as the facts therein are substantially different from the facts here.<sup>244</sup>

113. In *Bayview*, the claimants were irrigation districts, companies, and individuals that depended on rights to water from the Rio Grande, which flows from Mexico into the United States.<sup>245</sup> The claimants alleged that Mexico improperly diverted water from the Rio Grande and harmed their investments (i.e., collectively, their water rights, dams, reservoirs and delivery facilities, irrigation systems, farms, equipment, and overall irrigated farming businesses).<sup>246</sup> The tribunal noted that “[t]here [was] no doubt that the Claimants . . . invested in farms and irrigation facilities within the State of Texas,” but it

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<sup>242</sup> *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) para 194 (CS-0144).

<sup>243</sup> Jurisdictional Memorial, para 113.

<sup>244</sup> Other cases cited by Respondent in footnote 127 of the Jurisdictional Memorial to support its approach are equally inapposite because none concerns financial instruments, and the underlying treaties corresponding to those cases are not comparable to the FTA. For example, in *Urbaser v. Argentine Republic*, the tribunal stated: “Article X(5) [of the Spain Argentina BIT] establishes that the Tribunal must apply the law of the Argentine Republic. This provision implies the contracting parties’ consent to decide controversies resulting from violations of other international law rules or the Argentine domestic law. Domestic law is the legal system to which the investor submits voluntarily. Argentine law has the essential function of defining which rights were vested in Claimants.” *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016) para 556 (RL-0036) (emphasis added). As noted in Claimants’ Observations, Article 10.21.1 of the FTA does not include the application of any domestic law to the substance of this arbitration. See Claimants’ Observations, para 73.

<sup>245</sup> *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Request for Arbitration (2 February 2005) paras 1-45 (CL-0091-ENG).

<sup>246</sup> *Id.* paras 61, 65.

ultimately held that the claimants had not made any investment “in the territory of [Mexico]” because (a) the claimants’ water rights were granted by the State of Texas, and (b) the claimants did not own the water at issue, for “[w]hile the water [was] in Mexico, it belong[ed] to Mexico.”<sup>247</sup> In short, all aspects of the claimants’ purported investments were tied to Texas, whether it was the property rights granted to them via a Texas court order or the farms and irrigation facilities located in Texas.

114. By contrast, in the present proceeding, Claimants’ Commodities undoubtedly were physically located in Morocco, and the rights and obligations surrounding their storage in SAMIR’s tanks were dictated by the CSA, which, as Respondent expressly concedes, is in fact governed by Moroccan law.<sup>248</sup> Regardless of the choice of law provisions in the MCTA and the other Investment Agreements, Claimants’ Put Rights also are inextricably tied to Morocco in that they are wholly dependent on the repurchase of the Commodities stored in Morocco (such repurchase to be made by SAMIR, the only refinery in Morocco). Looking at Claimants’ Investments holistically, the territorial nexus is clear.<sup>249</sup>

115. Further, whereas investment tribunals “have taken a restrictive approach in cases in which a physical business was in question,” as in *Bayview*,<sup>250</sup> they have not been so strict with investments that are financial instruments because such investments do not, by nature, have a physical location.<sup>251</sup> Rather, as raised in Claimants’ Observations, several investment tribunals have evaluated the location of a financial instrument based on “where and/or for the benefit of whom the funds are ultimately used.”<sup>252</sup> As the tribunal in *Inmaris Perestroika v. Ukraine* stated: “[A]n investment may be made in the territory

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<sup>247</sup> *Bayview Irrigation District v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007) paras 91, 116-18 (RL-0033).

<sup>248</sup> Amended and Restated CSA (MO-0004) § 19.1 (“This Agreement is governed by and shall be construed in accordance with the laws of Morocco.”).

<sup>249</sup> See Schreuer Legal Opinion, paras 58-68, 99.

<sup>250</sup> Rudolf Dolzer, Christoph Schreuer, *Principles of Investment Law* p 77 (CL-0089-ENG).

<sup>251</sup> See *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013) paras 498-99 (CL-0080-ENG) (stating: “[b]y their very nature, financial instruments such as bonds/security entitlements are not physical investments such as a piece of land, an industrial plant or a mine.”).

