PCA CASE NO. 2009-23

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENTS, SIGNED 27 AUGUST 1993 (THE "TREATY") AND THE UNCITRAL ARBITRATION RULES 1976

BETWEEN:

1. CHEVRON CORPORATION (U.S.A.)
2. TEXACO PETROLEUM COMPANY (U.S.A.)

The Claimants

- and -

THE REPUBLIC OF ECUADOR

The Respondent

FOURTH PARTIAL AWARD ON TRACK III

17 November 2025

The Arbitration Tribunal:

Dr Horacio A. Grigera Naón
Professor Vaughan Lowe KC
Professor Albert Jan van den Berg (President)

Secretary to the Tribunal: Martin Doe
Assistant Secretary to the Tribunal: José Luis Aragón Cardiel

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EXECUTIVE SUMMARY OF THE FOURTH PARTIAL AWARD ON TRACK III*

This Award sets out the Tribunal's findings and decisions on matters falling under the scope of Track III of the present Arbitration (*see* paragraphs 94 and 95 below).

Track II

Track III follows Track II of the Arbitration. By its Second Partial Award on Track II, dated 30 August 2018 (the Track II Award), the Tribunal ruled that the Respondent had committed multiple violations of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993 (the Treaty) and international law, including (i) a violation of Article II(3)(a) of the Treaty and customary international law for denial of justice; (ii) a violation of Article II(3)(c) of the Treaty (Umbrella Clause); and (iii) a violation of the Tribunal's First Interim Award on Interim Measures dated 25 January 2012 and Second Interim Award on Interim Measures dated 16 February 2012.

All three violations stem, at their core, from the so-called Lago Agrio Judgment of 14 February 2011, which was issued in the Lago Agrio Litigation initiated by Ángel Piaguaje and others (the Lago Agrio Plaintiffs) against Chevron Corporation (Chevron) before Superior Court of Justice of Nueva Loja in Ecuador (the Lago Agrio Court). As found by the Tribunal, the Lago Agrio Judgment was not written by Judge Nicolás Zambrano of the Lago Agrio Court, but was rather 'ghostwritten' by certain representatives of the Lago Agrio Plaintiffs in corrupt collusion with Judge Zambrano. The Lago Agrio Judgment was later affirmed by the Lago Agrio Appellate Court, the National (Cassation) Court of Justice of Ecuador, and the Constitutional Court of Ecuador. The original Lago Agrio Judgment required Chevron to pay approximately USD 19 billion in damages, which were later reduced to approximately USD 9 billion by the Cassation Court.

In its Track II Award, the Tribunal ordered reparation for the Respondent's internationally wrongful acts in the form of several declarations and orders specifically targeted at wiping out the consequences of the recognition and enforcement of the unremedied Lago Agrio Judgment. Chief among them are the Tribunal's orders that the Respondent (i) take immediate steps, of its own choosing, to remove the status of enforceability from the unremedied Lago Agrio Judgment; and (ii) subject to further order by the Tribunal in Track III, make full reparation in the form of compensation for any injuries caused to the Claimants by the unremedied Lago Agrio Judgment.

Track III

In Track III, the Claimants seek compensation for the Respondent's internationally wrongful acts. In particular, they request (i) **USD 793,879,967.74** across 13 separate categories of damages related to legal fees and expenses allegedly incurred as a result of the Respondent's Treaty breaches; (ii) **USD 85,315,652** for the alleged embargo of certain trademarks and other intellectual property assets owned by three of Chevron's subsidiaries in Ecuador; (iii) **USD 13,000,000** in damages for the losses allegedly suffered by one of Chevron's subsidiaries as a result of the embargo of certain assets in Argentina in aid of the enforcement of the Lago Agrio Judgment; (iv) moral damages; and (v) pre- and post-award interest.

In addition, the Claimants request that the Tribunal (i) order the Respondent to indemnify them for any further damages resulting from pending or future enforcement actions of the Lago Agrio Judgment; and (ii) order further injunctive relief in view of the Respondent's purported failure to comply with the Track II Award.

* This Executive Summary does not form part of the Tribunal's reasons or decisions in this Fourth Partial Award on Track III.

General Matters and Legal Standards

Section VII of this Award sets out the Tribunal's analysis on general matters and legal standards cutting across the Claimants' damages claims.

As more fully set out therein, the Tribunal finds, consistently with its determinations in the Track II Award, that any measure of full reparation implemented in Track III must be targeted specifically at wiping out the injuries caused by the recognition and enforcement of the uncorrected Lago Agrio Judgment. On this basis, the Tribunal finds that any injury caused by the recognition and enforcement of the Lago Agrio Judgment (*e.g.* through attachment, arrest, interim injunction or execution) amounts to a form of direct damage under international law, while any legal fees and expenses incurred to mitigate such injury amount to incidental damages. The Tribunal also makes determinations regarding (i) the requirements that must be met for the compensation of each type of damage (proximate causation for direct damages, and causation and reasonableness for incidental damages); (ii) the corresponding cut-off dates for compensation in this case (1 March 2012 for direct damages, and 14 February 2011 for incidental damages); and (iii) the amount by which the damages award must be reduced to account for the legal fees and expenses the Claimants would have incurred in any event in a Treaty-compliant but-for scenario.

Under this heading, the Tribunal also rules that (i) Chevron, as a matter of principle, is entitled to claim compensation in this Arbitration in its own right for the injuries caused to certain of its international subsidiaries by the recognition and enforcement of the Lago Agrio Judgment; (ii) the Claimants did not breach their duty to mitigate by failing to pursue certain local remedies in Ecuador; (iii) under certain conditions, the Claimants are entitled to recover as damages in this Arbitration attorneys' fees awarded or settled in related domestic proceedings; and (iv) the Tribunal's damages award shall not be reduced on account on certain "tax savings" purportedly obtained by the Claimants when taking a tax deduction for the legal fees they claim as damages in this Arbitration.

Taking into account the preceding determinations, the Tribunal establishes a four-step methodology for the assessment of the Claimants' damages claims for legal fees and expenses based on the damages models provided by the Parties, taking into account the voluminous pool of information underlying such claims.

Damages Categories concerning Legal Fees and Expenses

The Claimants' damages claims comprise 13 damages categories relating to legal fees and expenses. 10 of those categories relate to distinct proceedings outside the present Arbitration: the Lago Agrio Litigation; proceedings relating to the recognition and enforcement of the Lago Agrio Judgment in Ecuador, Argentina, Brazil, and Canada; discovery proceedings in the United States of America under Section 1782 of Title 28 of the U.S. Code; proceedings in the United States of America under the RICO Act brought against, *inter alia*, certain of the Lago Agrio Plaintiffs' representatives; proceedings against non-party funders of the Lago Agrio Litigation in Gibraltar; criminal proceedings against certain Chevron employees in Ecuador; and proceedings before Dutch courts concerning applications for the annulment of awards issued in this Arbitration. The three remaining categories comprise costs of planning against potential enforcement in other jurisdictions, general defence costs, and treaty-arbitration costs incurred by non-counsel of record.

Applying its methodology for the assessment of incidental damages in this Arbitration to each of these damages categories, the Tribunal determines that the Claimants are entitled to a total of **USD 180,402,691.43** in compensation, plus (i) pre-award interest calculated at the 1-year U.S. Treasury bill rate (amounting to **USD 40,404,250.51** as of 15 October 2025); and (ii) post-award interest at the rate of 1-year U.S. Treasury bill + 2%. The Tribunal's decision regarding the amount of compensation awarded to the Claimants in connection with the RICO Litigation is subject to a separate dissenting opinion from co-arbitrator Dr. Horacio A. Grigera Naón.

Other Damages Categories

In respect of the damages categories "Embargo Losses in Argentina" and "Intellectual Property Losses in Ecuador", the Tribunal finds that while the Claimants have established that they suffered a compensable injury, they have failed to establish the extent of the corresponding loss. Accordingly, the Tribunal rejects the Claimants' claims in respect of these categories. The Tribunal likewise rejects the Claimants' claim for moral damages.

Indemnification

The Tribunal finds that the Claimants have not established the necessary predicates for the granting of an indemnity order, or other remedies akin to an indemnification.

Injunctive Relief

The Tribunal grants the Claimants' requests for injunctive relief in part. In particular, it declares that, by failing to remove the status of enforceability from the Lago Agrio Judgment through steps of its own choosing, the Respondent has failed to meet its obligations under paragraphs 10.13(i), (ii), (vi), and (vii) of the Track II Award and, accordingly, orders the Respondent to take immediate steps to meet these obligations.

Track IV of the Arbitration

By its Procedural Order No. 84, the Tribunal determined that issues related to the allocation and assessment of costs and expenses within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules as claimed by the Parties would be dealt with in Track IV of the Arbitration, following Track III.

Accordingly, following the issuance of this Award, the Arbitration now proceeds to Track IV.

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ABBREVIATED TABLE OF CONTENTS

DETAILED TABLE OF CONTENTS

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ABBREVIATIONS

13 Trademarks	Subset of the 43 Trademarks, encompassing 13 trademarks owned by Chevron IP included in the Trademark Licence that expired while under the Attachment Order
15 October 2012 Order	Order issued by the Lago Agrio Court on 15 October 2012 providing for the execution of the Lago Agrio Judgment
1973 Concession Agreement	Concession between the Respondent, TexPet and Gulf with a term expiring on 6 June 1992, dated 6 August 1973
1995 Settlement Agreement	Settlement agreement entitled "Contract for Implementing of Environmental, Remedial Work and Release from Obligations, Liability and Claims", signed on 4 May 1995 by the Respondent, acting by its Ministry of Energy and Mining and PetroEcuador as "one Party" and TexPet as "the other party"
1995-1998 Settlement and Release Agreements	The 1995 Settlement Agreement, the 1996 Municipal and Provincial Releases, and the 1998 Final Release
1996 Municipal and Provincial Releases	Settlement agremeents between TexPet and four muncipalities in the Oriente Region (Shushufindi, Francisco de Orellana, Lago Agrio and La Joya de los Sachas) pursuant to paragraph VII(C) of Annex A of the 1995 Settlement Agreement
1998 Final Release	Final Release signed by the Respondent (acting by its Minister of Energy and Mines), PetroEcuador, PetroProduccion and TexPet on 30 September 1998
25 October 2012 Order	Order providing for the expansion of the 15 October 2012 Order issued by the Lago Agrio Court
27 June 2013 Order	Order issued by the Lago Agrio Court on 27 June 2013 providing for the attachment of the amounts owed by Ecuador to Chevron as a

	result of the award in the *Chevron v. Ecuador I* arbitration
43 Trademarks	Subset of the 50 attached trademarks notified by the Lago Agrio Court to IEPI on 9 September 2013, excluding the seven trademarks over which Chevron's IP Subsidiaries had extinguished their rights prior to the Attachment Order (*i.e.*, "Havoline Diseño de etiqueta", "Havoline y Diseño ii", "Texaco, un mundo de energía" (No. 7010), "Texaco, un mundo de energía" (No. 2080), "Diseño estrella t-texaco", "Estrella roja t verde – texaco", and "Ursa super plus")
9 September 2013 Order	Order issued by the Lago Agrio court on 9 September 2013 notifying the attachment of 50 trademarks owned by Chevron's IP Subsidiaries to IEPI
Amazonia Action	Action brought by Chevron against Amazonia and Woodsford on 18 June 2014 before the Supreme Court of Gibraltar, in the context of the Gibraltar Proceedings
Amazonia Damages Judgments	Judgment dated 9 December 2015 and order dated 14 May 2018 issued by the Supreme Court of Gibraltar in the context of the *Amazonia* Action
Amazonia Liquidation Proceedings	Proceedings initiated by Chevron on 2 June 2016 requesting Amazonia's liquidation before the Supreme Court of Gibraltar, in the context of the Gibraltar Proceedings
Amended Complaint	Chevron's Amended Complaint in the RICO Litigation, dated 20 April 2011
Appellate Court	Provincial Court of Justice of Sucumbios, Ecuador
Argentina Embargo Order	*Ex parte* order issued by the National Civil Trial Court No. 61 of Argentina in *Aguinda Salazar Maria v. Chevron Corporation* on 6 November 2012, whereby it attached certain

	assets owned by Chevron's Argentine and Danish subsidiaries
Argentina Embargo Proceedings	Proceedings brought by the LAPs in Argentina on 5 November 2012 seeking to attach the assets of Chevron's Argentine and Danish subsidiaries
Argentina Enforcement Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in connection with the Argentina Embargo Proceedings and the Argentina Recognition Proceedings
Argentina Recognition Proceedings	Recognition (*exequatur*) proceedings brought by the LAPs on 21 November 2012 against Chevron to recognize the Lago Agrio Judgment in Argentina
Attachment Order	15 October 2012 Order of the Lago Agrio Court (as further expanded by the 25 October 2012 Order)
Brazil Recognition Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in proceedings brought by the LAPs against Chevron in Brazil on 27 June 2012, seeking the recognition of the Lago Agrio Judgment in Brazil
Canada Enforcement Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in proceedings brought by the LAPs against Chevron, Chevron Canada and Chevron Finance on 30 May 2012, seeking the recognition and enforcement of the Lago Agrio Judgment in Canada
Cash Call Retainer	Monthly retainer fee agreement between Chevron the so-called "Ecuador Legal Team"
Cash Calls	168 documents related to payments which, according to the Claimants, Chevron made to the so-called "Ecuador Legal Team"

Cassation Appeal	Chevron's cassation appeal of the Appellate Court's judgment of 3 January 2012 and Order of 13 January 2012, filed before the Cassation Court on 20 January 2012
Cassation Court	National Court of Justice of Ecuador
Cassation Judgment	Judgment of the Cassation Court dated 12 November 2013, whereby the Cassation Court partially quashed the 3 January 2012 Judgment of the Appellate Court
Categories	Each of the main heads of damages listed in items (a) through (m) of paragraph 479.2 of the Claimants' Memorial on Damages
Chevron	Chevron Corporation, the First Claimant in this Arbitration
Chevron Argentina	Chevron Argentina S.R.L.
Chevron Brazil	Chevron Brasil Petróleo Ltda
Chevron Canada	Chevron Canada Limited
Chevron Finance	Chevron Canada Finance Limited
Chevron IP	Chevron Intellectual Property LLC
Chevron's Guidelines	Chevron's Corporation and Affiliate 2007 Guidelines for Outside Counsel and their subsequent versions
Chevron's IP Subsidiaries	Chevron IP, Texaco Inc., and Texaco Company
Claimants' Damages Model	Damages model filed by the Claimants as per Procedural Order No. 83, the first version of which was filed on 2 November 2022 and the final version of which was filed on 14 October 2025
Claimants' Second Submission	Claimants' Second Submission on Request for a Partial Award, dated 1 October 2020

