

IN THE MATTER OF AN ARBITRATION UNDER THE ICSID CONVENTION AND
THE UNITED STATES–MOROCCO FREE TRADE AGREEMENT

ICSID Case No ARB/18/29

B E T W E E N

THE CARLYLE GROUP LP, CARLYLE COMMODITY MANAGEMENT LLC, TC
GROUP LLC, TC GROUP INVESTMENT HOLDINGS LP, CELADON
COMMODITIES FUND LP AND CELADON PARTNERS LLC

Claimants

– and –

KINGDOM OF MOROCCO

Respondent

RESPONDENT'S REPLY
ON OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

7 September 2020

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I INTRODUCTION

1 This is the Respondent's ("**Morocco's**") Reply on Objections to Jurisdiction and Admissibility (the "**Reply on Jurisdiction**"), filed in accordance with the Tribunal's Procedural Order No 1 of 1 June 2019 and Procedural Order No 4 of 20 January 2020. It has been filed in response to It supplements, rather than repeating, the arguments developed in Morocco's Memorial on Objections to Jurisdiction and Admissibility of 14 April 2020 (the "**Memorial on Jurisdiction**") and responds to the Claimants' Counter-Memorial on Jurisdiction of 22 June 2020 (the "**Counter-Memorial**").¹ Any omission of detail should not be read as an admission.

2 Alongside this Reply, Morocco submits two expert reports:

2.1 A supplemental expert report from Mr Anthony Travers OBE (the "**Supplemental Travers Report**") in which he reviews the additional documents submitted by the Claimants and comments on their implications for the analysis set out in his first report. Mr Travers conducts a comprehensive analysis of the various documents submitted by the Claimants to evince ownership of the Commodities, including the custody certificates, pledge agreements, transaction confirmations and sleeve transaction documents. Mr Travers concludes that these documents are "*materially incomplete and perhaps inaccurate*" and that "[t]hey are simply not capable of reconciliation".² More broadly, Mr Travers explains the numerous documents which he would expect to see underpinning the Repo Transactions but which are missing from the Claimants' submissions. As Mr Travers concludes, "*there remain material very serious unexplained gaps and inconsistencies in the documentation provided.*"³

¹ All capitalised terms bear the definitions given to them in the Memorial on Jurisdiction, unless otherwise stated.

² Supplemental Travers Report, ¶ 3.28.

³ Supplemental Travers Report, ¶ 3.34.

2.2 An expert report (the “**Versant Report**”) from Mr Bryan d’Aguiar and Mr Travis Taylor, both of Versant Partners (“**Versant**”). Mr d’Aguiar has a great deal of experience in portfolio management having been Lead Portfolio Manager with the Emerging Markets Team at The Rock Creek Group LP (a US\$14 billion Washington, DC based institutional investment manager). Mr d’Aguiar assesses CCM’s role in relation to the Repo Transactions and concludes that “*CCM does not put its own funds at risk and hence does not have investment exposure*”.⁴ He also analyses the structure of the Repo Transactions and, like Mr Travers, raises a number of serious concerns about gaps and inconsistencies in the Claimants’ documents and their account of the way the Repo Transactions worked in practice. Mr Taylor is a Fellow of the Institute of Chartered Accountants Australia & New Zealand and a member of the Royal Institution of Chartered Surveyors, as well as being an Approved Expert of the Institute of Chartered Accountants of England and Wales. He explains the concept of “*control*” as a matter of accounting principles and applies them in the present context, concluding that “*CCM acted as an agent of Q1, 2014-1 and 2015-1 to which certain powers were delegated but there was no ownership or control of these entities*”.⁵

A Overview

3 The Counter-Memorial on Jurisdiction is the Claimants’ fourth attempt at establishing that the Tribunal has jurisdiction to hear its claims.⁶ Their strategy continues to centre on obfuscation and withholding evidence, premised on their flawed submission that it is not for them to establish jurisdiction, but for Morocco to prove the negative. As is clear from Morocco’s preliminary objections, this strategy fails, for the following reasons:

⁴ Versant Report, ¶ 60.

⁵ Versant Report, ¶ 152.

⁶ Prior to the Counter-Memorial on Jurisdiction, the Claimants filed their (i) Request for Arbitration; (ii) Memorial; and (iii) Observations on the Respondent’s Request for Bifurcation.

- 3.1 **Objection 1:** None of the Claimants can meet the minimum requirements of an “*investment*” as set out in FTA Article 10.27 and Article 25(1) of the ICSID Convention. None of the Claimants made a valid contribution to the alleged Cayman investment activities, the short-term financings that these activities reflect did not meet the minimum duration, and the corporate structure that the Claimants adopted ensured that any risk associated with the alleged activity was shifted onto third party investors who are not before the Tribunal.⁷
- 3.2 **Objection 2:** None of the Claimants can be said to “*own or control*” an “*investment in the territory*” of Morocco within the meaning of FTA Article 10.27.⁸ Taking the two investments the Claimants assert in turn:
- 3.2.1 The Put Rights cannot be said to be located “*in the territory*” of Morocco. These are intangible assets the proper *situs* of which is determined by rules of private international law. As they are governed by New York law, and subject to the exclusive jurisdiction of the New York courts, they are outside of Morocco’s enforcement jurisdiction – and therefore outside its “*territory*” for the purposes of the FTA.
- 3.2.2 None of the Claimants “*own or control*” any of the Commodities. With the exception of CCM, each of the Claimants’ claims to ownership of the Commodities is dependent on title to the Commodities resting with Q1. However, the Claimants have not come close to discharging their burden of proof in this regard, and the Commodities are more likely to rest with any of 2014-1, State Street Bank and Trust Company (as indenture trustee), or nobody at all, given SAMIR’s recently-discovered practice of refining the Commodities immediately on delivery, with CCM’s consent. So far as CCM is concerned, (a) its merely contractual relationship as investment manager to Q1, 2014-1

⁷ See below at §III.

⁸ See below at §IV.

and 2015-1 does not rise to the level of “control” required by FTA Article 10.27 and (b) to the extent the Commodities were refined by SAMIR on delivery, it additionally had no “control” over them in the relevant sense, as after being refined, they ceased to exist as such.

3.3 **Objection 3:** Under well-established investment treaty jurisprudence, none of the Claimants has standing to claim with respect to the Put Rights or the Commodities, as even on the Claimants’ best case, these were the assets of Q1, a Cayman company, and not the Claimants. Furthermore, the Claimants’ claims as presently formulated are beyond the Tribunal’s jurisdiction, as they are for losses suffered only indirectly by the Claimants. The shared view of the US and Morocco is that such claims cannot be submitted to arbitration under FTA Article 10.15.1(a).⁹

3.4 **Objection 4:** None of the Claimants actively contributed to their alleged investment operations, contrary to FTA Article 10.27, which requires each Claimant to “concretely [...] make” an investment to be considered an “investor of a Party”. All Claimants aside from CCM have failed to prove that they (a) had a role in the direction of their alleged investment activities, or (b) contributed any funds or other resource to those alleged activities. As for CCM, any contributions made or directions given in the context of its role as a service provider do not qualify for these purposes, as the alleged investments were not “made” by CCM, but those it purportedly advised.¹⁰

3.5 **Objection 5:** CIM falls outside the jurisdiction of the Tribunal because it [REDACTED]
[REDACTED]
[REDACTED] on 7 August 2015.¹¹ Whilst CIM has now (rightly) withdrawn as a Claimant, this objection must still be borne in mind by the Tribunal, as critical elements of the Claimants investment structure still seem to have solidified after 7 August 2015. To the extent that

⁹ See below at §V.

¹⁰ See below at §VI.

¹¹ Memorial on Jurisdiction, §VII.

other Claimants are later revealed only to have made their alleged investments after the date of the alleged expropriation, Morocco reserves its right to raise further jurisdictional objections in respect of them in due course.

4 In their Memorial, the Claimants presented this as a case with straightforward facts. According to the Claimants' Memorial (the "**Memorial**"), they "*own or controlled directly or indirectly' the investments in Morocco*";¹² several of the Claimants "*owned (directly or indirectly) VMF [Q1], an entity that invested in Morocco through SAMIR*";¹³ and the Claimants collectively "*retained exclusive ownership of and title to the Commodities*".¹⁴

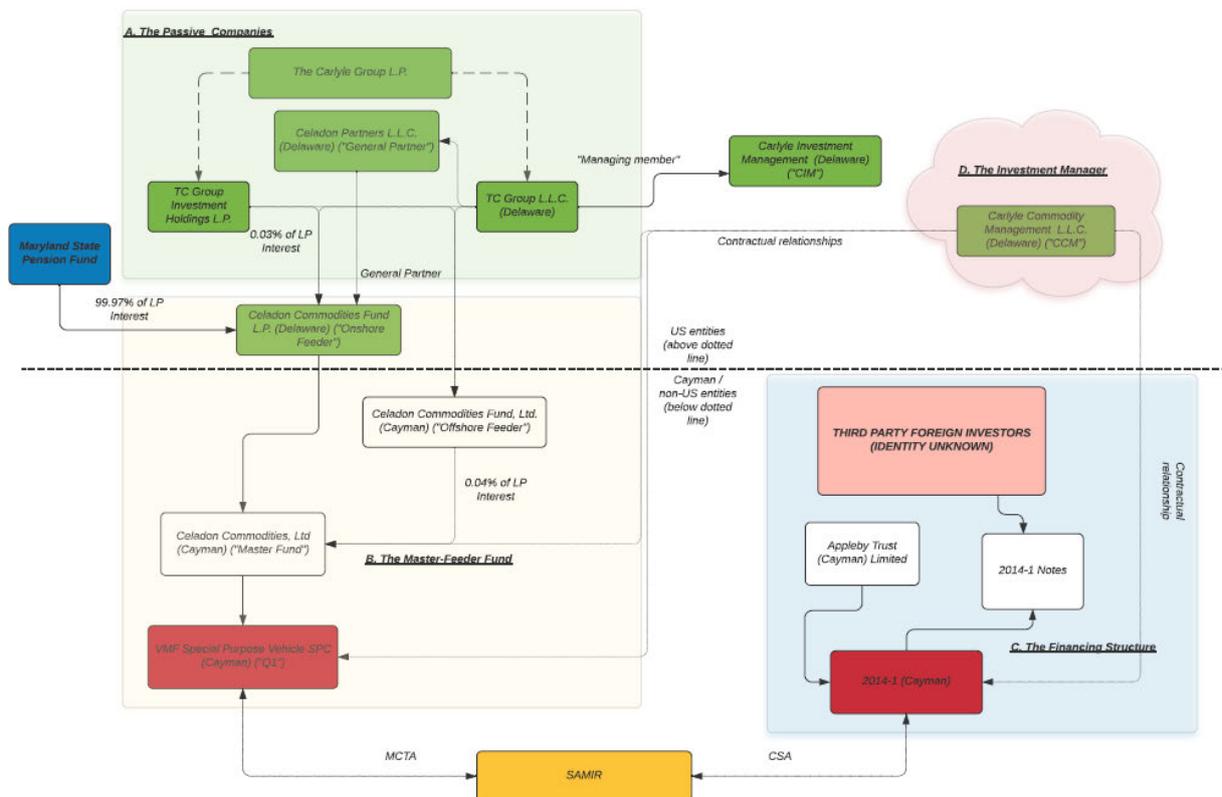
5 It was obvious even on the basis of the documents on which the Claimants relied in their Memorial that these vague assertions were divorced from the reality of the Repo Transactions. In its Memorial on Jurisdiction, Morocco demonstrated that the transactions in question were in fact complex repo financings between Q1 and SAMIR in which none of the Claimant entities was involved, and which appeared to have been structured so as to pass all financing obligations and risk associated to 2014-1, a Cayman Islands company which sat within the isolated Financing Structure. To recall, the financing structure is shaded in blue at the bottom right corner of **Diagram 1**:

¹² Memorial, ¶ 19.

¹³ Memorial, ¶ 19.

¹⁴ Memorial, ¶ 20.

Diagram 1: updated corporate structure chart



6 As the above diagram shows, the Financing Structure was orphaned, meaning there was no ownership link between it and any of the Claimant entities. Initially, the Claimants asserted that there was an ownership link between CIM and the Financing Structure, on the basis that CIM was the sole parent of 2014-1.¹⁵ When pressed on this, the Claimants pivoted, claiming that CIM’s alleged ownership of 2014-1 arose from it [REDACTED].¹⁶ When Morocco pointed out that the Claimants had admitted [REDACTED] – and that the Tribunal could not possibly have jurisdiction *ratione temporis* over CIM’s claim,¹⁷ CIM discontinued its claim and withdrew as a Claimant.¹⁸ Despite the Claimants’ implausible assertion that this withdrawal was merely “*in the interests of streamlining these jurisdictional proceedings*”,

¹⁵ Memorial, ¶ 11.

¹⁶ Claimants’ Observations on the Respondent’s Request for Bifurcation, ¶ 69(ii). The same is true of CIM’s ownership of 2015-1.

¹⁷ Memorial on Jurisdiction, §VII.B.

¹⁸ Counter-Memorial on Jurisdiction, ¶ 9 (fn 1).

it is an obvious concession that the one Claimant entity with any substantial link to the Financing Structure falls outside the Tribunal's jurisdiction.¹⁹ The fact that the Claimants advanced their case in respect of CIM remains troubling, however. It reveals either a serious failure of analysis, or an attempt to mislead the Tribunal; in either case calling into question the credibility of the Claimants' case generally.

7 The Claimants initially implied that, through their ownership of the Onshore and Offshore Feeders, the Passive Companies (see **Diagram 1** above) owned the entire economic interest in the Master-Feeder Fund at all relevant times.²⁰ That is also now established to have been untrue: the Claimants have been forced to admit that, as at 7 August 2015, 99.97 per cent of the economic interest in the Onshore Feeder was owned by a third party unrelated to the Claimants – the Maryland State Pension System (the “**Maryland Pension System**”). This critical admission renders the link between the Passive Companies and Q1 nominal: at most, TC Group Investment Holdings LP and TC Group LLC held 0.03 per cent of the LP interest (the economic interest) in the Onshore Feeder at the relevant time; and the same two entities held, through their ownership of the Offshore Feeder, just 0.04 per cent of the LP interest in the Master Fund. Contrary to the Claimants' representations in its Memorial, the combined economic interest of these Passive Companies in Q1 therefore turns out to be less than 0.3 per cent.

8 The ownership position which emerges as at 7 August 2015 is therefore completely different from the one first described by the Claimants: none of them owned or controlled 2014-1 (or indeed 2015-1) as at that date; and, with the exception of the Onshore Feeder, the other Claimants' indirect stake in Q1 was negligible.

9 That is important because the evidence available, notwithstanding that it remains incomplete and contradictory, suggests that title to the Commodities was not held by Q1 as at 7 August 2015. As Morocco explains below, the latest evidence in relation to the Repo Transactions leads to one of two conclusions:

¹⁹ Claimants' Counter-Memorial on Jurisdiction, ¶ 9 (fn 1).

²⁰ Claimants' Memorial, ¶ 19.

- 9.1 Either title to the Commodities underlying the Repo Transactions was ultimately transferred to 2014-1 (and possibly onwards, to the State Street Bank and Trust Company pursuant to the terms of an indenture governing 2014-1's issuance of notes).
- 9.2 Or, alternatively, the Commodities were refined (and sold) with Carlyle's knowledge almost immediately following their receipt by SAMIR, meaning the ostensible transfers of title were little more than paper exercises, entirely unrelated to any real-world commodity.
- 10 There is strong evidence to suggest that the latter is true. In July 2020, the Supreme Court of the State of New York handed down summary judgment (the "**New York Judgment**") in a claim between some of the Claimants and their insurers, holding that the Claimants and SAMIR did not follow the terms of the MCTA. Instead, there was an agreed course of conduct pursuant to which SAMIR would refine the Commodities on an ongoing basis more or less immediately on delivery, and without the prior written consent of the Claimants, as the terms strictly required. The Supreme Court arrived at its conclusion having considered a significant body of evidence; including a large volume of documents, numerous depositions – several from witnesses for the Claimants in this arbitration – and having heard from the parties at an in-person hearing in New York. Strikingly, in New York, the Claimants' case was fundamentally inconsistent with the one they make in these proceedings – namely that it was SAMIR that "*stole*" the Commodities, not Morocco.²¹ The Supreme Court held that there could have been no theft of the Commodities because of the course of conduct agreed by the Claimants and SAMIR:

In practice, SAMIR processed the oil and sold the resulting refined products on an ongoing basis without either payment to Carlyle or prior written consent [...]

*[...] SAMIR did not steal the oil by refining it in the normal course of its refining operations. Carlyle's losses were not due to theft by SAMIR, because **SAMIR and Carlyle had an ongoing business relationship and Carlyle expected that the***

²¹ **R-0001**, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Claimants Statement of Claim dated 3 March 2017, referring to the so-called "*SAMIR Theft*."

oil it purchased and that was delivered to SAMIR would be used in the refining process [...]"²²

- 11 The Supreme Court's conclusion drives a coach and horses through the Claimants' case theory in this arbitration; plainly Morocco could not have expropriated Commodities which did not exist at the alleged time of that expropriation. It also explains the Claimants' continuing inability to provide evidence of which entity owned the Commodities as at 7 August 2015. The reason the Claimants have such difficulty in doing so is that, by that date, the Commodities had ceased to exist.
- 12 Whether the Commodities were refined (and therefore ceased to exist), or whether they were ultimately transferred to the ownership of the State Street Bank and Trust Company, the key point is that they certainly were not owned or controlled – directly or indirectly – by any of the Claimant entities as at 7 August 2015. That fact alone prevents the Tribunal from accepting jurisdiction over the claims insofar as they relate to alleged expropriation of the Commodities.
- 13 Even were that not the case, the Tribunal is prevented from accepting jurisdiction by virtue of the Claimants' failure to establish a number of other important points.
- 14 As Morocco explained in its Memorial on Jurisdiction, the Claimants have not shown that any of them made any financial contribution to the Repo Transactions. The Claimants submitted a small number of account ledgers with their Counter-Memorial on Jurisdiction purportedly to show that certain funds were transferred from Q1 and 2015-1 in order to finance certain of the Repo Transactions. Putting aside the fact that the Claimants failed to produce any evidence that this was the intention behind these transfers, the Claimants also tellingly fail to submit any evidence showing that the funds in question originated with any Claimant entity.
- 15 It follows from the absence of contribution that there was also an absence of risk taken by the Claimant entities. Instead, all risk plainly lay with the Maryland

²² **R-0006**, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Order of the Supreme Court of the State of New York dated 17 July 2020, ¶¶ 4, 5, 9, 10 (emphasis added).

Pension System and the noteholders whose funds were used to finance the Repo Transactions and who stood to lose if those Repo Transactions failed.

16 The Claimants recognise that this precludes the Tribunal’s jurisdiction over their claims and accordingly focus on trying to establish that CCM – the Investment Manager – had “*control*” over the investments at all relevant times. This is equally misconceived. As a matter of treaty interpretation, it is not sufficient merely to show that an entity was given elements of “*control*” by virtue of a contractual delegation. Instead, as Morocco explains below, it is incumbent upon the Claimants to establish control through an economic interest in the underlying entity. The Claimants have come nowhere close to satisfying that test. As Morocco demonstrated in its Memorial on Jurisdiction, CCM’s powers were contractually-delegated functions. Like any professional services provider, CCM performed its functions subject to the continuing approval of the relevant boards and received fees from the companies in exchange. In order to assist the Tribunal, Versant explain the approach to “*control*” taken under relevant accounting standards (IFRS and US GAAP) in the Versant Report. Their conclusion squares with the inevitable conclusion as a matter of international law: these contractual arrangements do not begin to establish CCM’s “*control*” over any relevant entity.²³

17 Taken together, these points lead inexorably to the conclusion that the Claimants have not discharged their burden to prove basic elements of their jurisdictional case. It follows that the Tribunal must now decline jurisdiction over their claims.

B Structure of this pleading

18 The remainder of this Reply Memorial is set out in the following parts:

18.1 **Part II** sets out Morocco’s reply to the factual submissions made by the Claimants in their Counter-Memorial. Morocco demonstrates that: (i) title to the Commodities passed either to 2014-1, to the Indenture Trustee or ceased to exist – whatever the truth it certainly did not vest in Q1 as at 7 August

²³ Versant Report, ¶ 152.

2015; (ii) the Claimants have failed to provide evidence showing that they either owned or controlled the alleged investments as at 7 August 2015; (iii) the Claimants have not shown that they made financial contributions to the investments; and (iv) the Claimants have failed to establish that they took any risk.

18.2 **Parts III–VI** then set out Morocco’s reply in relation to the four remaining preliminary objections (following the Claimants admission of the fifth objection).²⁴

18.3 **Part VII** sets out the Respondent’s requests for relief.

C Burden of proof in preliminary matters

19 Before engaging with the substance of the Counter-Memorial on Jurisdiction, it is necessary to address the Claimants’ position of burden of proof, which reflects basic misunderstandings about Morocco’s case and principles of evidence before international courts and tribunals.²⁵ In many cases, such a discussion might be arid, but unfortunately in this case, the Claimants reluctance to divulge the true position in relation to their rights and relationships makes it important.

20 The Claimants’ position is that the “Respondent, rather than Claimants, bears the burden of proof with respect to its jurisdictional objections”.²⁶ This proceeds on the false premise that the jurisdiction of an investment tribunal is to be presumed unless the respondent can disprove it. In reality, however, the Claimants must establish the basic jurisdictional elements required for a tribunal to be competent to adjudicate a particular investment dispute: *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci*.²⁷ It is incumbent on a claimant to positively establish each of these basic requirements (or “essential facts”) on the evidence, as it is the claimant who is

²⁴ For an overview of Morocco’s position on each, see above at ¶ 3.

²⁵ Counter-Memorial on Jurisdiction, §III.

²⁶ Counter-Memorial on Jurisdiction, ¶ 37.

²⁷ **RL-0060**, Z Douglas, *The International Law of Investment Claims* (CUP 2009) ¶ 301.

positively alleging each.²⁸ The vast majority of investment treaty tribunals have upheld this position.²⁹

21 Thus, where the respondent makes an objection that one of the basic elements of a tribunal's adjudicative power is absent, it constitutes an objection that the claimant has not met its burden of proof in respect of matters that are peculiarly within its knowledge. The respondent, for example, cannot be expected to have to hand proof that the claimant does not own the asset alleged to constitute the investment, undermining a tribunal's jurisdiction *ratione materiae*. It would make no sense to require the respondent to prove a negative (e.g. that the claimant did not own the property or rights said to qualify as the investment). As the ICJ held in the *Diallo* case, international law would usually consider such an outcome aberrant for precisely this reason.³⁰ This is all the more so where a claimant adopts – as have the Claimants in these proceedings – a secretive and opaque approach to the structure

²⁸ **RL-0061**, G Born, 'On Burden and Standard of Proof', in M Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer/ICSID 2016) 43, 49.

²⁹ See e.g. (among many other cases) **CS-0011**, *Limited Liability Company Amtó v Ukraine*, SCC Arb No 080/2005 (Final Award, 26 March 2008) ¶ 64; **RL-0062**, *Perenco Ecuador Limited v Republic of Ecuador & Empresa Estatal Petróleos del Ecuador*, ICSID Case No ARB/08/6 (Decision on Jurisdiction, 30 June 2011) ¶ 98; **CL-0027**, *Abaclat & Ors v Argentine Republic*, ICSID Case No ARB/07/5 (Decision on Jurisdiction and Admissibility, 4 August 2011) ¶ 678; **RL-0063**, *Vito G Gallo v Government of Canada*, PCA Case No 2008-03 9Award, 15 September 2011) ¶¶ 277, 328; **RL-0064**, *ICS Inspection and Control Services Limited v Argentine Republic*, PCA Case No 2010-9 (Award on Jurisdiction, 10 February 2012) ¶ 280; **RL-0013**, *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, ICSID Case No ARB/11/28 (Decision on Bifurcated Jurisdictional Issue, 5 March 2013) ¶ 48; **CS-0061**, *Philip Morris Brand Sàrl, Philip Morris Products SA & Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (Decision on Jurisdiction, 2 July 2013) ¶ 29; **CS-0029**, *Emmis International Holding BV, Emmis Radio Operating BV & MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v Republic of Hungary*, ICSID Case No ARB/12/2 (Award, 16 April 2015) ¶¶ 170 174; **CS-0031**, *Ampal American Israel Corporation & Ors v Arab Republic of Egypt*, ICSID Case No ARB/12/11 (Decision on Jurisdiction, 1 February 2016) ¶ 216; **CS-0032**, *Blue Bank International & Trust (Barbados) Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/12/20 (Award, 26 April 2017) ¶ 66; **RL-0065**, *Aaron C Berkowitz, Brett E Berkowitz & Trevor B Berkowitz v Republic of Costa Rica*, ICSID Case No UNCT/13/2 (Interim Award (corrected), 30 May 2017) ¶ 239; **RL-0066**, *Caratube International Oil Company LLP & Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No ARB/13/13 (Award, 27 September 2017) ¶ 309; **CS-0034**, *Cortec Mining Kenya Limited, Cortec (Pty) Limited & Stirling Capital Limited v Republic of Kenya*, ICSID Case No ARB/15/29 (Award, 22 October 2018) ¶ 250; **RL-0067**, *Michael Ballantine & Lisa Ballantine v Dominican Republic*, PCA Case No 2016-17 (Award, 3 September 2019) ¶¶ 509 510.

³⁰ **RL-0068**, *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, ¶¶ 54 55 (emphasis added):

"[Where] it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the Applicant that it prove a negative fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applying the guarantees required by law – if such was the case – by producing documentary evidence of the actions it carried out."

of its investments. It is entirely unsatisfactory for a claimant to withhold evidence and then protest that the respondent has not proved that it did not own an investment, for example.

22 The situation is different if a particular jurisdictional objection arose from a positive allegation by the respondent, e.g. an allegation that a claim was an abuse of process. In such a case, it is the claimant that cannot be expected to prove a negative (e.g. prove that this claim is not an abuse of process).³¹

23 A review of the case law shows that, where the four objections that Morocco now raises (or objections analogous to them) have been previously argued, tribunals have held that the claimant bears the burden of proof. By way of illustration:

23.1 **Objection 1:** In *Malaysian Historical Salvors v Malaysia*, the claimant had the burden of showing that a contract fell within the definition of ‘investment’ as found in Article 25(1) of the ICSID Convention and the relevant portion of the BIT, in the sense that the claimant had to prove each of the *Salini* criteria.³² In *Eyre & Montrose v Sri Lanka*, the burden was similarly allocated,³³ with the claimants’ claims eventually being dismissed for lack of contribution and investment risk.³⁴ Thus, in relation to Objection 1, the Claimants must establish the three recognized indications of an investment, being (a) a contribution, for (b) a significant duration that (c) displays investment risk.

³¹ **CS-0036**, *Chevron Corporation & Texaco Petroleum Company v Republic of Ecuador*, PCA Case No 34877 (Interim Award, 1 December 2008) ¶¶ 138-139. See also **RL-0061**, Born, ‘On Burden and Standard of Proof’, 49:

“Once a claimant has discharged these burdens, it is then for the respondent to prove that it should not have jurisdiction. This has been referred to by some tribunals as the respondent carrying the burden of proving its jurisdictional objections. The better view, however, is that this can better be understood as comprising two different processes: the reversal of the evidential burden of proof where the claimant would be asked to prove a negative, and the allocation of the burden of proof with regard to affirmative defences to jurisdiction.”

³² **RL-0069**, *Malaysian Historical Salvors SDN BHD v Government of Malaysia*, ICSID Case No ARB/05/10 (Decision on Jurisdiction, 17 May 2007) ¶ 43.

³³ **CS-0129**, *Raymond Charles Eyre & Montrose Developments (Private) Limited v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/16/25 (Award, 5 March 2020) ¶¶ 250, 301.

³⁴ **CS-0129**, *Eyre & Montrose v Sri Lanka*, Award, ¶ 297.

- 23.2 **Objection 2:** In *Thunderbird Gaming v Mexico*, when discussing *de facto* control for the purposes of NAFTA Article 1117, the tribunal placed the burden on the claimant to prove the necessary degree of control – and moreover held that *de facto* control must be established beyond any reasonable doubt.³⁵ A similar approach was taken to *de facto* control in *B-Mex v Mexico*.³⁶ In *Bayview v Mexico*, the tribunal held that the claimants “*must demonstrate that they were seeking to make, were making, or had made, an investment in Mexico*”.³⁷ Thus, in relation to Objection 2, the Claimants must demonstrate that they (a) own or control an investment in (b) the territory of Morocco – in the form of the Put Rights and/or the Commodities.
- 23.3 **Objection 3:** In *Poštová banka v Greece*, the tribunal held that one of the claimants had “*failed to establish that it has any right to the assets of Poštová bank that qualifies for protection under the Cyprus–Greece BIT*”,³⁸ thereby placing the burden of proof with respect to standing on the claimants. In relation to Objection 3, therefore, the Claimants must individually establish that they have standing to claim with respect to the Put Rights and/or the Commodities.
- 23.4 **Objection 4:** In *Standard Chartered Bank v Tanzania*, the tribunal placed the burden of proof on the claimant when discussing the issue of whether an investment had been actively created by a particular entity, such that it could be considered an investment “*of*” that entity.³⁹ The Claimants must similarly meet that burden with respect to the active investment requirement in FTA Article 10.27.

³⁵ **CL-0067**, *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL (Award, 26 Jan 2006) ¶¶ 105–107.

³⁶ **CL-0068**, *B Mex LLC & Ors v United Mexican States*, ICSID Case No ARB(AF)/16/3 (Partial Award, 19 July 2019) ¶ 239.

³⁷ **RL-0033**, *Bayview Irrigation District & Ors v United Mexican States*, ICSID Case No ARB(AF)/05/1 (Award, 19 June 2007) ¶ 108.

³⁸ **RL-0006**, *Poštová banka AS & Istrokapital SE v Hellenic Republic*, ICSID Case No ARB/13/8 (Award, 9 April 2015) ¶ 246.

³⁹ **RL-0018**, *Standard Chartered Bank v United Republic of Tanzania*, ICSID Case No ARB/10/12 (Award, 2 November 2012) ¶ 264.

24 In the premises, the Claimants have the burden of proof with respect to each and every one of Morocco's objections.

D The Claimants' misleading approach to their submissions

25 In addition to failing to discharge their burden of proof in these proceedings, it is now clear that the Claimants have misled Morocco and the Tribunal in relation to a number of important factual points. As reflected below, the Claimants have frequently played with tense and word choice in their submissions in order to give a misleading impression of the corporate relationships relevant to their claim. Morocco gives some examples of this below.

26 **Misrepresentations as to the link between Claimants and 2014-1 / 2015-1.** In their Memorial, the Claimants' represented that CIM:

*"[I]s the sole parent company of (and directly owns and controls 100% of the economic interest in) Carlyle Global Market Strategies Commodities Funding 2014-1, Ltd. and Carlyle Global Market Strategies Commodities Funding 2015-1, Ltd."*⁴⁰

27 After Morocco queried the accuracy of this description, the Claimants, in their Observations, resiled from claiming that CIM was "the sole parent company" of 2014-1 and 2015-1 at all, asserting instead that CIM "owns 100% of the senior and subordinated notes issued by [2014-1 and 2015-1]".⁴¹ It was only after Morocco examined the underlying evidence forensically and concluded that [REDACTED]

[REDACTED]

[REDACTED] that CIM discontinued its claim.⁴²

28 **Misrepresentations as to the ownership of the Onshore Feeder.** In their Observations, the Claimants represented that:

⁴⁰ Memorial, ¶ 11.

⁴¹ Claimants' Observations on the Respondent's Request for Bifurcation, ¶ 69(ii).

⁴² Counter-Memorial on Jurisdiction, ¶ 9 (fn 1).

“TC Group, together with TC Group Investment Holdings, LP (‘TC Group Investment Holdings’), controls 100% of the limited partnership interests in the Onshore Feeder.”

29 Morocco, having studied the evidence submitted, noted that the Claimants had only proven this link as at 31 December 2016 – a year-and-a-half after the alleged expropriation date.⁴³ Morocco therefore put the Claimants to proof as to the ownership link as at 7 August 2015. Again, it was only following Morocco’s query that the Claimants finally revealed that, as at 7 August 2015, 99.97 per cent of the economic interest in the Onshore Feeder was owned by the Maryland Pension System.

30 **Concealment of the Sleeve Transactions.** In their Memorial, the Claimants represented to the Tribunal that:

“Claimants retained exclusive ownership of and title to the Commodities that were the subject of the agreements unless and until Claimants expressly agreed to sell Claimants’ Commodities to SAMIR in exchange for the payment by SAMIR of the agreed-upon purchase price plus the accrued investment premium owed to Claimants.”⁴⁴

31 In Morocco’s Memorial on Jurisdiction, it surmised, on the basis of the scant documents which the Claimants had by then disclosed, that title to the Commodities must, in fact, have passed to the Financing Structure.⁴⁵ It was only following this analysis by Morocco that the Claimants confirmed the existence of the Sleeve Transactions.⁴⁶ As explained below, the New York Judgment – which Morocco happened to locate and which the Claimants have not drawn to the Tribunal’s attention – now confirms that even these Sleeve Transactions do not reflect the reality of the Repo Transactions. No doubt, faced with this new evidence, the Claimants will once again change the substance of their case.

⁴³ Memorial on Jurisdiction, ¶ 44.

⁴⁴ Memorial, ¶ 20.

⁴⁵ Memorial on Jurisdiction, ¶ 65

⁴⁶ Counter-Memorial on Jurisdiction, ¶ 28.

- 32 Troublingly, the list of misrepresentations and concealments could go on.
- 33 The conclusion from them is obvious: the Claimants' submissions and evidence cannot be taken at face value. Time and again, it has only been when challenged specifically on a point that the Claimants reveal the true and complete position. The Tribunal must, regrettably, therefore treat the Claimants' submissions with caution, requiring contemporaneous documentary evidence of all factual submissions.

II FACTUAL BACKGROUND

A Introduction

34 In its Memorial on Jurisdiction, Morocco explained that the Claimants had fallen far short of meeting their burden to establish that the Tribunal had jurisdiction to hear their claim. In brief, Morocco explained that: (i) the Claimants had failed to show that CCM had a relationship of ownership or control with Q1, 2014-1 and/or 2015-1;⁴⁷ (ii) the Claimants had failed to substantiate any of the allegedly proprietary relationships asserted as at 7 August 2015;⁴⁸ (iii) the Claimants had not shown that any of them made any financial contribution to the Transactions;⁴⁹ and (iv) the Claimants had not shown that any of them took any risk.⁵⁰

35 In their Counter-Memorial on Jurisdiction, the Claimants focus on defending the position of only two of the Claimants, namely: (i) CCM; and (ii) the Onshore Feeder. To that end, the Counter-Memorial makes three substantive assertions:

35.1 The Claimants assert that the Transactions “*were ‘true sales’ of the Commodities, involving the ‘absolute transfer of the entire legal and beneficial interest’*”, and not mere financing transactions as contended by the Respondent in its Memorial on Jurisdiction.⁵¹ That assertion is belied by the evidence. The Transactions were pure financing arrangements. The Claimants plainly had no interest in the underlying Commodities; their only interest being in profiting from extending lines of credit to SAMIR. That point is reflected in the fact – recently established by the New York Courts – that, contrary to the terms of the MCTA, the Claimants tacitly agreed to SAMIR refining the Commodities soon after purchase, and selling the refined product to raise money in order to service SAMIR’s debt to 2014-1. That fact also explains the Claimants’ continuing inability to provide evidence that Q1 (or indeed 2014-1 or 2015-1)

⁴⁷ Memorial on Jurisdiction, §II.F.

⁴⁸ Memorial on Jurisdiction, §II.E(1).

⁴⁹ Memorial in Jurisdiction, §II.E(3).

⁵⁰ Memorial on Jurisdiction, §II.E(4).

⁵¹ Counter-Memorial on Jurisdiction, ¶ 10.

in fact owned any relevant Commodities as at 7 August 2015 – those Commodities had been refined and therefore no longer existed by that date. Morocco expands on this element of the Claimants’ case at §II.B, below.

35.2 The Claimants also assert that CCM’s relationship with Q1, 2014-1 and 2015-1 was not one of a professional adviser or service provider, but instead one in which CCM had “*complete control of all the investments in question*”.⁵² The Counter-Memorial on Jurisdiction is replete with exaggerated assertions about the power allegedly wielded by CCM, including that CCM “*created*” Q1, 2014-1 and 2015-1;⁵³ that it was CCM which “*transferred funds*” between Q1, 2014-1 and 2014-1;⁵⁴ and, perhaps most implausibly, that it was CCM “*that transferred title*” to the Commodities between those entities.⁵⁵ It goes without saying that the Claimants have not provided evidence substantiating any of these assertions. As Morocco explains below, the Claimants’ characterisation of CCM’s control finds no reflection in the documents. The only possible conclusion on the basis of the documentary evidence is that CCM was a manager with delegated powers – the scope of which was determined strictly by the terms of its contracts with the various entities and subject to the continuing approval of their boards. This element of the Claimants’ case is addressed further at §II.C, below.