<sup>252</sup> *Abaclat*, para 374 (CL-0078-ENG). Respondent attempts to reject this line of cases, saying that the “position has been subject to serious criticism on a number of grounds.” However, its only support for that statement is a reference to a single academic article that is unsupported by any investment case law or a leading international law treatise. The only case Respondent cites to is a case from the Singapore Court of Appeals, which Respondent claims “was applying international law in an analogous situation.” Jurisdictional Memorial, para 122. Respondent, however, fails to point to the source of the international law that the Singapore court was purportedly applying. And, in any event, the case before the Singapore Court of Appeals does not concern financial instruments covered independently by the underlying investment treaty, as is the case here.

of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself.”<sup>253</sup>

116. Accordingly, in *Deutsche Bank v. Sri Lanka*, the tribunal held that the hedging agreement at issue had a sufficient territorial nexus with Sri Lanka because “it [was] undisputed that the funds paid by Deutsche Bank in execution of the Hedging Agreement were made available to Sri Lanka, were linked to an activity taking place in Sri Lanka and served to finance its economy which is oil dependent.”<sup>254</sup> Here, too, even if the Investment Agreements with SAMIR did not contain a choice of law provision designating Moroccan law as the applicable law, all of the activity thereunder had ties to, and effects in, Morocco. And while Respondent is correct that SAMIR was not a government entity, nor was Morocco otherwise party to the Investment Agreements between Carlyle and SAMIR, the arrangement ultimately served the Moroccan economy with a reliable supply of fuel and crude oil critical for the operations of Morocco’s sole refinery (which, indeed, Morocco ultimately seized by improper means).
117. Therefore, Respondent is incorrect that the choice of law provision of the Investment Agreements is the determinative factor regarding whether Claimants’ Investments were “in the territory of Morocco.” Indeed, all of the other factors and considerations firmly establish the territorial nexus of Claimants’ Investments.
118. As for Respondent’s challenges to Claimants’ ownership and control of the Investments, for the reasons stated in Section V.C. above, Respondent’s contentions are incorrect, and, consequently, the fact that Claimants’ Commodities were “in the territory of Morocco” cannot be refuted on that basis.
119. For the foregoing reasons, there should be no doubt that Claimants’ Investments were “in the territory of Morocco” for purposes of Article 10.27 of the FTA.

## **VII. Claimants’ Complete Control Over the Investments Satisfies Any Requisite Level of Involvement in the Investments (Response to Objection No. 4)**

120. In both its Application for Bifurcation and Jurisdictional Memorial, Respondent attempts to advance a textual argument that Claimants are required to have “concretely” made an Investment in Morocco in order to satisfy the requirements of Article 10.27 of the FTA. Further, Respondent interprets the purported “concretely” requirement as an “active contribution” requirement. Because Respondent’s arguments have no basis whatsoever in the text of the FTA or in international case law, they should be dismissed out of hand and Respondent’s fourth objection also be rejected. Indeed, even if Respondent’s interpretations of the above terms were correct—which is not the case—Claimants would still comply with any such requirements.

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<sup>253</sup> *Inmaris Perestroika Sailing*, para 124 (CL-0081-ENG).

<sup>254</sup> *Deutsche Bank*, para 292 (CL-0002-ENG).

A. Respondents Have Misread the FTA Because the Term “Concretely” in Article 10.27 of the FTA is Intended to Cover Pre-Investments, Which Are Not At Issue Here

121. Article 10.27 of the FTA defines an “investor” to mean one that “concretely attempts to make, is making, or has made an investment in the territory” of the host State. Although Respondent interprets the word “concretely” as modifying all three verbs—attempts to make, is making, and has made—there is no support for Respondent’s reading of the definition. In fact, the more logical interpretation would be that the word “concretely” modifies the phrase “attempts to make” alone; as such, the “concretely” concept would cover *pre*-investments rather than investments that already *have* been made, such as the ones made by Claimants.
122. Such an interpretation is consistent with Article 31 of The Vienna Convention on the Law of Treaties, which provides 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.”<sup>255</sup> The Cambridge Dictionary defines “concretely” as “in a clear and definite way, or in a form that can be seen or felt[.]”<sup>256</sup> Based on this ordinary meaning, any purported “concretely” requirement would make the most sense in relation to an attempt to make an investment because it would ensure that the FTA protects activities that are sufficiently advanced enough to constitute an investment, while excluding those activities that are merely preparatory. Professor Schreuer also agrees with this interpretation, stating as follows:
- A grammatical interpretation of the formula “concretely attempts to make, is making, or has made an investment” reveals that the word “concretely” relates only to the first of the three items that follow. What is covered is a concrete attempt to make an investment. The placement of the word “concretely” and the use of commas, indicate that it does not relate to “is making” and “has made”.
- Apart from its grammatical context, the meaning of “concretely” makes sense only in conjunction with “attempts to make”. It does not make sense to speak of “concretely is making” or “concretely has made”.<sup>257</sup>
123. In fact, the reference to “concretely attempts to make” would address a question that is often before investment tribunals, i.e., at what point pre-investment activities become protected investments.<sup>258</sup>

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<sup>255</sup> VCLT, art 31 (CL-0049-ENG).