Components	Distinguishable subcategories of costs or actions that are specific to each category or main proceeding for which damages are claimed (e.g., count IX of the RICO Litigation, each of the Section 1782 Proceedings, etc.)
ConAuto	ConAuto Compañía Anónima Automotriz
Constitutional Action	Chevron's Extraordinary Action for Protection, filed before the Constitutional Court on 23 December 2013
Constitutional Court	Constitutional Court of Ecuador
Costs of Planning Against Potential Enforcement in other Jurisdictions	Category concerning the legal fees and expenses allegedly incurred by the Claimants to prepare and implement their defensive strategy in anticipation of continuing efforts by the LAPs to enforce the Lago Agrio Judgment in multiple jurisdictions around the world
Counter-Memorial	Respondent's Counter-Memorial on Damages, dated 28 February 2020
CPA	Collusion Prosecution Act
Criminal Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in connection with criminal proceedings initiated in Ecuador against Mr Ricardo Reis Veiga and Dr Rodrigo Pérez Pallares
DCF	Discounted Cash-Flow
Decision on Interpretation	Decision on the Respondent's Request for Interpretation under Article 35 of the UNCITRAL Arbitration Rules, dated 6 November 2018
Decision on Track I(B)	Decision on Track I(B), dated 12 March 2015
Defensive 1782s	Sub-category of the Section 1782 Proceedings concerning the legal fees and

	expenses incurred by Chevron in connection with 13 Section 1782 actions brought by Ecuador and the LAPs against individuals and entities other than Chevron, including scientists and experts retained by Chevron in connection with the Lago Agrio Litigation, "targets aimed at undermining Ecuador's bribery scandal involving Judge Nuñez" (as described by the Claimants), and Stratus
Denial of Justice Breach	Treaty breach declared by the Tribunal in paragraphs 10.4 and 10.5 of the Track II Award concerning the Respondent's violation of Article II(3)(a) of the Treaty and customary international law for denial of justice
DeLeon Action	Action brought by Chevron against Mr DeLeon and Torvia on 17 December 2012 before the Supreme Court of Gibraltar, in the context of the Gibraltar Proceedings
Donziger Defendants	Mr Steven Donziger, the Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC, defendants in the RICO Litigation
Dutch Set-Aside Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in connection with the Respondent's applications to annul six of the Tribunal's awards in this arbitration before the Dutch Courts
Ecuador Enforcement Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in proceedings concerning the execution of the Lago Agrio Judgment in Ecuador as a result of the Attachment Order
Elements	When compared to categories and components, any other cost subsets that may be present in several categories, and the recoverability of which is disputed on the basis of the nature of the expenditure, the observation of pathological or allegedly

	inadequate billing practices or other reasons (e.g., block billing, public relations, etc.)
Embargo Losses in Argentina	Category concerning the losses allegedly suffered by the Claimants as a result of the Argentina Embargo Order
E-Tech	E-Tech International
First Instance Appeal	Chevron's appeal of the Lago Agrio Judgment, filed on 9 March 2011 before the Appellate Court
First Interim Award	First Interim Award on Interim Measures, dated 25 January 2012
FOIA	Freedom of Information Act
Fourth Interim Award	Fourth Interim Award on Interim Measures, dated 7 February 2013
FTI	FTI Consulting
General 1782 Work	Sub-category of the Section 1782 Proceedings concerning the legal fees and expenses allegedly incurred by the Claimants in connection with work which, according to the Claimants, cannot be allocated to a single 1782 action, including general Section 1782 work, indeterminate Section 1782 work, and efficiencies created by combining Section 1782 work
General Defence	Category concerning the legal fees and expenses allegedly incurred by the Claimants "in the General Defense against the Lago Agrio fraud and the resulting fraudulent Judgment"
Gibraltar Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in connection with six proceedings initiated by Chevron before the Supreme Court of Gibraltar, namely: (i) the *DeLeon* Action; (ii) the *Amazonia* Action; (iii) the *GT* Action; (iv) the *TCPS* Action; (v) the *Jarvis* Action;

	and (vi) the *Amazonia* Liquidation Proceedings
GT Action	Action brought by Chevron against GT Nominees on 18 June 2014 before the Supreme Court of Gibraltar, in the context of the Gibraltar Proceedings
GT Entities	GT Management Limited, GT Fiduciary Services Limited and Grant Thornton Fund Administration Limited
GT Nominees	GT Nominees Limited
Hearing on a Partial Award	Hearing on the Request for Partial Award held on 15-18 March 2021
IBA Rules	International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (2010 edition)
IEPI	Ecuadorian Intellectual Property Agency
ILC Articles	International Law Commission's Articles on State Responsibility
Income Approach	Valuation approach proposed by Mr Weston Anson, expert for the Claimants, for the Claimants' alleged Intellectual Property Losses in Ecuador, which, as described by him, determines the current value of future economic benefits by way of a discounted cash-flow analysis
Intellectual Property Losses in Ecuador	Category concerning the intellectual property losses the Claimants claim to have incurred in Ecuador as a result of the embargo imposed by the Lago Agrio Court of trademarks and other intellectual property owned by Chevron's IP Subsidiaries by way of the Attachment Order
Interim Awards Breach	Treaty breach declared by the Tribunal in paragraph 10.18 of the Track II Award

	concerning the Respondent's violation of the First and Second Interim Awards
Invictus Memorandum	Document entitled "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated
Invoice Sample	Sample of approximately 400 invoices (to 95% accuracy) from the universe of 7,700-plus invoices claimed by the Claimants in Track III, prepared by Mr Daniel Slottje of FTI, expert for the Claimants
Jarvis Action	Action brought by Chevron against Mr Julian Jarvis on 20 June 2014 Action before the Supreme Court of Gibraltar, in the context of the Gibraltar Proceedings
Lago Agrio Complaint	Complaint filed by the LAPs against Chevron before the Lago Agrio Court on 7 May 2003
Lago Agrio Court	Superior Court of Justice of Nueva Loja in Ecuador
Lago Agrio Judgment	Judgment issued by the Lago Agrio Court on 14 February 2011, as well as the clarification order issued by that same court on 4 March 2011
Lago Agrio Litigation	Litigation initiated by Ángel Piaguage and others against Chevron by the Lago Agrio Complaint. The same defined term refers to the category oncerning the legal fees and expenses allegedly incurred by the Claimants in connection with those proceedings
LAPs	The 48 plaintiffs in the Lago Agrio Litigation
Lyteca	Lubricantes y Tambores del Ecuador, C.A.
Marketer Agreement	Texaco and Chevron Lubrication Marketer Agreement entered into by Chevron Products Company and ConAuto

Memorial	Claimants' Memorial on Damages (Track III), dated 31 May 2019
Moral Damages	Category concerning the moral damages allegedly suffered by the Claimants as a result of the Criminal Proceedings, the Respondent's alleged media campaign against Chevron and the Respondent's breach of the Tribunal's Interim Orders and Awards
Netflix	Netflix, Inc.
Partial Award on Track I	First Partial Award on Track I, dated 17 September 2013
Partial Award on Track III	Partial Award on Threshold Issues of Track III, dated 30 June 2021
PCA	Permanent Court of Arbitration
PetroEcuador	Empresa Estatal de Petróleos del Ecuador, known earlier as its predecessor "CEPE"
RAP	Remedial Action Plan agreed by TexPet, Petro Ecuador and the Respondent in September 1995
Rejoinder	Respondent's Rejoinder on Damages, dated 20 May 2022
Related Action	*Chevron v. The Weinberg Group*, Case No. 11-409 (JMF) (DDC)
Reply	Claimants' Reply Memorial on Damages (Track III), dated 20 August 2021
Request for Guidance	Claimants' Request for Guidance Concerning the Evidence to Support Claimants' Damage Claim for Legal Fees and Costs, dated 21 April 2020
Request for Partial Award	Claimants' Request for a Partial Award on Threshold Issues, dated 21 April 2020

Respondent's Damages Model	Damages model filed by the Respondent as per Procedural Order No. 83, the first version of which was filed on 2 November 2022 and the final version of which was filed on 15 October 2025
Respondent's Second Submission	Claimants' Second Submission on Request for a Partial Award, dated 1 October 2020
Response to the Request for Partial Award	Respondent's Response to Claimants' Request for a Partial Award on Threshold Issues, dated 19 May 2020
RFR Approach	Valuation approach proposed by Mr Weston Anson, expert for the Claimants, for the Claimants' alleged Intellectual Property Losses in Ecuador, under which, as described by him, a hypothetical situation is created to estimate what a business would pay to license its own intellectual property assets in an arms-length transaction. The value is then calculated as the present value of the avoided hypothetical royalty charges.
RICO	18 U.S.C. Section 1962 of Title 18 of the U.S. Code, the Racketeer Influenced and Corrupt Organizations Act
RICO Defendants	Collectively, the Donziger Defendants, the Stratus Defendants, Messrs Fajardo and Yanza, and ADF and Selva Viva, defendants in the RICO Litigation
RICO Judgment	RICO Judgment of 4 March 2014
RICO Litigation	Category concerning the legal fees and expenses allegedly incurred by Chevron in connection with an action brought by Chevron on 1 February 2011 before the U.S. District Court for the Southern District of New York, whereby it claimed claimed damages and injunctive relief for a pattern of racketeering activity and violations of 18 USC Section 1962 and New York State law

SAP Payments List	List of payments downloaded from Chevron's SAP system used by Mr Steve Stanton of Deloitte, expert for the Claimants, to prepare his expert opinion in this Arbitration
SAP System	Chevron's SAP electronic payment system
SDNY	U.S. District Court for the Southern District of New York
Second Circuit	U.S. Court of Appeals for the Second Circuit
Second Interim Award	Second Interim Award on Interim Measures, dated 16 February 2012
Second Procedural Meeting	Procedural meeting held on 28-29 May 2020
Section 1782	Section 1782 of Title 28 of the U.S. Code (Assistance to foreign and international tribunals and to litigants before such tribunals)
Section 1782 Proceedings	Category concerning the legal fees and expenses allegedly incurred by the Claimants in connection with the Affirmative 1782s, the Defensive 1782s, and General 1782 Work
SENADI	Ecuadorian National Service for Intellectual Rights, known earlier as IEPI
STJ	Brazilian Superior Court of Justice (*Superior Tribunal de Justiça*)
Stratus	Stratus Consulting Inc.
Stratus Defendants	Collectively, Stratus and two of its employees, Ms Ann Maest and Mr Douglas Beltman, defendants in the RICO Litigation
Swissoil	Swissoil del Ecuador S.A.
Swissoil PSA	Purchase and Sale Agreement entered into by Lyteca and Swissoil on 12 January 2010

TCPS	TC Payment Services (International) Limited
TCPS Action	Action brought by Chevron against TCPS on 20 June 2014 before the Supreme Court of Gibraltar, in the context of the Gibraltar Proceedings
Technical Information	Know-how that was licenced through the Technology Licence and was used in connection with the trademarks included in the Trademark Licence
Technology Licence	Technology Licence Agreement entered into between Chevron IP and Swissoil in 2010, whereby Swissoil was granted "a non-exclusive, non-transferable license without right to sublicense to use" certain technical information in an "existing blending facility" of Swissoil in Ecuador, and only for purposes of manufacturing, packaging, marketing, distributing, using, and selling certain types of lubricants defined in the agreement
Texaco	Texaco Inc.
TexPet	Texaco Petroleum Company, the Second Claimant in this Arbitration
Third Interim Award	Third Interim Award on Jurisdiction and Admissibility, dated 27 February 2012
Torvia	Torvia Limited
Track II Award	Second Partial Award on Track II, dated 30 August 2018
Track III Hearing	Hearing on Track III held from 18 August to 7 September 2022
Trademark Licence	Trademark Licence Agreement entered into between Chevron IP and Swissoil del Ecuador S.A. in 2010, whereby Swissoil was granted "a limited, royalty-free, non-transferable, non-exclusive license to use" 17 trademarks owned by Chevron IP in Ecuador

	"only on and in connection with" certain products identified in the Trademark Licence
Treaty	Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993
Treaty Arbitration Costs incurred by Non-Counsel of Record	Category concerning the legal fees and expenses allegedly incurred by the Claimants for work performed by non-counsel of record in connection with this Arbitration
Trunko Elements	Group of elements drawn from the Expert Report of John L. Trunko (RE-51), including: (i) (CLA) Activities allegedly relating to Media and Public Relations / (RES) Activities relating to Media and Public Relations; (ii) (CLA) Activities allegedly relating to Government Relations (including but not limited to USTR) / (RES) Activities relating to Government Relations (including but not limited to USTR); (iii) (CLA) Allegedly Nondefense-Related Activities / (RES) Nondefense-Related Activities ;(iv) (CLA) Alleged Block Billing / (RES) Block Billing; (v) (CLA) Allegedly Vague Billing Entries / (RES) Vague Billing Entries; (vi) (CLA) Alleged Administrative and Clerical Activities / (RES) Administrative and Clerical Activities; (vii) (CLA) Alleged Getting Up to Speed and Training / (RES) Getting Up to Speed and Training; (viii) Multiple Attendance at Events; (ix) (CLA) Alleged Excessively Long Billing Days and Excessive Time / (RES) Excessively Long Billing Days and Excessive Time; and (x) (CLA) Alleged Double Billing Entries / (RES) Double Billing Entries
Umbrella Clause	Article II(3)(c) of the Treaty
Umbrella Clause Breach	Treaty breach declared by the Tribunal in paragraphs 10.7 and 10.8 of the Track II Award concerning the Respondent's violation of the Umbrella Clause

UNCITRAL Arbitration Rules	Arbitration Rules of the United Nations Commission on International Trade Law (1976)
WACC	Weighted Average Cost of Capital
Weinberg	Weinberg Group Inc.
Woodsford	Woodsford Litigation Funding Limited
World Bank Guidelines	World Bank Guidelines on the Treatment of Foreign Direct Investment

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I. THE ARBITRATION

1. *The First Claimant:* The First Claimant is Chevron Corporation, a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583, United States of America ("**Chevron**").

2. *The Second Claimant:* The Second Claimant is Texaco Petroleum Company, also a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583 United States of America ("**TexPet**").

3. Until 2001, TexPet was a wholly-owned indirect subsidiary of Texaco Inc., a legal person organised under the laws of the United States of America ("**Texaco**"); and thereafter, as from 2001, TexPet became and remains a wholly-owned indirect subsidiary of Chevron.

4. *The Claimants' Legal Representatives*: During Track III of the Arbitration, the Claimants were represented by: R. Hewitt Pate Esq (General Counsel of the First Claimant); David Moyer Esq (Deputy General Counsel for Corporate Capability of the First Claimant), Andres R. Romero-Delmastro Esq (Chief Counsel, Strategic Issues and International Litigation of the First Claimant), and Heleina Formoso Esq (Senior Counsel, Strategic Issues and International Litigation of the First Claimant); R. Doak Bishop Esq, Tracie Renfroe Esq, Craig Miles Esq, Wade M. Coriell Esq, David H. Weiss Esq (until June 2023), Carol Wood Esq (until December 2020), Daniela Bravo Esq, and Sophia Sepulveda Harms Esq (all of King & Spalding LLP, Houston, Texas, USA); Elizabeth Silbert Esq, Brian A. White Esq (until July 2024), Amelia S. Magee Esq (until October 2022), Charlie Spalding Esq (until July 2025), and Carson W. Bennett Esq (all of King & Spalding LLP, Atlanta, Georgia, USA); Edward G. Kehoe Esq (until December 2024), Caline Mouawad Esq (until January 2020), Isabel Fernández de la Cuesta Esq (until April 2023), Jessica Beess und Chrostin Esq, Timothy McKenzie Esq, and Vivasvat Dadwal Esq (all of King & Spalding LLP, New York, New York, USA); Anisha Sud Esq (of King & Spalding (Singapore) LLP, Singapore); Sara McBrearty Esq and Nate Bilhartz Esq (both of King & Spalding LLP, Austin, Texas, USA); Eldy Quintanilla Roché Esq (of King & Spalding LLP, Denver, Colorado, USA); Herbert Stern Esq (Stern & Kilcullen

LLC, Florham Park, New Jersey, USA); and Jan Paulsson Esq, Luke Sobota Esq, Julia Sherman Esq, and William Sullivan Esq (all of Three Crowns LLP, Washington D.C., USA).[1]

5. *The Respondent:* The Respondent is the Republic of Ecuador. It has owned and controlled at all material times Empresa Estatal de Petróleos del Ecuador (herein called "**PetroEcuador**", known earlier as its predecessor "**CEPE**"), a legal person formed under the laws of Ecuador.

6. *The Respondent's Legal Representatives*: During Track III of the Arbitration, the Respondent was represented by: Juan Carlos Larrea Valencia (Procurador General del Estado), Íñigo Salvador Crespo (Procurador General del Estado until October 2022), Ana María Larrea (Directora Nacional de Asuntos Internacionales y Arbitraje), Claudia Salgado Levy (Directora General de Asuntos Internacionales y Arbitraje until February 2023), Lily Diaz Granados (Subdirectora de Asuntos Internacionales), Nazaret Ramos (Subdirectora de Asuntos Internacionales until April 2022), Christel Gaibor (Subdirectora de Asuntos Internacionales until February 2019), Gary Lopez Velez, Diana Terán Zamora (until February 2024), Macarena Bahamonde (until August 2020) and Xavier Rubio (until April 2019) (all of Procuraduría General Del Estado, República Del Ecuador, Quito, Ecuador); Mark Clodfelter Esq (until July 2021) and Diana Tsutieva Esq (of Foley Hoag LLP, Washington, D.C., USA); Andrew Schwartz Esq, Kenneth Leonetti Esq, Jonathan Ettinger Esq, Mark Finsterwald Esq, and Richard Maidman (until May 2024) (all of Foley Hoag LLP, Boston, MA, USA); Nicholas Renzler Esq (Foley Hoag LLP, New York, NY, USA); and Eduardo Silva Romero, José Manuel García Represa, Audrey Caminades, and Raphaelle Legru (all of Wordstone, Paris, France).[2]

7. *The Arbitration Agreement:* The arbitration agreement invoked by the Claimants is contained in Article VI of the Treaty between the United States of America and the

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[1] *See also* Track II Award, para. 1.4, regarding the Claimants' representation in earlier stages of these proceedings.