35.3 Finally, the Claimants assert that the Onshore Feeder had “*a clear ownership interest in the investments*”;⁵⁶ and that it “*directly contributed capital used to make the Investments and had a significant ownership interest in the Commodities stored at SAMIR.*”⁵⁷ Again, the Claimants’ position remains premised on pure assertion. There remains no evidence that any contribution allegedly made by a Claimant entity was in fact used in order to finance any of the Repo Transactions. Given that the Master Fund and Q1 (and indeed, 2014-1 and

⁵² Counter-Memorial on Jurisdiction, ¶ 3.

⁵³ Counter-Memorial on Jurisdiction, ¶ 21; ¶ 31(c).

⁵⁴ Counter-Memorial on Jurisdiction, ¶ 27.

⁵⁵ Counter-Memorial on Jurisdiction, ¶ 32(c).

⁵⁶ Counter-Memorial on Jurisdiction, ¶ 3.

⁵⁷ Counter-Memorial on Jurisdiction, ¶ 10.

2015-1) put funds into a variety of investments, it is equally or more likely that the funds contributed by any Claimant entity were used to finance investments entirely irrelevant to this dispute. Morocco deals with this element of the Claimants' case at **§II.D**.

36 In addition, the Claimants' Counter-Memorial on Jurisdiction is notable for its failure to address important points raised by Morocco in its Memorial on Jurisdiction. Whilst addressed in more detail at **§II.E**, below, in brief:

36.1 The Claimants are noticeably silent about the role of the Passive Companies.⁵⁸ The new evidence submitted by the Claimants now confirms that they previously misled the Tribunal as to the connection between these Passive Companies and the alleged investments. It now emerges that, as at 7 August 2015, TC Group LLC and TC Group Investment Holdings owned (whether directly or indirectly) only 0.04 per cent of the LP interest in the Onshore Feeder (previously the Claimants had maintained that they all owned 100 per cent at all relevant times), with the rest being owned by a previously undisclosed third party – the Maryland Pension System. By contrast the other Passive Companies appear not to have held any stake in Q1 – whether directly or indirectly.

36.2 Finally, there remains no documentary evidence that any of the Claimant entities made a financial contribution to the Repo Transactions or took any risk in respect of them. The Claimants' case on the alleged contribution of funds by Claimant entities continues to rely on pure assertion by Mr Zuech, despite the fact that fund flows should be straightforward to evidence.

37 This combination of incorrect assertions, elisions and omissions means the Claimants have not proven the basic facts required in order to establish the Tribunal's jurisdiction. In circumstances where the Claimants are yet to provide cogent evidence showing very basic facts – including, significantly, the entity that owned the Commodities which the Claimants now say were expropriated – it is

⁵⁸ The Passive Companies are those shaded in green at the top left of the diagram at **Annex A**.

difficult to see how the Tribunal could be satisfied that it has jurisdiction to hear a claim in respect of them.

38 Furthermore, the Claimants have now had four opportunities to get their story straight and to support it with the relevant documentary evidence. Yet, as set out above and elaborated below, the factual picture presented remains shifting and murky. The Tribunal cannot give the Claimants the benefit of the doubt on these vital questions. Rather – as required by the legal principles set out in §I.C above – it should hold the Claimants to their burden in discharging the basic predicates of jurisdiction, finding against them if that burden is not met to the Tribunal’s satisfaction.

B The Repo Transactions were financing arrangements only nominally linked to the Commodities

(1) Structure of the Repo Transactions based on latest evidence

39 In the Memorial on Jurisdiction, Morocco established that the motivation for the Repo Transactions was cash. SAMIR contracted with Q1 in order to finance its acquisition of hydrocarbons; 2014-1 provided financing on behalf of Q1 by issuing letters of credit.⁵⁹ In return, SAMIR paid Q1 certain premiums which acted as effective interest on the credit extended.⁶⁰ Given that, as a matter of form, all MCTA Confirmations were executed between SAMIR and Q1 (and not between SAMIR and 2014-1), Morocco surmised that there must have been undisclosed back-to-back arrangements between Q1 and 2014-1 justifying 2014-1’s provision of financing.

40 That Repo Transaction structure has now belatedly been confirmed by the Claimants’ Counter-Memorial on Jurisdiction:

40.1 It was Q1 which initially entered into all the MCTA Confirmations relevant to the Repo Transactions.⁶¹ In theory, under the terms of the MCTA, the

⁵⁹ Memorial on Jurisdiction, ¶ 12.

⁶⁰ Memorial on Jurisdiction, ¶ 27.5.

⁶¹ Memorial on Jurisdiction, ¶ 27.1.

Commodities would then be held in SAMIR's storage facilities pending Q1's exercise of a put right.⁶² Contrary to the implication of the Claimants' submissions in the Counter-Memorial on Jurisdiction, there was never any question that Q1 would exercise the put right. Under the terms of the MCTA, if Q1 did not exercise the put right it would be obliged to pay a significant penalty to SAMIR (termed the "settlement differential"). As Mr Travers explains, the "settlement differential" was often a large percentage of the transaction purchase price: "*in transaction SAMIR-1005 with purchase price US\$13,554,831, the settlement differential is US\$1,612,628 and for transaction SAMIR-1010 the figures are US\$43,558,223 and US\$4,500,000 respectively*".⁶³ The effect of this arrangement was to disincentivise Q1 from failing to exercise its put option.⁶⁴

40.2 Pursuant to its signature of the MCTA Confirmations, it was Q1 which was obliged to provide SAMIR with credit.⁶⁵ That notwithstanding, 2014-1 applied for, and obtained, a letter of credit in thirteen out of the sixteen Repo Transactions.⁶⁶ The Claimants have still chosen not to provide any information as to how the remaining three Transactions were financed. It is to be inferred they were not financed by Q1 or any of the Claimants.

40.3 Following acquisition of the Commodities, 2014-1 and Q1 entered into back-to-back financing arrangements by which 2014-1 nominally agreed to finance Q1's obligations under the MCTA (the "**Sleeve Transactions**").⁶⁷ These Sleeve Transactions were recorded by way of a document mirroring the form of the MCTA Confirmations (the "**Sleeve Confirmations**").⁶⁸ Unlike the MCTA Transactions, the parties to the Sleeve Confirmations were Q1 and

⁶² Though, as set out below, the Supreme Court of New York has held that this is not what happened in practice.

⁶³ Supplemental Travers Report, ¶ 3.18.

⁶⁴ Supplemental Travers Report, ¶ 3.19.

⁶⁵ **CZ-0002**, SAMIR MCTA, section 3.

⁶⁶ The Letters of Credit are found in **C-0045-ENG**; see also Memorial on Jurisdiction, ¶¶ 29 30 and Diagram 3.

⁶⁷ Counter-Memorial on Jurisdiction, ¶ 28.

⁶⁸ The sleeve transaction confirmations are at **C-0057-ENG**.

2014-1 – SAMIR was not involved. The Claimants assert that these Sleeve Transactions had the effect of transferring the physical Commodities from Q1 to the custody of 2014-1.⁶⁹

40.4 In keeping with their approach to many issues in this arbitration, the Claimants provide no evidence to substantiate that assertion. In particular, as Morocco explained in its Memorial on Jurisdiction, a number of the Claimants' documents contain reference to a master commodities transaction agreement dated 30 May 2014 between Q1 and 2014 1 (the "VM MCTA"), which presumably set out the detailed terms of the Sleeve Transactions.⁷⁰ The Claimants now assert that "*there is no master agreement governing the Sleeve Transactions, and the terms of these Transactions were set by the confirmations.*"⁷¹ As Mr Travers remarks, it would be surprising if this were true given the document's "*critical importance and that it appears to be referenced in several wider transaction documents*". Moreover, "*[t]he envisaged terms and effect of the VM MCTA are summarized in the Offering Memoranda of the Funding Vehicles and the Standard and Poor's Pre Sale Report*".⁷² This appears, therefore, to be another example of the Claimants' reticent approach to the disclosure of evidence in these proceedings – plainly the VM MCTA exists but, for reasons known only to the Claimants, they have failed to disclose it.

40.5 Whatever the terms on which the Sleeve Transactions were conducted, the Claimants have also provided no evidence of payment by 2014-1 to Q1 in exchange for title to the Commodities; nor evidence of payment by Q1 to

⁶⁹ Counter-Memorial on Jurisdiction, ¶ 32(c): "[CCM] transferred title between VMF Q1, 2014 1 and 2015 1 pursuant to the Sleeve Transaction confirmations". Morocco notes that this is not evident on the face of the Sleeve Confirmations

⁷⁰ Memorial on Jurisdiction, ¶¶ 63.4 and 66.

⁷¹ Counter-Memorial on Jurisdiction, page 59 (Annex C, sub-paragraph (e)).

⁷² Supplemental Travers Report, ¶ 3.1.

2014-1 at the close of the Sleeve Transactions showing payment for return of that title.

40.6 If it were correct that the effect of the Sleeve Transactions was to move title to the Commodities to 2014-1, then one further step is necessarily added to the Repo Transaction structure – the onward transfer of title from 2014-1 to the State Street Bank and Trust Company (the “**Indenture Trustee**”). That step arises from the terms of an indenture dated 30 May 2014 between 2014-1 and the Indenture Trustee the (“**Indenture**”).⁷³ The Indenture contains the contractual terms on which 2014-1 issued notes to noteholders in 2014 (thereby raising funds, among other things, to finance the Repo Transactions). In order to protect noteholders, the Indenture required 2014-1 to transfer title to the Commodities to the Indenture Trustee, to be held “*for the benefit*” of, among others, the noteholders. The relevant provision reads as follows:

*“[2014-1] hereby Grants to the Trustee, for the benefit and security of the Holders of the Senior Notes, the Trustee, the Collateral Administrator, the Administrator, the Portfolio Manager, the Document Custodians and the Commodity Intermediary (collectively, the ‘Secured Parties’) to the extent of such Secured Party’s interest hereunder, including under the Priority of Payments, **all of its right, title and interest in, to and under, in each case, whether now owned or existing, or hereafter acquired or arising, all securities, loans, investments, cash accounts, futures contracts and Commodities.**”*⁷⁴

40.7 The same obligation applied to 2015-1, expressed in materially identical terms in the indenture agreement applicable to the 2015-1 Notes.⁷⁵

40.8 The Claimants have provided no evidence as to whether, in keeping with their contractual obligations, 2014-1 (or 2015-1) in fact transferred title to the

⁷³ CZ-0050, 2014-1 Indenture.

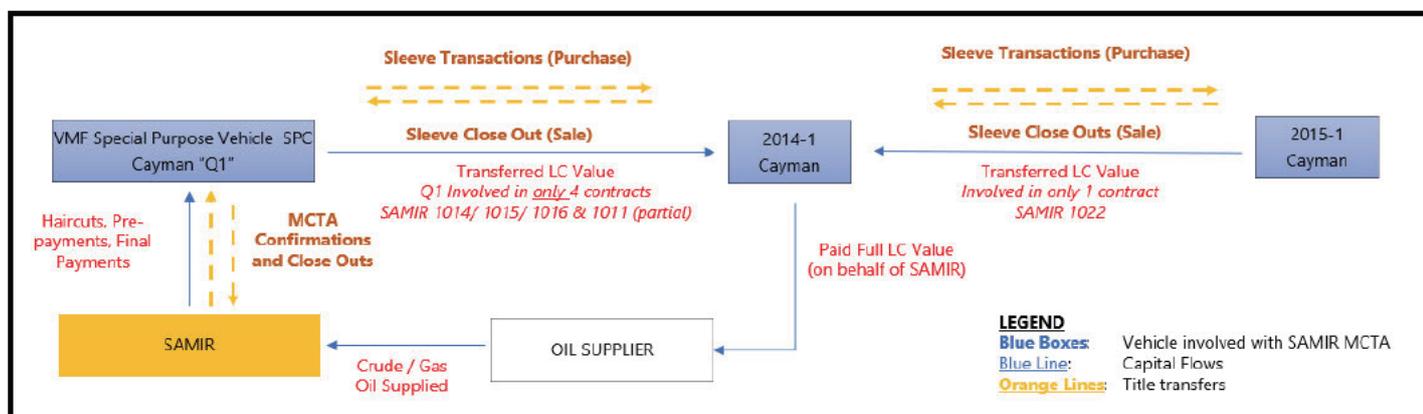
⁷⁴ CZ-0050, 2014-1 Indenture (emphasis added). Note also Supplemental Travers Report, ¶ 2.12.7(a), in which Mr Travers explains that “[t]he Funding Vehicle, or CCM acting on its behalf, was obligated to cause the Indenture Trustee to obtain control over the Commodities purchased in accordance with the terms of the Indenture”.

⁷⁵ CZ-0051, 2015-1 Indenture, 1.

Commodities to the Indenture Trustee. If such transfer did take place, the Claimants have also not shown that title was then transferred back, either to 2014-1, 2015-1 or to Q1. The Claimants' silence in relation to this obviously important point suggests that, if the Commodities existed at all, title to them in fact lay with the Indenture Trustee as at 7 August 2015. In any event, the Claimants have not produced any evidence that title was with Q1 as at 7 August 2015.

41 The above structure may be summarised in the following diagram:

Diagram 2 High Level Summary of Deal Structure Intended / Implemented



(2) *The Repo Transactions were obviously financing arrangements*

42 Even if one accepts that the Repo Transactions were carried out in accordance with the above structure – and, for the reasons given below, Morocco denies this could have been the case – these were plainly financing transactions and not, as the Claimants claim, “true sales” of the Commodities.⁷⁶

43 That follows for several reasons:

43.1 First, the Claimants relied, in their Memorial, on a letter which they (misleadingly) describe as an “authorisation” by the Respondent’s Customs and Exchange Office to undertake the Repo Transactions. In fact this letter reflects the information which the Claimants themselves had given to the

⁷⁶ Counter-Memorial on Jurisdiction, ¶ 10.

Customs and Exchange Office. Tellingly, the letter expressly states that this was to be an arrangement “*in relation to financing [...] crude oil imports*”;⁷⁷ that it would establish a “*credit line*”;⁷⁸ that the transfer of ownership of crude oil was only “*by way of a guarantee*”;⁷⁹ and that “*the repayment term for the financing [...] is set at 90 to 120 days*”.⁸⁰ By contrast, there is nothing in this letter to suggest that the Repo Transactions in fact concerned the Claimants’ desire to purchase crude oil. It is plainly not open to the Claimants on the one hand to represent to Morocco, at the outset of the Repo Transactions, that these were financing arrangements, only now to argue that they were not.

43.2 Secondly, the fundamental structure of the Repo Transactions involved a customer (SAMIR) selling a commodity to a lender (Q1) and, at the same time, both parties retaining the right to buy/sell it back at a future date.⁸¹ In the meantime – at least in theory – the lender (Q1), took title to the Commodities and exchanged that title for cash at maturity. As Versant explain, that tracks the steps involved in what would commonly be described as a ‘repo’ financing transaction.⁸² Partly on that basis, Versant conclude that “*the arrangements in place between Claimants and SAMIR are clearly typical of a commodity repurchase (repo) transaction*”.⁸³

43.3 Thirdly, that analysis is confirmed by the Standard & Poor’s (“**S&P**”) document submitted by Mr Travers. According to S&P, “[w]hen taken together, the transaction’s assets have substantially similar economic characteristics to repo loans”.⁸⁴

⁷⁷ **MO-0002**, Morocco Customs and Exchange Office Letter dated 16 January 2015, 5.

⁷⁸ **MO-0002**, Morocco Customs and Exchange Office Letter dated 16 January 2015, 5.

⁷⁹ **MO-0002**, Morocco Customs and Exchange Office Letter dated 16 January 2015, 5.

⁸⁰ **MO-0002**, Morocco Customs and Exchange Office Letter dated 16 January 2015, 6.

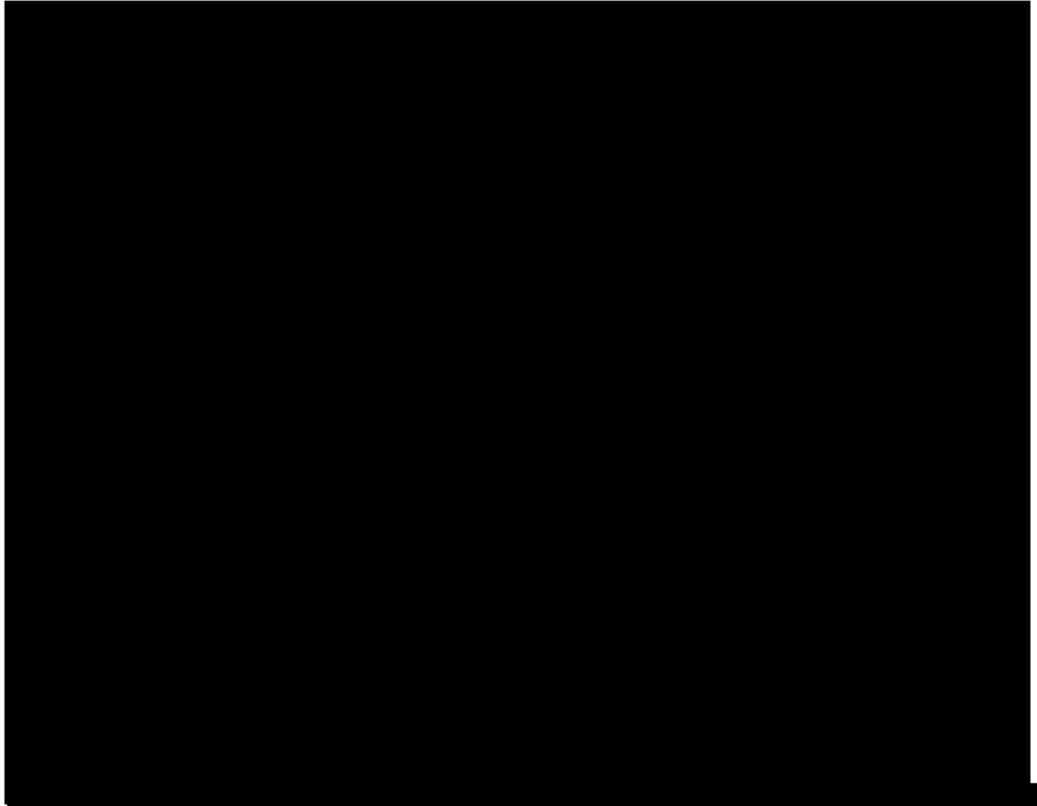
⁸¹ Versant Report, ¶¶ 159.

⁸² Versant Report, ¶¶ 160

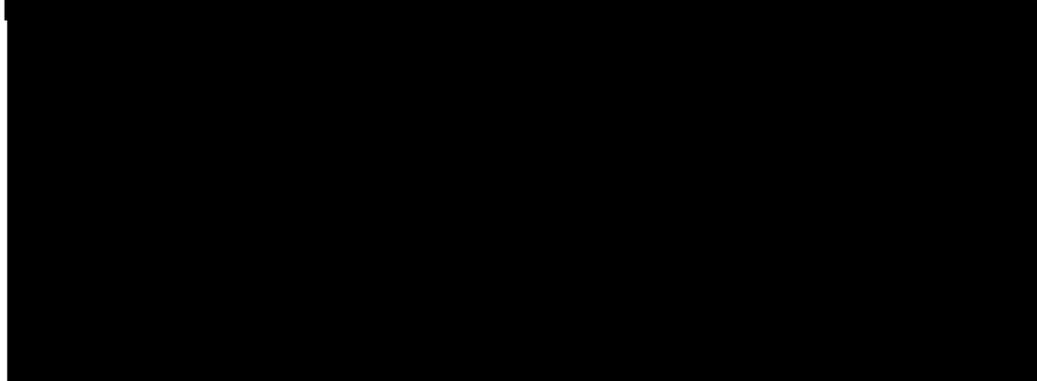
⁸³ Versant Report, ¶¶ 166.

⁸⁴ **RE-0002**, Standard & Poor’s presale report relating to Carlyle Global Market Strategies Commodities Funding 2014-1 Ltd/Carlyle Global Market Strategies Commodities Funding 2014-1 LLC dated 16 March 2014, 10.

43.4



43.5



43.6 Sixthly, the Claimants' own witness in this arbitration, Mr Michael Petrick, who was the Managing Director and Head of Global Market Strategies for The Carlyle Group at the relevant time has accepted in his testimony that the SAMIR transactions were structured in the manner of a traditional repo arrangement:

“Carlyle’s commodity transactions were typically structured similar to that of a traditional fixed income repurchase agreement. They involved a purchase of a physical commodity at a predetermined discount to market

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C-0009-ENG, Petition to Casablanca Commercial Court, File No 17/2015 dated 10 December 2015, 6.

and simultaneous hedge with a sale of a futures contract, exchange cleared swap, or forward contract.”⁸⁷

44 In brief, all evidence confirms that the Repo Transactions were financing arrangements akin to a traditional repo financing. This is important because the FTA treats financings differently from other types of investment.⁸⁸

(3) *The Commodities played only a nominal role in the Repo Transactions and were refined prior to the Repo Transactions closing out*

45 The above analysis is further supported by the fact that title to the Commodities nominally underlying the Repo Transactions appears to have been treated as a peripheral and unimportant issue by the Claimants.

46 The point was confirmed on 20 July 2020 by the New York Judgment. The Claimants’ claims in those proceedings were based upon precisely the same underlying facts as this claim against Morocco. The only substantive difference was that in New York, the Claimants alleged that it was SAMIR that “*stole*” their Commodities – not that they had been expropriated by Morocco.

47 In its 20 July 2020 Judgment, the Supreme Court of New York held that the substantial amount of evidence before it demonstrated that the MCTA structure described above was not followed in practice. Instead, the Claimants gave their “*implied consent*”⁸⁹ for the Commodities to be refined by SAMIR prior to payment. It followed that SAMIR could not have “*stolen*” the Commodities and the Claimants’

⁸⁷ Witness Statement of Michael Petrick, ¶ 4.

⁸⁸ In the event that the Repo Transactions are held to be financings, then the Claimants’ alleged investment operation could be considered a cross-border trade in financial services per FTA Art 12.1(c) and 12.19. If that is the case, then per Art 12.2, FTA Chapter 10 only applies to measures concerning such services to the extent Chapter 10 is incorporated into Chapter 12. Art 12.2(b) then incorporates Section B of Chapter 10 (on investor state dispute settlement) into Chapter 12 “*solely for claims that a Party has breached Articles 10.6 (Expropriation and Compensation), 10.7 (Transfers), 10.11 (Denial of Benefits), or 10.13 (Special Formalities)*”. It follows that the Claimants’ claim that Morocco has breached FTA Art 10.5 on the minimum standard of treatment will be outside the Tribunal’s jurisdiction *ratione materiae*. Morocco reserves the right to make submissions on this point following the Tribunal’s determination of the current suite of jurisdictional issues, in the event that the Tribunal does not decline jurisdiction in its entirety.

⁸⁹ **R-0007**, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Memorandum of Law of the Excess Insurers (redacted) dated 27 March 2020, 11 12.

claim with respect to that point was bound to fail.⁹⁰ As counsel for the excess insurers put it at the hearing:

“Once [the Commodities] got into storage in the tanks, it was immediately used by SAMIR. That was the purpose of obtaining the oil in the first place. That’s why SAMIR bought or contracted for the delivery of oil, so that they would have a supply for their refinery. And it was refined from the moment it hit the tanks, they would start to refine it. [...] When the oil that Carlyle paid for was refined, it no longer existed. It was gone. It was no longer insurable, because it didn’t exist. Once it went into the refining process, there was no way of tracking where that oil went [...]

*[...] The parties agreement was in large measure fiction [...] SAMIR needed the oil. Contracted to buy the oil. Allowed Carlyle to buy the oil. Allowed Carlyle to pay for that oil. But when it was delivered, SAMIR immediately began to refine it. It had to. The refinery could not run without it and Carlyle knew that [...]*⁹¹

48 The Supreme Court’s conclusion that the excess insurers’ position was correct was reached after hearing very detailed written and oral submissions. Morocco requested that the Claimants provide access to the full and unredacted records of the New York proceedings, however the Claimants have refused to do so on the self-evidently absurd basis that these documents are not relevant to the issues before the Tribunal.⁹² Notwithstanding the absence of large parts of the record, what evidence is publicly available suggests that the Supreme Court had before it a significant body of evidence, including:

48.1 The deposition of Mr V Suvagiya (who is also a witness in these proceedings) in which he accepted that Carlyle entities gave their “*implicit consent*” to the processing of the Commodities prior to payment and that it was those

⁹⁰ **R-0008**, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Memorandum of Law of the Claimants (redacted) dated 14 January 2020, 11 12; **R-0009**, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Statement of Material Facts of the Claimants dated 14 January 2020, 7 8; **R-0007**, *CCM v Lloyds*, Memorandum of Law of the Excess Insurers, 11 13; **R-0013**, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Response to Statement of Material Facts of the Excess Insurers (redacted) dated 27 March 2020, 62 65.

⁹¹ **R-0016**, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Transcript of the Hearing before the New York Supreme Court dated 5 June 2020, 26 27.

⁹² **R-0010**, Letter from Christopher Harris QC to Weil Gotshal & Manges LLP dated 14 August 2020; **R-0011**, Letter from Weil Gotshal & Manges LLP to Christopher Harris QC dated 18 August 2020; **R-0012**, Letter from Christopher Harris QC to Weil Gotshal & Manges LLP dated 21 August 2020.

entities' practice to issue closeout confirmations for crude oil which had, it was known, already been processed.⁹³

48.2 The deposition of Mr Olivo, in which he testified that though the Carlyle entities were aware in May 2015 of a shortfall between the amount of Commodities purchased by Q1 and the amount stored in SAMIR's tanks, this was seen as "*a timing issue*" which was within "*the ordinary course of commercial business.*"⁹⁴

48.3 The deposition of Mr Zuech, in which he testified that Q1 purchased crude oil as a mechanism to provide liquidity to SAMIR and that the transactions were presented as a way for SAMIR to "*get access to capital.*"⁹⁵

48.4 An expert report from Mr Walck, including an annex which the Claimants have refused to provide to Morocco, but which, as the transcript from the hearing before the Supreme Court strongly suggests, was highly probative in showing that the MCTA structure was not followed in practice.⁹⁶

49 Having considered the factual record and submissions before it, the Supreme Court of New York agreed that the MCTA did not reflect the reality of the position – that it was "*not what occurred in the real world*"⁹⁷ and that it would "*make [...] no economic sense*" for the Commodities to have been sat in tanks at SAMIR for 90 or 120 days without being processed.⁹⁸ As the Supreme Court held:

[...] *SAMIR entered into a Master Commodity Transaction Agreement ('MCTA') with Carlyle, pursuant to which Carlyle would purchase some of the oil SAMIR had contracted to buy from third-party suppliers. Under the MCTA, Carlyle owned the purchased oil, stored it at SAMIR's refinery at no cost at and, had put rights when*

⁹³ R-0007, *CCM v Lloyds*, Memorandum of Law of the Excess Insurers, 11–12, 17.

⁹⁴ R-0013, *CCM v Lloyds*, Response to Statement of Material Facts of the Excess Insurers, 15, 68. See also R-0014, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Affidavit of M Olivo dated 11 October 2018, ¶¶ 13–32.

⁹⁵ R-0015, *Carlyle Commodity Management LLC & Ors v Certain Underwriters at Lloyds London & Ors*, Extracts from the Deposition of C Zuech dated 25 February 2020, 5 (page 79 according to internal numbering).

⁹⁶ R-0016, *CCM v Lloyds*, Hearing Transcript, 68–70. See also *ibid*, 51–57.

⁹⁷ R-0016, *CCM v Lloyds*, Hearing Transcript, 68.

⁹⁸ R-0016, *CCM v Lloyds*, Hearing Transcript, 62.

exercised obligated SAMIR to purchase oil from Carlyle. SAMIR could not use the oil until SAMIR paid Carlyle for it except upon Carlyle's prior written consent.

In practice, SAMIR processed the oil and sold the resulting refined products on an ongoing basis without either payment to Carlyle or prior written consent, and then paid Carlyle at some period of time after the oil had already been refined and sold [...]

[...] SAMIR did not steal the oil by refining it in the normal course of its refining operations. Carlyle's losses were not due to theft by SAMIR, because SAMIR and Carlyle had an ongoing business relationship and Carlyle expected that the oil it purchased and that was delivered to SAMIR would be used in the refining process and eventually paid for (usually after the time for payment provided in the MCTA). Carlyle's losses were not occasioned by the unlawful taking of the oil, but rather by SAMIR's non-payment [...]"⁹⁹

50 The Supreme Court's conclusion puts beyond doubt that the Claimants were not concerned about following the letter of the agreements on which they now purport to rely in order to establish the Tribunal's jurisdiction. It also establishes that the Commodities which the Claimants identify as "*investments*" and which they claim were expropriated from storage tanks by Morocco were, in fact, being refined on an ongoing basis by SAMIR with the Claimants' knowledge and consent. It follows that a significant portion – and possibly all – of the Commodities which the Claimants now allege constituted "*investments*" simply did not exist as at the date of alleged expropriation – having long since been refined by SAMIR in accordance with its understanding and, quite possibly, sold on.¹⁰⁰

51 It is regrettable that the Claimants have chosen not merely to conceal from the Tribunal this failure to follow the letter of the agreements, but have presented a case as to the ownership of the Commodities and their existence which they know to be untrue. If Morocco had not happened upon the record of the parallel New York proceedings – the existence of which the Claimants failed to reveal to the Tribunal –

⁹⁹ R-0006, CCM v Lloyds, New York Judgment, ¶¶ 4, 5, 9, 10 (emphasis added).

¹⁰⁰ The Claimants have not alleged, still less shown, that they had an ownership interest in the refined products in these proceedings, nor is there any contractual or legal basis for doing so. To the extent that the Claimants believed that they had some legal interest in the refined products which provided them with a form of security, that was plainly their mistake.

they might have been able to get away with their deceit. In the event, the Claimants' conduct means that the Tribunal must adopt a very cautious approach to their submissions and should require contemporaneous documentary evidence before accepting their account of the facts.

(4) *The alleged evidence of title submitted by the Claimants is neither relevant nor helpful*

52 The only positive evidence of ownership of the Commodities submitted by the Claimants to date are the "*custodian certificates*" which set out the quantity of Commodities held by SAMIR on behalf of each of Q1, 2014-1 and 2015-1 ("**the Custodian Certificates**").¹⁰¹ These do not assist with the question of which entity owned the Commodities (if any) as at 7 August 2015. In fact, they reflect the conclusion of the New York Judgment; namely that the "*transfer*" of title to the Commodities appears to have been a paper exercise for the Claimants which did not necessarily track what was, in reality, being held in SAMIR's tanks. As Mr Travers explains in his supplemental report:

*"[G]iven the number of changes of title required under the sixteen SAMIR MCTA transactions and thirteen VM MCTA sleeve transactions, the custody certificates are remarkably infrequent and could not possibly capture the transactions comprehensively."*¹⁰²

53 The Custodian Certificates may be split into three groups:

53.1 The first is a set of two Custodian Certificates, one allegedly reflecting Q1's holdings and one allegedly reflecting 2014-1's holdings as at 15 June 2015.¹⁰³

¹⁰¹ **CZ-0059**, Custodian Certificate for 2014-1 dated 15 June 2015 (with regard to Commodities allegedly held by 2014-1); **CZ-0060**, Custodian Certificate for Q1 dated 15 June 2015 (with regard to Commodities allegedly held by Q1); **CZ-0061**, Custodian Certificate for 2015-1 dated 10 August 2015 (with regard to Commodities allegedly held by 2015-1). All Custodian Certificates are also contained in **C-0050-ENG**.

¹⁰² Supplemental Travers Report, ¶ 3.27.4(a).

¹⁰³ **C-0050-ENG**, Warehouse Certificate for Q1 dated 15 June 2015, 13, 17.

53.2 The second is a Custodian Certificate allegedly reflecting 2014-1's holdings as at 2 July 2015.¹⁰⁴

53.3 The third is a set of three Custodian Certificates allegedly reflecting the holdings of Q1, 2014-1 and 2015-1 as at 10 August 2015.¹⁰⁵

54 These documents offer little of value as evidence of the extent of Q1, 2014-1 and 2015-1's holdings as at 7 August 2015.

55 In the case of the first two groups of Custodian Certificates, that conclusion follows primarily from their date. The documents allegedly record commodities held by SAMIR for Q1 and 2014-1 as at 15 June 2015 and, in the case of 2014-1, as at 2 July 2015. Even accepting (*in arguendo*) that they accurately reflect holdings as at 15 June 2015 and 2 July 2015 (a point contradicted by the evidence summarised below), it is impossible that these documents also accurately reflect Q1 and 2014-1's holdings as at 7 August 2015 because:

55.1.1 Five of the Repo Transactions – SAMIR 1018, 1019, 1020, 1021 and 1022 – had not been executed by 15 June 2015.¹⁰⁶ A further two Repo Transactions were not executed prior to 2 July 2015.¹⁰⁷ The Commodities associated with those Repo Transactions therefore could not possibly have been reflected in the first two groups of Custodian Certificates.

55.1.2 Additionally, only two of the Sleeve Transactions had been executed by 2 July 2015.¹⁰⁸ As explained above, the Sleeve Transactions resulted in title to Commodities ultimately moving to the Indenture Trustee. It stands to reason that a document recording alleged ownership of Commodities prior to execution of the Sleeve

¹⁰⁴ C-0050-ENG, Warehouse Certificate for Q1 dated 15 June 2015, 22.

¹⁰⁵ C-0050-ENG, Warehouse Certificate for Q1 dated 15 June 2015, 26, 31 and 34.

¹⁰⁶ See Table 1, rows 8–12.

¹⁰⁷ See Table 1, rows 11, 12.

¹⁰⁸ Only Sleeve Transactions for SAMIR 1005 and SAMIR 1010 had been executed by 15 June 2015: C-0057-ENG, Sleeve Transaction Documentation.

Transactions would not capture the changes in ownership of those Commodities following execution of the Sleeve Transactions.

56 For those reasons alone, the first two groups of Custodian Certificates have no evidential value in relation to the alleged ownership of the Commodities at the time of the alleged expropriation.

57 In addition to their date, the substance of these Custodian Certificates leads invariably to the conclusion that they are inaccurate. For example:

57.1 In the case of at least one of the Repo Transactions – SAMIR 1012 – SAMIR appears to have designated Commodities as belonging to 2014-1 prior to those Commodities being the subject of a Sleeve Transaction between Q1 and 2014-1. A purely contractual analysis (on the basis of the documents so far disclosed by the Claimants) would lead to the conclusion that Q1 still owned the Commodities as at June 2015.¹⁰⁹ The Custodian Certificates, however, list the relevant Commodities as being owned by 2014-1. The fact that Commodities were apparently deemed transferred to 2014-1 before any agreement was signed to that effect suggests that the Custodian Certificates did not reflect reality.

57.2 In the case of two further Repo Transactions – SAMIR 1016 and SAMIR 1018 – ownership of the Commodities which were allegedly sold to Q1 (being high sulphur fuel oil and blend crude oil) is not reflected in any of the Custodian Certificates.¹¹⁰

57.3 In the case of two further Repo Transactions – SAMIR 1014 and SAMIR 1015 – while the Commodity in question (Russian export blend crude oil) is mentioned, the quantities set out in the Custodian Certificates are far higher than those which were the subject of the two relevant Repo Transactions.¹¹¹

¹⁰⁹ CZ-0059, Custodian Certificate for 2014-1 dated 15 June 2015, 5.

¹¹⁰ See Table 1, row 7.

¹¹¹ See Table 1, rows 5-6.

- 58 It follows from the above that, in addition to omitting relevant information about transactions which took place following their dates, the first two groups of Custodian Certificates also recorded the position even as at their dates inaccurately, rendering them doubly worthless as evidence of Q1 and 2014-1's alleged ownership of Commodities.
- 59 The final group of Custodian Certificates – those dated 10 August 2015 – is equally unhelpful to the determination of which entity owned the Commodities. For example, the 10 August 2015 Custodian Certificate for 2015-1 records 2015-1 as holding US\$45 million worth of Russian export blend crude oil as at 10 August 2015.¹¹² This amount does not relate to any of the Repo Transactions relevant to this dispute.¹¹³ That is established by the documents provided by the Claimants, which indicate that 2015-1 only entered into a Sleeve Transaction with respect to one Transaction – SAMIR 1018 – and it did so on 9 September 2015, almost a month after Exhibit CZ-0061.¹¹⁴ Moreover SAMIR 1018 concerned under US\$10 million of crude – not US\$45 million of Russian Export Blend Crude Oil. In the light of that, it appears likely that the commodity referenced in the 10 August 2015 2015-1 Custodian Certificate was unrelated to the Repo Transactions relevant to the present dispute. The 10 August 2015 Custodian Certificates for 2014-1 and Q1 are replete with similar inconsistencies and errors. **Table 1**, below, reflects the inconsistencies between the information in the MCTA Confirmations and that in the Custodian Certificates:

¹¹² **CZ-0061**, Custodian Certificate for 2015-1 dated 10 August 2015.

¹¹³ See also Supplemental Travers Report, ¶ 3.27(e).

¹¹⁴ **CZ-0051**, 2015-1 Indenture, 57.