<sup>256</sup> Cambridge University Press, Cambridge Dictionary (2020), “Concretely” <https://dictionary.cambridge.org/us/dictionary/english/concretely>.

<sup>257</sup> Schreuer Legal Opinion, paras 225-27.

<sup>258</sup> *Id.*, paras 227-28. For example, in *Mihaly v. Sri Lanka*, the claimant bid for an energy project agreement with the Government of Sri Lanka, and ultimately was selected to receive a letter of interest from the Government. *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*,

124. Conversely, Respondent’s application of a purported “concretely” requirement to already-made investments would make no sense, especially if, as Respondent claims, it means that “the putative investor must both direct the investment activity and fund or resource that activity itself.”<sup>259</sup> Among other things, such an interpretation would completely negate the unambiguous allowance of indirect investments under the FTA: under Respondent’s interpretation, a putative investor simultaneously would have standing for indirectly owning or controlling a certain asset in the territory of Morocco, but fail to have standing for not directly managing the asset and funding its acquisition. Therefore, Respondent not only wrongly fixates on the word “concretely” but also ascribes to it a meaning that is simply unsupported by—and in fact contrary to—the FTA, international case law, and all common sense.

B. Article 10.27 of the FTA Does Not Have an “Active Contribution” Requirement

125. Respondent’s argument that an investor must be “active” in the process of investment is equally meritless and is unsupported by both the language of Article 10.27 of the FTA (which, as noted above, broadly protects both direct *and indirect* investment activity) and international case law (which does not evaluate the validity of investments or investors based on the level of “activeness”).

126. Respondent once again attempts to rely on the *Standard Chartered Bank v. Tanzania* case, which, as noted in Claimants’ Observations, turned on the tribunal’s interpretation of the preposition “of” in the phrase “investment of,” not the term “concretely” (which did not appear at all in the BIT at issue). Specifically, the jurisdictional dispute in *Standard Chartered Bank* centered on a provision of the UK-Tanzania BIT that provided 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.”<sup>260</sup> Given that the BIT used the verb “made,” rather than “own” or “hold,” to refer to the relationship between an investor and a protected investment, the tribunal held that, in order to be an “investment of” a party, the investment had to be

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ICSID Case No. ARB/00/2, Award (15 March 2002) paras 37-39 (RL-0025). The non-binding letter of interest set an exclusivity period of six months and articulated changes to the claimant’s original proposal as well as technological requirements that had to be met in order for the project to move forward. *Id.* para 40. Negotiations continued between the claimant and Sri Lanka while the claimant incurred expenditures in hopes of finalizing an agreement, but ultimately, no contract was ever finalized. *Id.* paras 47-48. The tribunal held that the claimant’s expenditures could not constitute an “investment” under the U.S.-Sri Lanka BIT: “[I]f the negotiations during the period of exclusivity, or for that matter, without exclusivity, had come to fruition, it may well have been the case that the moneys expended during the period of negotiations might have been capitalised as part of the cost of the project and thereby become part of the investment. . . . The Respondent clearly signalled, [however], that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made.” *Id.* paras 50-51.

<sup>259</sup> Jurisdictional Memorial, para 165 (emphasis in original).

<sup>260</sup> *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award (2 November 2012) para 205 (RL-0018) (emphasis added).

“made” by the investor “in some active way, rather than simple passive ownership.”<sup>261</sup> This Tribunal need not engage in a similar analysis here because the language of the FTA greatly differs from that of the UK-Tanzania BIT. For example, Article 10.27 of the FTA also uses the words “own or control,” not just “made,” to refer to the relationship between an investor and a protected investment.<sup>262</sup> Therefore, the line of reasoning that the *Standard Chartered Bank* tribunal used to conclude that “investment *of*” meant “made” and not “own”, and that “made” means “active,” is completely without merit.