[2] *See also* Track II Award, para. 1.6, regarding the Respondent's representation in earlier stages of these proceedings.

Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993 (the "**Treaty**"), providing (*inter alia*) as follows:

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:

   (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or

   (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

   (c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

   . . .

      (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL);

   . . .

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

   . . .

   (b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

8. *Arbitration Rules:* Pursuant to Article VI(3)(a)(iii) of the Treaty, the Arbitration Agreement incorporates the UNCITRAL Arbitration Rules (1976) (the "**UNCITRAL Arbitration Rules**"), according to which this Arbitration has been conducted.

9. *The Arbitral Tribunal:* Pursuant to the Arbitration Agreement and the UNCITRAL Arbitration Rules, the Tribunal is comprised of three arbitrators appointed thereunder as follows:

(i) *Dr Grigera Naón:* In their Notice of Arbitration dated 23 September 2009, the Claimants notified the Respondent of their appointment as co-arbitrator of Dr Horacio A. Grigera Naón, of 5224 Elliott Road, Bethesda, Maryland 20816, United States of America.

(ii) *Professor Lowe:* On 4 December 2009, the Respondent notified the Claimants of its appointment as co-arbitrator of Professor Vaughan Lowe KC, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom.

(iii) *Professor van den Berg:* On 18 March 2020, following the resignation of Mr V.V. Veeder as presiding arbitrator on 1 January 2020, the Secretary-General of the Permanent Court of Arbitration (the "**PCA**") appointed as the presiding arbitrator Professor Albert Jan van den Berg, of IT Tower, Avenue Louise 480, 1050 Brussels, Belgium.

10. By further agreement of the Parties, the International Bureau of the PCA was appointed to administer these arbitration proceedings, with Mr Martin Doe (of the PCA) acting as Secretary to the Tribunal. He is assisted by Mr José Luis Aragón Cardiel, also of the PCA.

11. *Place of Arbitration:* By agreement of the Parties, the legal place (or seat) of this Arbitration is The Hague, the Netherlands.

12. *Language of Arbitration:* By agreement of the Parties, English and Spanish are the official languages of this Arbitration and, as between them, English is to be the authoritative language, with all oral proceedings to be simultaneously interpreted and transcribed into English and Spanish. Orders, decisions and awards of the Tribunal are to be rendered in English.

* * *

II. TRACK III OF THE ARBITRATION

13. *Earlier Orders, Decisions and Awards in Tracks I, IB and II*: This Award follows three Orders on Interim Measures, seven Awards, two decisions and 86 procedural orders made in these arbitration proceedings. For ease of reference, the Tribunal's main rulings in this Arbitration include:

(i) The First Interim Award on Interim Measures dated 25 January 2012 ("**First Interim Award**");

(ii) The Second Interim Award on Interim Measures dated 16 February 2012 ("**Second Interim Award**");

(iii) The Third Interim Award on Jurisdiction and Admissibility dated 27 February 2012 ("**Third Interim Award**");

(iv) The Fourth Interim Award on Interim Measures dated 7 February 2013 ("**Fourth Interim Award**");

(v) The First Partial Award on Track I dated 17 September 2013 ("**Partial Award on Track I**");

(vi) The Decision on Track I(B) dated 12 March 2015 ("**Decision on Track I(B)**");

(vii) The Second Partial Award on Track II dated 30 August 2018 ("**Track II Award**");

(viii) The Decision on the Respondent's Request for Interpretation under Article 35 of the UNCITRAL Arbitration Rules dated 6 November 2018 ("**Decision on Interpretation**"); and

(ix) The Partial Award on Threshold Issues of Track III dated 30 June 2021 ("**Partial Award on Track III**").

14. This Award is made in Track III of this Arbitration, following Track II. It serves no purpose to revisit here the full procedural history of these arbitration proceedings from September 2009. For simplicity's sake, the Tribunal hereby incorporates by reference Part I of its Third Interim Award, Part A of its Partial Award on Track I, Part B of its

Decision on Track I(B) and Part I(D) of its Track II Award. It here includes only a summary of the major procedural events following the Track II Award.

15. *Track III Procedure*: The Tribunal issued its Track II Award on 30 August 2018. As more fully set out in the Operative Part (Part X) of the Track II Award, and further described below, the Tribunal made a series of declarations and orders as to jurisdiction, admissibility, merits and other miscellaneous issues. It also referred all issues still extant between the Parties to be addressed in Track III of the proceedings.

16. On 29 September 2018, the Respondent requested interpretation and clarification of the Track II Award. On 6 November 2018, following further submissions by the Parties, the Tribunal issued its Decision on Interpretation, wherein it declined formally to accede to the Respondent's requests for the interpretation of the Track II Award.

17. On 10 October 2018, the Tribunal issued Procedural Order No. 52, concerning Track III of the Arbitration. The Tribunal there invited the Parties to apply for permission to add any further issue or request for relief to be addressed by the Parties in Track III beyond the extant issues identified in the Operative Part (Part X) of the Track II Award. It also invited the Parties to submit written summaries of their respective claimed amounts for legal costs and expenses until the date of the Order. The Respondent was further invited to show cause why the Tribunal should not vary Paragraph 4 of its Second Interim Award by ordering the release to the Claimants of the amount of USD 50 million deposited by the Claimants with the PCA as security for the Claimants' contingent responsibility to the Respondent in regard to such interim measures.

18. On 28 November 2018, the Parties filed their respective submissions on costs as instructed under paragraph 10.16 of the Track II Award.

19. On 8 December 2018, the Tribunal issued Procedural Order No. 54. Having taken note that the Respondent had no objection should the Tribunal decide to vary paragraph 4 of its Second Interim Award by ordering the release to the Claimants of the amount of USD 50 million deposited by the Claimants with the PCA, the Tribunal there set out directions for the release of the Claimants' security deposit.

20. On 17 December 2018, the Tribunal issued Procedural Order No. 55. It there identified the issues to be decided in Track III of the Arbitration, as fully set out below.[3] The Tribunal also requested the Parties to submit their proposals regarding (i) the procedural timetable for written and oral submissions concerning the issues to be addressed in Track III, as listed above; (ii) a proposed venue for an oral hearing on Track III; (iii) the estimated length of that hearing; and (iv) the preferred range of dates for such hearing.

21. On 19 March 2019, the Tribunal, the Parties and the PCA held a procedural meeting to address the matters set out in Procedural Order No. 55. On 10 April 2019, the Tribunal circulated a draft Procedural Order No. 56, regarding the procedural timetable for Track III, and invited the Parties' comments thereon. Having received the Parties' comments, on 26 April 2019, the Tribunal issued Procedural Order No. 56, setting out the Track III timetable and scheduling a procedural meeting for 28-29 May 2020 (the "**Second Procedural Meeting**"). It there also invited the Parties to seek a consensus as to the contents of a new confidentiality or protective order for Track III.

22. On 21 May 2019, the Tribunal issued Procedural Order No. 57, whereby it ruled upon the Respondent's 14 May 2019 application for certain amendments to Procedural Order No. 56.

23. On 22 May 2019, the Tribunal issued Procedural Order No. 58, a temporary confidentiality order in regard to the Claimants' Memorial and the Respondent's Counter-Memorial on Track III and the Parties' respective document productions under the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (2010 edition) (the "**IBA Rules**"). The Tribunal ruled that the order would be in force until the Second Procedural Meeting, at which time the Tribunal would review the order *de novo*.

24. On 17 June 2019, the Tribunal issued Procedural Order No. 59, whereby the Tribunal declined to grant the interim relief requested by the Claimants on 6 June 2019 "relating to information that is confidential pursuant to Procedural Order No. 58".

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[3] *See* para. 94 below.

25. On 19 July 2019, the Tribunal granted leave to the Claimants to submit a short letter on the contemporaneous status of the LAPs' recognition and enforcement action brought against Chevron in Canada. On 20 July 2019, the Claimants submitted the letter; on 24 July 2019, the Respondent submitted its response.

26. On 19 April 2020 the Tribunal issued Procedural Order No. 60, wherein it defined the issues to be addressed at the Second Procedural Meeting and the timing of written submissions in the lead-up to that meeting. Among other things, Procedural Order No. 60 foresaw that the Parties would file submissions concerning the Claimants' applications (i) "for the Tribunal's guidance concerning the proof that the Tribunal will require for damages consisting of legal fees and costs" ("**Request for Guidance**"); (ii) to decide certain "threshold issues" ("**Request for Partial Award**"); (iii) that the confidentiality order in Procedural Order No. 58 remain in place; and (iv) regarding issues of compliance with the Track II Award.

27. On 2 May 2020, the Tribunal issued Procedural Order No. 61, wherein it addressed several requests raised by the Parties in connection with the directions given by the Tribunal in Procedural Order No. 60. It there also declined to postpone the Second Procedural Meeting, as requested by the Respondent.

28. On 10 May 2020, the Tribunal issued Procedural Order No. 62, wherein it addressed a request from the Respondent for certain corrections and clarifications in respect of Procedural Order No. 61.

29. On 15 May 2020, the Tribunal circulated a draft of Procedural Order No. 63, establishing the format, time, and agenda of the Second Procedural Meeting. On 26 May 2020, the Tribunal held a procedural meeting with the Parties (by video conference) in preparation for the Second Procedural Meeting. Immediately following the procedural meeting, the Tribunal issued Procedural Order No. 63.

30. On 28 May and 29 May 2020, the Tribunal, the Parties and the PCA held the Second Procedural Meeting. On 29 May 2020, during the meeting, the Tribunal issued Procedural Order No. 64, whereby it extended the temporary confidentiality order in Procedural Order No. 58 until expressly abrogated.

31. On 5 June 2020, the Tribunal invited the Claimants to confirm whether the damages categories for which they sought guidance under their Request for Guidance corresponded to the heads of damages set forth in paragraph 479(2)(a)-(m) of the Memorial on Damages, or to any other heads of damages. The Claimants addressed this matter in a letter dated 6 June 2020.

32. On 10 July 2020, the Tribunal issued Procedural Order No. 65. It there declined to bifurcate the Track III proceedings to determine, as a preliminary matter, the threshold questions identified by the Claimants in their Request for Partial Award. The Tribunal also invited the Parties to take into account in their Track III Reply and Rejoinder the considerations set out in the order.

33. On 16 July 2020, the Tribunal issued Procedural Order No. 66, whereby it decided the Parties' outstanding document production requests set out in the Redfern Schedules filed with the Tribunal on 11 May 2020.

34. On 5 August 2020, the Claimants requested that the Tribunal revise the existing Track III schedule. On the basis that the schedule could not be maintained "given the time required for Claimants to clarify and comply with the extensive document production and privilege review and logging obligations imposed by Procedural Order No. 66", the Claimants requested that the Tribunal set the Request for Partial Award for hearing in March 2021, on the previously reserved dates for the Track III Hearing, with one more round of briefing by the Parties beforehand. The Claimants also requested a stay of all the environmental discovery obligations of both Parties until after the Tribunal had issued a decision on the Request for Partial Award. By a letter dated 11 August 2020, the Respondent requested that the Tribunal, in view of the Claimants' alleged non-compliance with Procedural Order No. 66, order the Claimants to produce immediately "all documents previously provided to their Memorial experts and witnesses", fix a date for the Claimants to produce all other responsive documents and required privilege logs, that adverse inferences be drawn if the Claimants failed to comply with these orders, and that the Claimants submit their Reply as scheduled.

35. After further exchanges of correspondence on these issues, the Tribunal invited the Parties to indicate their availability to make further submissions on these issues at a video conference. On 3 September 2020, the Tribunal held such video conference with the

Parties. On 28 September 2020, the Tribunal issued Procedural Order No. 67. It there ordered (i) the further bifurcation of Track III with respect to the four preliminary questions raised by the Claimants in their Request for Partial Award; (ii) a stay of the Tribunal's orders on environmental document production; and (iii) that the confidentiality order set out in Procedural Order No. 58 remain in effect for all Track III materials until expressly abrogated. Flowing from its directions on these matters, the Tribunal also issued a revised Track III schedule, which foresaw (*inter alia*) that a Hearing on the Request for Partial Award would take place on 15-18 March 2021 (the "**Hearing on a Partial Award**").

36. On 26 October 2020, the Tribunal issued Procedural Order No. 68. It there decided certain outstanding disputes between the Parties concerning the Claimants' 5 October 2020 privilege log, prepared in response to Document Requests Nos. 42-52 in the Respondent's Redfern Schedule.

37. On 5 November 2020, the Tribunal issued Procedural Order No. 69. It there fixed a revised schedule for Track III having taken note of the Parties' agreement to extend certain deadlines and their divergent positions on the extension of other deadlines in the schedule.

38. On 13 November 2020, the Tribunal issued Procedural Order No. 70. It there (i) ordered the Claimants to submit a Revised Appendix 2 to the Memorial on Damages to account for the Claimants' decision to reduce their pecuniary claim; (ii) rejected the Claimants' request that the Tribunal issue an order "to the effect that the production of their invoice detail as well as any inadvertent production of privileged documents would not result in a waiver and that a producing party could 'claw back' any privileged documents post-production, similar to the type of order a U.S. federal district court may enter pursuant to Rule 502(d) of the Federal Rules of Evidence"; and (iii) invited further comments from the Claimants regarding the Respondent's allegations of deficient document production.

39. On 22 December 2020, the Tribunal issued Procedural Order No. 71, whereby it found "that its order in respect of Request No. 31 [of the Respondent's 11 May 2020 Redfern Schedule] does not require the Claimants to produce the information constituting the Unclaimed Invoices or FTI's software. Accordingly, once the Claimants produced the Structured Data relating to Claimed Invoices, they satisfied the Tribunal's order in respect

of Request No. 31, as clarified in Procedural Orders Nos. 67 and 68." On this basis, the Tribunal rejected the Respondent's request that the Claimants produce the review database.

40. By a letter dated 8 January 2021, the Tribunal rejected a request from the Respondent for leave to submit a Reply to the Claimants' Response to Ecuador's Objections to Claimants' Privilege and Confidentiality Log, dated 21 December 2020. It there also granted leave to the Respondent to submit a rebuttal expert report to the Claimants' submitted expert report of Judge Stephen G. Larson and made certain adjustments to the Track III schedule.

41. On 8 February 2021, the Tribunal issued Procedural Order No. 72. It there decided outstanding privilege disputes concerning the Claimants' Second Privilege and Confidentiality Log.

42. On 4 March 2021, the Tribunal, the PCA and the Parties attended a procedural meeting (by video conference) in preparation for the Hearing on a Partial Award. During the procedural meeting, the Respondent requested that the Tribunal issue an instruction excluding from the scope of the hearing and from the Tribunal's ensuing decision any issues not directly responsive to the questions raised in the Claimants' Request for Partial Award. The Tribunal ruled upon such request in its Procedural Order No. 73, dated 8 March 2021.

43. The Hearing on a Partial Award was held on 16 March and 17 March 2021 by video conference.

44. By a letter dated 22 May 2021, the Claimants informed the Tribunal of an alleged breach of the Tribunal's confidentiality orders as established in Procedural Orders Nos. 58, 64 and 67. The Respondent addressed such allegations in a letter dated 28 May 2021. By its Procedural Order No. 74, dated 2 June 2021, the Tribunal reaffirmed its prior directions on confidentiality but declined to make any further orders at that juncture.

45. On 30 June 2021, the Tribunal issued its Partial Award on Threshold Issues of Track III (the "Partial Award on Track III", as defined above). It is further described below.[4]

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4 *See* paras. 92-93 below.

46. On 23 July 2021, the Tribunal issued Procedural Order No. 75, setting forth a revised schedule for Track III, leading to a Main Hearing on Track III to be held from 18 August to 7 September 2022 (the "**Track III Hearing**").

47. On 1 July 2022, the Tribunal issued Procedural Order No. 76, whereby it rejected a request from the Claimants to strike from the record the expert reports of B. Tod Delaney (bearing the references RE-34 and RE-64). It further addressed the Claimants' request to file additional evidence in response to the Rejoinder on Damages.