Table 1: comparison of commodities in confirmations and Custodian Certificates

	Transaction Ref	Date of MCTA Confirmation	Commodities subject to the Transaction	Date of First Sleeve Transaction transferring title to 2014-1 ¹¹⁵	Ownership of Commodities according to 15 June 2015 Custodian Certificates	Ownership of Commodities according to 2 July 2015 Custodian Certificate of 2014-1	Ownership of Commodities according to 10 August 2015 Custodian Certificates
1.	SAMIR 1005	10 March 2015 ¹¹⁶	US\$13.554 million worth of HSV Gasoil	16 April 2015	Q1 ¹¹⁷	Not mentioned ¹¹⁸	Not mentioned ¹¹⁹
2.	SAMIR 1010	28 April 2015 ¹²⁰	US\$43.558 million worth of Urals Crude Oil	29 May 2015	2014-1 ¹²¹	Not mentioned ¹²²	Not mentioned ¹²³
3.	SAMIR 1011	4 May 2015 ¹²⁴	US\$16.759 million worth of HSV Gasoil	9 July 2015	Q1 ¹²⁵	Not mentioned ¹²⁶	Not mentioned ¹²⁷
4.	SAMIR 1012	12 May 2015 ¹²⁸	US\$10,363 million worth of Blend Stock Fuel Oil	28 August 2015	2014-1 ¹²⁹	Not mentioned ¹³⁰	Not possible to know ¹³¹

¹¹⁵ Information taken from the Sleeve Confirmations in **C-0057-ENG**, Sleeve Transaction Documentation.

¹¹⁶ **C-0015-ENG**, Letter from the Claimants to ICSID, 51.

¹¹⁷ **CZ-0060**, Custodian Certificate for Q1 dated 15 June 2015, 5.

¹¹⁸ **C-0050-ENG**, Warehouse Certificate for Q1 dated 15 June 2015, 22.

¹¹⁹ **C-0050-ENG**, Warehouse Certificate for Q1 dated 15 June 2015, 27, 31, 35.

¹²⁰ **C-0015-ENG**, Letter from the Claimants to ICSID, 53.

¹²¹ **CZ-0059**, Custodian Certificate for 2014-1 dated 15 June 2015, 5.

¹²² **C-0050-ENG**, Warehouse Certificate for Q1 dated 15 June 2015, 22.

¹²³ **C-0050-ENG**, Warehouse Certificate for Q1 dated 15 June 2015, 27, 31 and 35.

¹²⁴ **C-0015-ENG**, Letter from the Claimants to ICSID, 55.

¹²⁵ **CZ-0060**, Custodian Certificate for Q1 dated 15 June 2015, 5. Morocco notes that when one adds the amounts of HSV Gasoil in SAMIR 1005 and SAMIR 1011, the result is slightly over the amount of HSV Gasoil registered as owned by Q1 in **CZ-0060**. Given that the numbers are reasonably close, we have assumed that they refer to the Commodities underlying these two Repo Transactions, however it is not possible to be certain about this point.

¹²⁶ **C-0050-ENG**, Warehouse Certificate for Q1 dated 15 June 2015, 22.

¹²⁷ **C-0050-ENG**, Warehouse Certificate for Q1 dated 15 June 2015, 27, 31, 35.

¹²⁸ **C-0015-ENG**, Letter from the Claimants to ICSID, 55.

¹²⁹ **CZ-0059**, Custodian Certificate for 2014-1 dated 15 June 2015, 5.

¹³⁰ **C-0050-ENG**, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 22.

¹³¹ Both 2014-1 and Q1 are listed as holding amounts of fuel oil, however both appear to be larger amounts than were the subject of SAMIR 1012.

	Transaction Ref	Date of MCTA Confirmation	Commodities subject to the Transaction	Date of First Sleeve Transaction transferring title to 2014-1 ¹¹⁵	Ownership of Commodities according to 15 June 2015 Custodian Certificates	Ownership of Commodities according to 2 July 2015 Custodian Certificate of 2014-1	Ownership of Commodities according to 10 August 2015 Custodian Certificates
5.	SAMIR 1014	26 May 2015 ¹³²	US\$21.093 million worth of Russian Export Blend Crude Oil	30 July 2015	Not possible to know ¹³³	Not possible to know ¹³⁴	Not possible to know ¹³⁵
6.	SAMIR 1015	27 May 2015 ¹³⁶	US\$24.076 million worth of Russian Export Blend Crude Oil	31 July 2015	Not possible to know	Not possible to know ¹³⁷	Not possible to know
7.	SAMIR 1016	1 June 2015 ¹³⁸	US\$9.544 million worth of High Sulfur Fuel Oil	Sleeve Transaction information not provided	Not mentioned ¹³⁹	Not mentioned ¹⁴⁰	Not mentioned ¹⁴¹
8.	SAMIR 1017	9 June 2015 ¹⁴²	US\$43.797 million of Blend Crude Oil	28 August 2015	Not mentioned ¹⁴³	Not possible to know ¹⁴⁴	Not mentioned ¹⁴⁵

¹³² C-0015-ENG, Letter from the Claimants to ICSID, 57.

¹³³ All three Custodian Certificates refer to amounts of Russian export blend crude oil, none of which precisely accords with the amounts which were the subject of SAMIR 1014 and SAMIR 1015. It is therefore not possible to discern which Custodian Certificates, if any, are referring to the Commodities relevant to these two Repo Transactions.

¹³⁴ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 22. While Russian export blend crude oil is mentioned on 2014-1's Custodian Certificate of 2 July 2015, it is in vastly greater quantity than the amounts which were the subject of SAMIR 1014 and SAMIR 1015

¹³⁵ 2014-1 and 2015-1 are listed as owning vast quantities of Russian export blend crude oil (over US\$273 million worth in the case of 2014-1, and over US\$40 million in the case of 2015-1) as at 10 August 2015: C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 27, 31. It is impossible to know whether part of this reflects amounts bought pursuant to SAMIR 1014 and 1015 and, if so, which part.

¹³⁶ C-0015-ENG, Letter from the Claimants to ICSID, 61.

¹³⁷ C-0050-ENG, Warehouse Certificate for Q1 dated 15 June 2015, 22.

¹³⁸ C-0015-ENG, Letter from the Claimants to ICSID, 63.

¹³⁹ None of the Custodian Certificates mention an amount of High Sulfur Fuel Oil.

¹⁴⁰ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 22.

¹⁴¹ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 27, 31, 35.

¹⁴² C-0015-ENG, Letter from the Claimants to ICSID, 65.

¹⁴³ Morocco notes that that the information at CZ-0061 confirms that "Blend Crude Oil" is a different category to "Russian Export Blend Crude Oil". CZ-0059, CZ-0060 and CZ-0061 do not record any of Q1, 2014-1 or 2015-1 owning any amount of Blend Crude Oil, despite the terms of SAMIR 1017.

¹⁴⁴ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 22: 2014-1 is recorded as owning over US\$89 million worth of blend crude oil. That figure does not correspond with any of the amounts underlying the Repo Transactions.

¹⁴⁵ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 27, 31, 35.

	Transaction Ref	Date of MCTA Confirmation	Commodities subject to the Transaction	Date of First Sleeve Transaction transferring title to 2014-1 ¹¹⁵	Ownership of Commodities according to 15 June 2015 Custodian Certificates	Ownership of Commodities according to 2 July 2015 Custodian Certificate of 2014-1	Ownership of Commodities according to 10 August 2015 Custodian Certificates
9.	SAMIR 1018	16 June 2015 ¹⁴⁶	US\$12.667 million of Crude Oil	5 August 2015	N/A (transaction post-dates the certificate)	Not mentioned ¹⁴⁷	Not mentioned ¹⁴⁸
10.	SAMIR 1019	22 June 2015 ¹⁴⁹	US\$10.472 million of Crude Oil	27 July 2015	N/A (transaction post-dates the certificate)	Not mentioned ¹⁵⁰	Not mentioned
11.	SAMIR 1020	25 June 2015	US\$23.499 million of Crude Oil	31 August 2015	N/A (transaction post-dates the certificate)	Not mentioned ¹⁵¹	Not mentioned
12.	SAMIR 1021	2 July 2015	US\$34.970 million of Crude Oil	Sleeve Transaction information not provided	N/A (transaction post-dates the certificate)	N/A (transaction post-dates the certificate)	Not mentioned
13.	SAMIR 1022	23 July 2015	US\$44.655 million of Crude Oil	30 September 2015	N/A (transaction post-dates the certificate)	N/A (transaction post-dates the certificate)	Not mentioned
14.	SAMIR-JUN-2015-Distillates	4 June 2015	US\$33.681 million of Distillates	Sleeve Transaction information not provided	Not possible to know ¹⁵²	Not mentioned	Not mentioned
15.	SAMIR-JUN-2015-Fuel Oil	4 June 2015	US\$10,783 million of Fuel Oil	Sleeve Transaction information not provided	Q1 ¹⁵³	Not mentioned	Not mentioned
16.	SAMIR-JUN-2015-Gasoline	4 June 2015	US\$32.470 million of Gasoline	Sleeve Transaction information not provided	Not possible to know ¹⁵⁴	Not mentioned	Not mentioned ¹⁵⁵

¹⁴⁶ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 67.

¹⁴⁷ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 22.

¹⁴⁸ Note the only type of crude oil which appears to have been held by 10 August 2015 was Russian export blend crude oil and Basrah light. It is unlikely that these refer to the commodity which was the subject of SAMIR 1018. In any case, the amounts listed are far higher than those which were the subject of SAMIR 1018.

¹⁴⁹ C-0015-ENG, Letter from the Claimants to ICSID, 69.

¹⁵⁰ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 22.

¹⁵¹ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 22.

¹⁵² While certain distillates are listed (e.g. Jet A1, Naphtha, etc.) they are not in quantities which can be matched with the MCTA Confirmation.

¹⁵³ C-0050-ENG, Warehouse Certificates, 15 June 2015, 2 July 2015 and 10 August 2015, 16.

¹⁵⁴ Both Q1 and 2014-1 are listed as owning gasoline as at 15 June 2015, but not in the amount which was the subject of SAMIR-JUN-2015-Gasoline: C-0050-ENG, Warehouse Certificate for Q1 dated 15 June 2015, 12, 17

¹⁵⁵ The only entity which appears to own any gasoline by 10 August 2015 is Q1, however the amount it held was almost half the amount which was the subject of SAMIR-JUN-2015-Gasoline.

60 These numerous gaps and positive errors in the Claimants' submissions and evidence cast further doubt over which specific entity owned the Commodities at the time of the alleged expropriation, if any. As Mr Travers notes:

*"It would seem that the custody certificates, pledge agreements, transaction confirmations and sleeve transaction confirmations are materially incomplete and perhaps inaccurate. They are simply not capable of reconciliation. I find it surprising that comprehensive custody and transactional records have not been presented which easily and clearly reflect the transactions occurring in a sequential manner as these records should exist."*¹⁵⁶

61 In the light of that, the Claimants have not even begun to meet their burden of showing that the Tribunal has jurisdiction to hear this claim.

C The Claimants have failed to establish a relationship of ownership or control of 2014-1 and/or Q1 as at the relevant dates

(1) Ownership

62 In its Memorial on Jurisdiction, Morocco explained that the Claimants had failed to provide evidence linking them to Q1, 2014-1 or 2015-1 as at 7 August 2015, the date of the alleged expropriation. In brief, Morocco demonstrated that:

62.1 The only evidence linking any of the Claimants to Q1, 2014-1 or 2015-1 as at 7 August 2015 was the evidence of CCM's contractual relationship with them.¹⁵⁷

62.2 By contrast, the Claimants had failed to substantiate the alleged links – as at 7 August 2015 – between the Passive Companies, the Master-Feeder Fund and Q1 or 2014-1.¹⁵⁸ For example, the Claimants had not provided any evidence as to who owned the Offshore Feeder prior to 29 February 2016, despite the documents suggesting that entities other than TC Group LLC and

¹⁵⁶ Supplemental Travers Report, ¶ 3.28.

¹⁵⁷ Memorial on Jurisdiction, ¶ 41.

¹⁵⁸ Memorial on Jurisdiction, ¶ 42.

TC Group Investment Holdings likely owned it.¹⁵⁹ The Claimants had also not provided any evidence as to who owned the Onshore Feeder prior to 31 December 2016, again despite the fact that the documents on which the Claimants themselves relied showed that TC Group LLC and TC Group Investment Holdings owned only a nominal stake in the Onshore Feeder at the beginning of 2016.¹⁶⁰

62.3 The Claimants also relied on several relationships said to be ones of “*general partnership*” without providing evidence that would explain the relationship implied by this term, and whether other entities may also have had proprietary relationships with those entities.¹⁶¹

62.4 Finally, the Claimants asserted that several of the Claimants’ relationships with Q1 existed through their ownership of “*participating shares*”. As Morocco explained, “*participating shares*” likely denotes a class of share which sits alongside “*voting shares*” or “*management shares*”.¹⁶² As such, simply establishing that a Claimant owned participating shares is not enough alone to establish that it owned the underlying company.¹⁶³

63 The evidence submitted by the Claimants in their Counter-Memorial on Jurisdiction vindicates Morocco’s concerns. It is now clear that the Claimants misled the Tribunal about the alleged corporate relationships on which they rely for their claim and that, in fact, the evidence establishes a very different ownership picture as at the 11 August 2015.

64 Specifically, prior to their Counter-Memorial on Jurisdiction, the Claimants had asserted that TC Group Investment Holdings and TC Group LLC “*control 100% of the limited partnership interests in*” the Onshore Feeder.¹⁶⁴ Morocco pointed out that

¹⁵⁹ Memorial on Jurisdiction, ¶ 44.

¹⁶⁰ Memorial on Jurisdiction, ¶ 45; C-0040-ENG, 2016 Celadon Commodities Fund LP Partnership Tax Returns, 7, 13.

¹⁶¹ Memorial on Jurisdiction, ¶ 48.

¹⁶² Travers Expert Report, ¶ 4.11.5.

¹⁶³ Memorial on Jurisdiction, ¶ 53.

¹⁶⁴ They did so in reliance on C-0040-ENG, 2016 Celadon Commodities Fund LP Partnership Tax Returns, 11.

the ‘evidence’ for this ownership dated from 29 February 2016, with no evidence on the record as to the ownership of the Onshore Feeder as at 7 August 2015. In response, the Claimants have now revealed that “[a]s of August 2015” a hitherto unmentioned third party, the Maryland Pension System “held 99.97% of the limited partnership interests in the US Onshore Feeder” and, in fact, TC Group Investment Holdings and TC Group LLC had only a nominal interest in the Onshore Feeder.¹⁶⁵

65 Perhaps cognisant of the harm this does to their case, the Claimants now boldly assert that the Maryland Pension System’s interest is not relevant because it was an limited partnership interest which did not “give rise to any control over the business or operation of the [Onshore Feeder] or any power to bind the [Onshore Feeder]”.¹⁶⁶ That is directly at odds with the Claimants’ previous submission regarding the significance of TC Group LLC’s and TC Group Investment Holdings’ limited partnership interest. On the Claimants’ case, that interest meant that TC Group LLC and TC Group Investment Holdings “indirectly controlled the Investments”.¹⁶⁷ The Claimants cannot have it both ways – either it is the limited partnership interest that controls underlying investments, or it is the general partnership. It cannot be both. In fact, as Versant explain, it is the limited partnership interest which reflects the economic stake in the underlying vehicle, and not the general partnership interest. Per Versant:

“Generally, LP interest reflects economic interest in the entity itself while economics of the GP interest is composed of fees earned on the LP capital it manages and the ability to influence the structure of the vehicle (e.g. the Board). In arriving at the sources of capital that are ‘at risk’, the LP Interest is the relevant figure to focus upon.”¹⁶⁸

66 The new evidence submitted by the Claimants suggests that the relevant corporate structure, as at 7 August 2015, was as follows:

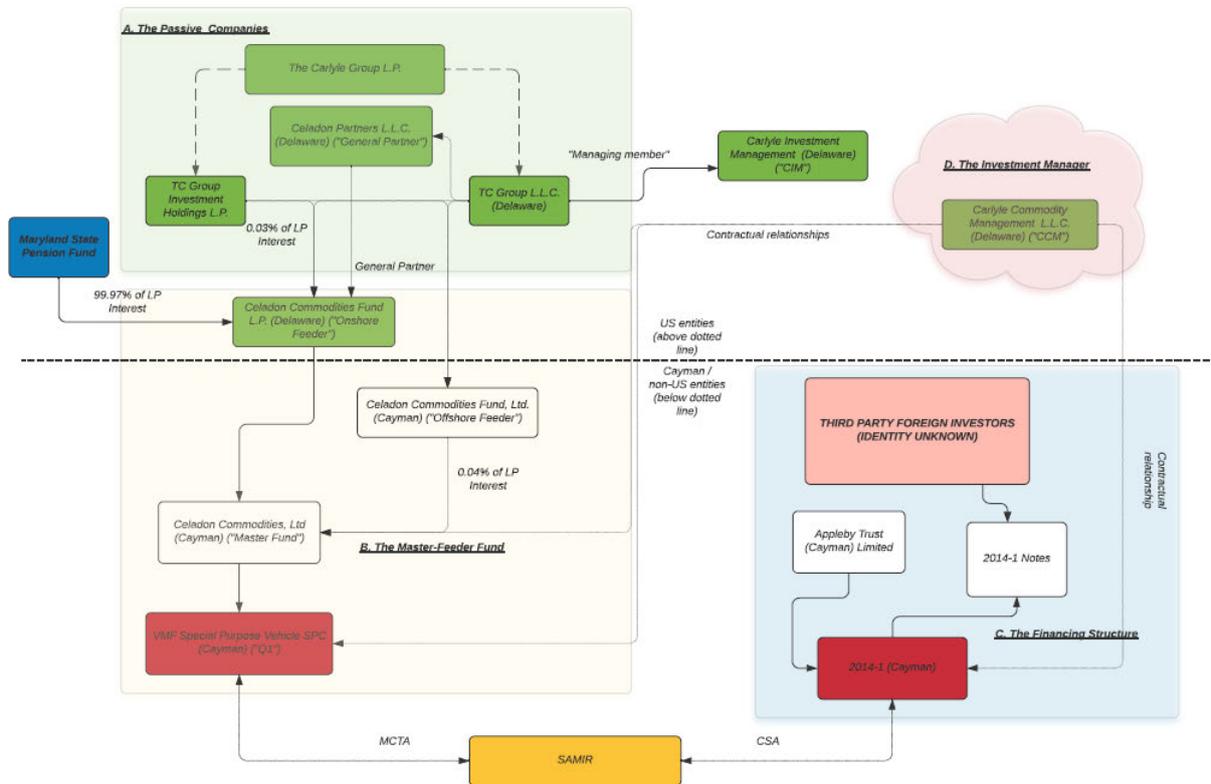
¹⁶⁵ Counter-Memorial on Jurisdiction, ¶ 20 (fn 38).

¹⁶⁶ Counter-Memorial on Jurisdiction, ¶ 20.

¹⁶⁷ Claimants’ Observations on the Respondent’s Request for Bifurcation, ¶¶ 69(v) and (vi).

¹⁶⁸ Versant Report, ¶ 104(b).

Diagram 1: Updated corporate structure chart



(2) Control

67 In its Memorial on Jurisdiction, Morocco also explained that CCM’s relationship with Q1, 2014-1 and 2015-1 (as “Investment Manager”) was purely contractual, and not one of ownership or control:

67.1 In relation to 2014-1, 2015-1 and to Q1, CCM provided certain contractually delineated services in exchange for a fee.¹⁶⁹

67.2 Other than the potential that it would not be paid its fee, CCM took no risk under its investment management agreements with 2014-1, 2015-1 and Q1 – it had no stake in the Repo Transactions and, indeed, was expressly indemnified against any losses arising out of them.¹⁷⁰

¹⁶⁹ Memorial on Jurisdiction, ¶ 75.

¹⁷⁰ Memorial on Jurisdiction, ¶ 75.5.

67.3 CCM was also expressly instructed as an independent contractor, not as a partner or co-venturer, and its instruction could be terminated, in the case of its relationship with Q1, on 30 days' notice; and in the case of its relationship with 2014-1, on 90 days' notice.¹⁷¹

67.4 It followed, from the terms of these agreements, that CCM was an agent of 2014-1, 2015-1 and Q1, to which certain powers had been delegated. However, it could not be said that CCM owned or controlled either entity.¹⁷²

68 Despite strenuous efforts to portray CCM's role as greater and of more significance than the above analysis implies, the Claimants have not produced any evidence with Counter-Memorial which changes that analysis.

69 The Counter-Memorial on Jurisdiction is peppered with overstatements of the extent of CCM's powers and control over various entities. The Claimants insist, for example, that CCM was "*the entity with complete control of all the investments in question*";¹⁷³ that CCM "*created*" Q1, 2014-1 and 2015-1;¹⁷⁴ that it was CCM which had the "*option to transfer title to the Commodities from VMF Q1 to 2014-1 and 2015-1*" under the MCTA even though CCM was not a party to it.¹⁷⁵

70 The premise of the Claimants' case on CCM is that it was dealing with what the Claimants call "*nominal directors*" in the underlying entities.¹⁷⁶ The implication of this phrase is that the directors of Q1, 2014-1 and 2015-1 simply did CCM's bidding without questioning. That could not be right without implying serious breaches by those directors of their fiduciary duties. As Mr Travers explains:

"Under the Cayman Islands law, there is no recognized concept of a nominal or passive director. The directors of a Cayman Islands exempted company owe certain

¹⁷¹ Memorial on Jurisdiction, ¶ 75.7.

¹⁷² Memorial on Jurisdiction, ¶ 76.

¹⁷³ Counter-Memorial on Jurisdiction, ¶ 3.

¹⁷⁴ Counter-Memorial on Jurisdiction, ¶ 31(a).

¹⁷⁵ Counter-Memorial, ¶ 28.

¹⁷⁶ The Counter-Memorial on Jurisdiction is littered with references to the "*nominal directors*" of Cayman entities. See for example, Counter-Memorial on Jurisdiction, ¶¶ 21 (fn 44) ("*the Master Fund's nominal directors signed an investment management agreement*"), 23 ("*Q1's nominal directors signed an investment agreement [...]*").

*duties to the company (and not directly to the shareholders or any other parties), which comprise the fiduciary duties and the duties of care, diligence and skill. It should be noted that such duties are not owed to companies with which the company is associated, to individual shareholders or to the persons who appointed them or organised the company.”*¹⁷⁷

71 In any case, the Claimants’ characterisation of CCM’s role is plainly incorrect – and more importantly is irrelevant. Any power exercised by CCM over another entity or its assets was a power devolved to it by contractual agreement, in exchange for fees. Moreover, CCM’s powers were exercised subject to the continuing approval of the boards of the relevant companies – and in some cases, those boards were able to terminate their companies’ arrangement with CCM with immediate effect. Specifically:

71.1 The Claimants allege that CCM was “*vested with “full and exclusive authority to manage and control the [Onshore Feeder’s] business and investments”*”.¹⁷⁸ In fact, the agreement between CCM and the Onshore Feeder makes clear that CCM was acting only as an “*investment adviser*”¹⁷⁹ in its capacity as an “*independent contractor*”.¹⁸⁰ Although CCM had a discretion to invest certain funds on behalf of the Onshore Feeder, such investments expressly did not entitle it to “*the receipt, retention or control of any Account assets*”.¹⁸¹ The terms of CCM’s engagement were also clear that CCM should not be construed as “*a partner or co-venturer*” of the Onshore Feeder, nor would it have any “*authority to bind, obligate or represent the*” Onshore Feeder.¹⁸² CCM’s services could be terminated by the Onshore Feeder at any time by notice.¹⁸³

71.2 Substantially the same terms governed CCM’s relationship with the Offshore Feeder.¹⁸⁴ As with the Onshore Feeder, CCM was an investment adviser to

¹⁷⁷ Supplemental Travers Report, ¶ 2.1.3.

¹⁷⁸ Counter-Memorial on Jurisdiction, ¶ 20.

¹⁷⁹ CZ-0035, US Onshore Feeder Investment Management Agreement, Art 1.

¹⁸⁰ CZ-0035, US Onshore Feeder Investment Management Agreement, Art 9.

¹⁸¹ CZ-0035, US Onshore Feeder Investment Management Agreement, Art 5(a) (emphasis added).

¹⁸² CZ-0035, US Onshore Feeder Investment Management Agreement, Art 9.

¹⁸³ CZ-0035, US Onshore Feeder Investment Management Agreement, Art 11.

¹⁸⁴ CZ-0041, Master Fund/Offshore Feeder Investment Management Agreement.

the Offshore Feeder.¹⁸⁵ While it was granted authority to make certain investment decisions on behalf of the Offshore Feeder, such decisions expressly did not entitle it to “*the receipt, retention or control of any Account assets*”, nor did they bestow upon it any general “*authority to bind, obligate or represent the*” Offshore Feeder.¹⁸⁶ Moreover, CCM was only contracted to manage those assets of the Offshore Feeder which were “*placed from time to time in the Account by the directors of the Offshore Feeder*”.¹⁸⁷ In other words, CCM was not at liberty to invest whatever assets it wished – its remit was strictly delineated by the directors, who could change the assets managed by CCM at will. The Offshore Feeder could also terminate CCM’s services on notice at any time.¹⁸⁸

71.3 Finally, CCM’s role in relation to Q1 was equally restricted.¹⁸⁹ Under the relevant investment management agreement, CCM was a “*limited attorney-in-fact*”.¹⁹⁰ Although CCM had rights to invest on behalf of Q1, its rights were expressly subject to the relevant companies’ policies, provided they were notified to Q1 by that company’s directors.¹⁹¹ As with its relationship with 2014-1 and 2015-1, CCM was expressly not to be construed as “*an agent, employee, partner or joint venturer*” of Q1.¹⁹² It also had “*no authority to act for or to represent [Q1] in any way*”.¹⁹³ CCM’s services could be terminated by Q1 on 30 days’ notice.¹⁹⁴

72 In order to assist the Tribunal’s assessment of whether CCM’s powers confer upon it “*control*” of the alleged investments, Versant have set out their analysis of the position under relevant accounting rules.¹⁹⁵ Although these standards are not

¹⁸⁵ CZ-0041, Master Fund/Offshore Feeder Investment Management Agreement, Arts 1, 9.

¹⁸⁶ CZ-0041, Master Fund/Offshore Feeder Investment Management Agreement, Arts 5(a), 9.

¹⁸⁷ Travers Report, ¶ 2.4.5(b).

¹⁸⁸ CZ-0041, Master Fund/Offshore Feeder Investment Management Agreement, Art 11.

¹⁸⁹ CZ-0047, VMF Q1 Investment Management Agreement.

¹⁹⁰ CZ-0047, VMF Q1 Investment Management Agreement, Art 1.

¹⁹¹ CZ-0047, VMF Q1 Investment Management Agreement, Art 3(a).

¹⁹² CZ-0047, VMF Q1 Investment Management Agreement, Art 8.

¹⁹³ CZ-0047, VMF Q1 Investment Management Agreement, Art 8.

¹⁹⁴ CZ-0047, VMF Q1 Investment Management Agreement, Art 11.

¹⁹⁵ Versant Report, ¶¶ 114–152.

directly applicable to treaty interpretation, the approach under them is consonant with the approach adopted by other investment treaty tribunals¹⁹⁶ and it may, therefore, assist the Tribunal's consideration of whether CCM had "control" in the present context. Certainly, these rules establish a workable approach to defining control in practice. As Versant explain:

72.1 Under IFRS 10, an investor controls an investee when three criteria are satisfied: "(i) power over the investee; (ii) exposure or rights to variable returns of the investee, and (iii) the ability to use power over the investee to affect the investor's returns."¹⁹⁷

72.2 Under US GAAP, there are broadly two scenarios in which a party may be said to have control, namely: (i) where an entity has "ownership of a majority of the voting interests of a legal entity";¹⁹⁸ and (ii) where an entity "has both: (a) the power to direct the activities of the [underlying investment vehicle] that most significantly affect the [underlying investment vehicle's] economic performance, and (b) the obligation to absorb losses or the rights to receive benefits that could be significant to the [underlying investment vehicle's]".¹⁹⁹

73 As Versant demonstrate, a nominal or limited economic exposure to an investment together with contractual rights to control it will not usually enough to establish control for purposes of the above tests. For example, an entity with a two per cent direct interest in underlying investments and which had contractual rights to control the investment which could only be terminated on breach still would not be considered to "control" the underlying asset under IFRS 10.²⁰⁰ It is only when the extent of the economic interest in the underlying asset is significantly greater – Versant give examples at 20 per cent and 35 per cent – that accounting principles begin to consider that entity to have "control".²⁰¹

¹⁹⁶ See further below at §IV.B(1).

¹⁹⁷ Versant Report, ¶ 118

¹⁹⁸ Versant Report, ¶ 138

¹⁹⁹ Versant Report, ¶ 139

²⁰⁰ Versant Report, Figure 9.

²⁰¹ Versant Report, Figure 9.

74 In their analysis of whether CCM would be deemed to be in control of the entities which it advises, Versant draw attention to (*inter alia*) the following facts:

74.1 “CCM did not ultimately control the Feeder Funds, Q1, 2014-1 or 2015-1 through a majority of voting rights”;²⁰²

74.2 “CCM’s role for 2014-1 could be terminated for cause on 20 days’ notice by a ‘supermajority’ of the senior noteholders and a ‘supermajority’ of the subordinated noteholders”;²⁰³

74.3 “CCM’s relationships were typically those of an independent contractor, and not those of a ‘partner’ or ‘joint venturer’”;²⁰⁴

74.4 CCM “had no proprietary trading accounts and therefore had no risk associated with any direct investments”²⁰⁵

74.5 CCM “was indemnified against any losses arising out of the repurchase transactions with SAMIR”.²⁰⁶

75 On that basis, Versant conclude that CCM would not be considered, as a matter of accounting analysis, to be in “control” of the entities which it advises. Per Versant:

“Based on the guidance outlined in IFRS 10 and ASC 810, it seems clear that CCM acted as an agent of Q1, 2014-1 and 2015-1 to which certain powers were delegated but there was no ownership or control.”²⁰⁷

76 That conclusion reflects the obvious reality – as Morocco explained in its Memorial on Jurisdiction – that CCM was at most a limited contractual agent of the various entities with which it contracted. As reflected in the Claimants’ own documents,

²⁰² Versant Report, ¶ 145

²⁰³ Versant Report, ¶ 146

²⁰⁴ Versant Report, ¶ 147

²⁰⁵ Versant Report, ¶ 151

²⁰⁶ Versant Report, ¶ 151.

²⁰⁷ Versant Report, ¶ 152.

CCM acted “*on behalf of*” those entities pursuant to contractually delegated and delineated powers – it was not free to control the entities in any way it wished.²⁰⁸

D The Claimants have failed to establish that any of them made financial contributions to the Repo Transactions

77 In addition to their failure to establish ownership or control over the alleged investments, the Claimants have not remedied their failure to show that they made a financial contribution to them.

78 In the Memorial on Jurisdiction, Morocco explained that:

78.1 The Claimants failed to provide evidence of any Claimant entity making a financial contribution prior to July 2017 – [REDACTED]

[REDACTED]²⁰⁹

78.2 The Claimants had not provided either submissions or documentary evidence establishing how funds allegedly reached Q1, 2014-1 (or 2015-1) from investors (whether these were Claimant entities or otherwise), or how such funds were ultimately returned to them.²¹⁰

78.3 The Funding Structure employed by the Claimants is atypical and suggests that the Claimants sought to hive off both the financing and risk elements of the Transactions in order to protect the Claimant entities in the Master-Feeder Fund structure. The existence of the Funding Structure strongly suggests that financing for the Transactions came in large or exclusive part from money paid for notes issued by 2014-1, but the Claimants had not provided any evidence in relation to this.²¹¹

²⁰⁸ For example, the Indentures make frequent reference to CCM acting “*on behalf of*” 2014-1 and 2015-1. See e.g. CZ-0050, 2014-1 Indenture, 54 (emphasis added): “[e]ach time that the Portfolio Manager *on behalf of* [2014-1] directs or causes the acquisition of [...]”.

²⁰⁹ Memorial on Jurisdiction, ¶ 56.

²¹⁰ Memorial on Jurisdiction, ¶ 58.

²¹¹ Memorial on Jurisdiction, ¶¶ 63–64.

79 On the basis of the Claimants' Counter-Memorial and the evidence submitted with it, it now appears that funds for the Transactions originated from four sources, namely: (i) with respect to seven of the thirteen Transactions involving a letter of credit, 2014-1; (ii) with respect to a further four Transactions, Q1; (iii) with respect to one Transaction, 2015-1; and (iv) with respect to one Transaction, a hitherto unmentioned entity named Crimson Physical Commodities.²¹² It bears noting that Crimson Physical Commodities is not mentioned in any of the Claimants' submissions. Its participation is only evidenced on a close examination of the documents related to transaction SAMIR 1020.²¹³ The Claimant provides no explanation as to what this entity was and how it related to the Claimants – if at all. Once again, therefore, the Claimants' approach is unhelpfully to conceal obviously relevant elements of their case. Morocco will now address each of these in turn.

80 **Funds from 2014-1 and 2015-1.** The Claimants have now confirmed that money committed by 2014-1 and 2015-1 originated from noteholders – undisclosed investors who purchased bonds issued by 2014-1 and 2015-1, and not from CIM.²¹⁴ As Mr Travers explains: *“it is not possible to determine with certainty the identity of the holders of the Notes of each of the Funding Vehicles at the relevant time because the register of noteholders ... was not provided”*.²¹⁵

81 The Claimants nevertheless assert that even prior to [REDACTED], a hitherto undisclosed entity named Carlyle CLO Coinvestors LP owned *“a portion of the subordinated equity tranches of the Notes issued by 2014-1 and 2015-1”*.²¹⁶

²¹² Q1 is alleged to have provided funds which were used by 2014-1 for four Transactions (SAMIR 1011, 1014, 1015 and 1016); the Claimants assert that 2015-1 provided the funds which were used by 2014-1 for one of the Transactions (SAMIR 1021), however they have provided no evidence at all to substantiate this and the relevant brokerage statement is missing from **C-0061-ENG**; Crimson Physical Commodities appears to have provided the funds used by 2014-1 for one Transaction (SAMIR 1020); and the remaining Transactions involving letters of credit were financed directly by 2014-1 from its account: **C-0061-ENG**, Brokerage Statements for LC Funding.

²¹³ Indeed, the entity is not mentioned in any of the Claimants' submissions. Its participation is only evidenced on a close examination of the documents related to SAMIR 1020 in **C-0061-ENG**.

²¹⁴ See 2020 Zuech Statement, ¶ 18: “[2014-1 and 2015-1] raised investment capital by issuing senior and subordinated debt instruments (‘Notes’) that were purchased by both foreign and US entities”. Morocco notes that the Claimants continue to obscure the identity of these noteholders who, in all likelihood, suffered the direct losses associated with SAMIR’s insolvency.

²¹⁵ Supplemental Travers Report, ¶ 2.11.2.

²¹⁶ Counter-Memorial on Jurisdiction, ¶ 25.

The evidence that Carlyle CLO Coinvestors LP held some of the 2014-1 Notes dates from 27 May 2014.²¹⁷ The equivalent evidence for 2015-1 dates from 27 June 2015.²¹⁸ The Claimant has not provided any evidence to show that this remained the position as at 7 August 2015. Moreover, as Mr Travers explains in his supplemental report, these notes were “*designed for trading in clearing systems so that they may change hands quickly and with ease*”.²¹⁹ It follows that evidence of ownership a year, or even a month, prior to the alleged expropriation date is not sufficient – there is a strong possibility that these notes would have been sold on in the intervening period.

82 Even if one accepts the Claimants’ assertion at face value, however, it still does not assist their case. That is because:

82.1 The “*portion*” of notes acquired by Carlyle CLO Coinvestors LP is miniscule: it amounted to 0.38 per cent of the 2014-1 Notes and 0.06 per cent of the 2015-1 Notes.²²⁰ Plainly such a small holding of subordinate notes could not possibly afford Carlyle CLO Coinvestors LP ownership or control over 2014-1 or 2015-1 (or over any Commodities which they, in turn, held), and the Claimants have not alleged that it does.

82.2 Moreover, the Claimants have not provided evidence establishing the alleged relationship between Carlyle CLO Coinvestors LP and any Claimant entity. In their Counter-Memorial, they assert that it was “*indirectly controlled by Claimant TC Group*”.²²¹ However, they provide no evidence at all to substantiate that fact, let alone evidence to show that this was the case as at 7 August 2015.

82.3 Finally, even were the Claimants to overcome the above evidentiary issues, there remains no evidence that all (or any) of the amounts committed by

²¹⁷ C-0055-ENG, Subscription Agreement for the 2014-1 Subordinated Notes.

²¹⁸ C-0056-ENG, Subscription Agreement for the 2015-1 Subordinated Notes.

²¹⁹ Supplemental Travers Report, ¶ 2.11.2.

²²⁰ Versant Report, Figure 12.

²²¹ Counter-Memorial on Jurisdiction, ¶ 25.

Carlyle CLO Coinvestors LP were actually used to finance the Repo Transactions.