127. In addition, with respect to those few treaties at issue that were more similarly worded to the FTA, investment tribunals have not required a claimant’s “active” involvement in an investment as a prerequisite to standing. In *Pezold v. Zimbabwe*, for example, the tribunal expressly stated that it was “not convinced” of “any requirement of an active role in the investment” given the broad definitions of “investment” in the BITs at issue.<sup>263</sup> Similarly, in *Orascom v. Algeria*, the tribunal rejected the notion of an “active” involvement requirement under the BLEU-Algeria BIT on the basis that the BIT protected indirect investments.<sup>264</sup>
128. Therefore, contrary to Respondent’s assertions, there is no “active contribution” requirement in Article 10.27 of the FTA, and Claimants plainly do not need to demonstrate that the purported requirement is satisfied in order for this Tribunal to find jurisdiction over their claims.

C. In Any Event, Claimants Were Sufficiently Involved in the Investments

129. Although Claimants do not agree that any “active contribution” requirement applies here, if the Tribunal were to consider such a requirement, Claimants satisfy it anyway. In *Standard Chartered Bank*, the tribunal “readily admit[ted] that an investment might be made indirectly, for example through an entity that serves to channel an investor’s contribution into the host state,” and recognized that “[s]pecial purpose vehicles have long facilitated cross-border investment” and “involve investing activity by a claimant, even if performed at the investor’s direction or through an entity subject to investor’s control.”<sup>265</sup> That is precisely the arrangement at issue here.
130. As elaborated in Section V above, all of the Claimants—not their Cayman investment vehicles—made the decisions to invest in the SAMIR Transactions and funded those

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<sup>261</sup> *Id.* paras 222-25.

<sup>262</sup> In addition, although the *Standard Chartered Bank* tribunal declined to find that the UK-Tanzania BIT applies only to direct, not indirect, investments, *see id.* para 240, Claimants here note that the UK-Tanzania BIT does not define “investment” as expressly including direct and indirect forms as the FTA does.

<sup>263</sup> *Bernhard von Pezold*, para 312 (CL-0070-ENG).

<sup>264</sup> *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award (31 May 2017) para 384 (CS-0118) (“***Nor is there such a requirement under the ICSID Convention.***” (emphasis added)).

<sup>265</sup> *Standard Chartered Bank*, para 199 (RL-0018).



investment activities. Accordingly, Claimants were sufficiently involved in the Investments to meet any purported “standard” of activity, and thereby have standing under Article 10.27 of the FTA.

### **VIII. Conclusion**

131. For all of the foregoing reasons, Respondent’s jurisdictional challenges should be rejected in their entirety.

Dated: June 22, 2020

Respectfully submitted,

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**Annex A**  
**Source of Funding for the Purchase of Commodities**

| <b><u>Transaction</u></b>  | <b><u>Source of Funding for LC*</u></b> | <b><u>Value of Commodities Purchased (USD)**</u></b> |
|----------------------------|---|--|
| SAMIR-1005                 | 2014-1                                  | 14,629,917   |
| SAMIR-1010                 | 2014-1                                  | 46,558,223   |
| SAMIR-1011                 | VMF Q1 & 2014-1***                      | 17,359,569   |
| SAMIR-1012                 | 2014-1                                  | 11,024,909   |
| SAMIR-1014                 | VMF Q1                                  | 22,653,661   |
| SAMIR-1015                 | VMF Q1                                  | 25,613,000   |
| SAMIR-1016                 | VMF Q1                                  | 10,316,743   |
| SAMIR-1017                 | 2014-1                                  | 46,665,368   |
| SAMIR-1018                 | 2014-1                                  | 13,757,916   |
| SAMIR-1019                 | 2014-1                                  | 21,864,747   |
| SAMIR-1020                 | 2014-1                                  | 25,000,000   |
| SAMIR-1021                 | 2015-1                                  | 37,670,202   |
| SAMIR-1022                 | 2014-1                                  | 48,225,613   |
| <b><u>VMF Q1 Total</u></b> |   | 68,583,404   |
| <b><u>2014-1 Total</u></b> |   | 235,086,262  |
| <b><u>2015-1 Total</u></b> |   | 37,670,202   |