48. On 26 July 2022, the Tribunal issued Procedural Order No. 77, whereby it established a Hybrid Hearing Protocol for the Track III Hearing.

49. On 1 August 2022, the Tribunal issued Procedural Order No. 78. It there (i) granted leave to the Parties to submit into the record additional documents listed in their respective communications of 11 July and 25 July 2022, and (ii) rejected the Claimants' request to submit into the record an additional opinion by Dr Ricardo Gil Lavedra.

50. On 11 August 2022, the Tribunal issued Procedural Order No. 79, whereby it (i) rejected the Respondent's request for reconsideration of Procedural Order No. 78; and (ii) invited the Parties to confer and submit a revised joint hearing schedule.

51. The Track III Hearing was held from 18 August to 7 September 2022. It is further described below.[5]

52. On 23 August 2022, the Tribunal issued Procedural Order No. 80, whereby it rejected the Claimants' request to "replace a document that was inadvertently submitted as Exhibit C-3488 with the correct document".

53. On 23 September 2022, the Tribunal issued Procedural Order No. 81, issuing directions concerning (i) post-hearing indexes to be submitted by the Parties; and (ii) corrections to the Track III Hearing transcript.

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5 *See* paras. 65-75 below.

54. Also on 23 September 2022, the Tribunal issued Procedural Order No. 82, deferring its decision on the Respondent's Motion to Strike the Claimants' Claims related to the "Cash Calls" dated 2 September 2022, to its Track III Award.

55. On 14 October 2022, the Tribunal issued Procedural Order No. 83, whereby it invited the Parties to submit a joint Microsoft Excel model for the calculation of damages and interest, provided directions for said model, and set forth the procedure for the submission of the model. On 3 November 2022, the Parties notified the Tribunal that they were unable to reach agreement on a joint damages and interest model, and each submitted a model. On 18 November 2022, the Parties submitted their respective disclaimers in respect of both models. The Claimants' disclaimer was accompanied by certain video tutorials concerning the Claimants' damages model. After being granted leave by the Tribunal, the Respondent filed its own video tutorials concerning its damages model on 9 December 2022.

56. Pursuant to paragraph 5 of Procedural Order No. 83, the Parties were required to provide monthly updates of their joint damages model in which the applicable benchmark interest rates and related data were already built-in as necessary. Starting in January 2023, in view of their failure to agree on a joint damages model, the Parties submitted updated versions of their respective damages model on a monthly basis. On 20 December 2024, the Claimants filed a model including, for the first time, interest calculations for the Claimants' alleged trademark and embargo losses. On 14 January 2025, the Respondent requested the Tribunal to reject the Claimants' 20 December 2024 damages model. On 11 April 2025, the Tribunal (i) instructed the Parties to continue filing damages models as prescribed under paragraph 5 of Procedural Order No. 83; and (ii) noted that it would not draw guidance from the Claimants' 20 December 2024 model in finalizing its award on Track III. The last versions of the Parties' damages models received by the Tribunal prior to the issuance of this Award were filed by the Claimants on 14 October 2025 and by the Respondent on 15 October 2025.

57. On 7 November 2022, the Parties filed their respective post-Track III Hearing indexes.

58. On 13 November 2022, the Tribunal issued Procedural Order No. 84, whereby it determined that issues related to the allocation and assessment of costs and expenses

within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules as claimed by the Parties would be dealt with in Track IV of the Arbitration.

59. *Written Pleadings*: Pursuant to the Tribunal's Procedural Orders, the Parties submitted the following written pleadings during Track III:

(i) The Claimants' Memorial on Damages (Track III), dated 31 May 2019 ("**Memorial**");

(ii) The Respondent's Counter-Memorial on Damages, dated 28 February 2020 ("**Counter-Memorial**");

(iii) The Claimants' Request for Guidance Concerning the Evidence to Support Claimants' Damage Claim for Legal Fees and Costs, dated 21 April 2020 (defined earlier as "Request for Guidance");

(iv) The Claimants' Request for a Partial Award on Threshold Issues, dated 21 April 2020 (defined earlier as "Request for Partial Award");

(v) The Respondent's Response to Claimants' Request for Guidance Concerning the Evidence to Support Claimants' Damage Claim for Legal Fees and Costs, dated 19 May 2020;

(vi) The Respondent's Response to Claimants' Request for a Partial Award on Threshold Issues, dated 19 May 2020;

(vii) The Claimants' Second Submission on Request for a Partial Award, dated 1 October 2020 (the "**Claimants' Second Submission**");

(viii) The Respondent's Second Submission on Request for a Partial Award, dated 15 January 2021 (the "**Respondent's Second Submission**");

(ix) The Claimants' Reply Memorial on Damages (Track III), dated 20 August 2021 (the "**Reply**"); and

(x) The Respondent's Rejoinder on Damages, dated 20 May 2022 (the "**Rejoinder**").

60. Whilst the Parties have submitted during these proceedings other written pleadings touching upon issues decided in this Award, the Tribunal considers that their respective claims for relief in Track III can fairly be taken for present purposes from the submissions listed in Section IV *infra*, save where otherwise indicated below.[6]

61. *Written Factual Testimony*: During Track III, the Claimants submitted the following written factual testimony:

(i) The witness statement of E.J. Rankin, dated 30 May 2019;

(ii) The third witness statement of Ricardo Reis Veiga, dated 30 May 2019;

(iii) The first witness statement of David S. Turner, dated 30 May 2019;

(iv) The witness statement of Colleen Kent, dated 31 May 2019;

(v) The fourth witness statement of Ricardo Reis Veiga, dated 29 July 2021;

(vi) The witness statement of Steven G. Kobre, dated 13 August 2021;

(vii) The witness statement of Robert A. Mittelstaedt, dated 18 August 2021;

(viii) The witness statement of Peter E. Seley, dated 18 August 2021; and

(ix) The second witness statement of David Turner, dated 19 August 2021.

62. The Respondent did not submit written factual testimony during Track III.

63. *Written Expert Testimony*: During Track III, the Claimants submitted the following written expert testimony:

(i) The third expert report of Weston Anson, dated 31 May 2019;

(ii) The first expert report of Kiran Sequeira, dated 31 May 2019;

(iii) The first expert report of Steven F. Stanton, dated 31 May 2019;

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[6] *See* Track II Award, para. 1.47 for a fuller list of written pleadings filed prior to Track III. *See also* Section XIII below.

(iv) The eighth expert report of Cesar Coronel Jones, dated 1 October 2020;

(v) The expert report of Stephen G. Larson, dated 21 December 2020;

(vi) The expert report of Daniel J. Slottje, dated 17 August 2021;

(vii) The fourth expert report of Weston Anson, dated 19 August 2021;

(viii) The expert report of José Luis Barzallo Sacoto, dated 19 August 2021;

(ix) The expert report of Charles Silver, dated 19 August 2021;

(x) The expert report of Clyde W. Lea, dated 20 August 2021;

(xi) The expert report of Sanford Litvack, dated 20 August 2021;

(xii) The expert report of Mark A. McGrath dated 20 August 2021;

(xiii) The expert report of Geoffrey Parsons Miller, dated 20 August 2021;

(xiv) The expert report of Joseph Ryan, dated 20 August 2021;

(xv) The second expert report of Kiran Sequeira, dated 20 August 2021; and

(xvi) The second expert report of Steven F. Stanton, dated 20 August 2021.

64. The Respondent submitted the following written expert testimony during Track III:

(i) The expert report of Verónica Arias Cabanilla, dated 20 February 2020;

(ii) The first expert report of Luis Sergio Parraguez Ruiz, dated 22 February 2020;

(iii) The first expert report of María de los Ángeles Lombeida Araujo, dated 23 February 2020;

(iv) The first expert report of Luciano de Souza Godoy, dated 25 February 2020;

(v) The first expert report of Erik S. Knutsen, dated 25 February 2020;

(vi) The first expert report of Juliette M. Luycks, dated 25 February 2020;

(vii) The first expert report of Fernando García Pullés, dated 26 February 2020;

(viii) The second expert report of William O. Kerr, dated 26 February 2020;

(ix) The first expert report of Mari Henry Leigh, dated 26 February 2020;

(x) The expert report of David Paige, dated 26 February 2020;

(xi) The first expert report of S.I. Strong, dated 27 February 2020;

(xii) The fourth expert report of Fabián Andrade Narváez, dated 28 February 2020;

(xiii) The first expert report of B. Tod Delaney, dated 28 February 2020;

(xiv) The first expert report of Daniel Flores, dated 28 February 2020;

(xv) The fifth expert report of Fabián Andrade Narváez, dated 14 January 2021;

(xvi) The second expert report of Luis Sergio Parraguez Ruiz, dated 13 January 2021;

(xvii) The expert report of Richard D. Friedman, dated 25 January 2021;

(xviii) The expert report of Misael Ruiz Fierro, dated 12 May 2022;

(xix) The expert report of Albert J. Lee, dated 13 May 2022;

(xx) The expert report of Bradley Wendel, dated 17 May 2022;

(xxi) The second expert report of Fernando García Pullés, dated 17 May 2022;

(xxii) The second expert report of María de los Ángeles Lombeida Araujo, dated 17 May 2022;

(xxiii) The expert report of William O. Kerr and Gregory E. Smith, dated 18 May 2022;

(xxiv) The second expert report of Mari Henry Leigh, dated 18 May 2022;

(xxv) The second expert report of Luciano de Souza Godoy, dated 19 May 2022;

(xxvi) The second expert report of Erik K. Knutsen, dated 19 May 2022;

(xxvii) The sixth expert report of Fabián Andrade Narváez, dated 19 May 2022;

(xxviii) The second expert report of Juliette Luycks, dated 19 May 2022;

(xxix) The expert report of John L. Trunko, dated 20 May 2022;

(xxx) The expert report of Lewis Baglietto, dated 20 May 2022;

(xxxi) The second expert report of Daniel Flores, dated 20 May 2022;

(xxxii) The second expert report of S.I. Strong, dated 20 May 2022; and

(xxxiii) The second expert report of B. Tod Delaney, dated 20 May 2022.[7]

65. *The Track III Hearing*: Issues under Track III were addressed by the Parties at the oral hearing held at the World Bank, in Washington D.C., USA held from 18 August to 7 September 2022, with the assistance of English and Spanish interpreters and recorded in the form of English and Spanish transcripts. The references below are made to the English version of the Track III Hearing transcript, as follows: "D1.10" signifies the first day, at page 10. As regards witness examinations, "x" signifies direct examination or direct presentation, "xx" signifies cross-examination, "xxx" signifies redirect examination, "xxxx" signifies recross-examination, and "QT" signifies questions from the Tribunal.

66. The Claimants and the Respondent were represented respectively at the Track III Hearing by those persons listed in the verbatim transcript, and it serves no purposes here listing these persons by name, save as follows.

67. For the Claimants, opening oral submissions were made by Jan Paulsson [D1.15], Doak Bishop [D1.42], Wade Coriell [D1.81], Edward Kehoe [D1.129], and Elizabeth Silbert [D1.166].

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[7] *See* Track II Award, paras. 1.49 *ff* for a fuller list of written witness and expert testimony submitted prior to Track III.

68. For the Respondent, opening oral submissions were made by Íñigo Salvador Crespo [D2.218], Andrew Schwartz [D2.226 & 384], Diana Tsutieva [D2.242, 340, & 372], Claudia Salgado Levy [D2.281 & 380], Jonathan Ettinger [D2.288 & 318], Richard Maidman [D2.300 & 360], Mark Finsterwald [D2.305, 330 & 368], Nicholas Renzler [D2.347], and Kenneth Leonetti [D2.394].

69. For the Claimants, further oral submissions were made by Elizabeth Silbert [D3.437], Jan Paulsson [D5.971 & D12.2784], Wade Coriell [D6.1249, D9.2031, D14.3258 & 3315], Doak Bishop [D7.1477, D8.1752, 1778 & 1788], Brian White [D10.2301, D14.3330 & 3359], and Luke Sobota Esq [D11.2600].

70. For the Respondent, further oral submissions were made by Richard Maidman [D3.442], Diana Tsutieva [D5.983, D6.1264, D11.2614 & D12.2800], Claudia Salgado Levy [D14.3300], Andrew Schwartz [D7.1492, D8.1765, 1786, D9.2041, D14.3218, 3307 & 3352], and Mark Finsterwald [D10.2307].

71. For the Claimants, closing oral submissions were made by Doak Bishop [D15.3379], Wade Coriell [D15.3392], Elizabeth Silbert [D15.3437], Craig Miles [D15.3463], Edward Kehoe [D15.3479], and Jan Paulsson [D15.3501].

72. For the Respondent, closing oral submissions were made by Claudia Salgado Levy [D15.3514], Diana Tsutieva [D15.3520], Jonathan Ettinger [D15.3548], Andrew Schwartz [D15.3570], Mark Finsterwald [D15.3598], and Kenneth Leonetti [D.15.3615].

73. The Claimants tendered 9 oral witnesses at the Track III Hearing who were all cross-examined by the Respondent: (i) Ricardo Reis Veiga [D3.454x, 467xx, 579xxx, 596QT, 607xxx & 608xxxx]; (ii) Peter E. Seley [D3.614x, 633xx, D4.711xx, 780xxx & 803QT]; (iii) Robert A. Mittelstaedt [D3.807x, 823xx & 939xxx]; (iv) Charles Silver [D5.995x, 1024xx, 1119xxx & 1123QT]; (v) Sanford Litvack [D5.1135x, 1163xx, D6.1277xx & 1289QT]; (vi) Joseph Ryan [D6.1301x, 1323xx & 1389xxx]; (vii) José Luis Barzallo Sacoto [D6.1401x, 1427xx & 1464xxx]; (viii) Weston Anson [D7.1508x, 1537xx & 1648xxx]; and (ix) Kiran Sequeira [D7.1662x, 1706xx, D8.1802xx & 1899xxx].

74. The Respondent tendered 10 oral witnesses at the Track III Hearing who were all cross-examined by the Claimants: (i) W. Bradley Wendel [D8.1920x & 1947xx]; (ii) S. I. Strong [D9.2051x, 2083xx, 2179xxx & 2196QT]; (iii) Mari Henry Leigh [D9.2206x,

2245xx, 2275xxx & 2279QT]; (iv) John L. Trunko Esq [D10.2316x, 2342xx, 2485xxx, 2429QT, D11.2567QT, 2581x[8] & 2582xx[9]]; (v) Fabián Andrade Narváez [D10.2501x, 2520xx, D11.2626xx & 2648xxx]; (vi) Lewis Baglietto [D11.2655x, 2683xx, 2753xxx, 2757QT & 2764xxxx]; (vii) David Paige [D12.2818x, 2843xx & 2854xxx]; (viii) María de los Ángeles Lombeida [D12.2859x & 2885xx]; (ix) Gregory E. Smith [D12.2917x, 2938xx, D13.3007xx & 3032xxx]; and (x) Daniel Flores [D13.3047x, 3098xx, 3156QT, 3169xx, 3171QT & 3176xxx].

75. The Tribunal called one witness: Mark A. McGrath [D11.2545QT, 2562x,[10] & 2563xx[11]].

76. *Track III Procedural Orders:* The Tribunal has issued 30 orders relevant to Track III (Procedural Orders Nos 52, 55-84), as follows:[12]

PO Number	***Date***	***Subject-Matter***
PO No. 52	10 October 2018	Track III Of the Arbitration
PO No. 55	17 December 2018	Track III Timetable and Other Matters
PO No. 56	26 April 2019	Track III Timetable
PO No. 57	21 May 2019	Respondent's Request of 14 May 2019
PO No. 58	22 May 2019	Temporary Confidentiality Order
PO No. 59	17 June 2019	Claimants' Application for Interim Relief
PO No. 60	19 April 2020	May 2020 Procedural Meeting
PO No. 61	2 May 2020	Tribunal's Directions in PO No. 60
PO No. 62	10 May 2020	Tribunal's Decisions in PO Nos. 56, 58, 60 & 61
PO No. 63	26 May 2020	Track III Procedural Meeting

[8] Examination by counsel for the Respondent.

[9] Examination by counsel for the Claimants.

[10] Examination by counsel for the Claimants.

[11] Examination by counsel for the Respondent.

[12] *See* Track II Award, Part I, Annex 2 for a list of all procedural orders issued in this Arbitration prior to Track III.