83 **Funds from Q1.** As to the funds allegedly originating with Q1, the only evidence on which the Claimants rely is in the form of accounts showing debits from Q1 to 2014-1 on or around the date on which Q1 signed four of the MCTA Confirmations.²²²

84 The Claimants assert that “*virtually all such funds [committed by Q1] were received from the US Onshore Feeder*” and that “*in turn*”, the Onshore Feeder “*received virtually all of those funds from the US state of Maryland’s pension fund*”.²²³ The Claimants provide no evidence for these assertions, leaving the Respondent – and the Tribunal – with no means of verifying it. In view of the Claimants previous conduct in this arbitration, such statements cannot simply be taken on trust. Indeed, these typically vague assertions are all the more remarkable because this is the first time the Claimants have mentioned the existence and interest of the Maryland Pension System. The fact that, on the Claimants’ revised case, it is the Maryland Pension System – which is pointedly not a Claimant – which has almost all of the economic interest in any investments made by Q1 as of 7 August 2015 creates obvious difficulties for the Claimants. Not least, it calls into question whether the Claimants took any risk (in relation to which see further below) and whether they were they suffered loss when the Repo Transactions failed.

85 **Funds from Crimson Physical Commodities.** The Claimants have given no information at all as to the origin of the funds committed by Crimson Physical Commodities, the terms on which they were provided, or even on who or what Crimson Physical Commodities is. In the light of that, it is reasonable to infer that these funds therefore did not originate from any of the Claimants.

86 In relation to all of the above, there is no evidence that these transfers of funds were either made for the purpose of financing the Repo Transactions; or that these

²²² See C-0061-ENG, Brokerage Statements for LC Funding.

²²³ Counter-Memorial on Jurisdiction, ¶ 55.

transfers somehow gave Q1, 2014-1, 2015-1 or Crimson Physical Commodities an additional interest in the underlying Repo Transactions.

87 If the position was in fact as the Claimants assert, they could easily have answered the question of how the Repo Transactions were funded by providing evidence of funds flowing from one or more Claimant entities to Q1, along with documents showing that such funds were given to Q1 for the purpose of acquiring the alleged investments. The fact that in none of their three submissions lodged to date have the Claimants been able to do so implies that such evidence does not exist because funds for the Repo Transactions did not flow from Claimant entities at all.

E The Claimants have failed to establish that they took any risk

88 Finally, the Claimants have failed to show that any of them took any risk. In the Memorial on Jurisdiction, Morocco explained that the MCTA Confirmations appeared to have been entered into by Q1 as a matter of form only, with all rights and obligations under the Repo Transactions eventually being passed on to 2014-1.²²⁴

89 As set out above, the new evidence submitted by the Claimants confirms Morocco's assumption. Although Q1 entered into the MCTA Confirmations, all funds for the Repo Transactions were committed by 2014-1, and 2014-1 (at least nominally) took title to the underlying Commodities (and possibly to the contractual rights) pursuant to the terms of the Sleeve Transactions. That title may also have been passed on further to the Indenture Trustee.

90 In their Counter-Memorial, the Claimants make two submissions in relation to risk:

90.1 Firstly, they assert that the existence of this dispute confirms that they took risk in relation to the Repo Transactions.²²⁵

²²⁴ Memorial on Jurisdiction, ¶ 71.

²²⁵ Counter-Memorial on Jurisdiction, ¶ 72.

90.2 Secondly, they assert that they contributed capital and/or Commodities to the Repo Transactions and took the risk that such capital and/or Commodities would fall in value or be lost.²²⁶

91 The first assertion is nonsense. The fact that the Claimants elected to commence proceedings in relation to assets which they did not own at the relevant time, asserting losses that they did not in fact incur themselves, does not evince that they took relevant risk. The only risk it involves is of an adverse costs award. That type of risk is not relevant for present purposes: as Morocco explains below, it is only “operational” or “investment” risk which would satisfy the relevant test.²²⁷

92 The second assertion is not supported by the facts. As explained above, the Claimants have submitted no evidence to establish that any of the Claimant entities contributed the funds which were used to finance the Repo Transactions – therefore there is no evidence that any of them had any funds or other assets at risk in any relevant sense. In making their assertion, the Claimants tellingly slip back to asserting that these were the “Claimants’ Commodities”.²²⁸ The Commodities were plainly not directly owned by any of the Claimants. Indeed, the Claimants have failed to establish which entity (if any) owned which of Commodities at the alleged expropriation date – or indeed whether those Commodities even existed still – let alone how such ownership entailed a risk for the Claimant entities, that is, “a risk inherent in the investment operation in its surrounding – meaning that profits are not ascertained, but depend upon the success or failure of the economic venture concerned”.²²⁹

93 The position is even more stark in relation to CCM. It is striking and revealing that the Claimants have not even attempted to explain how CCM could be considered to have taken risks in relation to the alleged investments. As Versant explain in their report, “CCM does not put its own funds at risk and hence does not have investment

²²⁶ Counter-Memorial on Jurisdiction, ¶ 73.

²²⁷ Being “a risk inherent in the investment operation in its surrounding meaning that profits are not ascertained, but depend upon the success or failure of the economic venture concerned”: **CS-0125, Romak SA v Republic of Uzbekistan**, PCA Case No 2007-07/AA280 (Award, 26 November 2009) ¶ 370. See further below at **§III.B(3)(a)**.

²²⁸ Counter-Memorial on Jurisdiction, ¶ 76.

²²⁹ **CS-0125, Romak v Uzbekistan**, Award, ¶ 370

*exposure similar to their Clients [...] this is consistent with industry norms where most investment managers are normally service providers to investors and do not take on proprietary risks inherent to their clients' investments.”*²³⁰

94 The fact CCM took no risk is also now confirmed by an investment brochure issued by CCM, which was submitted to the record by the Claimants with their Counter-Memorial on Jurisdiction.²³¹ That brochure warns “*clients and investors*” that “[i]nvesting in commodities, securities, futures, options and other derivatives is extremely speculative and Clients and Investors can lose their entire investment.”²³² Implicit in this warning is that CCM did not consider itself to be the investor in the underlying commodities. The fact that CCM had no material financial interest in the underlying commodities is also confirmed later in the brochure when CCM confirms that “[n]either the Adviser nor any of its related persons recommends to the Funds or the SPV, or buy or sell for any of them, securities in which the Adviser or any related person has a material financial interest”.²³³

95 In the light of that, any risk assumed in relation to the Transactions was plainly assumed by 2014-1 and those who purchased the notes issued by them, not by any of the Claimant entities.

* * *

96 In the light of these factual clarifications, Morocco returns to its four remaining jurisdictional objections.

²³⁰ Versant Report, ¶ 60

²³¹ CZ-0032, CCM Form ADV.

²³² CZ-0032, CCM Form ADV, 15.

²³³ CZ-0032, CCM Form ADV, 29.

III OBJECTION 1: THE CLAIMANTS DO NOT HOLD AN “INVESTMENT” WITHIN THE MEANING OF ARTICLE 25(1) OF THE ICSID CONVENTION OR FTA ARTICLE 10.27

97 Morocco’s first objection is that the Claimants do not hold an “investment” within the meaning of Article 25(1) of the ICSID Convention and FTA Article 10.27.²³⁴

A Article 25(1) of the ICSID Convention and FTA Article 10.27 place substantive limits on the concept of “investment”

98 As set out in the Memorial on Jurisdiction,²³⁵ it is well-recognized that Article 25(1) of the ICSID Convention places substantive limits on the concept of an “investment” – the *Salini* criteria.²³⁶ This is expressly fortified in the present case by FTA Article 10.27 which lists what the treaty parties understood to be the necessary “characteristics” of an investment, including “the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”.

99 The Claimants do not appear to contest that Article 25(1) of the ICSID Convention and FTA Article 10.27 place some objective limitation on the concept of “investment”²³⁷ – the difference between the parties is whether the *Salini* criteria are considered to be essential characteristics of a valid investment (Morocco’s submission) or mere ‘guidelines’ as to what an investment could look like (the

²³⁴ Memorial on Jurisdiction, §III.

²³⁵ Memorial on Jurisdiction, §III.A.

²³⁶ The Claimants appear to cavil with Morocco’s description of the *Salini* criteria as such, pointing out that the first case to consider the substantive limits of the term “investment” in Art 25(1) of the ICSID Convention was **CL-0003**, *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3 (Decision on Jurisdiction, 11 July 1997) such that a reference to the *Salini* criteria “is a misnomer”: Counter-Memorial, on Jurisdiction, ¶ 44. This misses the important point that *Salini* was the first case in which an objective approach to the word “investment” in Art 25(1) was fully articulated: **RL-0019**, E Gaillard & Y Banifatemi, ‘The Long March towards a *Jurisprudence Constante* on the Notion of Investment’, in M Kinnear et al (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer/ICSID 2016) 97, 107. It is presumably for this reason that Professor Schreuer also refers to the *Salini* test or criteria throughout his report: see e.g. Schreuer Report, ¶¶ 21, 26, 27, 30, 31, 32, 33, 38, 40, 42. In this light, Morocco will continue to refer to the *Salini* criteria in this Reply.

²³⁷ Counter-Memorial on Jurisdiction, ¶¶ 43 44.

Claimants' approach). Commentators have referred to these as the “*deductive*” and “*intuitive*” approaches respectively.²³⁸

(1) *Article 25(1) of the ICSID Convention requires a deductive approach to the meaning of “investment”*

100 The Claimants' adherence to the inductive approach²³⁹ is driven by Professor Schreuer. In his report, he claims:

“[T]he weight of authority is against an interpretation that sees the *Salini* test as a rigid list of requirements that must be met in order to demonstrate the existence of an investment as that term is understood in Article 25 of the ICSID Convention. The majority of tribunals that examined the criteria have used them as typical characteristics rather than as jurisdictional requirements.”²⁴⁰

101 But he has not always held this view. In 2006, Professor Schreuer gave another expert opinion on behalf of Egypt in the *Helnan v Egypt* case. There, the tribunal recorded that:

“[B]ased on ICSID precedents, as summarized in an unchallenged opinion by Professor Ch Schreuer [...] to be characterized as an investment a project ‘*must show a certain duration, a regularity of profit and return, an element of risk, a substantial commitment, and a significant contribution to the host State’s development*’.”²⁴¹

102 In his report, Professor Schreuer relies on *Helnan* as an example of the inductive approach. As the excerpt above shows, it is not. Several of the other authorities on which Professor Schreuer relies also support Morocco’s position. In *Jan de Nul v Egypt*, the tribunal (again relying on a report provided by Professor Schreuer in support of the respondent state) referred to the *Salini* factors as “*indicative of an*

²³⁸ **RL-0019**, Gaillard & Banifatemi, ‘Notion of Investment’, 112–114. See also **RL-0070**, E Gaillard, ‘Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice’, in C Binder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009) 403. Both approaches exist in opposition to the “*subjectivist*” approach, whereby an “*investment*” for the purposes of Article 25(1) is entirely reflective of the definition given in the relevant investment treaty: **RL-0019**, Gaillard & Banifatemi, ‘Notion of Investment’, 105–110.

²³⁹ Counter-Memorial on Jurisdiction, ¶ 44.

²⁴⁰ Schreuer Report, ¶ 40.

²⁴¹ **CS-0047**, *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19 (Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006) ¶ 77 (emphasis added).

investment”, but in the following paragraph made clear that they were applying them as strict “*criteria*”.²⁴² Similarly, in *Noble Energy v Ecuador*, the tribunal made clear that it was applying the *Salini* factors as “*requirements*”.²⁴³

103 More widely, however, Professor Schreuer’s report is not backed by detailed analysis: he merely rehearses the cases that agree with his position without explaining why that approach is correct in principle.²⁴⁴ He also fails to refer to, still less address, other commentators and decisions that disagree with his position. As Dr Banifatemi noted in 2019, the deductive approach advanced by Morocco has “*been followed by the vast majority of tribunals*” since *Salini* was handed down.²⁴⁵ So strong has the stream of authority been that by 2020, the *Eyre & Montrose v Sri Lanka* tribunal felt able to bypass the discussion altogether. After extensive argument between the parties on the merits of the intuitive and deductive approaches, the tribunal there simply found:

*“The Tribunal does not find it necessary to resolve the dispute between the parties as to whether the Salini criteria do or do not apply per se in evaluating whether an investor has made a protected investment. There are now many decisions that have considered that ‘investment’ has an inherent meaning and implies at least a contribution by the investor, a certain duration and economic risk.”*²⁴⁶

104 Morocco acknowledges that there are cases that support the intuitive approach.²⁴⁷ But as explained, there is a greater number in favour of the deductive approach, and of a more recent vintage, reflecting a convergence of opinion that has ossified into a *jurisprudence constante*,²⁴⁸ whatever the Claimants may say. The reasoning of these

²⁴² **CS-0046**, *Jan de Nul NV & Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13 (Decision on Jurisdiction, 16 June 2006) ¶¶ 91, 92.

²⁴³ **CS-0048**, *Noble Energy Inc & Machala Power Cía Ltd v Republic of Ecuador & Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12 (Decision on Jurisdiction, 5 March 2008) ¶ 128.

²⁴⁴ Schreuer Report, ¶¶ 26–39.

²⁴⁵ **RL-0029**, Y Banifatemi & E Edson, ‘Article 25(1)’, in J Fouret et al (eds), *The ICSID Convention, Regulations and Rules: A Commentary* (Edward Elgar 2019) 102, ¶ 2.40.

²⁴⁶ **CS-0129**, *Eyre & Montrose v Sri Lanka*, Award, ¶ 293.

²⁴⁷ See e.g. **CS-0056**, *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No ARB/05/22 (Award, 24 July 2008) ¶¶ 312–314, 316.

²⁴⁸ See e.g. (in addition to the authorities already cited) **RL-0029**, *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11 (Award on Jurisdiction, 6 August 2004) ¶¶ 42–63; **CS-0115**, *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29 (Decision on Jurisdiction, 14 November 2005) ¶ 130; **RL-0072**, *LESI SpA & Astaldi SpA v People’s Democratic Republic of*

tribunals is, moreover, highly persuasive – grounded as it is in elementary principles of treaty interpretation. The logic is best reflected in the decision in *Orascom v Algeria*:

“It is undisputed that, for the Tribunal to have jurisdiction over this dispute, the Claimant must establish that it has made an investment which is protected under both the BIT and the ICSID Convention. Starting from the ICSID Convention, it is equally beyond dispute that the ICSID Convention does not define the term ‘investment’. In the Tribunal’s view, the absence of a definition of ‘investment’ under the ICSID Convention implies that the Contracting States intended to give to the term its ordinary meaning under Article 31(1) of the VCLT as opposed to a special meaning under Article 31(4) of the same treaty. As held by a number of recent investment awards, this ordinary meaning of the term is an objective one, and comprises the elements of (i) a contribution or allocation of resources, (ii) a duration; and (iii) risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return.”²⁴⁹

105 Put simply, in circumstances where the parties to the ICSID Convention failed to define “investment” as it appears in Article 25(1) (in contrast to other terms such as “National of a Contracting State” in Article 25(2)), the parties must have intended that the word be interpreted according to the usual rule in VCLT Article 31(1). This

Algeria, ICSID Case No ARB/05/3 (Decision on Jurisdiction, 12 July 2006) ¶¶ 72–75; **CS-0020**, *Saipem SpA v People’s Republic of Bangladesh*, ICSID Case No ARB/05/7 (Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007) ¶ 99; **CS-0053**, *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18 (Decision on Jurisdiction, 6 July 2007) ¶ 116; **CS-0122**, *Victor Pey Casado & President Allende Foundation v Republic of Chile (I)*, ICSID Case No ARB/98/2 (Award, 8 May 2008) ¶¶ 232–233; **CS-0013**, *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5 (Award, 15 April 2009) ¶¶ 82–86; **RL-0073**, *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20 (Award, 14 July 2010) ¶¶ 110, 121; **CS-0114**, *Quiborax SA, Non Metallic Minerals SA & Allun Fosk Kaplún v Plurinational State of Bolivia*, ICSID Case No ARB/06/2 (Decision on Jurisdiction, 27 September 2012) ¶¶ 219, 217; **CS-0101**, *Electrabel SA v Republic of Hungary*, ICSID Case ARB/07/19 (Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012) ¶ 5.43; **RL-0074**, *AHS Niger & Menzies Middle East and Africa SA v Republic of Niger*, ICSID Case No ARB/11/11 (Decision on Jurisdiction, 15 July 2013) ¶¶ 209–211; **RL-0031**, *KT Asia Investment Group BV v Republic of Kazakhstan*, ICSID Case No ARB/09/8 (Award, 27 October 2013) ¶¶ 170–173; **CS-0144**, *Hassan Awadi, Enterprise Business Consultants Inc & Alfa El Corporation v Romania*, ICSID Case No ARB/10/13 (Award, 2 March 2015) ¶ 200; **CS-0078**, *OI European Group BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/25 (Award, 10 March 2015) ¶ 235; **RL-0006**, *Poštová banka v Greece*, Award, ¶ 360; **CS-0080**, *Bernhard von Pezold & Ors v Republic of Zimbabwe*, ICSID Case No ARB/10/15 (Award, 28 July 2015) ¶ 285; **RL-0075**, *Lundin Tunisia BV v Republic of Tunisia*, ICSID Case No ARB/12/30 (Excerpts of Award, 22 December 2015) ¶¶ 139–140; **CS-0109**, *Vestey Group Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB/06/4 (Award, 15 April 2016) ¶ 187; **CS-0018**, *Orascom TMT Investments Sàrl v People’s Democratic Republic of Algeria*, ICSID Case No ARB/12/35 (Award, 31 May 2017) ¶ 370; **CS-0116**, *Krederi Ltd v Ukraine*, ICSID Case No ARB/14/17 (Excerpts of Award, 2 July 2018) ¶ 237.

CS-0018, *Orascom v Algeria*, Award, ¶ 370.

²⁴⁹

produces an objective meaning autonomous from the concept as it appears in the relevant investment treaty. As the *Joy Mining v Egypt* tribunal said:

“[The ICSID Convention] in resorting to the concept of investment in connection with jurisdiction, establishes a framework to this effect: jurisdiction cannot be based on something different or entirely unrelated [...] The parties to the dispute cannot by contract or treaty define as investment, for the purposes of ICSID jurisdiction, something which does not satisfy the objective requirements of Article 25 of the Convention.”²⁵⁰

106 The deductive approach produces the three *Salini* factors relied on by Morocco and requires their strict application.²⁵¹ As the tribunal in *Fakes v Turkey* noted:

“[T]he present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both necessary and sufficient to define an investment within the framework of the ICSID Convention. In the Tribunal’s opinion, this approach reflects an objective definition of ‘investment’ that embodies specific criteria corresponding to the ordinary meaning of the term ‘investment’, without doing violence either to the text or the object and purpose of the ICSID Convention. These three criteria derive from the ordinary meaning of the word ‘investment,’ be it in the context of a complex international transaction or that of the education of one’s child: in both instances, one is required to contribute a certain amount of funds or know-how, one cannot harvest the benefits of such contribution instantaneously, and one runs the risk that no benefits would be reaped at all, as a project might never be completed or a child might not be up to his parents’ hopes or expectations.”²⁵²

107 To this, intuitive tribunals have responded by insisting that their approach is equally objective – and moreover that, by utilizing the *Salini* criteria not as fixed prerequisites of an investment, but as a list of ‘typical characteristics’ to be applied (or not) at the discretion of the tribunal, the result is a more “flexible and pragmatic” approach that

²⁵⁰ **RL-0029**, *Joy Mining v Egypt*, Award on Jurisdiction, ¶¶ 49–50. See also **RL-0073**, *Fakes v Turkey*, Award, ¶ 108:

“[T]he Tribunal considers that the notion of investment, which is one of the conditions to be satisfied for the Centre to have jurisdiction, cannot be defined simply through a reference to the parties’ consent, which is a distinct condition for the Centre’s jurisdiction. The Tribunal believes that an objective definition of the notion of investment was contemplated within the framework of the ICSID Convention, since certain terms of Article 25 would otherwise be devoid of any meaning.”

²⁵¹ **RL-0019**, Gaillard & Banifatemi, ‘Notion of Investment’, 117–124.

²⁵² **RL-0073**, *Fakes v Turkey*, Award, ¶ 110.

does not result in the “arbitrary exclusion of certain types of transaction from the scope of the Convention”.²⁵³ But the problem with this is that, by its purported inclusiveness, the intuitive approach steers back into the very subjectivism it condemns: it merely replaces the ICSID contracting parties’ objective definition of “investment” with the discretion of the tribunal.

108 The intuitive approach also inconsistent with the usual rules of treaty interpretation. VCLT Article 31(1) requires that the word “investment” in Article 25(1) of the ICSID Convention be given a definite meaning that can be stated free of external context. An approach that produces a meaning of “investment” that varies from case to case, or reduces the interpretive exercise to “I know it when I see it”²⁵⁴ cannot fulfil this mission.

109 Some tribunals have attempted to justify the intuitive approach by reference to the *travaux préparatoires* of the ICSID Convention.²⁵⁵ But in circumstances where the word “investment” in Article 25(1) is capable of being given a clear and not unreasonable meaning through the ordinary application of VCLT Article 31(1), recourse to preparatory work to determine the meaning of treaty language is impermissible per VCLT Article 32.²⁵⁶

110 The subjectivity inherent in the intuitive approach is also unhealthy for wider reasons of principle. As Professor Douglas QC points out, an investment treaty framework – of which the ICSID Convention may form an inherent part – needs to permit a potential investor “to know whether or not its investment project will qualify for investment protection at the time the decision is made to commit capital to the host state”.²⁵⁷ It follows that:

²⁵³ CS-0056, *Biwater Guaff v Tanzania*, Award, ¶¶ 312 314, 316.

²⁵⁴ RL-0071, *Jacobellis v Ohio*, 378 US 184, 197 (1964) (Stewart J).

²⁵⁵ CL-0061, *Philip Morris Brand Sàrl, Philip Morris Products SA & Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (Decision on Jurisdiction, 2 July 2013) ¶¶ 196 197.

²⁵⁶ RL-0076, T Gazzini, *Interpretation of Investment Treaties* (Hart 2016) 251:

“Given the clear and undisputed predominant place in the interpretive process of Article 31 and of textual interpretation in particular, it is argued that the interpreter must dismiss the supplementary means conflicting with the otherwise sufficiently clear interpretation based on Article 31.”

²⁵⁷ RL-0060, Douglas, *Investment Claims*, ¶ 400.

“If the fundamental objective of an investment treaty is to attract foreign capital, then the concept of an investment cannot be one in search of meaning in the pleadings submitted to an investment treaty tribunal that is established years, perhaps decades after the decision to commit capital to the host state was made.”²⁵⁸

111 It is for this reason that the deductive approach to Article 25(1) of the ICSID Convention – on which Morocco relies – has achieved the status of a *jurisprudence constante*: it is the only approach to combine proper application of VCLT Article 31(1) with the certainty of protection that the international investment regime demands.

(2) *FTA Article 10.27 requires a deductive approach to the meaning of “investment”*

112 The Claimants (again via Professor Schreuer²⁵⁹) also disagree with Morocco’s position that FTA Article 10.27 requires that an asset have characteristics similar to the *Salini* criteria in order to qualify as an “investment”.²⁶⁰ The relevant part of the definition reads as follows:

“[I]nvestment 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.”

113 According to Professor Schreuer:

“[T]hese characteristics are linked by the disjunctive ‘or’. Therefore, the three characteristics in the definition are alternatives and need not be present cumulatively. Under this disjunctive list, at least one of the three is required and need not be present cumulatively. Therefore, under the definition of ‘investment’ in Article 10.27, the presence of one of the characteristics listed there would suffice.”²⁶¹

114 The difficulty with this reading of FTA Article 10.27 is that it does not track the actual wording of the provision. While it is true that the definition of “investment”

²⁵⁸ RL-0060, Douglas, *Investment Claims*, ¶ 401.

²⁵⁹ Schreuer Report, §III.C.

²⁶⁰ Counter-Memorial on Jurisdiction, ¶ 43.

²⁶¹ Schreuer Report, ¶ 88.

incorporates a list of potential characteristics, these are not the definition proper, which is an “asset [...] *that has the characteristics of an investment*”.

115 Within this core definition, the use of the word “*characteristics*” immediately puts paid to Professor Schreuer’s suggestion that the presence of any one of the items in the list is sufficient to create an investment for the purposes of the FTA: by using a plural within the definition proper, the parties clearly intended to reflect that any true investment has multiple qualifying characteristics in order to obtain treaty protection. This clear choice cannot be overridden through the use of the disjunctive “*or*” in the list, which is external to the core definition.

116 Moreover, by using the possessive verb “*has*” without further qualification, the parties to the FTA conveyed that an asset must possess all “*the characteristics of an investment*” to qualify as such. Had they intended otherwise, the parties could easily have said so – for example, by stating that an asset that “*has some of*” or “*any of*” the required characteristics could obtain treaty protection.

117 This reading is supported by the French version of the FTA, which in the relevant part reads “[*atouts*] *qui presente les caracteristiques d’un investissement, parmi lesquelles [...]*”.²⁶² Translated literally, it reads as “[assets] *which have the characteristics of an investment, amongst which [...]*”.

118 In addition, the inclusive character of the list flatly contradicts Professor Schreuer’s assertion that FTA Article 10.27 is somehow broader than *Salini*, as “[the list] *does not contain reference to all the elements of the Salini test [such as] duration*”.²⁶³ Through the word “*including*”, the parties confirmed that the characteristics listed were non-exhaustive. As such, the list only communicates those characteristics the parties considered essential, leaving it open to the Tribunal to adduce others as required (e.g. duration). Indeed, Professor Schreuer seems to concede this point when he

²⁶² RL-0077, US Morocco Free Trade Agreement (French), Art 10.27.

²⁶³ Schreuer Report, ¶ 87.

applies the same logic to the list of potential forms that an investment may take (also in Article 10.27).²⁶⁴

119 Through this drafting, Morocco and the US expressly confirmed what a number of tribunals have described, viz. that there is an “*inherent meaning*” to the term “*investment*”²⁶⁵ that applies irrespective of whether or not an arbitration occurs under the auspices of the ICSID Convention. As the tribunal in *Romak v Uzbekistan* noted:

*“The Arbitral Tribunal therefore considers that the term ‘investments’ under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a **contribution** that extends over a **certain period of time** and that involves some **risk**. The Arbitral Tribunal is further comforted in its analysis by the reasoning adopted by other arbitral tribunals [...] which consistently incorporates contribution, duration and risk as hallmarks of an ‘investment’. By their nature, asset types enumerated in the BIT’s non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of ‘investment’, the fact that it falls within one of the categories listed in Article 1 does not transform it into an ‘investment’. In the general formulation of the tribunal in *Azinian*, ‘labeling ... is no substitute for analysis’.”²⁶⁶*

120 This was subsequently confirmed by the tribunal in *KT Asia v Kazakhstan*:

“As stated by the Romak tribunal, the inherent meaning of investment is also present in the BIT. The assets listed in Article 1(1)(a) of the BIT are the result of the act of investing. They presuppose an investment in the sense of a commitment of resources. Without such a commitment of resources, the asset belonging to the claimant cannot constitute an investment within the meaning of the ICSID Convention and the BIT. Since the BIT does not add further requirements to the inherent meaning of investment as it arises from the objective definition, the decisive test for the existence of an investment is the same under the BIT and the ICSID Convention. In fact, the Parties have not argued otherwise.”²⁶⁷

121 Accordingly, FTA Article 10.27 requires that an asset must have “*the characteristics of an investment*” in order to qualify for treaty protection. The stream of jurisprudence

²⁶⁴ Schreuer Report, ¶ 86.

²⁶⁵ CS-0129, *Eyre & Montrose v Sri Lanka*, Award, ¶ 293.

²⁶⁶ CS-0125, *Romak v Uzbekistan*, Award, ¶ 207 (emphasis original).

²⁶⁷ RL-0031, *KT Asia v Kazakhstan*, Award, ¶ 166.

that has emerged since *Salini* has narrowed these characteristics down to three criteria, which are also reflected in the objective definition of “investment” in Article 25(1) of the ICSID Convention: (a) a contribution, (b) extending over a significant duration, that (c) entails investment or operational risk.

122 On the facts, the Claimants have made out none of these essential requirements.

B The Claimants have failed to demonstrate the essential requirements of “investment” in Article 25(1) of the ICSID Convention and Article 10.27 of the FTA.

123 Examination of the facts reveals why the Claimants are so keen to avoid the application of the plain words of Article 10.27 and the *Salini* criteria: they fall short on all three of the essential requirements of “investment”. Significantly, and despite the persistent elision of the various Claimants by both Professor Schreuer and the Claimants themselves, each individual Claimant must meet the relevant threshold in this respect.

(1) The Claimants did not make a contribution to their purported investments

124 Morocco turns first to the requirement of contribution. It is clear that none of the Claimants can satisfy this criterion.

(a) Scope of the contribution requirement

125 As with the rest of their legal submissions, the Claimants’ legal arguments on contribution derive largely from Professor Schreuer. Morocco will therefore address the Claimants submissions largely through a rebuttal of his report.

126 A large portion of the relevant part of Professor Schreuer’s report is taken up through a discussion of the so-called ‘origin of capital requirement’. In effect, says Professor Schreuer, a putative investor does not need to put its own money into an investment for a contribution to be made. Moreover, a contribution does not need to be merely financial in nature.²⁶⁸

²⁶⁸ Schreuer Report, ¶¶ 47–56.

127 Professor Schreuer appears to have misunderstood Morocco's submissions. Morocco does not contest for present purposes that it does not matter where the capital that funds an investment comes from.²⁶⁹ The point, rather, is that the capital in question be directed by the investor into the putative investment.

128 Indeed, Morocco can put it no better than the Claimants themselves. In the Counter-Memorial, the Claimants say:

*"Neither the FTA nor the ICSID Convention contains a requirement concerning the origin of funds. **Instead what matters is that the funds were, in fact, used to make the investments at the direction of the qualifying investor.**"*²⁷⁰

129 It is therefore agreed between the parties that an entirely passive entity cannot be said to have made a contribution to an investment merely because they are part of the same corporate structure through which the investment was made.

130 On this basis, the critical question for the Tribunal is this: have each of the Claimants independently established that they either (a) contributed their own capital to the Claimants' purported investments, or (b) directed another's capital to the same end?

(b) Absence of contribution in the present case

131 None of the Claimants can satisfy either aspect of the contribution requirement. In this sense (and as set out above²⁷¹), the position has not advanced considerably from that set out in the Memorial on Jurisdiction.

131.1 With respect to the Passive Companies, it appears that the majority of these – as suggested in the Memorial on Jurisdiction²⁷² – played no role whatsoever in the Repo Transactions. The Claimants have not shown that they contributed their own funds to the Claimants' purported investments, nor have they shown that they direct that others' capital be so contributed.

²⁶⁹ Memorial on Jurisdiction, ¶¶ 88–90.

²⁷⁰ Counter-Memorial on Jurisdiction, ¶ 51 (emphasis added).

²⁷¹ See above §II.D.

²⁷² Memorial on Jurisdiction, ¶ 89.2.

131.2 The sole possible exception to this is the Onshore Feeder, who is said to have committed funds to Q1 that were then used to fund four of the Repo Transactions via 2014-1.²⁷³ But the Claimants' assertion in this respect is entirely unavailing: the alleged proof provided is a series of debits from Q1 to 2014-1 with no evidence that the funds committed were provided to Q1 by the Onshore Feeder. Absent such evidence, it cannot be held to have made a contribution.

131.3 As for CCM, the Claimants case is that its contribution was "*the US\$390 million in capital put towards the investments*", which was allegedly contributed at its direction from the Onshore Feeder, Q1 and 2014-1 and 2015-1.²⁷⁴ This is also unavailing as a contribution. At most, and as explained above,²⁷⁵ CCM was the contractual agent of those entities, and any directions it may have given were in the name of those it was allegedly directing. As such, they cannot be said to have been CCM's directions in any relevant sense. The Claimants are aware of this, and so further claim that CCM's "*investment management expertise*" can be considered another valid contribution to their alleged investments.²⁷⁶ But as pointed out in the Memorial on Jurisdiction, the Claimants have produced no documentary evidence that any management expertise or advice was ever provided to any of the Onshore Feeder, Q1, 2014-1 or 2015-1.²⁷⁷

132 In the Counter-Memorial on Jurisdiction, the Claimants also suggest that the Commodities also constitute a contribution – one that is made by all of the Claimants.²⁷⁸ Two points may be made in response to this.

132.1 In the first place, the Claimants' capacity to claim the Commodities as a contribution depends on them first establishing indirect title to the same –

²⁷³ Counter-Memorial on Jurisdiction, ¶ 55.

²⁷⁴ Counter-Memorial on Jurisdiction, ¶ 55.

²⁷⁵ See above §II.C.

²⁷⁶ Counter-Memorial on Jurisdiction, ¶ 60.

²⁷⁷ Memorial on Jurisdiction, ¶ 89.4.

²⁷⁸ Counter-Memorial on Jurisdiction, ¶ 58.

such that the commodities can be considered “theirs”. As has already been pointed out,²⁷⁹ the Claimants have repeatedly failed to meet their burden of proof in this respect.

132.2 In the second, the Commodities cannot stand as a contribution, because they are also claimed by the Claimants as an investment. Under the settled jurisprudence on this matter, a contribution is something that a putative investor puts forward in order to acquire an asset under the FTA.²⁸⁰ Consequently, the Commodities cannot simultaneously exist as a contribution and the resulting asset – they must be one or the other (and, due to the Claimants’ difficulty in evidencing title to the Commodities, in this case they are neither).

132.3 In the third, the Claimants do not identify which Claimant entity (if any) held title to the Commodities as at the alleged expropriation date, misleadingly referring to the Commodities as ‘theirs’ collectively. It is a nonsense to speak of the Claimants generally as contributing the Commodities in circumstances where on the Claimants’ case they were directly owned by a non-claimant (Q1), controlled by one claimant (CCM) and with respect to some of the Passive Companies at least (e.g. Carlyle Group LP), those Claimants had barely any economic interest in the Commodities at all. This observation is only sharpened by the revelation of the Maryland Pension System, which at the time of the alleged expropriation held 99.97 per cent of the limited partnership interest in the Onshore Feeder and, it may be inferred, almost the entirety of the indirect economic interest in the Commodities.²⁸¹ Thus, if any entity could be said to have ‘contributed’ the Commodities, it is the Maryland Pension System – not the Claimants.

²⁷⁹ See above §II.C(1).

²⁸⁰ See e.g. CS-0060, *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No ARB/08/18 (Award, 7 February 2011) ¶ 110.

²⁸¹ See above at ¶¶ 64–65, 84.

(2) *The Claimants' purported investments were of insufficient duration*

133 In the alternative, it is also apparent that the Claimants' purported investments were not of a sufficient duration to qualify as an investment.

134 The Claimants response to Morocco's arguments on duration is based on the idea of unity of investment – and the notion that the series of short term financings that comprised the Claimants' alleged investment activities can be joined together to create a more substantial investment operation that meets the duration requirement. They also point to authorities where even short-term investments have been held to meet this requirement – such as *Deutsche Bank v Sri Lanka*, where the relevant investment had an intended contractual duration of 12 months.²⁸²

135 The core of the Claimants' case on duration is accordingly the Commitment Letter, by which "*Claimants committed to engage in a long series of commodities transactions for a minimum of three years*".²⁸³ There are several points to be made in response to this. The first is that the only Claimant that signed the Commodities Letter was CCM. It cannot be considered to have any effect on the other Claimants or to indicate the intended duration of their investment activity.

136 The second point is that by its terms, the Commitment Letter was "*not intended to be and is not binding on [CCM] or any other person*".²⁸⁴ As was pointed out in the Memorial on Jurisdiction, it therefore "*did not commit CCM [...] to any specific duration of investment whatsoever*".²⁸⁵ The Claimants take exception to this, and accuse Morocco of a "*misleading and selective recitation of the Commitment Letter*", on the basis that Morocco did not also mention that the letter obliged SAMIR to enter into transactions under the MCTA for three years.²⁸⁶ But Morocco fails to see how SAMIR's obligations under the Commitment Letter detract from the fact that the letter did not similarly bind CCM – the entity that is the focus of the duration inquiry.

²⁸² Counter-Memorial on Jurisdiction, ¶ 68.

²⁸³ Counter-Memorial on Jurisdiction, ¶ 69.

²⁸⁴ **MO-0005**, Commitment Letter dated 22 June 2015.

²⁸⁵ Memorial on Jurisdiction, ¶ 103.

²⁸⁶ Counter-Memorial on Jurisdiction, ¶ 69.

The point is that CCM had no commitment to any specific duration of engagement with SAMIR.

137 The Claimants attempt to respond to this by arguing that SAMIR's obligation to enter into transactions under the Commitment Letter shows 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*".²⁸⁷ However, the usual way in which such an intent would be documented would be a binding commitment, which is conspicuously absent. In fact, CCM expressly reserved to itself the ability to abandon its relationship with SAMIR at any time.

138 Moreover, as the Supreme Court of New York found in relation to the contractual arrangements between CCM and SAMIR, those parties never complied with these arrangements as concluded, and instead rapidly abandoned them to pursue their own course of dealing.²⁸⁸ Thus, it seems that neither CCM nor SAMIR viewed the Commitment Letter as binding, even so far as SAMIR was concerned. The same observation applies to the MCTA and other contracts underpinning the Claimants' alleged investments.

139 In the premises, it is clear that the Commitment Letter does not add substantially to the position as set out in the Memorial on Jurisdiction:

139.1 The Master-Feeder Fund, again insofar as it can evidence direct ownership of Q1, would have only been exposed to the Repo Transactions for a short time, before the Sleeve Transactions transferred the entire economic risk to the Financing Structure. Further or alternatively, if the New York Supreme Court's conclusion is correct, then the same result obtains, as the Commodities could have been, and were, processed by SAMIR immediately on delivery.