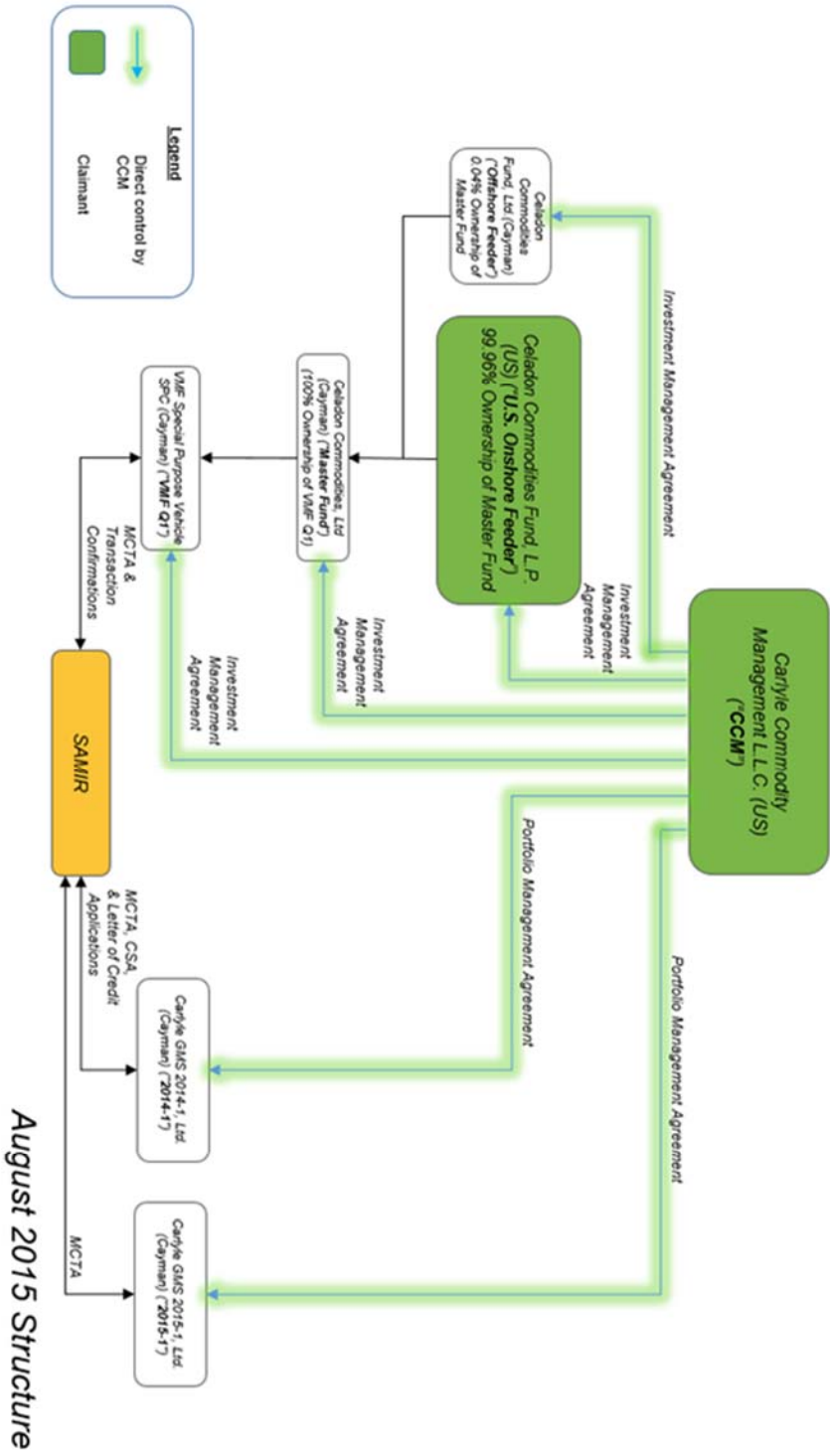
\* Source: Brokerage Statements for LC Funding (C-0061-ENG)

\*\* Source: Walck Report, Table 1.

\*\*\* VMF Q1 contributed \$10 million to fund the letter of credit for SAMIR-1011, with the remaining \$7,359,569 contributed by 2014-1.