PO No. 64	29 May 2020	Extension of Temporary Confidentiality Order in PO No. 58
PO No. 65	10 July 2020	Decision on the Claimants' Requests for a Partial Award and for Guidance dated 21 April 2020 and Claimants' Letter of 4 May 2020 raising issues of non-compliance with the Track II Award dated 30 August 2018
PO No. 66	16 July 2020	Decision on Parties' Document Production Requests
PO No. 67	28 September 2020	Omnibus Order
PO No. 68	26 October 2020	Decision on Outstanding Privilege Disputes
PO No. 69	5 November 2020	Revised Track III Schedule
PO No. 70	13 November 2020	Omnibus Order
PO No. 71	22 December 2020	Document production
PO No. 72	8 February 2021	Decision on the Respondent's Request concerning the Scope of the Hearing on Partial Award
PO No. 73	8 March 2021	Decision on Outstanding Privilege Disputes
PO No. 74	2 June 2021	Respondent's Alleged Confidentiality Breaches
PO No. 75	23 July 2021	Revised Track III Schedule
PO No. 76	1 July 2022	Claimants' Requests to Strike the Second Delaney Report and to File Additional Evidence in response to the Track III Rejoinder
PO No. 77	26 July 2022	Hybrid Hearing Protocol
PO No. 78	1 August 2022	Requests to File Additional Evidence and Claimants' Request to Introduce the Gil Lavedra Legal Opinion
PO No. 79	11 August 2022	Respondent's Request for Reconsideration of PO No. 78
PO No. 80	23 August 2022	Claimants' Request to Introduce a Declaration Authored by John L. Trunko
PO No. 81	23 September 2022	Post-Hearing Indexes and Corrections to Track III Hearing Transcripts

PO No. 82	23 September 2022	Respondent's Request to Strike the Claimants' Claims related to the "Cash Calls"
PO No. 83	14 October 2022	Joint Model for Calculation of Damages and Interest
PO No. 84	13 November 2022	Track IV of the Arbitration
PO No. 85	28 October 2025	Closing the Record as regards Track III of the Arbitration
PO No. 86	7 November 2025	Embargo Order – Track III Award

77. *Closing the Record:* By its Procedural Order No. 85, dated 28 October 2025, the Tribunal 'closed' the record of this Arbitration as regards the issues under Track III that were to be decided in this Award.

* * *

III. BACKGROUND TO THE TRACK III AWARD

A. FACTUAL BACKGROUND

78. In Parts IV, V and VI of the Track II Award, the Tribunal considered and made its findings in respect of the Claimants' allegations that several judges of the **Lago Agrio Court** wrongfully conducted and decided the **Lago Agrio Litigation**, in breach of the protections provided to the Claimants by the Treaty. Central among these was the Claimants' allegation that Judge Nicolás Zambrano did not write the **Lago Agrio Judgment** of 14 February 2011 (with its Clarification Order of 4 March 2011) but, rather, that the Lago Agrio Judgment was "ghostwritten", with Judge Zambrano's corrupt connivance, by certain of the Lago Agrio Plaintiffs' (the "**LAPs**") representatives.

79. It would serve no purpose to repeat here in full the Tribunal's findings on such allegations. However, for the sake of context the Tribunal provides a brief overview of some key aspects of the factual background of the case and the Tribunal's findings of fact as set out in the Track II Award.

80. *Crude Oil Pollution in the Oriente*: On 21 February 1964, the Respondent granted oil exploration and production rights in Ecuador's Oriente region to TexPet (a subsidiary of Texaco) and the Ecuadorian Gulf Oil Company (a subsidiary of Gulf) under a written concession made with these companies' local subsidiaries operating as a Consortium.[13] In 1967, the Consortium discovered significant deposits of crude oil in the Oriente and drilled its first wells. By 1969, the Consortium had found considerable reserves of crude oil.[14] On 6 August 1973, the Respondent, TexPet and Gulf entered into a further concession agreement with a term expiring on 6 June 1992 (the "**1973 Concession Agreement**"),[15] which, among other things, imposed environmental and related obligations on the Contractors (TexPet and Gulf) and the Operator (TexPet).[16] On 30 June 1990, TexPet ceased to act as the "Operator" under the 1973 Concession Agreement, after

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13 Track II Award, para. 4.55.

14 Track II Award, para. 4.56.

15 Track II Award, para. 4.58.

16 Track II Award, para. 4.59.

25 years (1965 to 1990). From 1 July 1990 onwards, PetroEcuador (by its subsidiary, Petroamazonas) became the "Operator" under the 1973 Concession Agreement.[17]

81. There is today crude oil pollution in the former concession area of the Oriente, including pollution lying close to human habitation.[18] The origin of such crude oil pollution, apart from accidental leaks and spills, derives principally from a mixture of oil and "produced water" in pits, subject to run-off into adjoining land and water courses.[19]

82. *The 1995-1998 Settlement and Release Agreements*: This term, as used in the Track II Award and in this Award, comprises three sets of contractual documentation: (i) the **1995 Settlement Agreement** of 4 May 1995; (ii) the **1996 Municipal and Provincial Releases**; and (iii) the **1998 Final Release** of 30 September 1998.[20] The general features of the 1995-1998 Settlement and Release Agreements are as follows:

(i) *The 1995 Settlement Agreement*: The 1995 Settlement Agreement was signed for the Respondent by the Minister of Energy and Mines (Dr Galo Abril Ojeda), for PetroEcuador by its Executive President (Dr Federico Vintimilla Ojeda) and for TexPet by its Vice-President (Mr Ricardo Reis Veiga) and its legal representative (Dr Rodrigo Pérez Pallares). It provides (*inter alia*): "the scope of the Environmental Remedial Work to be undertaken by TexPet to discharge all of its legal and contractual obligations and liability [for] Environmental Impact arising out of the Consortium's operations has been determined and agreed to by TexPet, the Government and PetroEcuador as described in this Contract"; the agreed scope of the environmental remedial work is attached as Annex A; and "TexPet agrees to undertake such Environmental Remedial Work in consideration for being released and discharged of all its legal and contractual obligations and liability for Environmental Impact arising out of the Consortium's operations".[21]

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17 Track II Award, para. 4.62.

18 Track II Award, para. 4.71.

19 Track II Award, para. 4.72.

20 Track II Award, para. 3.15.

21 Track II Award, paras. 4.157, 4.159.

By Article 5.1 of the 1995 Settlement Agreement, the Respondent and PetroEcuador release, acquit and forever discharge TexPet and its fellow "Releasees" of "all the Government's and Petroecuador's claims against the Releasees for Environmental Impact arising from the Operations of the Consortium, except for those related to the obligations contracted hereunder for the performance by TexPet of the Scope of Work (Annex A) which shall be released as the Environmental Remedial Work is performed to the satisfaction of the Government and Petroecuador. . .".[22]

(ii) *The 1996 Municipal and Provincial Releases*: In May-September 1996, the Municipal and Provincial Releases were agreed between TexPet and four municipalities in the Oriente (Shushufindi, Francisco de Orellana, Lago Agrio and La Joya de los Sachas), pursuant to paragraph VII(C) of Annex A of the 1995 Settlement Agreement and approved by the Ecuadorian Courts.[23]

(iii) *The 1998 Final Release*: The Final Release was issued on 30 September 1998, signed by PetroEcuador, the relevant Ministries, and TexPet. In summary, within the former concession area, a total of 250 pits and 7 spills at 133 well sites in 10 fields had been investigated under the Remedial Action Plan agreed by TexPet, Petro Ecuador and the Respondent in September 1995 (the "**RAP**"). Remedial action was taken at 168 of these locations; and the balance (of 89) not subjected to remedial action because it was not required under the RAP.[24]

83. *The Aguinda Litigation*: The Aguinda Complaint was filed in the District Court for the Southern District of New York on 3 November 1993. It pleaded a claim by the Aguinda Plaintiffs as a putative (uncertified) class action under the USA's Federal Rules of Procedure, by named individuals and "on behalf of a class of all others similarly situated" for personal injuries and property damage caused by the defendant's wrongdoing. The original defendant was Texaco.[25]

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22 Track II Award, para. 4.158.

23 Track II Award, para. 4.164.

24 Track II Award, para. 4.178.

25 Track II Award, para. 4.75.

84. As pleaded, the named individuals and unnamed class members estimated as numbering 30,000 were all resident in Ecuador from 1972 onwards within a geographical area defined by latitude and longitude, south of the Colombian border. This complaint asserted individual civil claims for personal injury and property damage, aggregated as members of the same putative class. The causes of action were pleaded in tort, including negligence, public nuisance, private nuisance, strict liability, trespass, and civil conspiracy, with relief claimed as compensatory damages, punitive damages and equitable relief to remedy the alleged pollution and contamination "of the plaintiffs' environment and the personal injuries and property damage caused thereby".[26]

85. After years of litigation at the trial court and appellate levels, by its judgment dated 30 May 2001, the U.S. District Court for the Southern District of New York (Judge Rakoff) dismissed the Aguinda Complaint (for a second time). The Court ordered an unconditional stay on the ground of *forum non conveniens* because the case had "everything to do with Ecuador and nothing to do with the United States [of America]". As there also recorded: "Following remand [by the Second Circuit to Judge Rakoff], Texaco provided the missing commitment to submit to the jurisdiction of the courts of Ecuador" on 11 January 1999.[27] By its judgment dated 16 August 2002, the Second Circuit affirmed, as modified, Judge Rakoff's Order.[28]

86. *The Lago Agrio Litigation*: On 7 May 2003, the LAPs filed the Lago Agrio Complaint with the Lago Agrio Court against Chevron (which, by then had "merged" with Texaco) (the "**Lago Agrio Complaint**"). The Complaint identified the 48 individual plaintiffs as being "domiciled in the Secoya Community of San Pablo de Aguarico, Canton of Shushufundi, Province of Sucumbíos" and "Ecuadorian nationals engaged in farming activities". These plaintiffs were described as having been the same Aguinda Plaintiffs as in the stayed Aguinda Litigation New York, having there sought "enforcement of their own rights as well as those of other people in the same class, as the term is used in [New York's] procedural rules to designate the people who might find themselves in an

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[26] Track II Award, para. 4.76.

[27] Track II Award, paras. 4.82-4.83.

[28] Track II Award, para. 4.84.

identical legal situation with regard to the specifics of the lawsuit [*i.e.*, the Aguinda Litigation]".[29]

87. The Lago Agrio Court (Judge Zambrano) issued the Lago Agrio Judgment on 14 February 2011 (with its Clarification Order of 4 March 2011), adverse to Chevron. It awarded USD 18.2 billion in damages to be paid by Chevron, including USD 8.6 billion as punitive damages subject to a timely public apology by Chevron, with a 10% award to the Amazonian Defence Front ("**ADF**").[30]

88. Chevron initiated three successive appeals against the Lago Agrio Judgment, resulting in the Judgments of the Provincial Court of Justice of Sucumbios (the "**Appellate Court**") in 2012, the National Court of Justice (the "**Cassation Court**") in 2013, and the Constitutional Court of Ecuador (the "**Constitutional Court**") in 2018.[31] In its 12 November 2013 Judgment, the Cassation Court affirmed in part the Lago Agrio Judgment, but nullified the punitive damages imposed for Chevron's omission to "apologise", as required by that Judgment and as upheld by the Appellate Court. As a result, the Cassation Court reduced the Lago Agrio Judgment's award of damages to USD 8.6 billion, with 10% to be paid to the ADF.[32] The Constitutional Court issued its Judgment on 27 June 2018, affirming the Judgment of the Cassation Court.[33]

89. *The 'Ghostwriting' of the Lago Agrio Judgment*: In Part VIII of the Track II Award, the Tribunal analysed in the aggregate the factual and forensic conclusions it had reached in Parts IV, V and VI of the Award as regards the Claimants' allegations that the Lago Agrio Judgment was 'ghostwritten' for Judge Nicolás Zambrano of the Lago Agrio Court:

> The facts established on the factual, expert and forensic evidence speak for themselves, as set out at length in Parts IV, V and VI above.
>
> As there explained, the details as to how exactly all or material parts of the Lago Agrio Judgment came to be written, corruptly by certain of the Lago Agrio Plaintiffs' representatives for Judge Zambrano, remain incomplete. The missing factual and forensic evidence is likely available only in Ecuador, if it still exists at all. Yet the circumstantial

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29 Track II Award, paras. 4.89-4.90.

30 Track II Award, para. 5.2.

31 Track II Award, para. 4.94.

32 Track II Award, para. 5.172.

33 Track II Award, para. 5.180.

> and other evidence adduced in this arbitration is overwhelming. Short of a signed confession by the miscreants, as rightly submitted by the Claimants at the end of the Track II Hearing, the evidence establishing 'ghostwriting' in this arbitration "must be the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal."
>
> As found by the Tribunal in Parts IV and V above, two of the Lago Agrio Plaintiffs' representatives who were privy to the 'ghostwriting' exercise were Mr Donziger and Mr Fajardo. As the Respondent acknowledged at the Track II Hearing, the participation of Mr Fajardo in 'ghostwriting' for Judge Zambrano, if correct (which the Respondent denies), would suffice to support the Claimants' claims for denial of justice. The Tribunal agrees: the Claimants' inability to identify by name with sufficient probability others of the Lago Agrio Plaintiffs' representatives, also involved in 'ghostwriting' (in addition to Mr Donziger), cannot by itself exculpate the Respondent from liability for denial of justice. If it were otherwise, the more successful the ghostwriting exercise, the less culpability would result. In any event, for denial of justice, the relevant actor is Judge Zambrano; and his participation in the 'ghostwriting' of the Lago Agrio Judgment is firmly established on the evidence before this Tribunal.
>
> On such evidence, the Tribunal has found that Judge Zambrano acted corruptly, in return for a bribe promised to him by certain of the Lago Agrio Plaintiffs' representatives. Judge Zambrano's collusive conduct in the 'ghostwriting' of the Lago Agrio Judgment was not authorised under Ecuadorian law. Nor was it under judicial standards long established under international law. He was far from acting as an independent or impartial judge deciding the Lago Agrio Litigation fairly between the parties, under minimum standards for judicial conduct long recognized under international law.[34]

B. KEY RULINGS IN THE TRIBUNAL'S PRIOR AWARDS AND DECISIONS

90. In its Track II Award, Part I, Annex 1, the Tribunal re-stated the Operative Parts of its Orders on Interim Measures, Awards and Decision on Track I(B). It is unnecessary to repeat those decisions here. For ease of reference, however, the Tribunal repeats here the Operative Parts of the Track II Award and the Partial Award on Track III.

91. *Track II Award*: Part X (the Operative Part) of the Track II Award reads as follows:

> *A: Introduction*
>
> 10.1 For the reasons set out in this Award, based on the evidential materials adduced in these arbitration proceedings together with its earlier awards, orders and decision, the Tribunal makes the following declarations and orders under the Treaty and international law:
>
> *B: Declarations as to Jurisdiction and Admissibility*
>
> 10.2 The Tribunal declares that it has jurisdiction under Article VI of the Treaty over the claims pleaded in this arbitration by the First Claimant (Chevron) and the Second

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[34] Track II Award, paras. 8.53-8.56.

Claimant (TexPet) under Articles II(3)(a) and II(3)(c) of the Treaty; and the Tribunal rejects all objections as to lack of jurisdiction pleaded by the Respondent;

10.3 The Tribunal declares that the claims pleaded in this arbitration by the First Claimant and the Second Claimant under Articles II(3)(a) and II(3)(c) of the treaty are admissible under Article VI of the Treaty; and the Tribunal rejects all objections as to non-admissibility pleaded by the Respondent.