²⁸⁷ Counter-Memorial on Jurisdiction, ¶ 70.

²⁸⁸ See above §II.B(3).

139.2 CCM's involvement was to manage the investments allegedly made by Q1, 2014-1 and 2015-1. This involvement was limited in time, and unbound by the Commitment Letter. Again, its short-term involvement did not meet the duration requirement.

139.3 The Passive Companies suffer the same fate as the alleged parents of the Master-Feeder Fund. They could not conceptually hold the investments longer than their supposed subsidiary, and therefore were subject to the same minimal level of exposure.

140 In the premises, it is clear that the Claimants alleged investments were little more than a series of short-term financings, the minimal duration of which was reduced further still, possibly to the vanishing point, by use of the Sleeve Transactions to transfer risk to the Financing Structure, or SAMIR's practice – in which the Claimants at least acquiesced – of immediately refining the Commodities once delivered. On no view, even applying the unity of investment, do these meet the duration requirement.

(3) *The Claimants did not assume any risk*

141 Finally, it is established that the Claimants assumed no qualifying risk in relation to their alleged investments.

(a) Scope of the risk requirement

142 In his report, Professor Schreuer spends a considerable amount of time purporting to establish that any of several species of risk may satisfy the risk requirement of *Salini* and/or the definition of "investment" in Article 10.27 of the FTA. In his view, "commercial, operational and sovereign risk" may satisfy this requirement.²⁸⁹

143 Two points may be made in response. First, Professor Schreuer misreads Morocco's principal argument, which is that risk is inherently connected to questions of

²⁸⁹ Schreuer Report, ¶ 80.

contribution, with the contribution being the thing that is risked.²⁹⁰ The key feature of risk is exposure to downside – the potential for the investor to lose something of value having contributed it to the investment operation. It follows that, without a contribution, there can be no risk of any kind, be it commercial, sovereign or investment. This central point does not appear to have been addressed by Professor Schreuer, or the Claimants.

144 Morocco’s second point concerns the need for a putative investor to demonstrate a specific investment risk in order to meet this criterion. The precise scope of the risk requirement has been debated historically, and while *Salini* has given its name to the test for an investment, the world has moved on considerably since that decision was rendered. As such, it is by now established that the only “operational” or “investment” risk will meet this criterion²⁹¹ – that is, “a risk inherent in the investment operation in its surrounding – meaning that profits are not ascertained, but depend upon the success or failure of the economic venture concerned”.²⁹²

145 The reason for this is that for risk to be of use in the identification of an investment (being the *raison d’être* of the test), it must be confined to the type of risk that is inherent in an investment. Otherwise the concept could be stripped of all meaning and fulfilled by any commercial transaction – for example, a one-off sale of goods.

146 Professor Schreuer fairly acknowledges this point – and the substantial caselaw that underpins it.²⁹³ His response is to use it as a parable on the dangers of the *Salini* criteria, on the basis that “any form of risk, commercial, operational or sovereign, or part of the typical features of an investment even though not every type of risk will necessarily be present in every investment”.²⁹⁴ But this is question begging. The better formulation is that not every form of risk will be present in every transaction; and that investment risk exists as a way to ensure transactions that may properly be considered

²⁹⁰ Memorial on Jurisdiction, ¶ 105,

²⁹¹ CS-0129, *Eyre & Montrose v Sri Lanka*, Award, ¶ 293.

²⁹² CS-0125, *Romak v Uzbekistan*, Award, ¶ 370.

²⁹³ Schreuer Report, ¶ 80.

²⁹⁴ Schreuer Report, ¶ 80.

investments are clearly distinguishable – as *Romak v Uzbekistan*,²⁹⁵ *Doutremepuich v Mauritius*,²⁹⁶ *Standard Chartered Bank (HK) v Tanzania*²⁹⁷ and other cases make clear.

147 Seen in this light, Professor Schreuer’s observation is actually a powerful affirmation of why the *Salini* criteria must exist – and why one of those criteria is a distinct concept of investment risk.

148 Professor Schreuer’s next point is that the exclusion of sovereign risk from a test for the existence of an investment would be illogical given that the point of international investment treaties is to shield foreign investments against interference by the state.²⁹⁸ But this is again question begging: the mere fact that a state could interfere with a particular transaction does not automatically elevate that transaction to the status of an investment that is the subject of international protection. Indeed, it is difficult to think of a transaction that cannot be subject to state inference of one kind or another – a single transaction for the sale of apples could be interfered with, but it is not an investment and there is no relevant investment risk in it. And in any event, Morocco does not purport to exclude sovereign risk from the test: rather, what it is saying is that the critical indication of an investment is that it reflect the kinds of risks associated with investments, namely an uncertainty of return.

(b) Absence of risk in the present case

149 Turning to the facts of the present case, it is clear that that none of the Claimants assumed the necessary degree of risk – and indeed, deliberately structured their affairs so as to incur no risk whatsoever. Several factors point to this conclusion.

150 In the first place – and as pointed out by Morocco in the Memorial on Jurisdiction – the question of risk within the *Salini* criteria is linked ineluctably to the question of

²⁹⁵ CS-0125, *Romak v Uzbekistan*, Award, ¶ 229

²⁹⁶ CS-0128, *Christian Doutremepuich & Antoine Doutremepuich v Republic of Mauritius*, PCA Case No 2018-37 (Award on Jurisdiction, 23 August 2019) ¶ 145

²⁹⁷ RL-0078, *Standard Chartered Bank (Hong Kong) Limited v United Republic of Tanzania*, ICSID Case No ARB/15/41 (Award, 11 October 2019) ¶ 218.

²⁹⁸ Schreuer Report, ¶ 81.

contribution: no contribution, no risk.²⁹⁹ Given that none of the Claimants made any contribution in a relevant sense,³⁰⁰ it follows automatically that they incurred no risk.

151 In the second place, it is clear on the basis of the evidence that the Claimants' corporate structure was designed to ensure that none of them incurred any qualifying investment risk – that is, *“a risk inherent in the investment operation in its surrounding – meaning that profits are not ascertained, but depend upon the success or failure of the economic venture concerned”*.³⁰¹

152 In the Counter-Memorial on Jurisdiction, the Claimants do not allege that they assumed investment risk.³⁰² It is right that they do not, as at all relevant times, the Claimants took care to ensure that they never put more than a nominal amount of their own funds into their alleged investment operations. Everything was paid for by somebody else: the funds necessary to purchase the Commodities derived from the noteholders of 2014-1 and/or 2015-1 and (possibly) from the Maryland Pension System. It was those latter entities that bore the investment risk of loss of the Commodities – as confirmed by the material produced by CCM on the matter, which declared that *“[i]nvesting in commodities, securities, futures, options and other derivatives is extremely speculative”* but that *“[n]either the Adviser nor any of its related persons recommends to the Funds or the SPV, or buy or sell for any of them, securities in which the Adviser or any relate person has a material financial interest”*.³⁰³

153 In contrast, the risk (if any) assumed by the Claimants was fixed and unwavering. Taking each group in turn:

153.1 The Master-Feeder Fund and Passive Companies did not take any risk with respect to the Commodities – as explained above, they have not shown that they contributed any funds towards the Commodities, nor that they expected any return from them at point of sale.³⁰⁴ Moreover, given that as of the date

²⁹⁹ Memorial on Jurisdiction, ¶ 106, citing **RL-0031**, *KT Asia v Kazakhstan*, Award, ¶¶ 217–221.

³⁰⁰ See above at **§III.B(1)(b)**.

³⁰¹ **CS-0125**, *Romak v Uzbekistan*, Award, ¶ 370.

³⁰² Counter-Memorial on Jurisdiction, ¶¶ 72–76.

³⁰³ **CZ-0032**, CCM Form ADV, 15, 29.

³⁰⁴ See above at **§III.B(1)(b)**.

of alleged expropriation, nearly all of the economic interest in the Commodities was owned by the noteholders to 2014-1 and 2015-1 and the Maryland Pension System,³⁰⁵ this alleged risk is reduced further still.

153.2 CCM's risk was limited to the fixed value of the contractual fees incurred in advising the Onshore Feeder, Q1, 2014-1 and 2015-1.³⁰⁶ This does not reflect the uncertainty of return that typifies investment risk. As Versant explain:

*"CCM does not put its own funds at risk and hence does not have investment exposure similar to their Clients [...] this is consistent with industry norms where most investment managers are normally service providers to investors and do not take on proprietary risks inherent to their clients' investments."*³⁰⁷

154 Finally, the Claimants assertion that the mere existence of a dispute with Morocco is evidence of risk is facile.³⁰⁸ If the requirement of risk was satisfied merely by the existence of a dispute, it would be utterly meaningless and met automatically in every case.

155 In light of the foregoing, none of the Claimants may be said to have assumed any risk – investment or otherwise – in the course of their alleged investment operations. This criterion therefore stands unmet.

³⁰⁵ See above §II.E.

³⁰⁶ See above §II.E.

³⁰⁷ Versant Report, ¶ 60

³⁰⁸ Counter-Memorial on Jurisdiction, ¶ 72.

IV OBJECTION 2: THE CLAIMANTS DO NOT “OWN OR CONTROL” AN “INVESTMENT IN THE TERRITORY” OF MOROCCO FOR THE PURPOSES OF FTA ARTICLE 10.27

156 Morocco’s second objection to jurisdiction is that the Claimants do not “own or control” investments “in the territory” of Morocco, as required by the definitions of “investment” and “investor” respectively in FTA Article 10.27, because:

156.1 The contracts underpinning the Put Rights and Repo Transactions – notably the SAMIR MCTA, the Terms and Conditions and the Commitment Letter – cannot be considered “investments in the territory” of Morocco.³⁰⁹

156.2 The Claimants did not “own or control” the Commodities – rather, such commodities were owned at the point of expropriation by either (a) 2014-1 and/or 2015-1, or (b) or SAMIR.³¹⁰

157 The Claimants’ response to both of these objections is misconceived.

A The Put Rights were not “investments in the territory” of Morocco

(1) For an intangible asset to be an “investment in the territory” of a state, it must be governed by the proper law of that state or enforceable therein

158 In its Memorial on Jurisdiction, Morocco set out the proper position on the meaning of the words “investment in the territory” as they appear in the definition of “investor” in FTA Article 10.27 when applied to intangible assets such as the Put Rights.³¹¹

159 When dealing with intangibles such as contractual rights, the better view is that international law will determine the location of these assets by reference to (a) the proper law of the contract, and (b) the place of enforcement of the contract.³¹² This approach is consistent with rules of private international law, and clearly required

³⁰⁹ Memorial on Jurisdiction, §IV.A.

³¹⁰ Memorial on Jurisdiction, §IV.B

³¹¹ Memorial on Jurisdiction, §IV.A(1).

³¹² Memorial on Jurisdiction, ¶ 113. See further **RL-0060**, Douglas, *Investment Claims*, ¶ 351.

in applying the words “investment in the territory” in the definition of “investor” in FTA Article 10.27 to intangible assets.³¹³ As Professor Gazzini has noted:

“[T]he standing offer made by the host State with regard to arbitration before ICSID tribunals cannot be stretched indefinitely. In defining the limits of the consent given by the host State, the interpreter must extrapolate from the text of the treaty the commitments that States could have reasonably contemplated and the type of exposure to international arbitration they were ready to accept when expressing [their] consent to the Centre’s jurisdiction.”³¹⁴

160 Put another way, when the states parties to the FTA included the words “investment in the territory” in the definition of “investor”, did they intend that this would extend to intangible assets outside of their enforcement jurisdiction – the content of which they could not modify and/or otherwise control? Did they agree to potentially unlimited liability, whereby they could be held responsible for alleged damage to any number of alleged investments outside their jurisdictional reach, merely because they happened to do something within their borders that affected the putative value of those assets?

161 The answer, plainly, is ‘no’ – and, moreover, that a consequence so remarkable would require express treaty language to bring about.³¹⁵

162 This position is supported in the caselaw, most notably in the decision of the Singapore Court of Appeal in *Swissbourgh Diamond Mines v Lesotho*,³¹⁶ on which

³¹³ And, moreover, from the territorial character of international jurisdiction: **RL-0015**, M Waibel, ‘Investment Arbitration: Jurisdiction and Admissibility’, in M Bungenberg et al (eds), *International Investment Law: A Handbook* (CH Beck/Hart/Nomos 2015) 1212, ¶ 144. See also **RL-0034**, Z Douglas, ‘Property, Investment and the Scope of Investment Protection Obligations’, in Z Douglas et al (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 363, 382–383; **RL-0079**, CR Zheng, ‘The Territoriality Requirement in Investment Treaties: A Constraint on Jurisdictional Expansionism’ (2016) 34 *Sing L Rev* 139. For the territorial concept of jurisdiction in international law, see **RL-0035**, *SS Lotus (France v Turkey)* (1927) PCIJ Ser A No 10, 18.

³¹⁴ **RL-0076**, T Gazzini, *Interpretation of International Investment Agreements* (Hart 2016) 138.

³¹⁵ Further: **RL-0080**, M Sornarajah, *The International Law on Foreign Investment* (4th edn: CUP 2017) 371.

³¹⁶ **RL-0016**, *Swissbourgh Diamond Mines (Pty) Limited & Ors v Kingdom of Lesotho* [2018] SGCA 81, ¶¶ 136–137 (emphasis original). See also *ibid*, ¶ 99:

“What this requires is that the alleged investment must be made or located within the territory of the host State and, if and to the extent it is conceived of as comprising a bundle of rights, those rights must exist and be enforceable under the domestic laws of the host State.”

Morocco relies. In the Counter-Memorial, the Claimants do not address *Swissbourgh* directly. Nor is it mentioned in Professor Schreuer's report.³¹⁷ The extent of the Claimants' engagement is to attempt to distinguish the case on the basis that it did not "concern financial investments covered independently by the underlying investment treaty, as here".³¹⁸ This is misconceived: the Court was considering the conditions under which intangible rights (like the Put Rights) could be considered to be situated "in the territory" of a particular state for the purposes of an investment treaty.³¹⁹ Its reasoning is plainly analogous to the present case.

163 A further case that supports Morocco is *Bayview v Mexico*, which the Claimants attempt to dismiss on the basis that it concerned "a physical business".³²⁰ But this is a misreading of that decision, in which a NAFTA tribunal also determined that the claimants' rights to extract water from the Rio Grande (that is, intangible assets) could not be considered an investment in Mexico. The tribunal noted:

"[T]he Claimants do not own any of the water within Mexico. Nor do the Claimants possess any water rights in Mexico and enforceable against the State of Mexico. Their water rights are granted by the State of Texas. Those rights are created in Texas and exercised in Texas."³²¹

164 The proposition put forward by the *Bayview v Mexico* tribunal is very simple: Mexico had no role in the creation of the claimants' intangible water rights, and those rights could not be modified by Mexico or enforced in its courts. The tribunal thus declined jurisdiction over the dispute on the basis that "it has not been demonstrated that any of the Claimants seeks to make, is making or has made an investment in Mexico".³²²

165 Morocco's position is further confirmed by the definition of the word "territory" in the FTA itself. In FTA Article 1.3 (which sets definitions for the entire FTA), a

³¹⁷ Schreuer Report, §IV.A.

³¹⁸ Counter-Memorial on Jurisdiction, ¶ 115 (fn 252).

³¹⁹ **RL-0016**, *Swissbourgh Diamond Mines v Lesotho* [2018] SGCA 81, ¶¶ 99–109.

³²⁰ Counter-Memorial on Jurisdiction, ¶ 115.

³²¹ **RL-0033**, *Bayview Irrigation District et al v United Mexican States*, ICSID Case No ARB/(AF)/05/1 (Award, 19 June 2007) ¶ 117.

³²² **RL-0033**, *Bayview v Mexico*, Award, ¶ 121.

physically-bounded definition is given for the US.³²³ While no similar definition is given for Morocco, the treatment of the US applies *mutatis mutandis*. As such, “territory” is clearly intended to refer to Morocco’s physical territory and its territorial sea. What the definition does not entertain is a virtual construction of “territory” in which intangible assets that would be considered by one state to be within its jurisdiction can somehow be considered investments in another state because the latter benefits from them. It is a basic premise of international law that “[t]erritorial sovereignty [...] involves the *exclusive* right to display the activities of a State”.³²⁴ It follows that an investment cannot be in two states at the same time.

166 This reading is also shown to be correct by uses of the word “territory” in other parts of the FTA – which *ex facie* prove that the parties understood the term to apply in the physical or jurisdictional sense of the word only. Article 1.3 defines a “covered investment” as “an investment [...] in its territory of an investor of the other Party”. Article 10.3(1) requires that each party must extend to foreign investors treatment no less favourable to that “it accords, in like circumstances, to its own investors with respect to [...] investments in its territory”. Article 10.5(4) requires that each party extend to investments of the other party “non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife”. Article 10.7(1) requires that the parties “all transfers relating to a covered investment to be made freely and without delay into and out of its territory”. Article 10.8(1) provides that neither party may seek to impose conditions with respect to the “disposition of an investment of a Party or of a non-Party in its territory”. Article 10.10 provides that nothing in the relevant part of the FTA “shall be construed

³²³ A wider and specific definition of “territory” for the US is clearly necessitated by the need to make specific provision in the FTA for Puerto Rico and foreign trade zones, as well as the US continental shelf. Thus, FTA Art 1.3 provides that:

“territory means, with respect to the United States:

- (a) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;
- (b) the foreign trade zones located in the United States and Puerto Rico; and
- (c) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources[.]”

³²⁴ **RL-0081**, *Island of Palmas (US v Netherlands)* (1928) II RIAA 829, 839.

to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns". Article 10.11 allows the parties to deny benefits under the relevant part of the FTA to certain investors with "no substantial business activities in the territory of the other Party". Article 10.25(7) requires the parties to "provide for the enforcement of an award in its territory". And the definition of "enterprise of a Party" in Article 10.27 extends to "a branch located in the territory of a Party and carrying out business activities there".

167 There are other examples, but the point is clear: the US and Morocco intended that the word "territory" in these provisions be delimited by reference to a state's physical territory and the jurisdiction appertaining thereto. There is no reason to read the term as it appears in the definition of "investor of a Party" in Article 10.27 any differently, and to suggest that it should cut across the usual presumption in treaty interpretation that parties intended for the same word or concept appearing in different parts of a treaty to bear the same meaning.³²⁵

(2) *The cases on which the Claimants rely are inapposite or wrongly decided*

168 Bu contrast, the cases on which the Claimants – and Professor Schreuer – rely are either distinguishable from this case and/or wrongly decided – as seen by the breakdown in **Table A in Annex 2** to this pleading. However, Morocco will here address the only three cases that are conceivably of assistance to the Claimants: *Abaclat v Argentina*, *Ambiente Ufficio v Argentina* and *Deutsche Bank v Sri Lanka*.

169 Starting with *Abaclat* and *Ambiente Ufficio*. As already noted, these decisions have been heavily criticized. Professor Douglas QC's views have been set out in the Memorial on Jurisdiction.³²⁶ The Claimants' answer to them is not to engage with materials that criticize its approach, but to (once again) dismiss them out of hand,

³²⁵ **RL-0047**, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* [2011] ITLOS Rep 10, ¶ 93.

³²⁶ Memorial on Jurisdiction, ¶ 124. Further: **RL-0034**, Z Douglas, 'Scope of Investment Protection Obligations', 384.

arguing that Morocco's position "is a reference to a single academic article".³²⁷ But others have criticized these cases in similarly trenchant terms, describing them: as entailing "a dramatic expansion of the subject matter jurisdiction [...] beyond the treaty framework acceptable to [...] State parties";³²⁸ as "stepping beyond the treaty framework acceptable to states parties to investment treaties by propounding a test that pays no regard as to whether the investment is subject to the host state's prescriptive and enforcement jurisdiction";³²⁹ and as "remov[ing] investment arbitration from the orbit of legitimacy created by free consent".³³⁰

170 The Claimants also do not mention that the jurisdictional decisions in *Abaclat* and *Ambiente Ufficio* were by majority and were accompanied by excoriating dissents from respected public international lawyers, both of whom had served as judges *ad hoc* of the ICJ.³³¹ These dissenting opinions show the fundamental flaws with the majority's views – to which Morocco now turns.

171 *Abaclat* and *Ambiente Ufficio* arose out of the same factual matrix. Argentina issued sovereign bonds, which were subscribed for by investment banks as lead managers and distributed through intermediaries to the investors, who were large groups of Italian nationals and legal entities. The bonds were governed by a foreign law, and subject to the jurisdiction of foreign courts. Following Argentina's attempt to restructure its sovereign debt following its 2001 currency crisis, mass claims were brought by the bondholders who did not consent to the restructuring.

³²⁷ Counter-Memorial on Jurisdiction, ¶ 115 (fn 252).

³²⁸ **RL-0082**, T Ishikawa, 'Keeping Interpretation in Investment Treaty Arbitration on Track: The Role of State Parties', in JE Kalicki & A Joubin-Bret (eds), *Reshaping the Investor State Dispute Settlement System: Journeys for the 21st Century* (Martinus Nijhoff 2015) 116, 132.

³²⁹ **RL-0079**, Zheng, 'The Territorial Requirement in Investment Treaties', 157.

³³⁰ **RL-0083**, M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 173. See also **RL-0080**, Sornarajah, *Foreign Investment*, 371 (describing these decisions as "suspect" and "an aberration").

³³¹ **RL-0084**, *Abaclat & Ors v Argentine Republic*, ICSID Case No ARB/07/5 (Dissenting Opinion of Georges Abi-Saab, 4 August 2011); **RL-0085**, *Ambiente Ufficio SpA & Ors v Argentine Republic*, ICSID Case No ARB/08/9 (Dissenting Opinion of Santiago Torres Bernárdez, 2 May 2013). Professor Schreuer alludes to Professor Abi-Saab's dissent in *Abaclat* in a footnote: Schreuer Report, ¶ 105 (fn 144). He makes no mention at all of Professor Torres Bernárdez's dissent in *Ambiente Ufficio*. The main text of his report gives no indication that either decision was by a majority.

172 The majority in *Abaclat* reached the following conclusion as to whether the bonds constituted an investment in Argentina:

*“The Tribunal finds that the determination of the place of the investment firstly depends on the nature of such investment. With regard to an investment of a purely financial nature, the relevant criteria cannot be the same as those applying to an investment consisting of business operations and/or involving manpower and property. With regard to investments of a purely financial nature, the relevant criteria should be where and/or for the benefit of whom the funds are ultimately used, and not the place where the funds were paid out or transferred. Thus, the relevant question is were the invested funds ultimately made available to the Host State and did they support the latter’s economic development?”*³³²

173 It went on to say:

*“There is no doubt that the funds generated through the bonds issuance process were ultimately made available to Argentina, and served to finance Argentina’s economic development. Whether the funds were actually used to repay pre-existing debts of Argentina or whether they were used in government spending is irrelevant. In both cases, it was used by Argentina to manage its finances, and as such must be considered to have contributed to Argentina’s economic development and thus to have been made in Argentina.”*³³³

174 Aside from the issues with this reasoning already identified by Professor Douglas QC,³³⁴ there are other problems with the majority ruling, as highlighted by the dissenting opinion of Professor Abi-Saab.

174.1 First, Professor Abi-Saab noted, there was *“no way to say (and no legal basis for saying) that [the bonds] were legally located in Argentina”*, given the presence of *“choice of law and forum selection clauses subjecting them to laws and fora foreign to Argentina”* – and that this conclusion was amplified when the bonds *“were*

³³² CS-0027, *Abaclat & Ors v Argentine Republic*, ICSID Case No ARB/07/5 (Decision on Jurisdiction and Admissibility, 4 August 2011) ¶ 374.

³³³ CS-0027, *Abaclat v Argentina*, Decision on Jurisdiction and Admissibility, ¶ 378.

³³⁴ Namely that the position (a) ignores guiding principles of private international law on the proper *situs* of contracts, (b) ignores the general principle of international law that enforcement jurisdiction is territorial, and (c) is idiosyncratic and clearly designed to reach a pre-determined outcome: Memorial on Jurisdiction, ¶ 124.

intentionally situated outside Argentina and out of reach of its laws and tribunals".³³⁵

174.2 Second, "given the use of fiscal agents, paying agents, depositories and places of payment all situated outside Argentina" under the bonds, the place of performance could not be said to be in the territory of Argentina either.³³⁶

Other private international law factors also pointed in this direction, including the place of payment, currency of payment and residence of intermediaries.³³⁷

174.3 Third, the majority's excuse for ignoring the forum selection clauses in the bonds – viz. that they were mere 'procedural' stipulations that were irrelevant for locating the investment for the purposes of a treaty claim – was nothing more than a "*facile escape route*". A treaty claim, Professor Abi-Saab noted, is necessarily based on a domestic property right (tangible or intangible) that has somehow been mistreated by the host state. If the right is created by contract, then it follows that it is the contract "*that governs its legal existence and modalities of existence, including the location of this right (and its reciprocal obligation)*".³³⁸ This is obviously correct.

175 In *Ambiente Ufficio*, the tribunal endorsed the *Abaclat* tribunal's reasoning and adopted as its determinant that the bonds were an investment "*in the territory*" of a state, the fact that "*the funds involved were destined to contribute to Argentina's economic development and were actually made available to it for that purpose*". Further, it said:

"The Tribunal is convinced that, in order to identify in which State's territory an investment was made, one has to determine first which State benefits from this investment. Most observers will agree that the one criterion which may be taken from the ICSID Convention itself when it comes to determining the nature of an investment under the Convention, is that of a contribution 'for economic development', as referred to in the first preambular paragraph of the ICSID

³³⁵ **RL-0084**, *Abaclat v Argentina*, Dissenting Opinion of Georges Abi-Saab, ¶ 78.

³³⁶ **RL-0084**, *Abaclat v Argentina*, Dissenting Opinion of Georges Abi-Saab, ¶¶ 80–82.

³³⁷ **RL-0084**, *Abaclat v Argentina*, Dissenting Opinion of Georges Abi-Saab, ¶ 82.

³³⁸ **RL-0084**, *Abaclat v Argentina*, Dissenting Opinion of Georges Abi-Saab, ¶ 84.

*Convention. Accordingly, to assess where an investment was made, the criterion must be to whose economic development an investment contributed.”*³³⁹

176 Thus, the *Ambiente Ufficio* tribunal based its conclusion the fact that the early *Salini* test required a claimant to prove a contribution that benefits the economy of the host state.³⁴⁰ However, this aspect of *Salini* has long been considered misguided, and dismissed.³⁴¹ In the present case, neither party is arguing that the *Salini* criteria require a contribution to the economic development of the host state – and indeed the Claimants’ position is that they are not criteria at all.³⁴² Application of the *Ambiente Ufficio* tribunal’s reasoning therefore results in a perverse outcome where a criterion introduced as a way to limit jurisdiction (in the case of *Salini*) and no longer used in that context, is retained in the jurisprudence as something that is able to expand jurisdiction (in the case of *Ambiente Ufficio*).

177 Precisely this point was made in the dissenting opinion of Professor Torres Bernárdez,³⁴³ along with the observation that, as here, the definition of “territory” in the relevant BIT was tied to the physical territory of the host state and its jurisdiction.³⁴⁴ The majority, he said, were engaging in “a discussion alien to the text of the definitions in Article 1(1) and (4) of the Argentina–Italy BIT” and as being “reminiscent of the most extremist subjectivist views mentioned in connection with the interpretation of the concept of ‘investment’ in Article 25(1) of the ICSID Convention”.³⁴⁵

178 The final case relied on by the Claimants is *Deutsche Bank v Sri Lanka*, a dispute concerning an oil price hedging agreement between a bank and the state-owned

³³⁹ **CS-0103**, *Ambiente Ufficio v Argentina*, Decision on Jurisdiction and Admissibility, ¶ 499.

³⁴⁰ **RL-0020**, *Salini Costruttori SpA & Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4 (Decision on Jurisdiction, 23 July 2001) ¶ 52.

³⁴¹ See e.g. **RL-0019**, Gaillard & Banifatemi, ‘Notion of Investment’, 117–119; **RL-0086**, R Castro de Figueiredo, ‘The Notion of Investment and Economic Development under the ICSID Convention’, in C Baltag (ed), *The ICSID Convention after 50 Years: Unsettled Issues* (Kluwer 2017) 75; **RL-0087**, P-M Dupuy, ‘About the Definition of an International Investment – The Requirement of a Contribution to the Economic Development of a Host State’, in Y Banifatemi (ed), *Jurisdiction in Investment Treaty Arbitration* (JurisNet/IAI 2018) 37.

³⁴² But cf. Schreuer Report, ¶ 27.

³⁴³ **RL-0085**, *Ambiente Ufficio v Argentina*, Dissenting Opinion of Santiago Torres Bernárdez, ¶ 300.

³⁴⁴ **RL-0085**, *Ambiente Ufficio v Argentina*, Dissenting Opinion of Santiago Torres Bernárdez, ¶¶ 299, 301–303.

³⁴⁵ **RL-0085**, *Ambiente Ufficio v Argentina*, Dissenting Opinion of Santiago Torres Bernárdez, ¶¶ 300–301.

Ceylon Petroleum Corporation³⁴⁶ (“CPC”) that required the bank to pay CPC a certain amount if the oil price rose above a pre-determined strike price, and CPC to pay the bank if the oil price fell below a certain strike price. This was entered into on the advice and under the direction of Sri Lanka’s Central Bank and its Cabinet of Ministers.³⁴⁷ The Central Bank subsequently gave directions to CPC not to pay amounts owing under the hedge.³⁴⁸

179 The hedge was subject to the jurisdiction of the English courts, and governed by English law.³⁴⁹ The tribunal – without any analysis – adopted the reasoning in *Abaclat*, and concluded that as the “funds paid by Deutsche Bank in execution of the Hedging Agreement were made available to Sri Lanka [...] and served to finance its economy, which is oil dependent”, the territoriality requirement of the Germany–Sri Lanka BIT was met.³⁵⁰ As for the fact that the parties had subjected the agreement to English law and English courts, this was brushed aside on the basis that:

*“It is a reality of modern banking that London is the world’s first financial place. Its courts have great experience in financial transactions and its law in that area offers great security to bankers and investors. It is the reason why, notwithstanding the territory where the investment takes place, parties to financial transactions often select English law and their English courts in their agreements.”*³⁵¹

180 This completely misses the point. Irrespective of the reason that the parties to the hedge selected English law and English courts to govern their agreement, the effect of that choice was to place the hedge outside of Sri Lanka’s jurisdiction – and thereby to preclude it from being an investment “in the territory” of Sri Lanka. As such, the tribunal failed to confront the respondent’s central contention, viz. “[a] commercial transaction with a foreign entity, falling outside the regulatory jurisdiction of the host State, is not covered by the BIT”.³⁵²

³⁴⁶ Strongly implied by the tribunal to be a *de facto* organ of the state: **CS-0113**, *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/09/2 (Award, 17 February 2009) ¶ 405.

³⁴⁷ **CS-0113**, *Deutsche Bank v Sri Lanka*, Award, ¶¶ 19–23.

³⁴⁸ **CS-0113**, *Deutsche Bank v Sri Lanka*, Award, ¶¶ 51–63.

³⁴⁹ **CS-0113**, *Deutsche Bank v Sri Lanka*, Award, ¶¶ 34–35.

³⁵⁰ **CS-0113**, *Deutsche Bank v Sri Lanka*, Award, ¶ 292.

³⁵¹ **CS-0113**, *Deutsche Bank v Sri Lanka*, Award, ¶ 292.

³⁵² **CS-0113**, *Deutsche Bank v Sri Lanka*, Award, ¶ 224.

181 In summary, the cases relied on by the Claimants are either (a) distinguishable from the present case, and/or (b) manifestly wrongly decided. The Tribunal should decline to follow them here.

(3) *The Put Rights cannot be considered investments “in the territory” of Morocco*

182 In light of the foregoing, it is clear that the Put Rights cannot be considered investments “in the territory” of Morocco. They arose under contracts governed by New York law, which were within the exclusive jurisdiction of the New York courts. As a matter of private international law – which in these matters should be controlling – they cannot be considered investments in Morocco.

183 The Claimants’ response to this appears to be three-fold. In the first place, they reject the assertion that private international law has a role to play in determining the *situs* of the Put Rights.³⁵³ For the reasons already given, they are wrong to do so.

184 In the second, they point to the fact that the Commodities were located in Morocco, and the circumstances concerning the Commodities’ storage were governed by the CSA – a Moroccan law contract to which SAMIR was a party. Thus, it is said:

“Regardless of the choice of law provisions in the MCTA and the other Investment Agreements, Claimants’ Put Rights are also 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 the Claimants’ investment holistically, the territorial nexus is clear.”³⁵⁴

185 This is wrong for several reasons:

185.1 First, the Put Rights and the Commodities have been claimed by the Claimants as separate investments. Although the two are linked in a contractual sense, it is fallacious to attempt to conflate the two for the purpose of determining the *situs* of the Put Rights. For example, if the Claimants’ owned a factory in the US that was dependent on refined

³⁵³ Counter-Memorial on Jurisdiction, ¶ 112.

³⁵⁴ Counter-Memorial on Jurisdiction, ¶ 114.

products from the Commodities in order to operate, it would be a nonsense to consider the factory to be in the territory of Morocco just because the Commodities were.

185.2 Secondly, the Claimants' proposal that the territoriality of the Put Rights follows the status of the Commodities would appear to be dependent on the Commodities constituting an investment in their own right. If the Commodities therefore fail as an investment under the FTA (which they must, for the various reasons given by Morocco) then the Put Rights must fail as well, as they cannot be considered an investment "*in the territory*" of Morocco without them.

185.3 Thirdly, even if the Commodities can be considered a factor in favour of the Put Rights being located in Morocco, that does not tip the overall balance away from Morocco's position. This is because – as explained – investment protection must be considered to apply only to assets within a host state's enforcement jurisdiction. Linking the Put Rights to the Commodities does not displace this: the governing law clause and exclusive jurisdiction clause that control the *situs* of the Put Rights as a matter of private international law mean that they cannot be considered within the jurisdiction of the Moroccan courts, or subject to Moroccan executive action. A foreign court would not recognize any judgment given by a Moroccan court that purported to modify the content of the Put Rights – nor would it recognize an executive decree that purported to cancel them. As such, they cannot be considered an investment "*in the territory*" of Morocco, even if the location of the Commodities can be considered relevant to that question (which, for the reasons already given, it is not).

186 In the third, the Claimants assert that the test propounded by cases such as *Abaclat* and *Ambiente Ufficio* as to the territoriality of intangibles such as the Put Rights, viz. that the question of *situs* depends of "*where and/or for the benefit of whom the funds are*

ultimately used”, is correct.³⁵⁵ Again, the Tribunal should reject that argument for the detailed and principled reasons given above – but even if it does not, the Claimants still fail to meet this test, as the direct beneficiary of the funds underpinning the Repo Transactions was not Morocco, but the suppliers of the Commodities and their states of nationality, at whose disposal the funds were ultimately placed. Any benefit to Morocco that accrued as a result of the Repo Transactions was therefore, at best, indirect. True it is, the Commodities may have ended up in Morocco – but as already pointed out, the Commodities constitute a separate alleged investment that cannot be conflated with the Put Rights on the question of territoriality.

187 Finally, and as already highlighted, in the principal cases on which the Claimants rely – including *Fedax*, *CSOB*, *Inmaris Perestroika*, *Abaclat*, *Ambiente Ufficio* and *Deutsche Bank* – the relevant state was intimately involved in the transaction in question, either because the alleged investment was government-issued bonds (*Fedax*, *Abaclat* and *Ambiente Ufficio*), the underlying investment project was state-backed (*CSOB* and *Inmaris Perestroika*) or the transaction concerned a hedging agreement entered into by a state entity (*Deutsche Bank*).

188 This is important, for two reasons. In the first place, it means that the cases on which the Claimants rely are not at all analogous. If SAMIR was a state-owned oil refinery, a parallel with some of the Claimants’ cases might be possible. But SAMIR was not publicly-owned – it was an entirely private entity doing business on its own account. The Moroccan state’s only involvement in its operations was through the collection of tax revenue.

189 In the second, the Claimants alternative attempt to explain the relevance of their alleged investments operations to the Moroccan state through vague references of SAMIR’s importance to the Moroccan economy is similarly unavailing.³⁵⁶ While it is true that SAMIR operated Morocco’s only oil refinery, it is not as though it was the sole source of oil and other fuel in Morocco – as shown by the fact that Morocco has suffered no kind of long-term fuel shortage or economic collapse in the wake of the

³⁵⁵ Counter-Memorial on Jurisdiction, ¶ 115.

³⁵⁶ Counter-Memorial on Jurisdiction, ¶ 116.

refinery being shuttered due to SAMIR's serial non-payment of tax. Furthermore, even if SAMIR was a significant economic actor in Morocco, it is not as though the Claimants' alleged investment operations were SAMIR's only source of oil.

190 On this basis, not matter how one approaches the problem, it is clear that the Put Rights cannot be considered investments "*in the territory*" of Morocco.

B The Claimants did not "*own or control*" the Commodities

191 Morocco's next objection is that the Commodities were not "*owned or controlled*" by the Claimants in the sense required by the definition of "*investment*" in FTA Article 10.27.