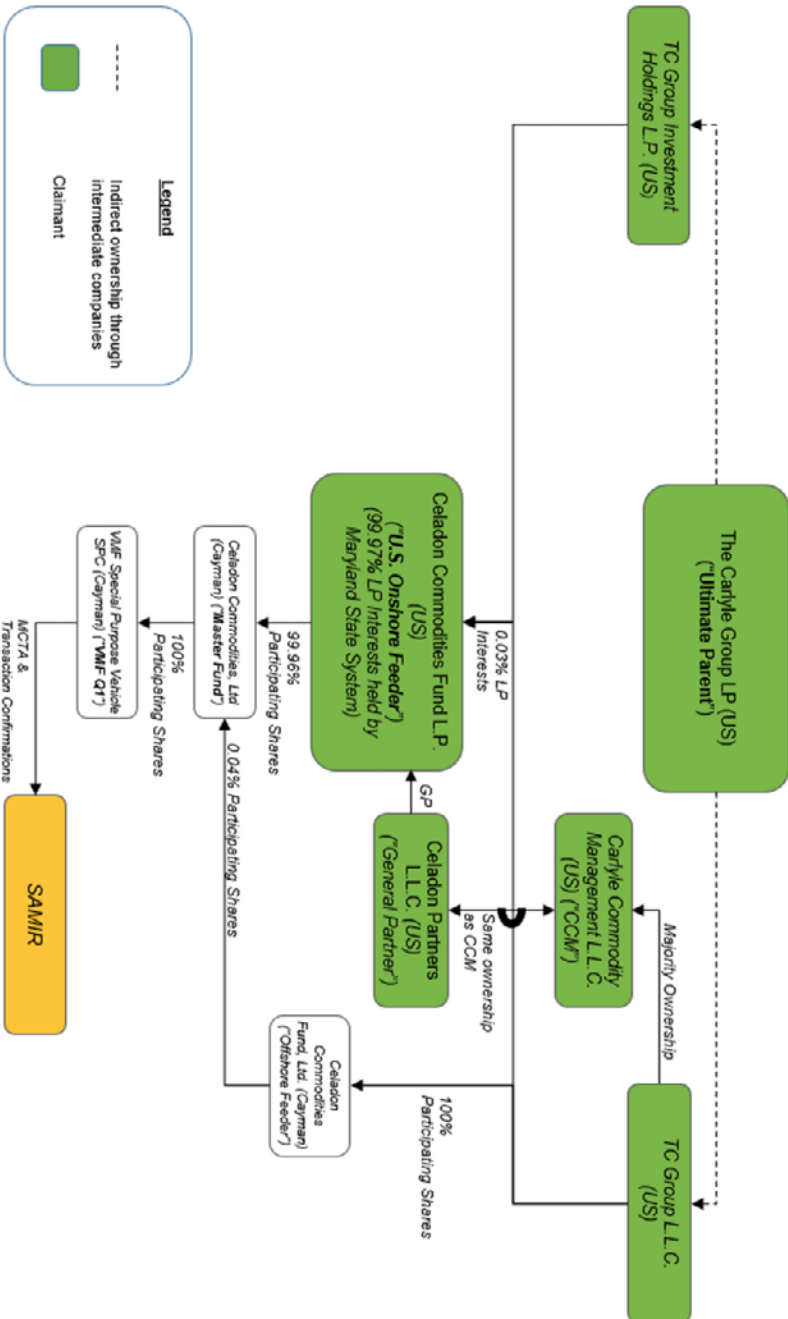
**Annex B  
Diagram 1**

**Diagram 1: Investment Control through CCM**



**Diagram 2**

**Diagram 2: Investment Ownership through Celadon**



August 2015 Structure

**Annex C**  
**Documents Provided in Response to Annex C to the Jurisdictional Memorial**

- a) 1.1: All offering memoranda of: (a) The Onshore Feeder; a (b) the Offshore Feeder; and (c) the Master Fund.**

Claimants hereby provide the offering memoranda for the U.S. Onshore Feeder and Offshore Feeder.<sup>266</sup> To Claimants' knowledge, there is no offering memorandum for interests in the Master Fund. However, the rights attaching to interests in the Master Fund are fully set forth in the Master Fund Articles of Association, which Claimants do provide herewith.<sup>267</sup>

- b) 1.2: All corporate constitutive documents of the same three companies, including, among other things: (a) the partnership agreement of the Onshore Feeder; and (b) the memoranda and articles of association of the Offshore Feeder and the Master Fund.**

Claimants hereby provide the partnership agreement of the **U.S. Onshore Feeder** and the Articles of Association of both the Offshore Feeder and the Master Fund.<sup>268</sup>