C: Declarations as to the Merits

10.4 The Tribunal declares that material parts of the Lago Agrio Judgment of 14 February 2011 (as clarified by order of 4 March 2011) were corruptly 'ghostwritten' for Judge Nicolás Zambrano Lozada, as a judge of the Lago Agrio Court, by one or more of the Lago Agrio Plaintiffs' representatives in return for a promise by such representative(s) to pay to Judge Zambrano a bribe from the proceeds of the Lago Agrio Judgment's enforcement by the Lago Agrio Plaintiffs;

10.5 The Tribunal declares that the Respondent, by issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador, wrongfully committed a denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty;

10.6 The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant for denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty; and the Tribunal rejects the defences pleaded by the Respondent;

10.7 The Tribunal (by a majority) declares, confirming its Decision on Track IB, that the Lago Agrio Complaint of 7 May 1998, as an initial pleading, included individual claims (for personal harm) resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement and that, therefore, the Lago Agrio Complaint was not wholly barred at its inception by res judicata under Ecuadorian law, by virtue of the 1995 Settlement Agreement;

10.8 The Tribunal declares that the said Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) decided only diffuse claims as distinct from individual claims for personal harm by the Lago Agrio Plaintiffs, whereby the Respondent violated its obligations towards the First Claimant and the Second Claimant as "Releasees" under the 1995 Settlement Agreement;

10.9 The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant under Article II(3)(c) of the Treaty for the non-observation of its obligations towards each of them as a "Releasee" under the 1995 Settlement Agreement; and the Tribunal rejects the defences pleaded by the Respondent;

10.10 The Tribunal declares that, given the Respondent's said denial of justice, the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) grossly violated the fundamental procedural rights of the First

Claimant (including its rights of defence); the said Lago Agrio Judgment (as thus decided) is contrary to international public policy; and no part of the said Lago Agrio Judgment should be recognised or enforced by any State with knowledge of the Respondent's said denial of justice;

10.11 The Tribunal declares that any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make reparation under international law;

10.12 For the avoidance of doubt, the Tribunal declares and confirms that neither this Award nor any of its earlier awards, orders and decision precludes a claim by any of the Lago Agrio Plaintiffs against the First or Second Claimants made for personal harm in respect of his or her individual rights, not being a diffuse claim within the meaning of the 1995 Settlement Agreement.

D: Orders as to the Merits

10.13 The Respondent shall, to the satisfaction of the Tribunal and as unconditional obligations of result (save where otherwise indicated):

(i) Take immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts);

(ii) take immediate steps, of its own choosing, to preclude any of the Lago Agrio Plaintiffs, any "trust" purporting to represent their interests (including the "Frente de Defensa La Amazonia"), any of the Lago Agrio Plaintiffs' representatives, and any non-party funder from enforcing any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts), directly or indirectly, whether by attachment, arrest, interim injunction, execution or howsoever otherwise;

(iii) on notice from the First or Second Claimants, advise promptly in writing any State (including its judicial branch), where the Lago Agrio Plaintiffs may be seeking directly or indirectly, now or in the future, the enforcement or recognition of any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) of this Tribunal's declarations and orders regarding the Respondent's internationally wrongful acts comprising a denial of justice resulting from the Lago Agrio Judgment (as thus decided); and, for this purpose (being required by legal duty or to pursue a legal right), any Party shall be entitled, notwithstanding Article 32(5) of the UNCITRAL Arbitration Rules, to disclose to the State's judicial branch (on whatever terms that its courts may order) a copy of this Award and its earlier awards, orders and decision;

(iv) abstain from collecting or receiving, directly or indirectly, any proceeds from the enforcement or recognition of any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) within or without Ecuador;

(v) return promptly to the First Claimant any such proceeds that (notwithstanding the foregoing) come into the Respondent's custody, possession or control;

(vi) take corrective measures, of its own choosing, to "wipe out all the consequences" of all the Respondent's internationally wrongful acts in regard to the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts), within the meaning of Article 31 of the International Law Commission's Articles on State Responsibility, excepting only reparation in the form of compensation (as to which, see Section E below);

(vii) comply with its obligations towards the First Claimant and the Second Claimant as "Releasees" under the 1995 Settlement Agreement, in accordance with Article II(3)(c) of the Treaty; and

(viii) subject to further order of this Tribunal in Track III, make full reparation in the form of compensation for any injuries caused to the First Claimant and the Second Claimant by the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts).

E: Compensation

10.14 All issues as to reparation in the form of compensation for any injuries sustained by the First or Second Claimant, as claimed by the Claimants and denied by the Respondent, including any assessment of the amount of compensation, moral damages, indemnities, reimbursements, payments, expenses and interest, are currently assigned for further submissions by the Parties to Track III. These issues are not decided in this Award.

F: Legal and Arbitration Costs

10.15 All issues relating to the allocation and assessment of costs and expenses (within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules), as claimed by the Claimants and the Respondent, are currently assigned for further submissions by the Parties later in these arbitration proceedings. These issues are not decided in this Award;

10.16 Nonetheless, so as to facilitate this later exercise as to assessment, the Claimants and the Respondent shall submit written summaries (not to exceed ten pages) of their respective claimed amounts for costs and expenses to date, to be submitted to the Tribunal not later than 90 days following the date of this Award. These summaries shall contain only a breakdown of the claimed amounts and shall not include any submissions as to the merits of the Parties' respective claims for costs (including issues of allocation).

G: Miscellaneous

10.17 The Parties' extant requests for relief, as marked-up in the enclosures to their respective letters dated 19 March and 20 April 2018 for Track III, shall be addressed by the Parties in Track III of these arbitration proceedings;

10.18 The Tribunal confirms, as declared in its Fourth Interim Award on Interim Measures dated 7 February 2013, that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law;

10.19 In accordance with the Tribunal's said Fourth Interim Award, at Paragraph 2 of Part IV (page 31), the 'show cause' issues relating to compensation claimed by the First and Second Claimants for the Respondent's violations of the said First and Second Interim Awards shall be addressed by the Parties in Track III of these arbitration proceedings;

10.20 The Respondent's application of 1 March 2013 for the reconsideration of the Tribunal's First, Second and Fourth Interim Awards shall be further addressed by the Parties in Track III of these arbitration proceedings;

10.21 In the light of this Award, not later than 90 days following the date of this Award, any Party may apply to the Tribunal for permission to add any further issue or request for relief to be addressed by the Parties in Track III of these arbitration proceedings;

10.22 Further, in the light of this Award, not later than 90 days following the date of this Award, the Respondent may (in writing) show cause why the Tribunal should not vary Paragraph 4 of its Second Interim Award on Interim Measures by ordering the release to the Claimants of the amount of US$ 50 million deposited by the Claimants with the Permanent Court of Arbitration as security for the Claimants' contingent responsibility to the Respondent in regard to such interim measures; and

10.23 Save as aforesaid, the requests for relief made by the First and Second Claimants for decision in this Track II are not granted; and the requests for relief made by the Respondent for decision in this Track II are not granted.

10.24 This Award, although separately signed by the Tribunal's members on three signing pages, constitutes a "partial award" signed by the three arbitrators under Article 32 of the UNCITRAL Arbitration Rules.

92. *Partial Award on Track III*: As already stated above, by its Procedural Order No. 67 the Tribunal ordered the bifurcation of Track III with respect to the four preliminary questions raised by the Claimants in their Request for Partial Award, which arose from the hypothetical "but-for" reduction and "mitigation" arguments outlined in the Respondent's Counter-Memorial, namely:

Question #1: Is Ecuador's request for a reduction in damages based upon a hypothetical "but-for" scenario barred by the Tribunal's Track II finding that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption?

Question #2: Do the Tribunal's prior rulings regarding the scope and effects of the 1995 and 1998 Settlement and Release Agreements, as well as its rulings on its own jurisdiction, preclude both the claims that Ecuador's Counter-Memorial on Damages refers to as "collective" claims and any offset based on individual claims?

Question #3: If any hypothetical "but-for" scenario offset were permitted here, would it be limited to the confines of those claims actually pursued by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record?

Question #4: Do the Tribunal's prior rulings preclude Ecuador's argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law?

93. The Operative Part of the Partial Award on Track III reads:

> For the reasons set out above, the Tribunal:
>
> ***(i)*** Declares, in respect of Question #1, that there is no finding in the Tribunal's Track II Award that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption;
>
> ***(ii)*** Declares, in respect of Question #2, that its prior rulings do not preclude an offset based on individual claims or collective claims, to the extent that it refers to the legal costs that the Claimants would in all probability have incurred in defending themselves against those claims in a Treaty-compliant Lago Agrio Litigation;
>
> ***(iii)*** Declares in respect of Question #3, that any hypothetical but-for scenario offset should in principle at least be limited to the confines of the claims actually pleaded by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record;
>
> ***(iv)*** Declares, in respect of Question #4, that the Tribunal's prior rulings do not preclude the Respondent's argument that the Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law;
>
> ***(v)*** Vacates its Decision on the Parties' Document Production Requests in relation to requests concerning environmental matters, as originally set out in Procedural Order No. 66 and stayed by paragraph 7 of Procedural Order No. 67;
>
> ***(vi)*** Rejects the Parties' claims and requests to the extent that they contradict the Tribunal's decisions in this Partial Award; and
>
> ***(vii)*** Reserves its decision on all other claims and requests for subsequent determination.

C. SCOPE OF TRACK III

94. On 17 December 2018, the Tribunal issued Procedural Order No. 55. It there directed that the issues to be decided in Track III would be those identified in the Track II Award and paragraph 4 of Procedural Order No. 52, namely:

> a. All issues as to reparation in the form of compensation for any injuries sustained by the First Claimant or the Second Claimant, as claimed by the Claimants and denied by the Respondent, including any assessment of the amount of compensation, moral damages, indemnities, reimbursements, payments, expenses and interest;
>
> b. All issues relating to the allocation and assessment of costs and expenses (within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules), as claimed by the Claimants and the Respondent respectively, for Tracks I, II and III;
>
> c. The Parties' extant requests for relief, as marked-up for Track III in the enclosures to their respective letters dated 19 March and 20 April 2018 and set out in the Tribunal's Second Partial Award;

d. The 'show cause' issues relating to compensation claimed by the First Claimant and the Second Claimant for the Respondent's violations of the First and Second Interim Awards; and

e. The Respondent's application of 1 March 2013 for the reconsideration of the Tribunal's First, Second and Fourth Interim Awards.

95. In respect of item (b) in the preceding quote, and as already noted, by its Procedural Order No. 84 the Tribunal assigned all issues relating to the allocation and assessment of costs and expenses (within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules), as claimed by the Claimants and the Respondent for further submissions by the Parties to Track IV of the Arbitration. Accordingly, such issues are not addressed in this Award.

* * *

IV. THE PARTIES' REQUESTS FOR RELIEF IN TRACK III

A. THE CLAIMANTS' REQUESTS FOR RELIEF

96. In their letter dated 20 October 2025, the Claimants indicated the parts of their requests for relief that remain extant for Track III and, separately, Track IV.[35] What follows are the Claimants' prayers for relief from the outset of the Arbitration, highlighting **in bold** the relief extant for Track III (highlighted in yellow in the original), <u>in underscore</u> the relief extant for Track IV (highlighted in blue in the original), and **<u>in bold and underscore</u>** the relief relevant to both Tracks III and Track IV (in green in the original).

97. In their Amended Memorial on the Merits dated 23 September 2010, the Claimants made the following request for relief (footnotes here omitted):

> 547. Accordingly, Claimants request an Order and Award granting the following relief:
>
> 1. Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador.
>
> 2. Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements and the U.S.-Ecuador Treaty, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non- discriminatory treatment, and to observe obligations it entered into under the investment agreements.
>
> 3. Declaring that under the Treaty and applicable international law, Chevron is not liable for any judgment rendered in the Lago Agrio Litigation.
>
> 4. Declaring that any judgment rendered against Chevron in the Lago Agrio

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[35] *See also* Letter from the Claimants to the Tribunal dated 20 October 2025: "Consistent with the enclosure that Claimants submitted on 19 March 2018 listing their requests for relief, Claimants have highlighted each extant request for relief only once and have highlighted only the most recent extant requests. In other words, where Claimants sought relief in an earlier submission and subsequently sought the same relief in a later submission, Claimants have only highlighted the request from the later submission. The Tribunal can disregard the requests for relief that are not highlighted because either they are no longer extant or they are included in the yellow, blue, and green highlighted requests.

Claimants reserve the right to apply for relief from the Tribunal during Track IV, in addition to the relief currently highlighted in blue or green in Enclosure 1, to the extent such relief becomes necessary due to any action or inaction by Respondent."

Litigation is not final, conclusive or enforceable.

5. Declaring that Ecuador or Petroecuador (or Ecuador and Petroecuador jointly) are exclusively liable for any judgment rendered in the Lago Agrio Litigation.

6. Ordering Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable.

7. Ordering Ecuador to use all measures necessary to enjoin enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation, including enjoining the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices.

8. Ordering Ecuador to make a written representation to any court in which the nominal Plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive;

9. Ordering Ecuador to dismiss the Criminal Proceedings in Ecuador against Messrs Ricardo Veiga and Rodrigo Pérez.

10. Ordering Ecuador not to seek the detention, arrest or extradition of Messrs Veiga or Pérez or the encumbrance of any of their property.

11. Awarding Claimants indemnification against Ecuador in connection with a Lago Agrio Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in to the Lago Agrio judgment.

12. Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing a Lago Agrio judgment.

13. Awarding all costs and attorneys' fees incurred by Claimants in (1) defending the Lago Agrio Litigation and the Criminal Proceedings, (2) pursuing this Arbitration, (3) uncovering the collusive fraud through investigation and discovery proceedings in the United States, (4) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this Arbitration through litigation in the United States, (5) as well as all costs associated with responding to the relentless public relations campaign by which the Lago Agrio Plaintiffs' lawyers (in collusion with Ecuador) attacked Chevron with false and fraudulent accusations concerning this case. These damages will be quantified at a later stage in these proceedings.

14. Awarding moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's outrageous and illegal conduct.

15. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment.

16. Any other and further relief that the Tribunal deems just and proper.

98. In their Supplemental Memorial on the Merits dated 20 March 2012, the Claimants made the following request for relief (footnotes here omitted):

257. Accordingly, Claimants request an Order and Award granting the following relief:

1. Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador;

2. Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements;

3. Declaring that Ecuador has breached the U.S.-Ecuador Treaty, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non- discriminatory treatment, and to observe obligations it entered into under the investment agreements;

4. Declaring that Ecuador has committed a denial of justice under customary international law;

5. Declaring that under the Treaty and applicable international law, Chevron is not liable for any judgment rendered in the Lago Agrio Litigation;

6. Declaring that any judgment rendered against Chevron in the Lago Agrio Litigation is not final, conclusive or enforceable;

7. Declaring that Ecuador or Petroecuador (or Ecuador and Petroecuador jointly) are exclusively liable for any judgment rendered in the Lago Agrio Litigation;

8. Ordering Ecuador to use all measures necessary to prevent any judgment against Chevron in the Lago Agrio Litigation from becoming final, conclusive or enforceable;

9. Ordering Ecuador to use all measures necessary to enjoin enforcement of any judgment against Chevron rendered in the Lago Agrio Litigation, including enjoining the nominal Plaintiffs from obtaining any related attachments, levies or other enforcement devices;

10. Ordering Ecuador to make a written representation to any court in which the nominal Plaintiffs attempt to enforce a judgment from the Lago Agrio Litigation, stating that the judgment is not final, enforceable or conclusive;

11. Awarding Claimants indemnification against Ecuador in connection with a Lago Agrio Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in to the Lago Agrio Judgment;

12. Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing a Lago Agrio Judgment;

13. Awarding all costs and attorneys' fees incurred by Claimants in (1) defending the

Lago Agrio Litigation and the Criminal Proceedings, (2) pursuing this Arbitration, (3) uncovering the collusive fraud through investigation and discovery proceedings in the United States, (4) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this Arbitration through litigation in the United States, (5) as well as all costs associated with responding to the relentless public relations campaign by which the Lago Agrio Plaintiffs' lawyers (in collusion with Ecuador) attacked Chevron with false and fraudulent accusations concerning this case. These damages will be quantified at a later stage in these proceedings;

14. Awarding moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's outrageous and illegal conduct;

15. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment; and

16. Any other and further relief that the Tribunal deems just and proper.

99. In their Reply Memorial on the Merits for Track 1 dated 29 August 2012, the Claimants requested the following relief:

272. Accordingly, Claimants request a Partial Award that effectively protects Claimants' rights, and reverses (as far as possible) the harmful effects of Ecuador's breaches of the Settlement Agreements and its international-law obligations. To achieve this result, Claimants respectfully submit the following list of requests, from which the Tribunal can fashion a combination of declaratory, injunctive, and monetary relief in protection of Claimants' rights:

A. Specific Performance

1. Order that Ecuador specifically perform the Settlement Agreements.

B. Declaratory Relief

(i) Scope of the Settlement Agreements

1. Declare that both Claimants are "Releasees" under the Settlement Agreements, and were released from all diffuse environmental claims arising from TexPet's operations in Ecuador; and

2. Declare that the claims pleaded in the Lago Agrio Litigation (and upon which the Lago Agrio Judgment is based) are the same diffuse environmental claims settled and released in the Settlement Agreements.