192 As was set out in the Memorial on Jurisdiction, it is clear on the facts that, at the point at which the alleged expropriation occurred in August 2015, the Commodities were not in any sense "*owned or controlled*" – even indirectly – by the Claimants:³⁵⁷

192.1 At the point of the alleged expropriation, title to the Commodities (to the extent they still existed) appears to have been held either by 2014-1 or by the Indenture Trustee. As none of the Claimants ever had any ownership interest (direct or indirect) in 2014-1 or in the Indenture Trustee,³⁵⁸ they therefore cannot be said to have "*owned*" the Commodities to the extent they still existed, even indirectly.

192.2 Similarly, there is no basis for saying that the Claimants "*controlled*" the Commodities, as none of them had any ownership interest through which such control could be exercised. Rather, the sole connection between the Claimants and 2014-1 is through CCM and its Management Agreement with 2014-1, by which CCM is said to have "*controlled*" 2014-1. However, common sense and an analysis of the caselaw demonstrates that mere contractual

³⁵⁷ Memorial on Jurisdiction, §§IV.B, VI.C(1).

³⁵⁸ Save CIM, whose claim has been abandoned by the Claimants and who was never a valid claimant in any event: Memorial on Jurisdiction, §VII.

control absent of any ownership is insufficient for the purposes of FTA Article 10.27.³⁵⁹

193 In the Counter-Memorial on Jurisdiction, the Claimants have been forced to reveal additional facts and materials, causing their case on the facts to alter once again and introducing further complications. Before addressing each Claimant in turn and explaining why they neither own nor control the Commodities, Morocco will explain why the Claimants' proposed definition of "control" under Article 10.27 of the FTA is incorrect.

(1) *"Control" under Article 10.27 of the FTA cannot be satisfied through mere contractual control*

(a) Morocco's definition of control aligns with corporate and economic reality

194 In the Memorial on Jurisdiction, Morocco explained why "control" of an asset for the purposes of the definition of "investment" in FTA Article 10.27 is rooted in concepts of ownership of that asset – that is, the idea that in order to "control" something, it is not enough to have only a contractual and/or revocable power to direct it: one must also have a proprietary or financial stake in the asset.³⁶⁰ In circumstances where the asset in question is held by another company (e.g. Q1, 2014-1 or 2015-1), the Claimants must demonstrate the requisite proprietary or financial stake in that company to demonstrate control over it.

195 This definition also has the advantage of cohering with economic and corporate reality. An analogy may be drawn here with accounting standards such as IFRS 10 or US GAAP, which are used by global accounting firms to determine relationships

³⁵⁹ The Claimants now assert that TC Group LLC, as 83 per cent owner of CCM, and The Carlyle Group, as the ultimate parent of TC Group LLC, controlled the Commodities through CCM: Counter-Memorial on Jurisdiction, ¶¶ 101–106. As these Claimants' claim to have "controlled" the Commodities is parasitic on CCM's claim through the Management Agreement, if CCM is found not to have "controlled" the Commodities, these entities' claims must fail as well.

³⁶⁰ Memorial on Jurisdiction, ¶¶ 180–190.

of control within large corporate groups – with specific reference to fund managers. As the Versant Report explains:

195.1 Under IFRS 10, a financial interest in the investee – in the sense of exposure, or rights, to variable returns – is critical when considering whether an investor controls and investee for the purposes of the standard.³⁶¹ Other key indications include whether the investor has voting rights with respect to the investee, the capacity to appoint key management personnel for the investor,³⁶² or is acting as a principal as opposed to a mere agent.³⁶³

195.2 Under US GAAP, control may be established:

195.2.1 Under the variable interest entity (“VIE”) model, where the investor has a controlling financial interest in the investee, as proved by: (a) the power to direct the activities of the VIE that most significantly affect the VIE’s economic performance; and (b) the obligation to absorb losses or the rights to receive benefits that could be significant to the VIE.³⁶⁴

195.2.2 Under the voting interest model, by an investor with ownership of the majority of the voting interests in a legal entity.³⁶⁵

196 A similar position is taken by large multilateral investment treaties that regularly deal with corporate groups. Like FTA Article 10.27, Article 1(6) of the Energy Charter Treaty (“ECT”), defines “investment” as “every kind of asset, owned or controlled directly or indirectly by an investor”. This is clarified by the Understanding concluded by the parties to the ECT with respect to that provision, which provides that, in determining whether an investor controls an investment:

“[A]ll relevant factors must be considered, including the Investor’s:

³⁶¹ Versant Report, ¶ 118.

³⁶² Versant Report, ¶¶ 121–125.

³⁶³ Versant Report, ¶¶ 129–136.

³⁶⁴ Versant Report, ¶ 139.

³⁶⁵ Versant Report, ¶ 138.

- (a) *financial interest, including equity interest in the Investment;*
- (b) *ability to exercise substantial influence over the management and operation of the Investment; and*
- (c) *ability to exercise substantial influence over the selection of members of the board of directors or any other managing body.*

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, an Investor claiming such control has the burden of proof that such control exists.”³⁶⁶

197 This position is similar to IFRS 10 and US GAAP: account is taken of all relevant factors, including the financial or proprietary interest of the putative controller (e.g. an equity interest or exposure to losses) and its capacity to affect key structural aspects of the company (e.g. the composition of its board).

198 As pointed out in the Memorial on Jurisdiction, Morocco’s approach is also the position taken by NAFTA tribunals such as *Thunderbird Gaming v Mexico* and *B-Mex v Mexico* when considering the treaty language from which FTA Article 10.27 is drawn³⁶⁷ (returned to below). Other cases also support Morocco. In *Aguas del Tunari v Bolivia*, the tribunal was required to interpret treaty language by which a “national of a Contracting Party” was said to include “legal persons controlled directly or indirectly, by nationals of that Contracting Party, but constituted in accordance with the law of the other Contracting Party”.³⁶⁸ The majority said:

*“As to the context in which the phrase ‘controlled directly or indirectly’ is found, the Tribunal notes that Article 1 in defining the concept of ‘national’ not only defines the scope of persons and entities that are to be regarded as the beneficiaries of the substantive rights of the BIT but also defines those persons and entities to whom the offer of arbitration is directed and who thus are potential claimants. Given the context of defining the scope of eligible claimants, **the word ‘controlled’ is not intended as an alternative to ownership since control without an ownership***

³⁶⁶ **RL-0088**, European Energy Charter Conference: Final Act, Energy Charter Treaty, Decisions and Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, 17 December 1994, 34 ILM 360, 375 (1995).

³⁶⁷ Memorial on Jurisdiction, ¶¶ 182–184.

³⁶⁸ **RL-0089**, *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3 (Decision on Respondent’s Objections to Jurisdiction, 21 October 2005) ¶ 225.

interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim. In this sense, 'controlled' indicates a quality of the ownership interest."³⁶⁹

199 The parallels between that case and the present are obvious. The words “owns or controls, directly or indirectly” appear in the definition of “investment” in FTA Article 10.27, which term is also a crucial aspect of the definition of “investor of a Party”. Finally, Article 10.27 identifies a claimant as “an investor of a Party that is a party to an investment dispute with the other Party”. To paraphrase the *Aguas del Tunari* tribunal, as the words “owns or controls, directly or indirectly” are used to define the scope of eligible claimants, the concept of “control” is not intended as an alternative to ownership since control without an ownership interest would define a group of entities not necessarily possessing an interest which could be the subject of a claim that sounds in damages.

200 Another relevant is *Vacuum Salt v Ghana*, which arose in the context of Article 25(2)(b) of the ICSID Convention. In that case, the request for arbitration contended that the claimant was controlled by a Greek national. Subsequent investigation, however, established that the Greek national and his wife held only a 20 per cent stake in the claimant; the balance was held by Ghanaian nationals.³⁷⁰ The tribunal held:

*“[F]oreign control’ within the meaning of the second clause of Article 25(2)(b) does not require, or imply, any particular percentage of share ownership. Each case arising under that clause must be viewed in its own particular context, on the basis of all the facts and circumstances. There is no formula. It stands to reason, of course, that 100 percent foreign ownership almost certainly would result in foreign control, by whatever standard, and that a total absence of foreign shareholder would virtually preclude the existence of such control. How much is ‘enough’, however, cannot be determined abstractly.”*³⁷¹

³⁶⁹ **RL-0089**, *Aguas del Tunari v Bolivia*, Decision on Respondent’s Objections to Jurisdiction, ¶ 242 (emphasis added). The dissenting arbitrator took an even more severe view of the matter: **RL-0090**, *Aguas del Tunari SA v Republic of Bolivia*, ICSID Case No ARB/02/3 (Declaration of Jose Luis Alberro Semerena, 21 October 2005).

³⁷⁰ **RL-0091**, *Vacuum Salt Products Limited v Government of the Republic of Ghana*, ICSID Case No ARB/92/1 (Award, 16 February 1994) ¶ 41.

³⁷¹ **RL-0091**, *Vacuum Salt v Ghana*, Award, ¶¶ 43 (emphasis added).

201 On this basis, the Greek national's 20 per cent stake in the claimant combined with his significant participation in its management was not sufficient to establish "*foreign control*" for the purposes of Article 25(2)(b) of the ICSID Convention.³⁷² The situation would have been even more emphatic if the Greek national had no shareholding in the claimant whatsoever – the position of the Claimants in this case.

202 Finally, Morocco's approach has the benefit of preventing individuals from being considered investors in circumstances where logic and common sense show they are anything but. If the Claimants' position is accepted and "*control*" for the purposes of the FTA can be satisfied by the delegation of powers via contract, that would lead to self-evidently absurd outcomes. For example, if a company incorporated in Morocco by Moroccan nationals, using Moroccan capital were simply to appoint a US CEO, or a US investment manager with contractually-delegated powers to manage its assets, on the Claimants' case that US CEO or investment manager would then have an investment in the Moroccan company and would be entitled to bring proceedings against Morocco under the FTA. That is plainly wrong.

203 The Claimants' proposed definition is therefore unworkable and unprincipled. It is also not supported by the caselaw, as Morocco will now explain.

(b) The Claimants' definition of "*control*" is misguided

204 The position taken in the Counter-Memorial on Jurisdiction on the question of "*control*"³⁷³ is the same as that set out in Professor Schreuer's report. In the latter, Professor Schreuer defines control by reference to a single factor: "*the power to direct the business of a juridical person*".³⁷⁴ He also says that "[e]ffective control through operation and management is the ultimate litmus test"³⁷⁵ and that through the Management Agreement, "*CCM had the power to manage the transactions and made all relevant investment decisions*" such that "*CCM had complete control over all the*

³⁷² **RL-0091**, *Vacuum Salt v Ghana*, Award, ¶ 53.

³⁷³ Counter-Memorial on Jurisdiction, ¶ 107: "[c]ontrol exists if the investor directs and manages investment decisions".

³⁷⁴ Schreuer Report, ¶ 116.

³⁷⁵ Schreuer Report, ¶ 147.

investments at all relevant times”,³⁷⁶ extending that control to TC Group and the Carlyle Group through their ownership of CCM. This is misconceived.³⁷⁷

205 In the first place, Professor Schreuer points to definitions of “control” from sources such as *Black’s Law Dictionary* and the *Shorter Oxford Dictionary*.³⁷⁸ These are predictably broad – and some do on their face admit that “control” could be exercised through contractual means. Others, however, are more restrictive. Indeed, in his report, Professor Schreuer only refers to the *Black’s* definition of “control” as a noun.³⁷⁹ However, the definition of “investment” in FTA Article 10.27 uses the concept as a verb (i.e. “every asset that an investor owns or controls”). And in that sense, one of the definitions given by *Black’s* for “control” is expressly linked to ownership: “[t]o have a controlling interest in <the five shareholders controlled the company>”.³⁸⁰

206 The point here is that while dictionaries can play a role in the process of ascertaining the ordinary meaning of treaty language under VCLT Article 31(1), “dictionaries alone are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue **all** meanings of words – be those meanings common or rare, universal or specialized”.³⁸¹ The role of the Tribunal is to determine which (if any) of those definitions was intended by the parties – in light of the other elements of VCLT Article 31(1) (good faith, context, object and purpose, etc.). Thus, as Lord McNair said:

“[Plain meaning] is merely a starting point, a prima facie guide, and cannot be allowed to obstruct the essential quest in the application of treaties, namely to search for the real intention of the contracting parties in using the language employed by them.”³⁸²

³⁷⁶ Schreuer Report, ¶ 113.

³⁷⁷ Schreuer Report, §IV.B.

³⁷⁸ Schreuer Report, ¶¶ 117, 118.

³⁷⁹ Schreuer Report, ¶ 117.

³⁸⁰ **RL-0092**, *Black’s Law Dictionary* (11th edn: Thomson Reuters 2019) 416.

³⁸¹ **RL-0093**, *United States Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Appellate Body Report, 7 April 2005) ¶¶ 164–165 (emphasis original).

³⁸² **RL-0094**, A McNair, *The Law of Treaties* (OUP 1961) 366. See also *ibid*, 367:

“[W]hile a term may be ‘plain’ absolutely, what a tribunal adjudicating upon the meaning of a treaty wants to ascertain is the meaning of the term relatively, that is, in relation to the circumstances in which the treaty was made,

207 The feasibility of the Claimants' understanding is reduced further by the practical difficulties that would result if the Claimants' understanding were correct, as set out above and having been flagged in the Memorial on Jurisdiction.³⁸³ They are addressed nowhere in the relevant part of Professor Schreuer's report, nor in the Counter-Memorial on Jurisdiction – but must nevertheless be confronted by the Tribunal. In determining whether these consequences are permissible under the FTA, the Tribunal must bear in mind Professor Gazzini's injunction: "*the interpreter must extrapolate from the text of the treaty the commitments that States could have reasonably contemplated and the type of exposure to international arbitration they were ready to accept when expressing [their] consent to the Centre's jurisdiction*".³⁸⁴ It is difficult to see how Morocco and the US would have agreed to any of the (borderline absurd) scenarios described. But if the Claimants' view of "*control*" under the FTA is correct, they must necessarily follow in its wake.

208 Beyond dictionaries, Professor Schreuer also refers to ECT Article 1(6) and the Understanding concluded by the parties to the ECT with respect to that provision. According to Professor Schreuer, the Understanding "*is strong authority for the proposition that [...] control is to be viewed in terms of an 'ability to exercise substantial influence over the management and operation of the Investment'*".³⁸⁵ But as already pointed out, the Understanding actually supports Morocco, in that it promotes a holistic understanding of "*control*" that takes into account "*all relevant factors*" before listing three illustrations, only one of which is the ability of the investor "*to exercise substantial influence over the management and operation of the Investment*". Indeed, of the three factors listed in the Understanding, two of them – equity interest under paragraph (a) and board selection under paragraph (c) – are rooted in rights of ownership. This speaks to the intention of the parties to the ECT to link "*controlled*" to concepts of financial or proprietary interest.

and in which the language was used. If that is what is meant by the doctrine of 'plain terms', no objection may be raised to it. But if it means that tribunals must stop short at applying the term in its primary or literal sense and permit no enquiry as to anything further then the doctrine is wrong."

³⁸³ Memorial on Jurisdiction, ¶¶ 181, 189.

³⁸⁴ **RL-0076**, Gazzini, *Interpretation of International Investment Agreements*, 138.

³⁸⁵ Schreuer Report, ¶ 130.

(c) The caselaw on “control” supports Morocco’s interpretation

209 The difficulties in Professor Schreuer’s position are also borne out in the cases he relies upon. In the first place, he does not refer to those decisions in which the Claimants’ understanding of “control” was expressly rejected – namely *Aguas del Tunari* and *Vacuum Salt*.³⁸⁶ A further weakness of Professor Schreuer’s report arises from those cases he does cite. None of these – whether arising in relation to the definitional section of an investment treaty or under Article 25(2)(b) of the ICSID Convention – considers a situation in which control of one entity by another has been established merely through a contractual right of control, free of any ownership or wider economic interest whatsoever. Accordingly, they do not support the Claimants’ understanding of “control” in the context of FTA Article 10.27. An analysis of each is set out in **Table B in Annex 2** to this pleading – but Morocco will illustrate the point with a few examples here.

210 For example, Professor Schreuer considers two NAFTA cases on which Morocco commented in the Memorial on Jurisdiction³⁸⁷ – *Thunderbird v Mexico* and *B-Mex v Mexico*. He does not engage with Morocco’s understanding of those decisions, instead putting forward his own view without confronting the alternative.³⁸⁸

211 With respect to *Thunderbird*, Professor Schreuer simply recites without analysis the tribunal’s finding that *de facto* control was a valid basis of “control” for the purposes of NAFTA Article 1117.³⁸⁹ What Professor Schreuer misses, however, is that *Thunderbird* was a case in which the investor’s control over the relevant entities was grounded in a significant minority stake of no less than 33.3 per cent.³⁹⁰ The tribunal was accordingly not called upon to determine the existence of *de facto* control in

³⁸⁶ He does, however, discuss them in his published work: **RL-0095**, C Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn: CUP 2009) 325–327.

³⁸⁷ Memorial on Jurisdiction, ¶¶ 182–184.

³⁸⁸ Schreuer Report, ¶¶ 132–135.

³⁸⁹ Schreuer Report, ¶ 132.

³⁹⁰ **CL-0067**, *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL (Award, 26 January 2006) ¶ 104.

circumstances where the putative investor had no proprietary stake in the future of the entity it was said to control.

212 Professor Schreuer's treatment of *B-Mex* is also materially incomplete. There, he cites the portion of the Partial Award that adopts the reasoning from *Thunderbird*.³⁹¹ However, he neglects the part of the tribunal's decision where it actually spelled out what "control" in NAFTA Article 1117 means, and to which specific attention was drawn in the Memorial on Jurisdiction.³⁹² The tribunal said that *de facto* control under NAFTA Article 1118 will exist where an investor "**does not own a number of shares sufficient to confer the legal capacity to control but is otherwise able to exercise de facto control (also an enterprise that the investor 'controls')**".³⁹³ Thus, the *B-Mex* tribunal pointedly grounded its definition of it at least some level of share ownership by the investor in respect of the enterprise.

213 Professor Scheuer also relies (as do the Claimants³⁹⁴) on *SD Myers v Canada*, an outlier case that is not at all analogous with the facts here. There, the US claimant ("SDMI") had no direct ownership interest in the Canadian investment ("**Myers Canada**") that was the subject of the case. But the two companies were owned and managed by the same individuals, who served as shareholders and corporate officers – the key individual, Dana Myers, owned 25 per cent of Myers Canada and 51 per cent of SDMI and was the CEO of SDMI, in which capacity he directed the operations of Myers Canada.

214 This was sufficient for the tribunal to conclude that SDMI controlled Myers Canada for the purposes of NAFTA Article 1117.³⁹⁵ Several observations may be made:

214.1 First, if the *SD Myers* tribunal concluded that SDMI controlled Myers Canada merely because SDMI was an affiliate of Myers Canada, it was wrong to do

³⁹¹ Schreuer Report, ¶ 135.

³⁹² Memorial on Jurisdiction, ¶ 183.

³⁹³ **CL-0068**, *B Mex LLC & Ors v United Mexican States*, ICSID Case No ARB(AF)/16/3 (Partial Award, 19 July 2019) ¶ 205 (emphasis added).

³⁹⁴ Counter-Memorial on Jurisdiction, ¶ 82.

³⁹⁵ **CS-0222**, *SD Myers Inc v Government of Canada*, UNCITRAL/NAFTA (Partial Award (Merits), 13 November 2000) ¶¶ 227-231.

so. By the same logic, Myers Canada would have controlled SDMI, resulting in an obvious absurdity: one cannot claim to control what one is controlled by in turn.

214.2 Second, although SDMI and Myers Canada were mere affiliates, their relationship was, in reality, far deeper: SDMI was found to control Myers Canada because its CEO, Dana Myers, had a sufficient ownership interest in Myers Canada to issue directions to the same.³⁹⁶ Moreover, as the Federal Court of Canada said with respect to the corporate group of which both SDMI and Myers Canada were part:

*“It was a family business which operated in the United States and other countries through SDMI. SDMI advanced the money necessary for the operation of Myers Canada, SDMI provided personnel and technical support for Myers Canada and SDMI expected to share in the profits from Myers Canada.”*³⁹⁷

214.3 Third, on this basis, the *SD Myers* tribunal’s finding that SDMI controlled Myers Canada was grounded, not in mere contractual rights of management, but additional forms of legal interaction demonstrating SDMI’s considerable economic interest in Myers Canada:

*“The Tribunal recognizes that there are a number of other bases on which SDMI could contend that it has standing to maintain its claim including that (a) SDMI and Myers Canada were in a joint venture, (b) Myers Canada was a branch of SDMI, (c) it had made a loan to Myers Canada, and (d) its market share in Canada constituted an investment. It is not necessary to address these matters in this context and the Tribunal does not do so, although they may be relevant to other issues in the case.”*³⁹⁸

215 On this basis, it is clear that *SD Myers* is of no assistance to the Claimants and readily distinguishable from the facts of this case. The individual within SDMI that was used by SDMI to control Myers Canada had an ownership stake in Myers Canada

³⁹⁶ CS-0222, *SD Myers v Canada*, Partial Award (Merits), ¶ 227.

³⁹⁷ CS-0223, *Attorney General of Canada v SD Myers Inc (United Mexican States intervening)*, 2004 FC 38, ¶ 64 (Kelen J).

³⁹⁸ CS-0222, *SD Myers v Canada*, Partial Award (Merits), ¶ 232.

that allowed instructions to be issued and obeyed. SDMI also funded Myers Canada, provided technical support to Myers Canada, and expected a share of Myers Canada's profits. None of these facts are present in the present case with respect to the relationship between CCM and Q1, 2014-1 or 2015-1.

216 Professor Schreuer also points out that “*in some cases, tribunals completely dispensed with legal ownership and found that beneficial ownership alone was sufficient to give investors standing*”, citing a number of decisions to this effect.³⁹⁹ As international law generally considers a beneficial owner to be the ‘true’ owner of an asset or claim,⁴⁰⁰ this conclusion is not surprising. But given that beneficial ownership is – by definition – a species of ownership, these cases do not establish that “*control*” for the purposes of the FTA can be established by contract alone, free of any economic or ownership interest (be it formal or beneficial) in the investment. Indeed, these cases positively undermine the Claimants’ position by making it clear that standing to claim is dependent on beneficial title to the asset in question.⁴⁰¹

217 In the Counter-Memorial on Jurisdiction, the Claimants seem to take this argument one step further, and argue that it is sufficient that any party that merely benefits (in an economic sense) from an investment can be considered an investor.⁴⁰² Their authority for this proposition is *Société Générale v Dominican Republic*, an outlier case where tribunal held that as the relevant BIT protected “*a broader category of rights and*

³⁹⁹ Schreuer Report, ¶¶ 248–254.

⁴⁰⁰ See e.g. **CL-0064**, *Occidental Petroleum Corporation & Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11 (Decision on Annulment of the Award, 2 November 2015) ¶¶ 259–264.

⁴⁰¹ **CL-0064**, *Occidental v Ecuador*, Decision on Annulment of the Award, ¶ 262 (emphasis added):

“The position as regards beneficial ownership is a reflection of a more general principle in international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty. And tribunals exceed their jurisdiction if they grant compensation to third parties whose investments are not entitled to protection under the relevant instrument.”

⁴⁰² Counter-Memorial on Jurisdiction, ¶ 85.

interests of any nature” as an investment, that a “*wider economic interest underlying a given transaction*” was entitled to protection.⁴⁰³

218 The Claimants are mistaken. The BIT that was the focus of *Société Générale* did not include an explicit requirement that the investor “*owns or controls*” the claimed investment.⁴⁰⁴ It is those words – which the parties to the FTA took care to include in Article 10.27 – that are the focus of Morocco’s objection. Unless the Claimants can explain how a mere economic interest in a particular transaction equates, without more, to ownership and control of an underlying asset, *Société Générale* is irrelevant.

219 On this basis, none of the cases that Professor Schreuer relies on in his report actually supports the proposition that the Claimants advance, viz. that “*control*” for the purposes of the FTA can be established via rights of management bestowed under a contract. Indeed some of them expressly support Morocco’s position.

220 The reality is that “*control*” in the FTA Article 10.27 sense is predicated on some level of financial or proprietary interest in the asset said to constitute the investment – or in another company that owns it. This has significant ramifications for the Claimants in the present case since none of the Claimants owned or controlled the Commodities at the time of the alleged expropriation.

(2) *None of the Claimants “owned” the Commodities at the time of the alleged expropriation*

221 On the basis of the Claimants’ corporate structure, it is clear that, at the time of the alleged expropriation, none of them “*owned*” the Commodities either directly or indirectly.

222 This is because, on the Claimants’ own case, it was Q1 which owned the Commodities at the relevant time, such that any claim by the Claimants to

⁴⁰³ **RL-0053**, *Société Générale in respect of DR Energy Holdings Limited & Empresa Distribuidora de Electricidad del Esta SA v Dominican Republic*, LCIA Case No UN 7927 (Award on Preliminary Objections to Jurisdiction, 19 September 2008) ¶ 48.

⁴⁰⁴ **RL-0096**, France Dominican Republic BIT (1999).

ownership of the Commodities is necessarily indirect and predicated on their ownership of Q1.

223 But, as already described, the Claimants have not even come close to proving that Q1 owned the Commodities at the time of their alleged expropriation on 7 August 2015. Rather, the Claimants' have presented a confused and continually-shifting factual narrative.⁴⁰⁵ Depending on how one reads the evidence underpinning that narrative, title to the Commodities at the relevant time could have been held, in whole or in part, by any of (a) 2014-1, (b) the Indenture Trustee or, (c) nobody at all, given that (as the Supreme Court of New York found⁴⁰⁶) the written contractual arrangements between Q1 and SAMIR (as reflected in the MCTA and other New York law agreements) were never followed and, as a matter of practice, SAMIR refined any Commodities immediately on receipt, such that title to them was effectively destroyed on delivery.

224 The matter is further complicated by the revelation of the Maryland Pension System – a third party previously undisclosed by the Claimants that, at the time of the alleged expropriation, owned 99.97 per cent of the economic interest in the Onshore Feeder.⁴⁰⁷ That fact means that of all the Claimant entities, only the Onshore Feeder had any significant ownership link to Q1. Of the other Claimant entities, only TC Group Investment Holdings and TC Group LLC have shown an indirect link to Q1: those two Claimant entities held 0.03 per cent of the limited partnership interest (the economic interest) in the Onshore Feeder at the relevant time; and the same two entities held, through their ownership of the Offshore Feeder, just 0.04 per cent of the limited partnership interest in the Master Fund.

225 The ownership position which emerges as at 7 August 2015 is therefore rather different to the one first described by the Claimants, namely that, with the exception of the Onshore Feeder, the other Claimants' indirect stake in Q1 was negligible at

⁴⁰⁵ See above at §I.D.

⁴⁰⁶ See above at ¶¶ 64–65, 84.

⁴⁰⁷ See above at ¶¶ 47–50.

best. This has considerable ramifications for the Claimants' claims to own the Commodities indirectly through Q1.

226 Title to the Commodities is at the core of the Tribunal's jurisdiction *ratione materiae* – and should it affirm jurisdiction, on the Tribunal's consideration of the merits. The burden of proving that title falls unequivocally on the Claimants.⁴⁰⁸ Their failure to meet it means that for the majority of the Claimants,⁴⁰⁹ the Commodities cannot be considered a protected investment. For this reason, the Tribunal's investigation of this matter cannot be limited to the question of ownership of the Commodities at large – it must determine (a) the extent of the Claimants' ownership links to Q1 as of the date of the alleged expropriation (if any); (b) whether Q1 owned any of the Commodities at the time of the alleged expropriation, and (c) if so, the precise proportion of the Commodities Q1 owned, as only these Commodities can be said within the jurisdiction of the Tribunal with respect to the majority of the Claimants. As explained above, the evidence submitted to date strongly suggests that Q1 did not in fact own any of the Commodities at all.

(3) *CCM did not "control" the Commodities at the time of the alleged expropriation*

227 Perhaps understanding the weakness of their case on ownership of the Commodities via Q1, the Claimants in their Counter-Memorial on Jurisdiction place strong emphasis on the alleged "*control*" of the Commodities by CCM through its management agreements with Q1, 2014-1 and 2015-1. The Claimants also assert that two other Claimants – TC Group and The Carlyle Group – controlled the Commodities through their ownership interest in CCM.⁴¹⁰ If this is true, then these Claimants' claims of "*control*" over the Commodities is parasitic on CCM's claims – and if CCM does not have control over the Commodities, then neither do these entities.

⁴⁰⁸ See above §I.C.

⁴⁰⁹ That is, the Claimants other than CCM, whose claim is based on "*control*" of the Commodities, and The Carlyle Group and TC Group, which have parasitic claims based on CCM's control: see below at ¶ 215.

⁴¹⁰ Counter-Memorial on Jurisdiction, ¶¶ 101–106.

228 Furthermore, CCM's own claim to "control" the Commodities depends on the extent to which the Commodities were, in turn, owned by one of the entities over which it asserts control – i.e. Q1, 2014-1 and/or 2015-1. To the extent that the Tribunal finds that these entities did not own the Commodities – or, more likely, that the Commodities did not even exist as of the date of alleged expropriation as they were immediately processed by SAMIR on delivery – then CCM's claim of "control" of the Commodities and those other claims that are parasitic upon it must also necessarily fail.

229 In any event, it is clear that CCM did not "control" any of the relevant entities in the sense required by the FTA. As set out above, Article 10.27 requires some measure of financial or proprietary interest in order to establish control⁴¹¹ – irrespective of what the Claimants' or Professor Schreuer may say. CCM had no such interest in Q1 or 2014-1, and therefore had no qualifying interest in the Commodities (or, for that matter, the Put Rights) that could form the foundation of "control" in the relevant sense.

230 Furthermore – and as already highlighted in the Memorial on Jurisdiction⁴¹² – the contractual powers given to CCM under its management agreements with Q1 and 2014-1 are insufficient to meet the Claimants' burden of proof with respect to *de facto* control – which is one of "beyond any reasonable doubt".⁴¹³ As already established,⁴¹⁴ despite overblown assertions of CCM's 'total' control over Q1 and 2014-1, the management agreements tell a different story – one in which CCM was a mere "attorney-in-fact" or "agent"; whose liability for its decisions was severely limited; who was entitled to be fully indemnified and held harmless for losses arising out of the Repo Transactions; who bore no real risk for its advice; who was expressly described as an independent contractor and excluded from more onerous roles just as a partner or joint venture *vis-à-vis* the entities to which it gave that advice; and

⁴¹¹ See above at §IV.B(1).

⁴¹² Memorial on Jurisdiction, §VI.C(1)(b).

⁴¹³ CL-0067, *Thunderbird Gaming v Mexico*, Award, ¶ 106.

⁴¹⁴ See above at §II.C(2).

who, most importantly, could be sacked on 30 or 90-days' notice , depending on the entity and contract.

231 As the Versant Report makes clear, these factors and others indicate that under recognized accounting standards such as IFRS 10 and US GAAP, CCM cannot be considered to control either of Q1, 2014-1 or 2015-1. In this, Versant places particular emphasis on the fact that: (a) CCM could be removed without cause from its position as investment manager for these three entities; (b) CCM was expressly described in the Management Agreements as an independent contractor, and not as a partner or joint venturer; and (c) CCM assumed no risk with respect to these entities' direct investments – and indeed was indemnified against any losses arising out of repurchase transactions with SAMIR.⁴¹⁵ Versant is therefore able to conclude that “[b]ased on the guidance outlined in IFRS 10 and [US GAAP], it seems clear that CCM acted as an agent of Q1, 2014-1 and 2015-1 to which certain powers were delegated but there was no ownership or control”.⁴¹⁶

232 In the premises, it is clear that CCM did not have the level of close, *de facto* control over Q1 and 2014-1 necessary to hold an “*investment*” and be considered an “*investor of a Party*” under the FTA. Indeed, this was by design.⁴¹⁷ Now that it suits it, it reverses course, and claims that it had control all along – and further that the Tribunal should ignore the careful terms of the management agreement by which that control was carefully circumscribed.

233 The Tribunal should hold CCM to the terms of its agreements – and rule that it lacks jurisdiction over CCM's claims and those other Claimants whose claims are parasitic upon it.

⁴¹⁵ Versant Report, ¶ 143.

⁴¹⁶ Versant Report, ¶ 152.

⁴¹⁷ Versant Report, ¶ 166.

V **OBJECTION 3: THE CLAIMANTS LACK STANDING TO CLAIM WITH RESPECT TO THE ASSETS AND/OR LOSSES OF Q1, 2014-1 OR 2015-1**

234 Morocco’s third objection is based on the principle of standing identified (*inter alia*) in *Poštová banka*.⁴¹⁸

235 In *Poštová banka*, after an extensive review of the caselaw, the tribunal held:

*“As clearly and consistently established by the above referenced decisions [...] a shareholder of a company incorporated in the host State may assert claims based on measures taken against a company’s assets that impair the value of the claimant’s shares. However, such claimant has no standing to pursue claims directly over the assets of the local company, as it has no legal right to such assets.”*⁴¹⁹

236 As further pointed out in the Memorial on Jurisdiction, the facts of *Poštová banka* align with the present case:⁴²⁰ one of the *Poštová banka* claimants, Istrokapital, argued that its investment in Greece was Greek government bonds held by its subsidiary, *Poštová banka*, in respect of which it had no rights in Greek law. Istrokapital at no point claimed in respect of its shares in the Greek-domiciled *Poštová banka*, leading to the tribunal rejecting jurisdiction over the claim.⁴²¹ The parallels with the Claimants here – whose claims are framed entirely in terms of assets owned by Cayman entities and the losses that flow from the alleged expropriation of those assets – is obvious.

237 This objection is amplified by the wording of FTA Article 10.15.1⁴²² – under which a prospective claimant is entitled to bring a claim either “*on its own behalf*” or “*on behalf of an enterprise of the respondent*” (i.e. a locally-incorporated company). Examination of the Claimants’ pleadings and the evidence proffered in support, however, demonstrates that the Claimants’ claims are not formulated in terms of direct losses

⁴¹⁸ Memorial on Jurisdiction, §V.

⁴¹⁹ **RL-0006**, *Poštová banka v Greece*, Award, ¶ 246 (emphasis added).

⁴²⁰ Memorial on Jurisdiction, ¶¶ 156–157.

⁴²¹ **RL-0006**, *Poštová banka v Greece*, Award, ¶ 246.

⁴²² Memorial on Jurisdiction, ¶ 152. See also Respondent’s Application for Bifurcation of Proceedings dated 11 October 2019, ¶¶ 51–53.

suffered by them, but indirect losses allegedly suffered by Q1, 2014-1 and/or 2015-1. As Cayman entities, no claim can be brought on their behalf under FTA Article 10.15.1 – and yet that is precisely what the Claimants attempt.

238 Again, the Claimants’ response to this objection is framed almost entirely by Professor Schreuer’s legal opinion on the subject. As such, Morocco responds principally to the relevant section of Professor Schreuer’s report.⁴²³

A The Claimants are not entitled to claim with respect to assets owned by Cayman entities

(1) Morocco’s objection is clearly preliminary in character

239 When confronting the *Poštova banka* line of cases, Professor Schreuer conspicuously does not say they were wrongly decided. Rather, he asserts that the issue they identify is not preliminary in character:

*“It is unclear to what extent the statements in these cases detract from the authorities outlined above. The most plausible answer is that while shareholders may claim for a diminution of share value as a consequence of adverse action by the host State, they cannot directly rely on rights that accrue to a company in which they hold an interest. But this does not affect the standing of indirect investors as such. It merely highlights that the rights of these investors is derived from their participation in the company and should be measured in terms of the effect on the value of that participation. [...]”*⁴²⁴

240 This is wrong. The question of what rights a shareholder “*may claim for*” is precisely a question of standing⁴²⁵ – as is the realization that “*the rights of these investors is derived from their participation in the company*”. That is reflected in the fact that each of the authorities relied on by Morocco treated this matter as one of standing and/or jurisdiction. Thus, in *Poštová banka*, it was held that the claimant had “*no standing to pursue claims directly over the assets of the local company*”,⁴²⁶ and in *Karkey v Pakistan* the

⁴²³ Schreuer Report, §V.

⁴²⁴ Schreuer Report ¶ 192.

⁴²⁵ Standing being “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right”: **RL-0092**, *Black’s Law Dictionary* (11th edn: Thomson Reuters 2019) 1695.

⁴²⁶ **RL-0006**, *Poštová banka v Greece*, Award, ¶ 230.

tribunal said that the claimant “does not have standing to assert claims based on the host-State’s treatment of the contracts and assets of the company in which it holds shares”.⁴²⁷ The other cases on which Morocco relies reflect the same proposition.⁴²⁸

241 A similar submission is made by the Claimants themselves, arguing that “the issue in Respondent’s cases [...] is not one determinative of jurisdiction, but one potentially relevant regarding damages”.⁴²⁹ Again, this is not consistent with *Poštová banka* itself, where the question at hand was expressly treated as one of jurisdiction that led to the case being dismissed.⁴³⁰ Its preliminary character is further confirmed by the Tribunal’s decision to include the objection in this bifurcated phase as an objection to jurisdiction *ratione personae*,⁴³¹ as well as by the fact that the Claimants have only now decided to challenge this objection on the basis that it is not preliminary. No such observation appeared in the Claimants’ Observations on Morocco’s Request for Bifurcation.⁴³²

(2) *Morocco is not arguing that the FTA does not permit indirect investment*

242 Professor Schreuer also submits that adoption of Morocco’s views on the *Poštová banka* line of cases would remove indirect investments from the protection of the FTA. To that end, he cites at length the usual caselaw concerning indirect

⁴²⁷ **RL-0008**, *Karkey Karadeniz Elektrik Uretim AS v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1 (Award, 22 August 2017) ¶ 716.