- c) 1.3: Documents fully and accurately reflecting the ownership of the various Claimant entities, including, among other things: (a) the subscription documentation for partnership units in the Onshore Feeder; (b) the investor register of the Onshore Feeder; (c) the investor register of the Onshore Feeder's general partner, Celadon Partners LLC; (d) the investor register of Celadon Partners LLC; (e) the subscription documentation for shares in the Offshore Feeder; (f) the subscription documentation for shares in the Master Fund.**

Claimants hereby provide investor registers, covering the period August 1, 2015 through August 31, 2015, for the U.S. Onshore Feeder,<sup>269</sup> Offshore Feeder,<sup>270</sup> and Master Fund.<sup>271</sup> Claimants also hereby provide the list of shareholders of Celadon Partners, LLC and

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<sup>266</sup> See U.S. Onshore Feeder Offering Memorandum (CZ-0037); Offshore Feeder Offering Memorandum (CZ-0040).

<sup>267</sup> See Master Fund Articles of Association, pp 7-8 (CZ-0043) (description of participating shares; *see also* Master Fund Board of Directors Resolution (authorizing issuance of participating shares).

<sup>268</sup> See U.S. Onshore Feeder LP Agreement (CZ-0034); Offshore Feeder Articles of Association (C-0060-ENG); Master Fund Articles of Association (CZ-0043).

<sup>269</sup> C-0051-ENG.

<sup>270</sup> CZ-0039.

<sup>271</sup> CZ-0038.

CCM, which have the same owners, effective as of June 2015.<sup>272</sup> Claimants further hereby provide the subscription agreement for the Maryland State Retirement Pension System, the only outside investor in the Celadon Entities at the time of the Investments.<sup>273</sup> The foregoing documents, in addition to Audited Financial Statements for the U.S. Onshore Feeder, Offshore Feeder, and Master Fund, dated December 2014, are more than sufficient to establish Claimants' ownership and control of the Celadon Entities at the time of the Investments. Any other documents, including the subscription documents for the Offshore Feeder and Master Fund, either do not exist or are irrelevant.

**d) 1.4: Documents fully and accurately reflecting the ownership of the various Cayman Islands entities involved in the transactions, including, without limitation: (a) subscription documentation for shares in Q1; (b) the investor register of Q1; (c) the subscription documentation for shares in 2014-1.**

Claimants hereby provide the investor register for VMF Q1 as of August 2015,<sup>274</sup> which further confirms that the Master Fund controlled all of the economic interest of VMF Q1 at the time of the Investments. Claimants do not believe that the subscription documentation for 2014-1 (and 2015-1) has any relevance to the jurisdictional analysis, especially since it refers back to the offering memoranda for 2014-1 and 2015-1, which Claimants already provided with their prior submission on jurisdiction. Nevertheless, Claimants also hereby provide subscription documents for 2014-1 and 2015-1.<sup>275</sup>

**e) 1.5: Documents reflecting the role played by 2014-1 in the transactions underlying this claim, including, among other things: (a) the agreement between 2014-1 and Q1 pursuant to which the latter transferred title to the underlying commodities to the former; and (b) any confirmations for transactions under that agreement.**

Claimants hereby provide the confirmations for the Sleeve Transactions between VMF Q1, 2014-1, and 2015-1.<sup>276</sup> To Claimants' knowledge, there is no master agreement governing the Sleeve Transactions, and the terms of these Transactions were set by the confirmations.

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<sup>272</sup> C-0062-ENG.

<sup>273</sup> C-0063-ENG.

<sup>274</sup> C-0053-ENG.

<sup>275</sup> 2014-1 Subscription Document (Senior) (C-0064-ENG); 2014-1 Subscription Document (Subordinated) (C-0064-ENG); 2015-1 Subscription Document (Senior) (C-0066-ENG); 2015-1 Subscription Document (Subordinated) (C-0067-ENG).

<sup>276</sup> See Sleeve Transaction Documentation (C-0057-ENG).