(ii) Legal Effect of the Settlement Agreements

1. Declare that Claimants have no liability or responsibility for satisfying the Lago Agrio Judgment because they were fully released for all such claims by the Settlement Agreements;

2. Declare that the claims pleaded in the Lago Agrio Litigation (and upon which the Lago Agrio Judgment were based) are barred by res judicata and collateral estoppel;

3. Declare that under the Settlement Agreements, Claimants have no further liability or responsibility for diffuse environmental claims in Ecuador for Environmental Impact arising out of the Consortium's operations, or for performing any further environmental remediation;

4. Declare that Ecuador (through its various branches of Government) has breached the Settlement Agreements, inter alia, by refusing to specifically perform the Settlement Agreements, by refusing to ensure Claimants' enjoyment of their releases and their right to be free of litigation, by refusing to dismiss the Lago Agrio Plaintiffs' claims, by refusing to indemnify Chevron for the Lago Agrio Plaintiffs' claims, by seeking to nullify the Settlement Agreements by illegitimate means, and by refusing to comply with this Tribunal's Interim Awards;

5. Declare that Ecuador's actions have breached the U.S.-Ecuador BIT, including its obligations to afford fair and equitable treatment, full protection and security, effective means of enforcing rights, and to observe obligations it entered into under the overall investment agreements;

6. Declare that enforcement of the Lago Agrio Judgment within or without Ecuador would be inconsistent with Ecuador's obligations under the Settlement Agreements, the BIT and international law;

7. Declare that the Lago Agrio Judgment is a nullity as a matter of international law; and

8. Declare that: (i) the Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (ii) any enforcement of the Judgment would place Ecuador in violation of its international-law obligations; (iii) the Judgment violates international public policy and natural justice, and as a matter of international comity and public policy, the Judgment should not be recognized and enforced.

C. Injunctive Relief

1. Order Ecuador to use all measures necessary to comply with its obligations under the Settlement Agreements to release Claimants (and to ensure that Claimants may effectively enjoy the benefits of such releases) from any liability or responsibility for the Lago Agrio Judgment in Ecuador or in any other country;

2. Order Ecuador to use all measures necessary to prevent the Lago Agrio Judgment from becoming final, conclusive, or enforceable in Ecuador or in any other country;

3. Order Ecuador to use all measures necessary to stay or enjoin enforcement of the Lago Agrio Judgment, including enjoining the Lago Agrio Plaintiffs from obtaining any related attachments, levies, or other enforcement devices in Ecuador or in any other country;

4. Order Ecuador to use all measures necessary to revoke and nullify the Judgment;

5. Order Ecuador to make a written representation to any court in which the Lago Agrio Plaintiffs attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Judgment were released by the Government; (ii) the Lago Agrio Court had no personal or subject-matter jurisdiction over Chevron; (iii) the Judgment is a legal nullity; (iv) the Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (v) any enforcement of the Judgment would place Ecuador in violation of its international-law obligations; (vi) the Judgment violates international public policy and natural justice; (vii) any enforcement proceedings should be stayed pending the Tribunal's final award in this arbitration; and (viii) as a matter of international comity and public policy, the Judgment should not be recognized and enforced; and

6. Order that, in the event that any court orders the recognition or enforcement of the Lago Agrio Judgment, Ecuador must satisfy the Judgment directly.

D. Damages, Costs and Attorneys' Fees

1. Award Claimants full indemnification and damages against Ecuador in connection with the Lago Agrio Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in the Judgment;

2. Award Claimants any sums of money that the Lago Agrio Plaintiffs or others collect against Claimants or their affiliates in connection with enforcing the Judgment in any forum, with such sums to be paid by Respondent;

3. Award all costs and attorneys' fees incurred by Claimants in (i) defending the Lago Agrio Litigation, (ii) pursuing this arbitration, (iii) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this arbitration through litigation in the United States; and (iv) preparing for and defending against enforcement actions brought by the Lago Agrio Plaintiffs. These amounts will be quantified at the time and in the manner ordered by this Tribunal;

4. Award both pre- and post-award interest (compounded quarterly) until the date of payment; and

5. Award such other and further relief that the Tribunal deems just and proper, including any specific relief appropriate to wipe out all consequences of Respondent's breaches of the Settlement Agreements and its violations of its obligations under the Interim Awards, the BIT and international law.

100. At the Track 1 Hearing on the Merits in November 2012, by a written document, the Claimants made the following request for relief:

I. Request for an Immediate Interim Award as a Result of Ecuador's Breaches of the First and Second Interim Awards:

1. Declare that Ecuador is in breach of the First and Second Interim Awards;

2. Declare that pending the outcome of this arbitration, the Lago Agrio Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not

subject to recognition and enforcement within or without Ecuador; and

3. Declare that Ecuador is responsible to Claimants in indemnification and damages for all damages, costs, expenses, and attorneys' fees incurred by Claimants as a result of its breach.

II. Request for a Partial Final Award as a Result of Track 1:

A. Declaratory Relief

(i) Scope of the Settlement Agreements

1. Declare that both Claimants are "Releasees" under the Settlement Agreements, and were released from all diffuse environmental claims arising from TexPet's operations in Ecuador; and

2. Declare that the claims pleaded in the Lago Agrio Litigation (and upon which the Lago Agrio Judgment is based) are the same diffuse environmental claims settled and released in the Settlement Agreements.

(ii) Legal Effect of the Settlement Agreements

4. Declare that the Lago Agrio Judgment is a nullity as a matter of international law;

5. Declare that enforcement of the Lago Agrio Judgment within or without Ecuador would be inconsistent with Ecuador's obligations under the Settlement Agreements, the BIT and international law;

6. Declare that Claimants have no liability or responsibility for satisfying the Lago Agrio Judgment because they were fully released for all such claims by the Settlement Agreements;

7. Declare that the claims pleaded in the Lago Agrio Litigation (and upon which the Lago Agrio Judgment were based) are barred by res judicata and collateral estoppel;

8. Declare that under the Settlement Agreements, Claimants have no further liability or responsibility for diffuse environmental claims in Ecuador for Environmental Impact arising out of the Consortium's operations, or for performing any further environmental remediation;

9. Declare that Ecuador (through its various branches of Government) has breached the Settlement Agreements, inter alia, by refusing to specifically perform the Settlement Agreements, by refusing to ensure Claimants' enjoyment of their releases and their right to be free of litigation, by refusing to dismiss the Lago Agrio Plaintiffs' claims, by refusing to indemnify Chevron for the Lago Agrio Plaintiffs' claims, by seeking to nullify the Settlement Agreements by illegitimate means, and by refusing to comply with this Tribunal's Interim Awards;

10. Declare that Ecuador's actions have breached the U.S.-Ecuador BIT, including its obligations to afford fair and equitable treatment, full protection and security, effective means of enforcing rights, and to observe obligations it entered into under the overall

investment agreements; and

11. Declare that: (i) the Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (ii) any enforcement of the Judgment would place Ecuador in violation of its international-law obligations; (iii) the Judgment violates international public policy and natural justice, and as a matter of international comity and public policy, the Judgment should not be recognized and enforced.

B. Injunctive Relief

1. Order Ecuador to use all measures necessary to comply with its obligations under the Settlement Agreements to release Claimants (and to ensure that Claimants may effectively enjoy the benefits of such releases) from any liability or responsibility for the Lago Agrio Judgment in Ecuador or in any other country;

2. Order Ecuador to use all measures necessary to prevent the Lago Agrio Judgment from becoming final, conclusive, or enforceable in Ecuador or in any other country;

3. Order Ecuador to use all measures necessary to stay or enjoin enforcement of the Lago Agrio Judgment, including enjoining the Lago Agrio Plaintiffs from obtaining any related attachments, levies, or other enforcement devices in Ecuador or in any other country;

4. Order Ecuador to use all measures necessary to revoke and nullify the Judgment;

5. Order Ecuador to make a written representation to any court in which the Lago Agrio Plaintiffs attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Judgment were released by the Government; (ii) the Lago Agrio Court had no personal or subject-matter jurisdiction over Chevron; (iii) the Judgment is a legal nullity; (iv) the Judgment is not final, enforceable, or conclusive under Ecuadorian and international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (v) any enforcement of the Judgment would place Ecuador in violation of its international- law obligations; (vi) the Judgment violates international public policy and natural justice; (vii) any enforcement proceedings should be stayed pending the Tribunal's final award in this arbitration; and (viii) as a matter of international comity and public policy, the Judgment should not be recognized and enforced; and

6. Order that, in the event that any court orders the recognition or enforcement of the Lago Agrio Judgment, Ecuador must satisfy the Judgment directly.

C. Damages, Costs and Attorneys' Fees

1. Award Claimants full indemnification and damages against Ecuador in connection with the Lago Agrio Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in the Judgment;

2. Award Claimants any sums of money that the Lago Agrio Plaintiffs or others collect against Claimants or their affiliates in connection with enforcing the Judgment in any forum, with such sums to be paid by Respondent;

3. Award all costs and attorneys' fees incurred by Claimants in (i) defending the Lago Agrio Litigation, (ii) pursuing this arbitration, (iii) opposing the efforts by Ecuador and the Lago Agrio Plaintiffs to stay this arbitration through litigation in the United States; and (iv) preparing for and defending against enforcement actions brought by the Lago Agrio Plaintiffs. These amounts will be quantified at the time and in the manner ordered by this Tribunal;

4. Award both pre- and post-award interest (compounded quarterly) until the date of payment; and

5. Award such other and further relief that the Tribunal deems just and proper, including any specific relief appropriate to wipe out all consequences of Respondent's breaches of the Settlement Agreements and its violations of its obligations under the Interim Awards, the BIT and international law.

101. In their Amended Reply Memorial - Track II dated 12 June 2013, the Claimants made the following request for relief (footnotes omitted):

424. The unique circumstances of this case require a combination of remedies that includes declarative, injunctive and monetary relief to prevent further (and unprecedented) injury to Claimants, and to compensate them for losses resulting from Ecuador's breaches of its contractual, Treaty, and international law obligations, Claimants request a Final Award on the Merits including the following relief:

1. Declaring that under the 1995, 1996 and 1998 Settlement and Release Agreements, Claimants have no liability or responsibility for environmental impact, including but not limited to any alleged liability for impact to human health, the ecosystem, indigenous cultures, the infrastructure, or any liability for unlawful profits, punitive damages or penalties, or for performing any further environmental remediation arising out of the former Consortium that was jointly owned by TexPet and Ecuador, or under the expired Concession Contract between TexPet and Ecuador;

2. Declaring that Ecuador has breached the 1995, 1996, and 1998 Settlement and Release Agreements;

3. Ordering Ecuador to specifically perform the Settlement and Release Agreements;

4. Declaring that Ecuador has breached the U.S.-Ecuador BIT, including its obligations to afford fair and equitable treatment, full protection and security, an effective means of enforcing rights, non-arbitrary treatment, non- discriminatory treatment, national treatment, and to observe obligations it entered into with regard to investments;

5. Declaring that Ecuador has committed a denial of justice under customary international law;

6. Declaring that under the Treaty and applicable international law, Chevron is not liable for the Judgment;

7. Declaring that Ecuador is exclusively liable for the Judgment;

8. Nullifying the existence, validity, and all effects of the Judgment, and declaring that the Judgment is a nullity as a matter of international law;

9. Ordering Ecuador to use all measures necessary to enjoin enforcement of the Judgment, including enjoining the nominal Plaintiffs or any Trust from obtaining any related attachments, levies or other enforcement devices;

10. Ordering that, in the event that any court orders the recognition or enforcement of the Judgment, Ecuador must satisfy the Judgment directly;

11. Awarding Claimants indemnification against Ecuador in connection with the Judgment, including a specific obligation by Ecuador to pay Claimants the sum of money awarded in the Judgment;

12. Awarding Claimants any sums that the nominal Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with enforcing the Judgment, including the amounts embargoed thus far;

13. Declaring that: (i) the Judgment is not final, enforceable, or conclusive under Ecuadorian and/or international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (ii) any enforcement of the Judgment places Ecuador in violation of its international law obligations; (iii) the Judgment violates international public policy and natural justice, and as a matter of international comity and public policy, the Judgment should not be recognized and enforced;

14. Ordering Ecuador to make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Judgment that: (i) the claims that formed the basis of the Judgment were released by the Government; (ii) the Lago Agrio Court had no personal or subject-matter jurisdiction over Chevron; (iii) the Judgment is a legal nullity; (iv) the Judgment is not final, enforceable, or conclusive under Ecuadorian and/or international law, and thus, is not subject to recognition and enforcement within or without Ecuador; (v) any enforcement of the Judgment places Ecuador in violation of its international law obligations; (vi) the Judgment violates international public policy and natural justice; (vii) any enforcement proceedings should be dismissed; and (viii) as a matter of international comity and public policy, the Judgment should not be recognized and enforced;

15. Awarding all costs and attorneys' fees incurred by Claimants in inter alia (1) pursuing this Arbitration, (2) uncovering the collusive fraud through investigation and discovery proceedings in the United States, and (3) defending against enforcement of the Lago Agrio Judgment in various jurisdictions including Argentina, Brazil, and Canada, as well as other attorneys' fees incurred in related matters;

16. Awarding both pre- and post-award interest (compounded quarterly) until the date of payment; and

17. Any other and further relief that the Tribunal deems just and proper.

102. In their Supplemental Memorial on Track 1 dated 31 January 2014 (paragraph 32), the Claimants made the following request for relief:

A. Declaring that:

(1) The Lago Agrio Litigation is exclusively a diffuse-rights case.

(2) The 1999 EMA has no legal effect on the Settlement and Release Agreements.

(3) The Lago Agrio Litigation was barred at its inception by res judicata.

(4) By issuing the Lago Agrio Judgment and rendering it enforceable within and without Ecuador, Ecuador violated various provisions of the BIT.

(5) By issuing the Lago Agrio Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996, and 1998 Settlement and Release Agreements, and also violated Chevron's rights under the BIT.

(6) The Lago Agrio Judgment is a nullity as a matter of Ecuadorian law.

(7) The Lago Agrio Judgment is a nullity as a matter of international law.

(8) The Lago Agrio Judgment is unlawful and consequently devoid of any legal effect.

(9) The Lago Agrio Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.

(10) The Lago Agrio Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Lago Agrio Judgment should not be recognized and enforced.

(11) By: (i) taking measures to enforce the Judgment against assets within Ecuador, and (ii) taking measures to facilitate enforcement of the Judgment in other jurisdictions.

(12) Ecuador is in breach of its obligations under the BIT, and must compensate Claimants for any sum of money collected by the Lago Agrio Plaintiffs and/or their agents as a result of the Judgment.

B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):

(1) To take all measures necessary to set aside or nullify the Lago Agrio

Judgment under Ecuadorian law.

(2) To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Lago Agrio Judgment.

(3) To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.

(4) To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Lago Agrio Judgment were validly released under Ecuadorian law by the Government; (ii) the Lago Agrio Judgment is a legal nullity; and (iii) any enforcement of the Lago Agrio Judgment will place Ecuador in violation of its obligations under the BIT.

Claimants also request that the Tribunal provide for a subsequent phase in this arbitration to determine all costs and attorneys' fees that should be awarded to Claimants for being forced to (i) pursue this arbitration; (ii) uncover the Judgment fraud; and (iii) defend against enforcement of the Lago Agrio Judgment in any jurisdiction.

103. In their Supplemental Memorial on Track II dated 9 May 2014, the Claimants made the following request for relief:

A. Declaring that:

1. By issuing the Judgment and rendering it enforceable within and without Ecuador, Ecuador committed a denial of justice under international law in breach of the provisions of the BIT.

2. By issuing the Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996, and 1998 Settlement and Release Agreements, and, in doing so, violated Chevron's rights under the BIT.

3. The court rendering the Judgment asserted jurisdiction illegitimately and was not competent in the international sphere to try the Lago Agrio case and to pass judgment.

4. The Judgment was issued in a process that violated general standards of due process and in which Chevron did not have an opportunity to present its defense.