⁴²⁸ **RL-0007**, *Asian Agricultural Products Limited v Republic of Sri Lanka*, Award (1990) 4 ICSID Rep 246, ¶ 95 (“[t]he scope of international law protection granted to the foreign investor [...] is limited to [...] [t]he value of his shareholding”); **RL-0009**, *ST AD GmbH v Republic of Bulgaria*, PCA Case No 2011-06 (Award on Jurisdiction, 18 July 2003) ¶ 278 (“an investor has no enforceable right [over a subsidiary’s assets]”); **RL-0010**, *Enkev Beheer BV v Republic of Poland*, PCA Case No 2013-01 (First Partial Award, 29 April 2014) ¶ 310 (“[a claimant cannot] stand in the shoes of its subsidiary [...] as regards the latter’s [...] property”); **RL-0040**, *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15 (Award, 31 October 2011) ¶ 189 (“none of the contracts the interference with which is complained of by the Claimant are protected investments under the ICSID Convention and the BIT”); **RL-0041**, *BG Group plc v Republic of Argentina*, UNCITRAL (Final Award, 24 December 2007) ¶ 214 (“[a claimant does not] have standing to seize this Tribunal with ‘claims to money’ and ‘claims to performance’ and to assert other rights, which it is not entitled to exercise directly”)/

⁴²⁹ Counter-Memorial on Jurisdiction, ¶ 93.

⁴³⁰ **RL-0006**, *Poštová banka v Greece*, Award, ¶ 246. See also **RL-0040**, *El Paso v Argentina*, Award, ¶ 189; **RL-0041**, *BG Group v Argentina*, Final Award, ¶¶ 216–217.

⁴³¹ Procedural Order No 4 (Decision on Bifurcation) dated 20 January 2020, ¶ 72 (“The Second Objection is a *ratione personae* jurisdictional objection that Claimants lack standing to bring a claim with respect to assets and/or losses of entities incorporated in a third state (i.e. Cayman Islands)”).

⁴³² Observations on the Respondent’s Application for Bifurcation dated 20 November 2019, ¶¶ 71–74.

shareholder actions (whether through subsidiaries incorporated in the host state or third states) under investment treaties.⁴³³

243 This analysis misses the mark. Morocco's objection – as explained in the Memorial on Jurisdiction – does not concern indirect investment *per se*.⁴³⁴ Rather, it is rooted in the distinction that investment treaty tribunals have “repeatedly found”⁴³⁵ between indirect claims concerning shares in a locally incorporated investment vehicle on the one hand, and claims concerning other classes of asset on the other. In recognizing this distinction, the *ST-AD v Bulgaria* tribunal said, for example, “an investor has no enforceable right in arbitration over the assets and contracts belonging to the company in which it holds shares”.⁴³⁶

244 Thus, Professor Schreuer's rendition (adopted by the Claimants) of the cases discussing indirect investment through host state and third state subsidiaries is largely irrelevant – save to the extent it confirms Morocco's approach, as some of Professor Schreuer's cases do. For example, he draws particular attention to *Paushok v Mongolia*, where the learned tribunal allowed the claimants to claim with respect to shares in GEM, a Mongolian investment vehicle.⁴³⁷ The tribunal there held:

“In the present instance, Claimants' investment are the shares of GEM, a company incorporated under Mongolian law as required by that country in order to engage into the mining business and, through ownership of those shares, Claimants are entitled to make claims concerning alleged Treaty breaches resulting from actions affecting the assets of GEM, including its rights to mine gold deposits or its contractual rights and thereby affecting the value of their shares. It is therefore important to note that Claimants must prove that their claims arise out of the Treaty itself and not merely be an attempt to exercise contractual rights belonging to GEM. To argue that Claimants could not make such Treaty claims would render it practically meaningless in many instances; a large number of countries require foreign investors to incorporate a local company in order to engage into activities in sectors which are considered of strategic importance (mining, oil and gas, communications etc.). In such situations, a BIT

⁴³³ Schreuer Report, ¶¶ 155–179.

⁴³⁴ Memorial on Jurisdiction, ¶¶ 145–146.

⁴³⁵ **RL-0008**, *Karkey v Pakistan*, Award, ¶ 716.

⁴³⁶ **RL-0009**, *ST AD v Bulgaria*, Award on Jurisdiction, ¶ 278.

⁴³⁷ Schreuer Report, ¶ 166.

would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets would be not be subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company.”⁴³⁸

245 The above passage was relied on by both the *Poštova banka*⁴³⁹ and *ST-AD v Bulgaria*⁴⁴⁰ tribunals in justifying the very principle for which Morocco now contends. Moreover, the bolded words make clear that the *Paushok* tribunal considered the claimants’ loss to be limited to the diminution in the value of their shares in GEM; they were not permitted to bring a claim in respect of GEM’s contractual rights. It is striking that when extracting this paragraph in his report, Professor Schreuer omits this vital passage.⁴⁴¹

246 Professor Schreuer’s references to passages from *BG Group* and *El Paso* suffer from the same defect.⁴⁴² As described in the Memorial on Jurisdiction, these cases established that the standing of the investors in those cases began and ended with their shareholding in local companies.⁴⁴³ Both tribunals specifically excluded claims based on the assets of those companies – namely licenses and contracts to which the local vehicles (but not the investors) were party. That is precisely the type of claim that the Claimants bring here.

247 Accordingly, Professor Schreuer’s attempt to argue that the *Poštová banka* line of cases does not apply to the situation in the present case is untenable.

248 The Claimants also make their own attempt to avoid *Poštová banka* and its surrounding case law. They argue that, in these decisions, “the tribunals [...] disallowed claims as to the assets of a company in which the claimants held an interest but did not deny such claimants the right to bring indirect claims for damages suffered by the

⁴³⁸ **CS-0074**, *Sergei Paushok, CJSC Golden East Company & CJSC Vostokneftegaz Company v Government of Mongolia*, UNCITRAL (Award on Jurisdiction and Liability, 28 April 2011) ¶ 202 (emphasis added).

⁴³⁹ **RL-0006**, *Poštová banka v Greece*, Award, ¶ 244.

⁴⁴⁰ **RL-0009**, *ST AD v Bulgaria*, Award on Jurisdiction, ¶ 292.

⁴⁴¹ Schreuer Report, ¶ 166

⁴⁴² Schreuer Report, ¶¶ 194 198.

⁴⁴³ Memorial on Jurisdiction, ¶¶ 147 151.

company”.⁴⁴⁴ This is precisely Morocco’s point: such claims can be brought – but only where the investment comprises shares in the relevant company. As stated in the very passage from *Poštova banka* on which the Claimants rely: “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**”. That tribunal went on to say, “such claimant has no standing to pursue claims directly over the assets of the local company, **as it has no legal right to such assets**”.⁴⁴⁵

249 The Claimants also attempt to distinguish *Enkev v Poland*, noting that the tribunal’s “decision to reject the claimant’s claim in respect of that company was based on the language in of the Netherlands–Polish BIT and Polish law, not any fundamental principle of international law”.⁴⁴⁶ Again, this argument makes Morocco’s point for it. Polish law (like virtually all systems of corporate law) presumably does not allow a shareholder to claim in respect of the assets of a company. And this is the principled basis of the rule identified in *Poštova banka*:

“[A]s an independent legal entity, a company is granted rights over its own assets, which it alone is capable of protecting. **Claimants have not even attempted to establish whether there is a deviation of the ‘default position’ in the applicable domestic law.** In other words, Claimants have failed to prove that, under the applicable law, Istrokapital has any legal or contractual right to the GGB interests held by Poštová banka that would allow it to bring a treaty claim against Greece on the basis of an alleged impairment in such security entitlements.”⁴⁴⁷

250 Like the claimants in *Poštová banka* and *Enkev*, the Claimants here have not attempted to establish that under Cayman and/or Moroccan law, a shareholder has a right to claim with respect to the assets of a company (and it is not too late for them to do so). The Claimants cannot bring a claim with respect to the Put Rights or the Commodities where those assets were not owned by the Claimants, but by one or more Cayman entities.

⁴⁴⁴ Counter-Memorial on Jurisdiction, ¶ 93.

⁴⁴⁵ **RL-0006**, *Poštova banka v Greece*, Award, ¶ 245 (emphasis added).

⁴⁴⁶ Counter-Memorial on Jurisdiction, ¶ 93.

⁴⁴⁷ **RL-0006**, *Poštova banka v Greece*, Award, ¶ 230 (emphasis added).

(3) *The cases relied on by the Claimants are either distinguishable or wrongly decided*

- 251 The Claimants also identify various cases in which claimants have been entitled to bring claims with respect to assets owned by companies in which they hold shares.⁴⁴⁸ These are either distinguishable on their facts, and/or wrongly decided.
- 252 In *Mera v Serbia*, the tribunal held that a Cypriot investor was entitled to bring claims with respect to assets owned by its Serbian investment vehicle. However, this determination was *obiter*: the claimant's claim was with respect to the diminution of the value of its shares in the Serbian company, and expressly framed in those terms.⁴⁴⁹ Moreover, it does not appear that the cases on which Morocco now relies (including *Poštova banka*) were submitted to the *Mera* tribunal.
- 253 Furthermore, the *Mera* tribunal reached its conclusion on the basis of the BIT's preamble, which included references to creating "*favourable conditions for greater economic cooperation between the Contracting Parties*" and "*maintain[ing] favourable conditions for reciprocal investments*". It also considered the BIT's title, as a treaty for "*the Reciprocal Promotion and Protection of Investments*".⁴⁵⁰ No such language appears in the preamble to the FTA or its title, and so this analysis does not apply.
- 254 Finally, the *Mera* tribunal held that language such as that used in the preamble and title to the BIT rendered it "*legitimate to resolve uncertainty in interpretation so as to favour the protection of covered investments*".⁴⁵¹ This kind of teleological, 'pro-investor' interpretation has long been discredited, both in investment law⁴⁵² and international law more generally.⁴⁵³ On this basis, and to the extent the case is even relevant, *Mera* was wrongly decided. The correct approach is to adopt a balanced interpretation

⁴⁴⁸ Counter-Memorial on Jurisdiction, ¶¶ 91–92.

⁴⁴⁹ **CS-0086**, *Mera Investment Fund Limited v Serbia*, ICSID Case No ARB/17/2 (Decision on Jurisdiction, 30 November 2018) ¶¶ 117–118.

⁴⁵⁰ **CS-0086**, *Mera v Serbia*, Decision on Jurisdiction, ¶ 122.

⁴⁵¹ **CS-0086**, *Mera v Serbia*, Decision on Jurisdiction, ¶ 123 (citing *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/6 (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) ¶ 116).

⁴⁵² **RL-0097**, JR Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) ¶¶ 6.98–6.106; **RL-0076**, Gazzini, *Interpretation of International Investment Agreements*, 164–165.

⁴⁵³ **RL-0098**, I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn: MUP 1984) 130.

“taking into account both State sovereignty and the State’s responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow”.⁴⁵⁴ This methodology was adopted in *El Paso*, and led that tribunal to find that investors cannot bring claims with respect to assets owned by subsidiaries.⁴⁵⁵

255 *Von Pezold* – on which the Claimants also rely⁴⁵⁶ – was a very different case from the present. There, the question before the tribunal arose “in the context of the Tribunal’s remedial jurisdiction”,⁴⁵⁷ (i.e. the scope of its jurisdiction to award remedies) which was distinct from its jurisdiction *ratione personae*. In short, the case concerned the expropriation of white-owned farms in Zimbabwe. The claimants had claimed for the indirect expropriation of their shares in various Zimbabwean investment vehicles that owned the farms, and requested the tribunal to award compensation. However, the principal remedy requested was for ownership of the farms to be restored to the Zimbabwean vehicles. Properly characterized, therefore, the question for the tribunal was whether it had jurisdiction to make such an order despite the fact that the farms were not owned by the claimants; not whether it had jurisdiction over the claimants at all. That question could already be answered in the affirmative as the claimants owned the shares in the Zimbabwean vehicles, so that nothing turned on the extension of tribunal’s jurisdiction to the vehicles’ assets.

256 But beyond this, *von Pezold* is distinguishable from the present case for some of the same reasons as *Mera*. In the first place, *Poštová banka* and its allied cases do not appear to have been brought to the tribunal’s attention – with the *von Pezold* tribunal therefore not having the benefit of the careful analysis set out in those decisions.⁴⁵⁸ In the second, the tribunal’s analysis was again based on specific preambular wording in the relevant BITs – wording that is, again, absent from the FTA.⁴⁵⁹

⁴⁵⁴ **RL-0040**, *El Paso v Argentina*, Award, ¶ 70.

⁴⁵⁵ **RL-0040**, *El Paso v Argentina*, Award, ¶ 189.

⁴⁵⁶ Counter-Memorial, ¶ 92.

⁴⁵⁷ **CS-0080**, *Von Pezold v Zimbabwe*, Award, ¶ 317.

⁴⁵⁸ **CS-0080**, *Von Pezold v Zimbabwe*, Award, ¶ 321.

⁴⁵⁹ **CS-0080**, *Von Pezold v Zimbabwe*, Award, ¶ 323.

257 But to the extent that *von Pezold* is considered to be addressing the same points, it was wrongly decided. As clearly established by the line of cases that Morocco relies upon – including (*inter alia*) *AAPL*, *ST-AD*, *Enkev*, *Paushok*, *El Paso*, *BG Group*, *Karkey* and *Poštová bank* – a shareholder can bring no claim with respect to the assets of a company in which it holds shares. The most it can do it bring a claim with respect to the shares themselves, claiming diminution in the value thereof.

258 The Claimants (and Professor Schreuer) have failed to address Morocco’s objection and have not seriously engaged with the cases on which it relies. They instead preoccupy themselves with an objection that they would rather Morocco had made, but which it has not. The points made in the Memorial on Jurisdiction therefore stand largely unaddressed.⁴⁶⁰ The Tribunal should exclude the entirety of the Claimants’ claims as a result.

B The Claimants cannot claim with respect to the losses of Cayman entities

259 In the Memorial on Jurisdiction, Morocco pointed out that that *Poštová banka* line of cases is reinforced by the wording of FTA Article 10.15.1,⁴⁶¹ which is derived from NAFTA Articles 1116 and 1117.

(1) *FTA Article 10.15.1(a) requires that the Claimants identify loss or damage accruing to them directly*

260 FTA Article 10.15.1(a) provides, in the relevant part:

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

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

(i) that the respondent has breached

(A) an obligation under Section A,

⁴⁶⁰ Memorial on Jurisdiction, ¶ 146.

⁴⁶¹ Memorial on Jurisdiction, ¶ 152.

[...]

and

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

261 Article 10.5.1(b) provides that that a claimant may also bring such a claim on behalf of an “enterprise” of the respondent, being “any entity constituted or organized under [the law of the respondent], whether or not for profit, and whether privately owned or governmentally owned [...]”.⁴⁶²

262 Thus, what Article 10.15.1 does not allow is for the claimant to bring a claim for direct losses suffered by an entity domiciled in a third state. This, for present purposes, includes all of the Cayman-domiciled entities that the Claimants have identified: Q1, 2014-1 and/or 2015-1.

263 Professor Schreuer partly agrees with Morocco on this.⁴⁶³ He concedes that “Article 10.15.1 of the FTA is indeed modelled after Articles 1116 and 1117 of the NAFTA”.⁴⁶⁴ But he argues that in the present case, “the Claimants are claiming on their own behalf” as “[t]he alternative of a claim on behalf of an enterprise in Morocco does not present itself”.⁴⁶⁵ The Claimants adopt this as their submission, claiming that they are not claiming on behalf of Q1, 2014-1 and 2015-1, but on their own behalf “based on their direct and indirect ownership and/or control of the Investments”.⁴⁶⁶

264 The difficulty with this position is that it fails to analyse the text and function of FTA Article 10.15.1(a); and, in particular, the requirement that a claimant that purports to bring a claim on its own behalf must plead that it has “incurred loss or damage”. Critically, for this purpose, a prospective claimant must identify loss and damage that has accrued to it directly; it cannot claim in respect of loss and damage that has

⁴⁶² FTA Arts 1.3, 10.27.

⁴⁶³ Schreuer Report, ¶¶ 199–204.

⁴⁶⁴ Schreuer Report, ¶ 202.

⁴⁶⁵ Schreuer Report, ¶ 203.

⁴⁶⁶ Counter-Memorial ¶ 97.

accrued to it only indirectly – that is, by way of losses reflected from damage suffered in the first instance by a subsidiary.

265 This view has also been the clear and consistent position of the US in relation to the same treaty language, as reflected in its NAFTA Article 1128 submissions on Articles 1116 and 1117 of that treaty.⁴⁶⁷ The Tribunal thus has the benefit of a situation in which both state parties to the FTA agree on the proper interpretation of Article 10.15.1 and can proceed with confidence as a result. Nevertheless, and out of an abundance of caution, Morocco will set out its argument in full.

266 In essence, FTA Article 10.15.1(a) was specifically drafted to preserve the customary rule identified by the ICJ in *Barcelona Traction* and affirmed most recently in *Diallo*, viz. confirmation in international law of “*the principle of domestic law that a company is distinct from its shareholders*”.⁴⁶⁸ The upshot of this is that, as a matter of international law, “*whenever a shareholder’s interests are harmed through an act done to the company, it is to the latter he must look to institute appropriate action, for although two separate entities have suffered from the same wrong, it is only one entity whose rights have been infringed*”.⁴⁶⁹

267 Put another way, international law will only recognize only direct loss or damage suffered by shareholders.⁴⁷⁰ The categories of such loss, however, are limited. As the ICJ said in *Barcelona Traction*:

“It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. [...] But a distinction must be drawn

⁴⁶⁷ See **RL-0099**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware Inc v Government of Canada*, PCA Case No 2009-04 (Submission of the United States of America, 29 December 2017). See also **RL-0100**, *SD Myers Inc v Government of Canada*, UNCITRAL (NAFTA) (Submission of the United States of America, 18 September 2001) ¶¶ 6–10; **RL-0101**, *GAMI Investments Inc v United Mexican States*, UNCITRAL (NAFTA) (Submission of the United States of America, 30 June 2003) ¶¶ 2–18.

⁴⁶⁸ **RL-0068**, *Diallo* [2010] ICJ Rep 639, ¶¶ 155–156.

⁴⁶⁹ **CS-0146**, *Barcelona Traction, Light and Power Company Ltd (Belgium v Spain) (New Application: 1962)*, Second Phase [1970] ICJ Rep 3, ¶ 46.

⁴⁷⁰ **CS-0146**, *Barcelona Traction* [1970] ICJ Rep 3, ¶ 47. See also **RL-0099**, *Bilcon v Canada*, US Submission, ¶ 6.

between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company."⁴⁷¹

268 This rule, as noted, is preserved in FTA Article 10.15.1(a) which allows a claimant to bring a claim on its own behalf, for loss and damage suffered by it directly. This is also the logic behind NAFTA Article 1116⁴⁷² and Article 24(1)(a) of the 2012 US Model BIT.⁴⁷³

269 The rule in FTA Article 10.15.1(a) is subject to the exception provided in Article 10.15.1(b) – the equivalent of NAFTA Article 1117 and Article 24(1)(b) of the US Model BIT. This expressly allows for the claimant to claim in respect of losses suffered directly by a local enterprise (that is, indirectly by the claimant) – effectively circumventing the customary international law position confirmed in Article 10.15.1(a). But the exception is limited by Article 10.25(2), which provides that any amounts awarded pursuant to a derivative action under Article 10.15.1(b) be paid directly to the enterprise, so as not to prejudice other stakeholders in that entity (e.g. creditors and other shareholders).⁴⁷⁴

270 Furthermore, the existence of FTA Article 10.15.1(b) affirms that Article 10.15.1(a) does not derogate from the rule in *Barcelona Traction* – if the latter did contract out of customary international law, the former would be superfluous. Worse, if a shareholder could bring a derivative claim for the losses of a subsidiary under Article 10.15.1(a), the protection to other stakeholders in the enterprise provided in Article 10.25(2) would be completely undermined.⁴⁷⁵ As Professor Douglas QC has noted:

"It is difficult to imagine why a shareholder would elect to bring a claim for the account of its company if it had the option of bypassing the company altogether. The

⁴⁷¹ **CS-0146**, *Barcelona Traction* [1970] ICJ Rep 3, ¶ 47.

⁴⁷² **RL-0099**, *Bilcon v Canada*, US Submission, ¶ 4.

⁴⁷³ **RL-0102**, LM Kaplan & JK Sharpe, 'United States', in C Brown (eds), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 755, 824–825.

⁴⁷⁴ **RL-0011**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton & Bilcon of Delaware Inc v Government of Canada*, PCA Case No 2009-04 (Award on Damages, 10 January 2019) ¶ 388.

⁴⁷⁵ **RL-0099**, *Bilcon v Canada*, US Submission, ¶¶ 19–20.

company might be liable to pay creditors, local taxes and discharge other obligations before distributing the residual amount of any damages recovered to shareholders.”⁴⁷⁶

271 From a treaty interpretation perspective, therefore, the delineation between FTA Article 10.15.1(a) and 10.15.1(b) – not to mention the existence of Article 10.25(2) – serves as vital context for application of VCLT Article 31(1). And that context clearly indicates that Article 10.15.1(a) does not contract out of the default international position on shareholder protection – a position confirmed by the US in its NAFTA Article 1128 submissions and shared by Morocco here.

272 This context, moreover, is supplemented by the usual rule that an important principle of customary international law cannot be “*tacitly dispensed with, in the absence of any words making clear an intention to do so*”.⁴⁷⁷ In the absence of such clear words in Article 10.15.1(a), it is clear that no such derogation has occurred with respect to the rule in *Barcelona Traction*.

273 The upshot of all of this is that a claimant cannot bring a claim for the reflected losses of a subsidiary under FTA Article 10.15.1(a). This was recognized expressly by the tribunal in *Bilcon v Canada*:

*“The [need] not to allow payment of compensation to the investor in the context of a claim made under Article 1117 shows the importance of distinguishing claims for reflective loss under Article 1117 from claims under Article 1116. As the Respondent points out, to allow an investor to recover under Article 1116 damages that belong to its investment could have an impact on other stakeholders, including other investors in the investment. That is the reason why recovery of monetary damages in respect of claims made under Article 1117 are to be paid to the investment vehicle and not to the investor pursuant to Article 1135(2)(b). **The lack of any equivalent provision in relation to Article 1116 carries the implication that reflective loss was not contemplated under Article 1116.***

*In light of the above, the Tribunal is persuaded that the Respondent and the United States are in principle correct. **Articles 1116 and 1117 are to be interpreted to prevent claims for reflective loss from being brought under Article 1116.** This*

⁴⁷⁶ **RL-0060**, Douglas, *Investment Claims*, ¶ 848.

⁴⁷⁷ **RL-0103**, *Elettronica Sicula SpA (ELSI) (US v Italy)* [1989] ICJ 15, ¶ 50. See also **RL-0104**, *Loewen Group Inc v United States of America*, ICSID Case No ARB(AF)/98/3 (Award, 26 June 2003) ¶¶ 160, 162 (“[i]t would be strange indeed if sub silentio the international rule were to be swept away”).

follows from the wording of Article 1116 in its context, which includes Articles 1121 and 1135. Moreover, the Tribunal takes account of the common position of the NAFTA Parties in their submissions to Chapter Eleven tribunals.”⁴⁷⁸

274 On this basis, in the narrow situation where a putative investor (a) incorporates a subsidiary in a third state through which to make its investment without also, (b) incorporating a vehicle in the host state to serve as an enterprise, no claim for indirect loss can be brought under the FTA: Article 10.15.1(a) is clear in its intention not to depart from *Barcelona Traction* and the exception in Article 10.15.1(b) does not apply.

275 To this, the Claimants’ response is that as the FTA protects indirect investment through the definition of “investment” in Article 10.27.⁴⁷⁹ That is unavailing. That definition defines which assets may be given treaty protection. It says nothing about who has standing to claim for what loss and damage arising out of host state treatment directed towards those assets, which is the purpose of Article 10.15.1. The shared position of the US and Morocco on this matter is set out in the US’s NAFTA Article 1128 submissions in *Bilcon v Canada*, with which Morocco agrees:

“The approach taken by other tribunals allowing shareholders to claim indirect loss is inapposite in the context of [the FTA] as those cases typically involved investment treaties that did not address the limitations of shareholder claims under customary international law and reference ‘shares’ only in the context of definition of an investment. [The FTA], in contrast, creates an explicit regime, which must be treated as lex specialis.”⁴⁸⁰

276 The Claimants also argue that this shared approach may create practical difficulties with respect to complex investment structures, such as the one it has implemented here:

“It is important to note that the corporate structure of the entities involved in the Investments is not uncommon for investment companies. [...] 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. Those funds then ‘feed’ investor cash to the master fund, which then applies the capital towards investments.

⁴⁷⁸ **RL-0011**, *Bilcon v Canada*, Award on Damages, ¶¶ 388–389 (emphasis added).

⁴⁷⁹ Counter-Memorial on Jurisdiction, ¶ 97.

⁴⁸⁰ **RL-0099**, *Bilcon v Canada*, US Submission, ¶ 14.

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 protection.”⁴⁸¹

277 This is misconceived. The Tribunal is not a policy body, but an international tribunal empanelled to determine a dispute according to international law within the terms of the FTA. The protection offered to private investors by investment treaties is not a right; it is a privilege extended by states, and subject to their consent. If a putative investor chooses to structure its affairs in way that exceeds the limits of that consent, it is allowed to do so. But having made that choice, it cannot complain that the bargain struck by the treaty parties is not to its liking. In the present case, it is not obvious at all that the US and Morocco intended to extend the exceptional protection of the FTA to US nationals who chose to structure their business outside the US in order to minimise their tax liabilities. Indeed, in the case of the US, the loss of tax revenue occasioned by this restructuring would be a disincentive to extend treaty protection to such entities, as their activities deprive the US Treasury of revenue that would otherwise accrue.

278 Furthermore, it is not as though the limits of the parties' consent are narrowly drawn. The Claimants could easily have structured their affairs to remain within its parameters in this regard. They could have incorporated a Moroccan vehicle to serve as an enterprise for the purposes of Article 10.15.1(b). Or they could have kept all of their operations in the US, in which case a claim for direct loss under Article 10.15.1(a) would have been possible. Or, if they absolutely had to route their investments through a third state subsidiary, they could have incorporated that subsidiary in any of the 50 plus states with which Morocco has an investment treaty presently in force.

279 But the Claimants did none of these things. Instead, they chose to situate critical parts of their corporate structure in the Cayman Islands – a jurisdiction that, whilst offering certain tax advantages, has no investment treaty with Morocco. The

⁴⁸¹ Counter-Memorial on Jurisdiction, ¶ 98.

Claimants were entitled to prioritize obtaining these advantages over acquiring treaty protection. Morocco does not criticize this choice. But it does point out that actions have consequences – and the main consequence of the Claimants’ scheme in this case is that none of them is entitled to claim indirectly for the alleged losses of Q1, 2014-1 and 2015-1 under FTA Article 10.15.1(a). The Claimants cannot have their cake and eat it.

(2) *The loss and damage identified by the Claimants was incurred indirectly through the Cayman entities and cannot form the basis of a valid claim under FTA Article 10.15.1(a)*

280 Examination of the Claimants’ Memorial and that of their expert, Mr Walck, confirms that their claim is impermissible under FTA Article 10.15.1(a). In the relevant section of the Memorial, the Claimants’ case is entirely cast in terms of “their” Put Rights and “their” Commodities.⁴⁸² The resulting claim for damages is consequently framed as “the total net cost of the Commodities and the total value of Claimants’ Put Rights”,⁴⁸³ plus interest and minus certain additional amounts paid under the Forbearance Agreement with SAMIR of 1 October 2015.⁴⁸⁴

281 On this basis, the Claimants claims are for losses allegedly incurred by Q1, 2014-1 and 2015-1. On the Claimants own cases, they were only incurred by the Claimants indirectly, if at all. As noted, they are claims made on behalf of an entity that cannot be considered Claimants under FTA Article 10.15.1(a) or qualifying enterprises for the purposes of Article 10.15.1(b).

282 This framing of the Claimants claims raises a jurisdictional bar to their claims. It could also be considered an issue of admissibility. FTA Article 10.15.1(a)(ii) makes clear that an essential ingredient of a valid claim is that the prospective claimant allege “on its own behalf” that it has “incurred loss or damage” as a consequence of the respondent’s acts. A claim that does not do this by specifying the damage that has

⁴⁸² See e.g. Memorial, ¶¶ 181–186.

⁴⁸³ Memorial, ¶ 185.

⁴⁸⁴ Memorial, ¶¶ 186–191.

accrued to the claimant directly is *ex facie* invalid and cannot be submitted to arbitration. It is important to note that this is not a question of proving the allegations of loss so made: that is a question for the merits. But the allegation must bring the claim within the four walls of Article 10.15.1(a) in order to be within the Tribunal's jurisdiction or otherwise admissible.

283 This is hardly a new understanding of the way in which the consent-based jurisdiction of a treaty tribunal works. The basic principle was set out in 1923 by the US–Germany Mixed Claims Commission, in its *Administrative Decision No II*:

*“When the allegations in a petition or memorial presented [...] bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches. If the allegations are controverted in whole or in part [...] the issue thus made must be decided by the Commission. Should the Commission so decide such issue that the claim does not fall within the terms of the Treaty, it will be dismissed for lack of jurisdiction.”*⁴⁸⁵

284 As matters stand, therefore, the claims formulated by the Claimants in their Memorial are outside the jurisdiction of the Tribunal (as set by the terms of FTA Article 10.15.1(a)) or otherwise inadmissible. The Tribunal should exclude them as a result.

⁴⁸⁵ **RL-0104**, *Administrative Decision No II* (1923) VII RIAA 23, 25 (emphasis added).

VI OBJECTION 4: THE CLAIMANTS HAVE NOT “MADE” AN INVESTMENT IN MOROCCO FOR THE PURPOSES OF FTA ARTICLE 10.27

285 Finally, Morocco turns to its fourth objection to jurisdiction, which that none of the Claimants satisfies the definition of “investor of a Party” in FTA Article 10.27 – which positively requires that a protected investor is one that “concretely attempts to *make*, is *making* or has *made* an investment in the territory of the other Party” (emphasis added).⁴⁸⁶ This is an objection based solely on proper interpretation and application of the FTA – it does not depend on any wider principle of international law.

286 Again, the relevant part of the Counter-Memorial on Jurisdiction relies heavily on Professor Schreuer.⁴⁸⁷ Morocco will therefore address the Claimants’ arguments largely through a rebuttal of his report.⁴⁸⁸

A FTA Article 10.27 requires that an investor positively “make” an investment

287 The relevant part of Professor Schreuer’s report begins by erecting and attacking a straw man: that Morocco is somehow attempting to tear down the concept of shareholder protection in international law.⁴⁸⁹ Morocco is doing no such thing; rather, it is asking the Tribunal to look to the plain wording of the FTA, and apply it to the case at hand.⁴⁹⁰

(1) Standard Chartered Bank v Tanzania and other cases are clearly analogous to the present case and support Morocco’s view

288 In principle, Morocco’s positive case is that, in order for the Tribunal to have jurisdiction *ratione personae* over the Claimants, each claimant must demonstrate that it was an active participant in the investment process and was contributing some resource towards the final alleged investment. It is clear that none of the Claimants meets this essential criterion.

⁴⁸⁶ Memorial on Jurisdiction, §VI.

⁴⁸⁷ Counter-Memorial on Jurisdiction, §VII.

⁴⁸⁸ Schreuer Report, §VI.

⁴⁸⁹ Schreuer Report, §VI.A.

⁴⁹⁰ See Memorial on Jurisdiction, ¶ 158.

289 The key authority relied on by Morocco in this respect is *Standard Chartered Bank v Tanzania*.⁴⁹¹ Professor Schreuer addresses this case, and pointedly does not disagree with its outcome.⁴⁹² Rather, he claims it was based on “*somewhat unusual*” facts, whereby a UK claimant sought to claim as investments loans purchased by its Hong Kong subsidiary from a Malaysian bank, in circumstances where the UK claimant played no active role in acquiring or managing the loans, and contributed no money of its own to their purchase. But the difficulty is that, with most of the Claimants in this case, the facts of *Standard Chartered Bank* are replicated (and, in reality, are not that unusual), such that the case is clearly analogous. This has already been addressed in the Memorial on Jurisdiction⁴⁹³ and will be returned to further below.⁴⁹⁴

290 A further attempt to distinguish *Standard Chartered Bank* from the FTA in this case is made by the Claimants themselves. As this argument is not replicated in the Schreuer Report, Morocco infers that he was understandably not prepared to support the Claimants’ argument. The Claimants do not disagree with the outcome in *Standard Chartered Bank*, but go on to argue that:

“[T]he jurisdictional dispute in *Standard Chartered Bank* centred 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 another Contracting Party concerning an **investment** of the latter in the territory of the former’. [...] This Tribunal need not engage in a similar analysis [to that of the *Standard Chartered Bank* tribunal] 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.”⁴⁹⁵

⁴⁹¹ Memorial on Jurisdiction, ¶ 161.

⁴⁹² Schreuer Report, ¶ 208. Professor Schreuer also claims that *Standard Chartered Bank* is Morocco’s “*only case authority*” for this objection: Schreuer Report. This is not correct. In the Memorial on Jurisdiction, Morocco also relies on **RL-0043**, *Alapli Elektrik BV v Republic of Turkey*, ICSID Case No ARB/08/13 (Excerpts of Award, 16 July 2012) ¶¶ 355–361; Memorial on Jurisdiction, ¶ 163 (fn 173). As this largely replicates the reasoning of *Standard Chartered Bank*, Morocco will not burden the Tribunal with a further analysis.

⁴⁹³ Memorial on Jurisdiction, §VI.B.

⁴⁹⁴ See below at §VI.C.

⁴⁹⁵ Counter-Memorial on Jurisdiction, ¶ 126 (emphasis original).

291 The Claimants have missed the point of *Standard Chartered Bank*, as set out in the Memorial on Jurisdiction.⁴⁹⁶ There, the tribunal was confronted with the ambiguous language “*investment of the latter*”. It was therefore forced look elsewhere in the relevant BIT to understand what an investment “*of*” might mean. It alighted on references to investments “*made*” (which the tribunal considered unambiguous) within the treaty, and used these as context to determine the meaning of “*of*” – pointing out in the process that the BIT “*nowhere uses the verb ‘own’ or ‘hold’ in connection with an investment by or of an investor*”.⁴⁹⁷

292 But in FTA Article 10.27, no such search for meaning is required: the unambiguous verb “*made*” is included in the definition of “*investor of a Party*”. All that remains is for the Tribunal to apply it as requiring “*action in bringing about an investment, rather than purely passive ownership*”.⁴⁹⁸ The fact that the verb “*own*” is used elsewhere in the FTA is irrelevant.

293 This view is confirmed by a proper analysis of the Article 10.27. The provision contains two definitions relevant to this question, which the Claimants have elided.

294 The first – which the Claimants address – is the definition of “*investment*”. This provides that an investment is an asset that an investor “*owns and controls*”. The second – on which Morocco’s objection is actually based⁴⁹⁹ – is “*investor of a Party*”. This provides that:

“investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that concretely attempts to make, is making, or has made an investment in the territory of the other Party [...].”

295 Of the two definitions, “*investor of a Party*” is the more important within the schema of the FTA. It is only an “*investor of a Party*” that can be considered a “*claimant*”, and therefore entitled to commence arbitration under Article 10.15. Thus, an

⁴⁹⁶ Memorial on Jurisdiction, ¶ 161.

⁴⁹⁷ **RL-0018**, *Standard Chartered Bank v United Republic of Tanzania*, ICSID Case No ARB/10/12 (Award, 2 November 2012) ¶ 222 223.

⁴⁹⁸ **RL-0018**, *Standard Chartered Bank v Tanzania*, Award, ¶ 222 223.

⁴⁹⁹ Memorial on Jurisdiction, ¶¶ 159 162.

“investment” forms an element of – and is subservient to – the definition of *“investor of a Party”*, which separately requires that the investment be *“made”*. Put another way, while the definition of *“investment”* describes the universe of assets that may attain treaty protection when owned or controlled by an investor, the definition of *“investor of a Party”* applies a further limitation to the Tribunal’s jurisdiction – by requiring a national or enterprise of the US or Morocco to have *“made”* an investment before it becomes an *“investor of a Party”*.⁵⁰⁰

296 The differing language in these definitions suggests a deliberate choice by the US and Morocco. If, as the Claimants suggest, the word *“made”* in the definition of *“investor of a Party”* adds nothing to the words *“owns and controls”* in the definition of *“investment”*, then the parties to the FTA would have used the same language in both definitions to prevent arguments of this kind. Instead, they not only materially changed the language in the definition of *“investor of a Party”*, but they repeated that change three times: *“attempts to make, is making, or has made”* (emphasis added).