A summary of the documents being provided is reflected in the charts below:

*I. Celadon Entities*

| <u>Entity</u>   | <u>Articles of Association/<br/>Limited Partnership Agreement</u> | <u>Offering Memorandum</u> | <u>Investment Management Agreement with CCM</u> | <u>Audited Financial Statements</u>   | <u>Investor Register</u>              |
|---|---|----------------------------|---|---------------------------------------|---------------------------------------|
| <b>Celadon Commodities Fund, LP (“U.S. Onshore Feeder”)</b>               | Yes* (CZ-0034)  | Yes* (CZ-0037)             | Yes* (CZ-0035)                                  | Yes (As of December 2014)** (CZ-0036) | Yes (As of August 2015)* (C-0051-ENG) |
| <b>Celadon Partners, LLC (General Partner of the U.S. Onshore Feeder)</b> | Yes* (C-0068-ENG)   | Not Applicable             | Not Applicable                                  | Not Applicable                        | Yes (As of June 2015)* (C-0062-ENG)   |
| Celadon Commodities Fund, Ltd. (“Offshore Feeder”)                        | Yes* (C-0061-ENG)   | Yes* (CZ-0040)             | Yes* (CZ-0041)                                  | Yes (As of December 2014)** (CZ-0042) | Yes (As of August 2015)*** (CZ-0039)  |
| Celadon Commodities, Ltd. (“Master Fund”)                                 | Yes* (CZ-0043)  | Not Applicable             | Yes* (CZ-0041)                                  | Yes (As of December 2014)** (CZ-0044) | Yes (As of August 2015)* (CZ-0038)    |
| VMF Special Purpose Vehicle SPV – Q1 Segregated Portfolio (“VMF Q1”)      | Yes (CZ-0045)   | Not Applicable             | Yes (CZ-0047)                                   | Not Applicable                        | Yes (As of August 2015)* (C-0053-ENG) |

\*Submitted with Claimants’ Counter-Memorial on Jurisdiction.

\*\*Claimants previously submitted Audited Financial Statements as of December 2015, which demonstrates ownership interests throughout calendar year 2015. But for the avoidance of doubt, the Audited Financial Statements as of December 2014 are hereby submitted with Claimants’ Counter-Memorial on Jurisdiction.

\*\*\*Claimants previously submitted an investor register for the Offshore Feeder as of February 2016, which details the list of investors throughout the period of the Investments. But for the avoidance of doubt, the investor register for the Offshore Feeder as of August 2015 is hereby submitted with Claimants' Counter-Memorial on Jurisdiction.

## II. Notes Entities

| <u>Entity</u>   | <u>Articles of Association</u> | <u>Offering Memorandum</u> | <u>Indenture</u>  | <u>Portfolio Management Agreement with CCM</u> | <u>Subscription Documents</u>                               |
|---|--------------------------------|----------------------------|-------------------|--|---|
| Carlyle GMS Commodities Funding 2014-1, Ltd. ("2014-1") | Yes*<br>(CZ-0048)              | Yes<br>(C-0029-ENG)        | Yes*<br>(CZ-0050) | Yes<br>(C-0024-ENG)                            | Yes*<br>(C-0064-ENG (Senior);<br>C-0065-ENG (Subordinated)) |
| Carlyle GMS Commodities Funding 2015-1, Ltd. ("2015-1") | Yes*<br>(CZ-0049)              | Yes<br>(C-0030-ENG)        | Yes*<br>(CZ-0051) | Yes<br>(C-0025-ENG)                            | Yes*<br>(C-0066-ENG (Senior);<br>C-0067-ENG (Subordinated)) |

\*Submitted with Claimants' Counter-Memorial on Jurisdiction.

## III. Additional Carlyle Entities

| <u>Entity</u>                         | <u>Foundational Document</u>                         |
|---------------------------------------|--|
| Carlyle Investment Management, L.L.C. | LLC Agreement*<br>C-0069-ENG                         |
| TC Group, L.L.C.                      | LLC Agreement*<br>C-0070-ENG                         |
| TC Group Investment Holdings, L.P.    | Partnership Agreement*<br>C-0071-ENG                 |
| Carlyle Holdings I L.P.               | Partnership Agreement*<br>C-0072-ENG                 |
| Carlyle Holdings I GP Inc.            | Bylaws*<br>C-0073-ENG                                |
| Carlyle Holdings II L.P.              | Partnership Agreement*<br>C-0074-ENG                 |
| Carlyle Holdings II GP L.L.C.         | LLC Agreement*<br>C-0075-ENG                         |
| The Carlyle Group, L.P.               | Partnership Agreement*<br>C-0076-ENG                 |
| CCM                                   | LLC Agreement and June 2015 Amendment*<br>C-0077-ENG |

\*Submitted with Claimants' Counter-Memorial on Jurisdiction.