297 On this basis, the Claimant’s attempt to make something of the linguistic differences between these two definitions is misguided. Professor Schreuer was right not to adopt this position and the Tribunal should do likewise.

298 Other cases establish that investment activity in the sense required by the FTA cannot take place in the absence of some kind of economic interest in the transaction in question. Put another way, it is not possible to *“make”* an investment in the ordinary sense of the word – even if planning and executing the investment – without taking some stake in the investment so made. As will be appreciated, this has particular significance for CCM, which in its role as investment manager had no ownership interest in either the Put Rights or the Commodities, nor any economic interest in the same.

299 In *Blue Bank v Venezuela* the BIT defined an *“investment”* as *“every kind of asset invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party”*, and extended the tribunal’s jurisdiction to *“disputes between one Contracting*

⁵⁰⁰ Memorial on Jurisdiction, ¶ 167.

Party and a national or company of the other Contracting Party concerning an obligation of the former [...] in relation to an investment of the latter".⁵⁰¹ The claimant in that case was a corporate trustee – a position analogous to an investment manager.

300 The tribunal described the claimant's role in relation to its alleged investments as follows:

"Blue Bank exercises the function of a trustee – a sui generis legal construct – and as such it acts in its own name but on behalf of a trust in furtherance of certain third party interests (whether for a person or a purpose). As a trustee, Blue Bank does not own the assets, but simply manages and administers them, for a particular purpose [...] or to the benefit of a third party [...]. It follows that, in acting as its capacity as trustee, the Claimant cannot be considered as having committed any assets in its own right, as having incurred any risk, or as sharing the loss or profit resulting from its investment. As appears from the Trust Deed, the emolument flowing to the Claimant for the discharge of services as Trustee of the Qatar Trust is for a fixed annual fee and nothing else.

*The plain and ordinary meaning of Article 8(1) of the BIT makes it clear that the Tribunal's *ratione personae* jurisdiction is predicated on the Claimant having made an 'investment'. An 'investment' is defined in Article 1(a) of the BIT as 'every kind of asset invested by [...] companies of one Contracting Party'. Determinative for Blue Bank's standing is therefore the question whether it has made an investment."⁵⁰²*

301 On this basis, the *Blue Bank* tribunal reached the unsurprising conclusion that it had no jurisdiction *ratione personae* over the claimant:

"Blue Bank, as a trustee holding the assets of the Qatar Trust for the ultimate benefit of third party interests, does not own the assets of the Qatar Trust, did not invest these assets for its own account and cannot, therefore, ground jurisdiction on any investment made by it as required by Article 1(a) and 8(1) of the BIT.

The Tribunal has thus reached the conclusion that Blue Bank has no ownership rights in respect of the assets of the Qatar Trust, that it has not brought a claim on its own behalf – whether as a nominal or beneficial owner – and that, accordingly, Blue Bank has not invested the relevant assets under the terms of the BIT."⁵⁰³

⁵⁰¹ **RL-0106**, Barbados Venezuela BIT (1994), Arts 1(a), 8(1).

⁵⁰² **CS-0032**, *Blue Bank v Venezuela*, Award, ¶¶ 153–154.

⁵⁰³ **CS-0032**, *Blue Bank v Venezuela*, Award, ¶¶ 172–173.

302 As the Tribunal will appreciate, each of the above cases touches on the position of at least one of the Claimants in the present case. On no view, therefore, can any of them be seen as “investors of a Party” in the sense required by FTA Article 10.27. This point will be returned to in due course.

(2) *The cases relied on by the Claimants are clearly inapposite or support Morocco’s position*

303 Beyond this, the cases relied on by Professor Schreuer (and, by extension, the Claimants) to establish that the word “made” in FTA Article 10.27 should bear a meaning other than its plain and ordinary one are either (a) not applicable to the present case, or (b) actually support Morocco.⁵⁰⁴ Morocco addresses the former category in **Table C of Annex 2**. The latter category is addressed here.

304 The first case to consider is *Gold Reserve v Venezuela*.⁵⁰⁵ Contrary to what Professor Schreuer says, it actually supports Morocco. The BIT in that case was framed in similar terms to the FTA, speaking of “any enterprise [...] who makes the investment in the territory of Venezuela”.⁵⁰⁶ The Canadian claimant in that case acquired its investment – shares in a Venezuelan entity – via a share swap with its US parent, at the end of which the Canadian ‘subsidiary’ owned the US ‘parent’ which, in turn, owned the Venezuelan vehicle said to constitute the investment. The respondent argued that the claimant’s act of acquiring a company that already owned an investment was not, for the purposes of the BIT, the same as “making” that investment. On its view, to “make” an investment would require positive movement of capital into Venezuela.⁵⁰⁷

305 The tribunal disagreed, holding that the requirement that the claimant “make” the investment was met through its acquisition of the US company as part of the restructuring.⁵⁰⁸ Moreover, the tribunal also pointed out that from the point at which

⁵⁰⁴ Schreuer Report, ¶¶ 211–224.

⁵⁰⁵ Schreuer Report, ¶¶ 213–218.

⁵⁰⁶ **CS-0079**, *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1 (Award, 22 September 2014) ¶ 222

⁵⁰⁷ **CS-0079**, *Gold Reserve v Venezuela*, Award, ¶¶ 229–230.

⁵⁰⁸ **CS-0079**, *Gold Reserve v Venezuela*, Award, ¶¶ 260–262.

the share swap occurred, the claimant served as the primary funder for the Venezuelan entity, as it was able to source some US\$300 million of additional capital from the Canadian stock exchange.⁵⁰⁹ Pointedly, the tribunal found that the requirement that the investment be “made” by the claimant implied that the claimant had to undertake a positive act in order to bring about the investment – indeed, it found that the claimant actively made an investment, and so the requirement was satisfied. In this sense, *Gold Reserve* is entirely consistent with and, indeed, affirms, *Standard Chartered Bank*.

306 Another decision that supports Morocco is *MNSS & RCA v Montenegro*.⁵¹⁰ Again, that case concerned a BIT that made several references to an investment “made” by the investor. The second claimant in the case was an assignee of loan claims from the first claimant. It then administered these claims through the extension of the loans’ terms from time to time.⁵¹¹ The respondent argued that this was not sufficient to meet the requirement of “making” an investment in the BIT. The tribunal disagreed, holding that this requirement “does not mean that an investor, once a loan is made or equity in a company is acquired, needs to make further investments or be particularly active in the management of the investment”,⁵¹² and further that the second claimant had made a material contribution to the investment through extension of the loan terms.⁵¹³

307 Again, just like the *Gold Reserve*, *Standard Chartered Bank* and *Blue Bank* tribunals, the *MNSS & RCA* tribunal populated the requirement of “making” an investment with substantive content: on no view was it acceptable for a putative investor to be the passive beneficiary of others’ investment activities. The case therefore supports Morocco.

⁵⁰⁹ CS-0079, *Gold Reserve v Venezuela*, Award, ¶ 271.

⁵¹⁰ Schreuer Report, ¶ 219.

⁵¹¹ CS-0110, *MNSS BV & Recupero Credito Acciaio NV v Montenegro*, ICSID Case No ARB(AF)/12/8 (Award, 4 May 2016) ¶ 56.

⁵¹² CS-0110, *MNSS & RCA v Montenegro*, Award, ¶ 204.

⁵¹³ CS-0110, *MNSS & RCA v Montenegro*, Award, ¶ 203.

308 *Flemingo v Poland* is another case that supports Morocco. The BIT in that case defined “investment” as “every kind of asset established or acquired” – with the tribunal finding that acquisition of an existing investment by the investor met this requirement, applying *Gold Reserve* to reach this conclusion.⁵¹⁴ Moreover, the tribunal made an interesting comment on *Standard Chartered Bank* even as it distinguished it from the case before it, noting that the decision was relevant “for bilateral investment treaties which require investments *be made* in the territory of the host state”.⁵¹⁵ The *Flemingo* tribunal would therefore have agreed that *Standard Chartered Bank* was applicable to the definition of “investor of a Party” as it appears in FTA Article 10.27 – and, in particular, its drafters’ bargain that only “a national or an enterprise of a Party, that [...] has made an investment in the territory of the other Party” can be given treaty protection.

309 Finally, *Mera v Serbia* is supportive of Morocco. There, the critical definition was that of “investor” for the purposes of Article 1(3)(b) of the Cyprus–Serbia BIT. This provided that an “investor” could be:

“[A] legal entity incorporated, constituted or otherwise duly organised according to the laws and regulations of one Contracting Party having its seat in the territory of that same Contracting Party and investing in the territory of the other Contracting Party.”⁵¹⁶

310 The tribunal held that the act of investing in the relevant sense “comprise[d] more than the funding and acquisition of investments, but as well, the holding and management of investments”.⁵¹⁷ In this, the tribunal did not say that the mere “holding” of an investment would be sufficient to create an “investor” – but imposed a further requirement of “management”. Once again, therefore, the *Mera* tribunal impliedly concluded that mere passive ownership of the investments, independent of any actual investment activity, could not create an investor.

⁵¹⁴ CS-0210, *Flemingo Duty Free Shop Private Limited v Republic of Poland*, UNCITRAL (Award, 12 August 2016) ¶¶ 314–316.

⁵¹⁵ CS-0210, *Flemingo v Poland*, Award, ¶¶ 323–324 (emphasis added).

⁵¹⁶ RL-0107, Cyprus–Serbia BIT (2005), Art 1(3)(b).

⁵¹⁷ CS-0086, *Mera Investment Fund Limited v Republic of Serbia*, ICSID Case No ARB/17/2 (Decision on Jurisdiction, 30 November 2018) ¶ 107.

311 Professor Schreuer concludes this section of his report with a remarkable generalization: “[t]hese cases indicate that it is not necessary for an investor to participate actively in the establishment of the investment. A mere passive ownership of the investment will suffice”.⁵¹⁸ As the above analysis shows, this is wrong. Not only are generalizations of this kind unacceptable (as the wording of the FTA is a *lex specialis*), but none of the cases cited stand for this broad proposition. All were dependent on the terms of the particular treaty before their respective tribunals.

312 Furthermore, and as already shown, a number of the cases Professor Schreuer refers to – e.g. *Gold Reserve*, *MNSS & RCA*, *Flemingo* and *Mera* – actually support Morocco’s view that the inclusion of terms such as “made” in an investment treaty connotes a requirement of positive investment activity by the putative investor, whether in the establishment of the investment or its subsequent management. When added to cases such as *Standard Chartered Bank*, *Alapli Elektrik* and *Blue Bank*, the picture that emerges is one that clearly affirms Morocco’s position: that the definition of “investor of a Party” in FTA Article 10.27 will prevent a purely passive entity from gaining treaty protection, and will further exclude any entity undertaking investment activity on behalf of another without any economic interest in the underlying transaction.

B FTA Article 10.27 requires a putative investor to undertake investment activity “concretely”

313 Professor Schreuer⁵¹⁹ and the Claimants⁵²⁰ also attempt to rebut Morocco’s argument that the adverb “concretely” – in conjunction with the requirement that an investment be “made” in the definition of “investor of a Party” in FTA Article 10.27 – places additional limitations on the Tribunal’s jurisdiction *ratione personae*.⁵²¹

⁵¹⁸ Schreuer Report, ¶ 224.

⁵¹⁹ Schreuer Report, §IV.B.

⁵²⁰ Counter-Memorial on Jurisdiction, §VII.A.

⁵²¹ Memorial on Jurisdiction, ¶ 164.

314 The Claimants' response is again based on Professor Schreuer's report.⁵²² His answer is that the adverb "concretely" in the phrase "concretely attempts to make, is making, or has made an investment" applies only to the first part of the formula ("attempts to make") and not to the final two ("is making" and "has made"). He says this reading emerges from "[t]he placement of the word 'concretely' and the use of commas" – although he does not explain what he means by this.⁵²³

315 Professor Schreuer is wrong. Under generally accepted rules of English syntax, an initial modifier (be it an adverb or adjective) will tend to govern all elements in a series unless a different modifier appears. Thus, where (as here) a series consists of verbs ("attempts to make, is making or has made") in which the first verb is modified by an adverb ("concretely"), the reader will expect the adverb to modify the other verbs in the series as well.

316 The point was well made by the California Court of Appeal in *Ward General Insurance v Employers' Fire Insurance*, in interpreting the policy language "direct physical loss of or damage to Covered Property". The Court held that for the adjectives "direct" and "physical" to apply only to the element "loss of", and not "damage to", the property would constitute "a strained and clumsy reading". The Court went on to explain why:

*"Most readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series unless another adjective appears. For example, if a writer were to say, 'The orphanage relies on donors in the community to supply the children with used shirts, pants, dresses, and shoes,' the reader expects the adjective 'used' to modify each element in the series of nouns, 'shirts,' 'pants,' 'dresses,' and 'shoes.' The reader does not expect the writer to have meant that donors supply 'used shirts,' but supply 'new' articles of the other types of clothing. Thus, we construe the words 'direct physical' to modify both 'loss of' and 'damage to.'"*⁵²⁴

317 Given this ordinary presumption, had the FTA's drafters intended that "concretely" apply to "attempts to make" but not to "is making" and "has made" in defining an

⁵²² Counter-Memorial on Jurisdiction, ¶¶ 122.

⁵²³ Schreuer Report, ¶ 226.

⁵²⁴ **RL-0108**, *Ward General Insurance Services Inc v Employers Fire Insurance Co*, Docket No G031624 (California Court of Appeal, Fourth District, Division Three, Judgment, 17 December 2003) 4.

“investor of a Party”, they would have used a different construction to make that clear – e.g. “attempts to make concretely”.⁵²⁵ The same effect could also have been achieved through the use of semicolons (“concretely attempt to make; is making; or has made”), enumeration (“(i) concretely attempts to make, (ii) is making, or (iii) has made”) or just reordering the series (“is making, has made, or concretely attempts to make”). The fact that the US and Morocco did not have recourse to these obvious methods of making clear the meaning for which the Claimants now contend reflects a deliberate choice – for Morocco’s interpretation.

318 But this debate may well be sterile in any event. Morocco’s argument on “concretely” is ancillary to its principal submission concerning the word “made”. As already set out,⁵²⁶ there is considerable case law demonstrating that word alone connotes a requirement of active investment according to which a putative claimant will only be within the Tribunal’s jurisdiction *ratione personae* if “the investment was made at the claimant’s direction, [...] the claimant funded the investment or [...] the claimant controlled the investment in an active and direct manner”.⁵²⁷

319 On the facts, and as already set out in the Memorial on Jurisdiction, it is clear that none of the Claimants meet this threshold requirement and are so outside the Tribunal’s jurisdiction *ratione personae*.⁵²⁸ Morocco returns to that point now.

C None of the Claimants has met the active investment requirement of FTA Article 10.27

320 The Claimants’ response to Morocco’s case that they failed to meet to active investment requirement of FTA Article 10.27 is very faint indeed.

321 In the first place, they attempt to distinguish *Standard Chartered Bank* on the basis that the tribunal in that case “readily admit[ted] that an investment might be made indirectly,

⁵²⁵ Indeed, the drafters could have made the point by putting the adverb literally anywhere else in the phrase, e.g. “attempts concretely to make”, “attempts to concretely make” (granted, a split infinitive) and “attempts to make concretely”.

⁵²⁶ See above at §VI.A.

⁵²⁷ **RL-0018**, *Standard Chartered Bank v Tanzania*, Award, ¶¶ 230–232.

⁵²⁸ Memorial on Jurisdiction, §§VI.B, C.

for example through an entity that serves to channel an investor's contribution into the host state"⁵²⁹ – which is said to be what happened here.⁵³⁰

322 This represents a fundamental misreading of *Standard Chartered Bank*. In the passage quoted by the Claimants, the *Standard Chartered Bank* tribunal was simply demonstrating that it was not *a priori* hostile to the notion of indirect investment, or to investment through a special purpose vehicle. What it did find objectionable was the idea that an entity could bring a claim under the relevant BIT solely because it happened to share the same corporate structure as the entity that actually “made” the investment – while having no actual involvement in that investment activity.

323 This is shown by the very next paragraph of *Standard Chartered Bank*, to which the Claimants do not refer. There, it was said:

*“Under the facts of the present case, Claimant made no contribution to any relevant loans, taking no action to constitute the making of an investment. Also Claimant has neither exercised any control over any credit to the Tanzanian debtor nor provided any direction to SCB Hong Kong related to the making of the Loans. Admittedly, Claimant does own a substantial equity interest in a Hong Kong company, which in turn holds Tanzanian debt acquired from Malaysian financial institutions. However, an indirect chain of ownership linking a British company to debt by a Tanzanian creditor does not in itself confer the status of investor under the UK-Tanzania BIT.”*⁵³¹

324 As was set out in the Memorial on Jurisdiction,⁵³² this precisely matches the situation for the majority of the Claimants.

325 The Claimants have not proved that the Passive Companies had any role at all in the investment activities of Q1, 2014-1 or 2015-1. Despite the remarkable claim that “*all of the Claimants [...] made the decisions to invest in the SAMIR Transactions and funded*

⁵²⁹ **RL-0018**, *Standard Chartered Bank v Tanzania*, Award, ¶ 199.

⁵³⁰ Counter-Memorial on Jurisdiction, ¶ 129.

⁵³¹ **RL-0018**, *Standard Chartered Bank v Tanzania*, Award, ¶ 200. See also *ibid*, ¶ 198:

“[T]o constitute Claimant’s status as treaty investor, so that the Loans may be considered investments “of” Claimant, implicates Claimant doing something as part of the investing process, either directly or through an agent or entity under the investor’s direction. No such actions were performed.”

⁵³² Memorial on Jurisdiction, §VI.B.

those investment activities”,⁵³³ there is no evidence at all that any of the Passive Companies: (a) directed the decision-making process surrounding the Claimants’ alleged investment activities; (b) contributed any money or resource of their own to those alleged activities; and/or (c) otherwise controlled those alleged activities in an active and direct manner. Taking each in turn:

325.1 The General Partner is said to have an ownership interest in the Onshore Feeder – such that it, in turn, owns Q1 via the Master Fund.⁵³⁴ But, as held in *Standard Chartered Bank*, mere ownership and the potential for control is not sufficient to meet the requirement of active investment – active and direct control in fact must be demonstrated.⁵³⁵ In the absence of any evidence that the General Partner actually had a hand in designing or implementing the Repo Transactions and/or contributed its own funds to the Repo Transactions, it cannot meet the active investment requirement. In any case, as Versant explain, it is the limited partnership interest which reflects the economic stake in the underlying vehicle, and not the general partnership interest:

“Generally, LP interest reflects economic interest in the entity itself while economics of the GP interest is composed of fees earned on the LP capital it manages and the ability to influence the structure of the vehicle (e.g. the Board). In arriving at the sources of capital that are ‘at risk’, the LP Interest is the relevant figure to focus upon.”⁵³⁶

325.2 At the time of the alleged expropriation, TC Group Investment Holdings’ interest in Q1 was limited to a small limited partnership interest in the Onshore Feeder (with 99.97 per cent of that interest owned by the Maryland Pension System) and an interest in the Offshore Feeder – which owned 0.04 per cent of the participating share in the Master Fund, which in turn owned Q1. By the Claimants’ own admission, this qualifies (barely) as an ownership

⁵³³ Counter-Memorial on Jurisdiction, ¶ 130.

⁵³⁴ Counter-Memorial on Jurisdiction, ¶ 102 (point 3).

⁵³⁵ **RL-0018**, *Standard Chartered Bank v Tanzania*, Award, ¶¶ 230–232.

⁵³⁶ Versant Report, ¶ 104(b).

interest in Q1⁵³⁷ – and is in no way reflective of the kind of control and/or contribution that would meet the active investment requirement.

325.3 TC Group’s interest is precisely the same as TC Group Investment Holdings’, but is supplemented by an 83 per cent ownership interest in CCM, such that TC Group is said to indirectly control the alleged investments.⁵³⁸ But again, mere potential for control of CCM is not sufficient for the active investment requirement – TC Group must be able to demonstrate active participation in and/or contribution towards Q1’s investment activities. No evidence of this kind of qualifying participation and contribution appears on the record.

325.4 Finally, The Carlyle Group is said to have “*indirect ownership and control over the other Claimants and their Investments*” by virtue of being the parent company of the group. This is presented by way of a bare assertion, with no further elaboration given.⁵³⁹ Even if true, this places The Carlyle Group in the exact same situation as the claimant in *Standard Chartered Bank*. It is therefore the paradigmatic example of a claimant that cannot meet the active investment requirement.

326 On this basis, none of the Passive Companies can meet the active investment requirement of FTA Article 10.27. The Tribunal must reject jurisdiction over their claims as a consequence.

327 Turning to the Onshore Feeder, the Claimants claim that it meets the active investment requirement through its ownership (via the Master Fund) of Q1 and its contribution of certain funds to Q1’s alleged investment activities.⁵⁴⁰ As to the first point, *Standard Chartered Bank* establishes that mere passive ownership is not sufficient to meet the active investment requirement. So far as the Onshore Feeder’s contribution is concerned, the requirement of a “*concrete*” investment under FTA Article 10.27 means that this is not sufficient to meet the requirement – but even if it

⁵³⁷ Counter-Memorial on Jurisdiction, ¶ 102 (point 4).

⁵³⁸ Counter-Memorial on Jurisdiction, ¶ 102 (point 4).

⁵³⁹ Counter-Memorial on Jurisdiction, ¶ 102 (point 5).

⁵⁴⁰ Counter-Memorial on Jurisdiction, ¶ 102 (point 1).

was, the Claimants have not proved that the funds contributed to Q1 by the Onshore Feeder were actually used to fund the Repo Transactions.⁵⁴¹ On this basis, the Onshore Feeder has again failed to meet the active investment requirement.

328 This leaves CCM in its role as investment manager of Q1, 2014-1 and 2015-1. As already explained, the Claimants' claims that CCM had total control of these Cayman entities – and therefore corresponding control of the Claimants' alleged investment operation – are exaggerated. In reality, it was little more than a service provider that gave guidance to those it advised and otherwise acted as an “agent” or “attorney-in-fact”.⁵⁴² As the Memorial on Jurisdiction pointed out,⁵⁴³ this is not sufficient to meet the requirement in FTA Article 10.27 that an investment be “concretely [...] made”, as CCM was only ever undertaking investment activity on behalf of those it advised, without contributing its own capital to the enterprise and without assuming material risk outside of extreme circumstances. Thus, CCM too fails to meet the active investment requirement of FTA Article 10.27 – as did the trustee in *Blue Bank*.

329 In the premises, none of the Claimants can be considered an “investor of a Party” under FTA Article 10.27, on the basis that none of them has “concretely [...] made” an investment. Rather, all relevant activity was carried out by Q1, 2014-1 and 2015-1. As a result, the Tribunal must decline jurisdiction *ratione personae* over all of the Claimants' claims.

⁵⁴¹ See above at §§II.D, III.B(1)(b)

⁵⁴² See above at ¶ 71.

⁵⁴³ Memorial on Jurisdiction, ¶ 198.

VII REQUEST FOR RELIEF

330 Accordingly, Morocco respectfully repeats its request that the Tribunal:

330.1 DECLINE jurisdiction over the Claimants' claims; and

330.2 ORDER that the Claimants pay all of the costs and expenses of this arbitration, including the fees and expenses of the Tribunal, the fees and expenses of any experts appointed by the Tribunal and Morocco, the fees and expenses of Morocco's legal representation in respect of this arbitration, and any other costs of this arbitration; and

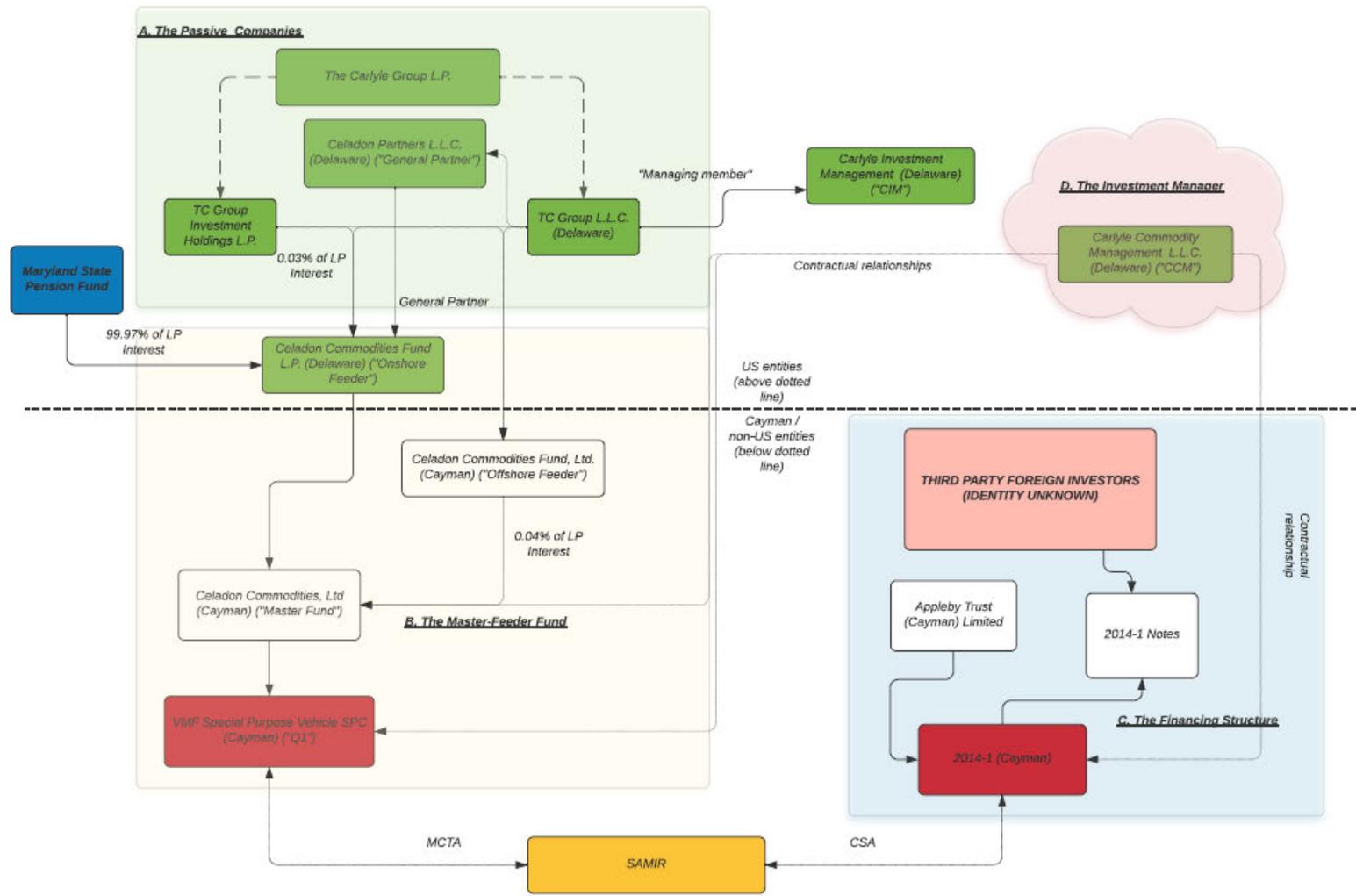
330.3 AWARD such other relief as the Tribunal considers appropriate.

Respectfully submitted on behalf of Morocco on 7 **September 2020**.

Christopher Harris QC
Mark Wassouf
Sarah Tulip
Georges Chalfoun
Dr Cameron Miles

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ANNEX A
Larger version of Diagram 1



ANNEX B
The Claimants' Legal Authorities

Table 1 – *Situs* of Intangible Assets

Exhibit No	Case Name	Date	Type of Asset	Basis of Distinction
CS-0044	<i>Fedax NV v Republic of Venezuela</i> , ICSID Case No ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction	11 July 1997	Promissory notes	<ul style="list-style-type: none"> Notes directly issued by the Venezuelan government to a Venezuelan corporation under Venezuelan law, and enforceable in Venezuela as the seat of the debtor (¶¶ 37, 42). Transactions involved in the case “<i>are not ordinary commercial transactions and indeed involve a fundamental public interest</i>” (¶ 42) – namely a specific governmental project within Venezuela itself, to which the original noteholder contributed services. Tribunal’s reasoning has been criticized as imprecise (RL-60, Z Douglas, <i>The International Law of Investment Claims</i> (CUP 2009) ¶ 378).
CS-0088	<i>Ceskoslovenska Obchodni Banka AS v Slovak Republic</i> , ICSID Case No ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction	24 May 1999	Loan	<ul style="list-style-type: none"> Loan connected to a state-administered project, namely privatization of a bank and enforceable in the host state as the seat of the state-owned debtor and the state as guarantor (¶¶ 1–3). <i>Situs</i> of the loan was not a live question before the tribunal – central question was whether an investment could be made “<i>in the territory</i>” of the host state where capital did not enter the state (¶¶ 76, 78).
CS-0134	<i>Renta 4 SCSA & Ors v Russian Federation</i> , SCC Arb No V (24/2007), Award on Preliminary Objections	20 March 2009	American depository receipts (“ <i>ADRs</i> ”)	<ul style="list-style-type: none"> Respondent admitted that ADR’s reflected a property interest in a Russian company (¶¶ 139–140). Respondent did not argue that the <i>situs</i> of the ADRs was dependent on their governing law and place of enforcement – tribunal’s reasoning on this matter is lacking in detail (¶ 144).

Exhibit No	Case Name	Date	Type of Asset	Basis of Distinction
CS-0096	<i>Alpha Projektholding GmbH v Ukraine</i> , ICSID Case No ARB/07/16, Award	8 November 2010	Rights arising under construction contracts	<ul style="list-style-type: none"> Respondent's complaint did not concern <i>situs</i> of the contracts, but the fact that payments under those contracts were mostly made to accounts in third states (¶ 281). Relevant contracts were governed by Ukrainian law and enforceable in Ukraine; claimant undertook substantial construction efforts in Ukraine; at least some payments made into bank accounts in Kyiv (¶¶ 280–284).
CS-0059	<i>Inmaris Perestroika Sailing Maritime Services GmbH & Ors v Ukraine</i> , ICSID Case No ARB/08/8, Decision on Jurisdiction	8 March 2010	Group of contracts concerning state-owned vessel	<ul style="list-style-type: none"> Respondent's objection did not concern <i>situs</i> of the contracts, but that the claimant made no injection of funds into Ukraine (¶ 122). Project that underpinned the contracts was in the interest of the respondent – tribunal noted that following the claimants' efforts, it owned "a substantially renovated training vessel for the training of its cadets, which offers the prospects of revenues from tourist operations" (¶ 124).

Table 2 – Ownership as a Basis of "Control"

Exhibit No	Case Name	Date	Claimant's Ownership Interest	Basis of Distinction
CS-0139	<i>Italba Corporation v Oriental Republic of Uruguay</i> , ICSID Case No ARB/16/9, Award	22 March 2019	None – claimant argued that it was in "control" of the company due to (a) business decisions, (b) funding of operations, and (c) representation to third parties that it was the company's owner	<ul style="list-style-type: none"> Tribunal concluded none of the alleged indicia of "control" was made out on the evidence; as such, there was no need to reach a conclusion on whether they were sufficient to establish "control" (¶ 264).
CS-0140	<i>United Utilities (Tallinn) BV & Aktsiaselts Tallinna Vesi v Republic of Estonia</i> , ICSID Case No ARB/14/24, Award	21 June 2019	Minority shareholding (35.3%)	<ul style="list-style-type: none"> Tribunal expressly acknowledged the claimant to be the "most important private shareholder" of

Exhibit No	Case Name	Date	Claimant's Ownership Interest	Basis of Distinction
				<p>the company due to its significant minority interest.</p> <ul style="list-style-type: none"> In conjunction with a shareholders' agreement, this gave the claimant "operational control" over the company (¶¶ 414–416).
CS-0141	<i>Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela</i> , ICSID Case No ARB/00/5, Decision on Jurisdiction	27 September 2001	Majority shareholding	<ul style="list-style-type: none"> Tribunal based its understanding of the objective limit of control under Art 25(2)(b) of the ICSID Convention on whether the "definition of foreign control chosen by the parties is reasonable and the purposes of the Convention have not been abused" (¶ 116). Tribunal expressly noted "the parties have specifically identified majority shareholding as the criterion to be applied", that "the Tribunal must respect the parties autonomy and may not discard the criterion of direct shareholding". Tribunal further noted "even if it does not constitute the sole criterion to define 'foreign control', direct shareholding is certainly a reasonable test for control" (¶¶ 119–121). Tribunal only considered the question of the shareholder's "technical expertise" to address respondent's argument that the shareholder was a corporation of convenience exerting fictional control over the claimant (¶¶ 123–126).
CS-0142	<i>Compagnie d'Exploitation du Chemin de Fer Transgabonais v Gabonese Republic</i> , ICSID Case No ARB/04/5, Decision on Jurisdiction	19 December 2005	Majority shareholding	<ul style="list-style-type: none"> Shareholder's majority control over the company was the principal basis of the tribunal's finding under Art 25(2)(b) of the ICSID Convention (¶ 39).

Exhibit No	Case Name	Date	Claimant's Ownership Interest	Basis of Distinction
				<ul style="list-style-type: none"> • Tribunal's finding that other elements can "contribute to ensuring control" (¶ 40) was a subsidiary or confirmatory determination only.
CS-0144	<i>Hassan Awdi, Enterprise Business Consultants Inc & Alfa El Corporation v Romania</i> , ICSID Case No ARB/10/13, Award	2 March 2015	Minority shareholding (10%)	<ul style="list-style-type: none"> • Tribunal found "control" under the BIT "may also be a 'de facto' control whenever it is clearly shown that a minority shareholder dominated the company decision making structure" (¶ 194). • Tribunal further found that the claimant was in control of the project "directly and indirectly through the various companies in which he held a share participation" (¶ 195). • Tribunal therefore rooted its determination in the claimant's minority and other shareholding.
CS-0080	<i>Bernhard von Pezold & Ors v Republic of Zimbabwe</i> , ICSID Case No ARB/10/15, Award	28 July 2015	50% shareholding	<ul style="list-style-type: none"> • Claimants were natural persons with a 50% stake in a group of Zimbabwean companies. • Claimants joined with the other 50% shareholder to conclude a management agreement that gave one of the shareholders control over the group on behalf of the claimants as a whole (¶ 324). • On this basis, all the claimants were deemed to have control of the Zimbabwean company – not just the claimant who had management powers under the management agreement.
CS-0040	<i>Philip Morris Asia Limited v Commonwealth of Australia</i> , PCA Case No 2012-12, Award on Jurisdiction and Admissibility	17 December 2015	None – the claimant asserted that a particular executive controlled the relevant company in fact	<ul style="list-style-type: none"> • The relevant BIT conditioned "control" on the claimant having "a substantial interest in the company or investment" (¶ 497). • The tribunal did not consider cases based on different treaty language to be useful to its analysis (¶ 501).

Exhibit No	Case Name	Date	Claimant's Ownership Interest	Basis of Distinction
				<ul style="list-style-type: none"> The claimant held that mere “<i>management control</i>” would suffice for these purposes – but said control was not made out by the executive on the facts (¶ 506).

Table 3 – Requirement of “Active” Investment

Exhibit No	Case Name	Date	Basis of Distinction
CS-0192	<i>Renée Rose Levy de Levi v Republic of Peru</i> , ICSID Case No ARB/10/17, Award	26 February 2014	<ul style="list-style-type: none"> Question was whether the claimant could be considered to benefit from investment activity by her father before he transferred to her shares that constituted the investment. Relevant BIT did not contain a positive requirement that the claimant “<i>make</i>” an investment (¶¶ 138–148). As such, the question of active investment did not arise.
CS-0080	<i>Bernhard von Pezold & Ors v Republic of Zimbabwe</i> , ICSID Case No ARB/10/15, Award	28 July 2015	<ul style="list-style-type: none"> Relevant BIT referred only to “<i>an investment of [a] national [of a Contracting Party]</i>” and included not positive requirement that an investor “<i>make</i>” an investment. The BIT also did not include additional wording implying an active investment requirement – and so the tribunal was expressly able to distinguish <i>Standard Chartered Bank v Tanzania</i> (¶¶ 309–316).
CS-0018	<i>Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria</i> , ICSID Case No ARB/12/35, Award	31 May 2017	<ul style="list-style-type: none"> Relevant definition of “<i>investment</i>” was “<i>any kind of any direct or indirect contribution in case, in kind or in services, invested or reinvested in any sector of economic activity whatsoever</i>” (¶ 347). Definition did not specify precisely <u>who</u> was supposed to be making the contribution, and so it is not surprising that the tribunal found there was no requirement of active investment (¶ 384).

Exhibit No	Case Name	Date	Basis of Distinction
CS-0039	<i>Vladislav Kim & Ors v Republic of Uzbekistan</i> , ICSID Case No ARB/13/6, Decision on Jurisdiction	8 March 2017	<ul style="list-style-type: none"> • The BIT did not refer to investments “made” in the definition of “investment” or “investor” – but in the requirement that investments be “made in compliance with [host state] legislation” (¶ 374). • The tribunal therefore found that while this temporally limited the legality requirement, it did not limit the definition of “investor” via an active investment criterion (¶ 310). • The tribunal was therefore able to distinguish <i>Standard Chartered Bank v Tanzania</i> (¶ 313).