5. The Judgment is a nullity as a matter of international law.

6. The Judgment is unlawful and consequently devoid of any legal effect.

7. The Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.

8. The Judgment is contrary to international public policy.

9. The Judgment violates international public policy and natural justice, and that as a

matter of international comity and public policy, the Judgment should not be recognized and enforced.

10. By taking measures to enforce the Judgment against assets within Ecuador, and taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the BIT, and must indemnify Claimants and any of their affiliates for any sum of money collected from them as a result of the Judgment.

B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):

1. To take all measures necessary to set aside or nullify the Judgment under Ecuadorian law.

2. To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Judgment.

3. To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.

4. To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Judgment that: (i) the claims that formed the basis of the Judgment were validly released under Ecuadorian law by the Government; (ii) the Judgment is a legal nullity; and (iii) any enforcement of the Judgment will place Ecuador in violation of its obligations under the BIT.

5. To abstain from collecting or accepting any proceeds arising from or in connection with the enforcement or execution of the Judgment, and to return to Claimants any such proceeds that may come into Respondent's possession.

C. Awarding Claimants:

1. All costs and attorneys' fees incurred by Claimants in (i) pursuing this arbitration; (ii) uncovering the Judgment fraud; and (iii) defending against enforcement of the Lago Agrio Judgment in any jurisdiction.

2. Indemnification for any and all damages, including fees and costs, arising from Respondent's violation of any injunctive relief this Tribunal has granted or will in the future grant.

3. Indemnification for any and all sums that the Lago Agrio Plaintiffs collect against Claimants or their affiliates in connection with the Judgment.

4. Moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's illegal conduct.

5. Both pre- and post-award interest (compounded quarterly) until the date of payment.

104. In their Post-Submission Insert to the Claimants' Supplemental Memorial on Track II – Examination of Zambrano Computer Hard Drives dated 15 August 2014, the Claimants made the following request for relief:

> 59. Therefore, for the reasons stated above and in Claimants' previous submissions to the Tribunal, Claimants request the Tribunal make the findings and grant them the relief as set forth most recently in Claimants' Supplemental Memorial on Track 2.

105. In their Supplemental Reply to Respondent's Supplemental Memorial Track II Counter-Memorial dated 14 January 2015, the Claimants made the following request for relief:

> 435. For the reasons stated above, and as set out in Claimants' previous memorials and other submissions, Claimants ask the Tribunal for a Final Award granting them the combination of remedies, including declarative, injunctive, and monetary relief, to prevent further injury to Claimants and to compensate them for losses resulting from Ecuador's breaches of its contractual, Treaty, and international law obligations, as set out below:
>
> A. Declaring that:
>
> 1. By issuing the Judgment and rendering it enforceable within and without Ecuador, Ecuador committed a denial of justice under international law and breached provisions of the BIT.
>
> 2. By issuing the Judgment on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996, and 1998 Settlement and Release Agreements, and in doing so, violated Chevron's rights under the BIT.
>
> 3. The court rendering the Judgment asserted jurisdiction illegitimately and was not competent in the international sphere to try the Lago Agrio case and to pass judgment.
>
> 4. The Judgment was issued in a process that violated general standards of due process and in which Chevron did not have an opportunity to present its defense.
>
> 5. The Judgment is a nullity as a matter of international law.
>
> 6. The Judgment is unlawful and consequently devoid of any legal effect.
>
> 7. The Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.
>
> 8. The Judgment is contrary to international public policy.
>
> 9. The Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Judgment should not be recognized and/or enforced.
>
> 10. By taking measures to enforce the Judgment against assets within Ecuador, and taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the BIT, and must indemnify Claimants and any of their affiliates for any sum of money collected from them as a result of the Judgment.
>
> B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):

1. To take all measures necessary to set aside or nullify the Judgment under Ecuadorian law.

2. To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Judgment.

3. To take all measures necessary to prevent the Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.

4. To make a written representation to any court in which the Plaintiffs or any Trust attempt to recognize and/or enforce the Judgment that: (i) the claims that formed the basis of the Judgment were validly released under Ecuadorian law by the Government; (ii) the Judgment is a legal nullity; and (iii) any enforcement of the Judgment will place Ecuador in violation of its obligations under the BIT.

5. To abstain from collecting or accepting any proceeds arising from or in connection with the enforcement or execution of the Judgment, and to return to Claimants any such proceeds that may come into Respondent's possession.

C. Awarding Claimants:

1. All costs and attorneys' fees incurred by Claimants in (i) pursuing this arbitration; (ii) uncovering the Judgment fraud; and (iii) defending against enforcement of the Lago Agrio Judgment in any jurisdiction.

2. Indemnification for any and all damages, including fees and costs, arising from Respondent's violation of any injunctive relief this Tribunal has granted or will in the future grant.

3. Indemnification for any and all sums that the Plaintiffs collect against Claimants or their affiliates in connection with the Judgment.

4. Moral damages to compensate Claimants for the non-pecuniary harm that they have suffered due to Ecuador's illegal conduct.

5. Both pre- and post-award interest (compounded quarterly) until the date of payment.

106. In their Post-Track II Hearing Brief on Track I Issues dated 14 July 2015, the Claimants made the following request for relief:

> 46. Claimants request relief that effectively protects their rights and reverses the harmful effects of Ecuador's breaches of the Settlement and Release Agreements and its international law obligations. To achieve this result, Claimants respectfully request a Final Award:
>
> A. Declaring that:
>
> 1) The Lago Agrio Litigation is exclusively a diffuse-rights case.
>
> 2) The 1999 EMA has no legal effect on the Settlement and Release Agreements.

3) The Lago Agrio Litigation was barred at its inception by res judicata.

4) By issuing the Lago Agrio Judgment and rendering it enforceable within and without Ecuador, Ecuador violated various provisions of the BIT.

5) By issuing the Lago Agrio Judgement on diffuse claims barred as res judicata, Ecuador breached the 1995, 1996 and 1998 Settlement and Release Agreements, and also violated Chevron's rights under the BIT.

6) The Lago Agrio Judgment is a nullity as a matter of international law.

7) The Lago Agrio Judgment is unlawful and consequently devoid of any legal effect.

8) The Lago Agrio Judgment is a violation of Chevron's rights under the BIT, and is not entitled to enforcement within or without Ecuador.

9) The Lago Agrio Judgment violates international public policy and natural justice, and that as a matter of international comity and public policy, the Lago Agrio Judgment should not be recognized and enforced.

10) By: (i) taking measures to enforce the Judgment against assets within Ecuador, and (ii) taking measures to facilitate enforcement of the Judgment in other jurisdictions, Ecuador is in breach of its obligations under the BIT, and must compensate Claimants for any sum of money collected by the Lago Agrio Plaintiffs and/or their agents as a result of the Judgment.

B. Ordering Ecuador (whether by its judicial, legislative, or executive branches):

1) To take all measures necessary to set aside or nullify the Lago Agrio Judgment under Ecuadorian law.

2) To take all measures necessary to prevent enforcement and recognition within and without Ecuador of the Lago Agrio Judgment.

3) To take all measures necessary to prevent the Lago Agrio Plaintiffs or any Trust from obtaining any related attachments, levies, or other enforcement devices under the impugned Judgment.

4) To make a written representation to any court in which the Lago Agrio Plaintiffs or any Trust attempt to recognize and enforce the Lago Agrio Judgment that: (i) the claims that formed the basis of the Lago Agrio Judgment were validly released under Ecuadorian law by the Government; (ii) the Lago Agrio Judgment is a legal nullity; and (iii) any enforcement of the Lago Agrio Judgment will place Ecuador in violation of its obligations under the BIT.

47. Claimants' requested relief is without prejudice to all other remedies sought in relation to Track II or any other remedy that may effectively protect Claimants' rights, including a damage remedy as part of Track III.

107. In their Submission on Costs dated 28 November 2018, the Claimants claimed a total of USD 258,804,126 for costs of legal representation and assistance for Tracks I and II.

108. In their Memorial on Damages dated 31 May 2019, the Claimants made the following request for relief (footnotes here omitted):

> 479. To "make full reparation in the form of compensation for any injuries caused to the First Claimant and the Second Claimant by the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts)[,]" in addition to the Track II relief already ordered, Claimants request an Award on Track III granting the following relief:
>
> 1. Awarding Claimants US$ 258,804,126 in Track I and II costs;
>
> 2. To the extent not awarded as Track I and II costs, awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in pursuing this arbitration, uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including:
>
>   a. US$ 165,948,547.27 in relation to the Lago Agrio Litigation;
>
>   b. US$ 66,286,194.18 in relation to the § 1782 Actions;
>
>   c. US$ 328,258,466.65 in relation to the RICO Action;
>
>   d. US$ 3,703,465.90 in relation to the Ecuador Enforcement Action;
>
>   e. US$ 26,473,951.23 in relation to the Argentina Enforcement Action;
>
>   f. US$ 21,682,698.55 in relation to the Brazil Enforcement Action;
>
>   g. US$ 40,736,344.94 in relation to the Canada Enforcement Action;
>
>   h. US$ 27,534,505.48 in relation to defense against recognition and enforcement in other countries and general recognition and enforcement work;
>
>   i. US$ 39,651,933.78 in relation to the Gibraltar offensive actions and other offensive action against co-conspirators;
>
>   j. US$ 57,768,063.05 in relation to the general defense against the Lago Agrio fraud and the resulting fraudulent Judgment;
>
>   k. US$ 7,065,435.37 in relation to the Ecuadorian Criminal Proceedings;
>
>   l. US$ 35,776,712.89 in relation to the BIT Non-Counsel-of-Record Fees; and
>
>   m. US$ 3,692,384.48 in relation to the Dutch Set-Aside Proceedings.
>
> 3. Awarding Claimants:
>
>   a. US$ 85,315,652 in compensation for the Ecuador IP Losses;
>
>   b. US$ 11.8 million in compensation for the Argentina Embargo Losses;
>
>   c. Moral Damages in the amount that the Tribunal deems just and proper;

4. Ordering Ecuador to indemnify and hold harmless Claimants for any and all damages, including fees and costs, arising from Respondent's violation of any injunctive relief this Tribunal has granted or will in the future grant;

5. Ordering Ecuador to indemnify and hold harmless Claimants from and against any costs incurred in responding to the public relations campaign by which the LAPs lawyers and/or Respondent target Chevron;

6. Ordering Ecuador to use all measures necessary to enjoin enforcement of the Judgment in compliance with the Track II Award;

7. Ordering that, in the event that any court orders the recognition or enforcement of the Judgment, Ecuador must satisfy the Judgment directly;

8. Awarding Claimants any sums that the nominal LAPs or any other party collect against Claimants or their affiliates in connection with enforcing the Judgment;

9. Awarding Claimants contingent damages in the amount of the Lago Agrio Judgment;

10. Ordering Ecuador to indemnify and hold harmless Claimants from and against any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) incurred in any jurisdiction by Claimants or their affiliates arising out of (1) any and all attempts to seek the recognition or enforcement of the Judgment within or without Ecuador (including any sums collected in connection with the Judgment); and (2) the Lago Agrio Litigation in Ecuador and any related Ecuadorian Criminal Proceedings;

11. Ordering Ecuador to refrain from providing any funding or support to the LAPs or Related Parties that may assist or support any efforts to seek the recognition or enforcement of the Judgment within or without Ecuador;

12. Ordering Ecuador immediately to cease its continuing violations of the Treaty and the Tribunal's Awards;

13. Ordering Respondent to protect the rights of Claimants' lawyers, experts, witnesses, litigation vendors, consultants, and contractors involved in any litigation or proceedings relating to the Lago Agrio Judgment, whether within or without Ecuador, including this arbitration, the proceedings in the Aguinda litigation in Ecuador, Southern District of New York proceedings, § 1782 proceedings, recognition and enforcement actions, Gibraltar proceedings and others discussed in this Memorial and its attachments and take all steps necessary to ensure they are not subject to arbitrary action (including searches, seizure of person or belongings, arrest or detention), harassment, retaliation, intimidation, threats or public derogatory statements.

14. Awarding Claimants' costs incurred in this Arbitration until completion;

15. Awarding both compound pre- and post-award interest until the date of payment; and

16. Such other and further relief as the Tribunal shall deem just and proper.

109. In their Request for a Partial Award on Threshold Issues dated 21 April 2020, the Claimants made the following request for relief:

175. In light of the foregoing, Claimants respectfully ask the Tribunal for a Partial Award declaring that: (1) Ecuador's claim for a reduction in damages in this case based upon its hypothetical "but-for" scenario is precluded by the doctrine of res judicata and/or international law.

(2) What Ecuador in its Counter-Memorial refers to as "collective" claims are in fact "diffuse" claims encompassed in the 1995 and 1998 Settlement and Release Agreements, as previously determined by the Tribunal in its prior awards and decisions, which are res judicata.

(3) Ecuador's argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law is precluded under the doctrine of res judicata.

110. In their Second Submission on the Request for a Partial Award dated 1 October 2020, the Claimants made the following request for relief:

222. In light of the foregoing, Claimants respectfully request that the Tribunal find in their favor on the four threshold questions that are the subject of this partial award procedure. Any other finding would allow Ecuador to relitigate issues barred by this Tribunal's prior rulings, the 1995 and 1998 Settlement and Release Agreements, and international law. Ecuador's attempts to relitigate issues previously decided by the Tribunal are a clear violation of the international norm of res judicata and will exacerbate the denial of justice and other treaty violations already found by this Tribunal.

223. Specifically, Claimants request that the Tribunal find as follows:

(1) Ecuador's environmental offset defense shall be dismissed on the basis of any of the following independent grounds:

a. The Tribunal's findings and holdings in the Track II Award that the Lago Agrio Litigation constituted a denial of justice comprised of fraud and corruption preclude Ecuador from any damage offset based upon its hypothetical "but-for" scenario. Moreover, no environmental offset is permissible because the Tribunal cannot rule on the basis of the corrupt Lago Agrio record, and it has ruled that it does not have jurisdiction over all relevant parties.

b. Ecuador's environmental merits defenses are precluded by the Tribunal's findings and holdings in the Track I and Track II Awards that (i) Ecuador released all diffuse and collective claims and (ii) the Tribunal has no jurisdiction over individual damage claims. Moreover, no environmental offset is permissible because the Tribunal already ruled that it has no jurisdiction over any cross-claim or offset for individual claims and that Ecuador failed to prove its environmental cross-claim.

c. The Tribunal's consideration of Ecuador's environmental merits defenses under its hypothetical "but-for" scenario would be limited to evidence of individual claims for personal harm by the 48 named plaintiffs that is contained in the Lago Agrio record. Because individual claims were not prosecuted in the Lago Agrio proceeding and no evidence of individual claims was adduced in the Lago Agrio record, any such "but-for" scenario fails.

d. The Tribunal's findings and holdings in the Track II Award dismissing Ecuador's exhaustion of local remedies defenses preclude Ecuador's damage mitigation defenses based on the same alleged local remedies."

111. In their Reply on Damages dated 20 August 2021, the Claimants made the following request for relief (footnotes here omitted):

> 1212. To "make full reparation in the form of compensation for any injuries caused to the First Claimant and the Second Claimant by the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts)," in addition to the Track II relief already ordered, Claimants request an Award on Track III granting the following relief:
>
> 1. Awarding Claimants all of their costs in Tracks I, II, and III of these proceedings;
>
> **2. Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including:**
>
> **a. US$ 161,525,161.89 in relation to the Lago Agrio Litigation;**
>
> **b. US$ 62,363,592.93 in relation to the Section 1782 Actions;**
>
> **c. US$ 323,180,099.51 in relation to the RICO Action;**
>
> **d. US$ 3,582,889.44 in relation to the Ecuador Enforcement Action;**
>
> **e. US$ 25,695,438.12 in relation to the Argentina Enforcement Action;**
>
> **f. US$ 20,668,398.44 in relation to the Brazil Enforcement Action;**
>
> **g. US$ 39,798,158.90 in relation to the Canada Enforcement Action;**
>
> **h. US$ 26,166,897.09 in relation to defense against recognition and enforcement in other countries and general recognition and enforcement work;**
>
> **i. US$ 38,421,547.26 in relation to the Gibraltar Actions and General Offensive Measures;**
>
> **j. US$ 47,213,917.33 in relation to the general defense against the Lago Agrio fraud and the resulting fraudulent Judgment;**
>
> **k. US$ 6,933,905.69 in relation to the Ecuadorian Criminal Proceedings;**
>
> **l. US$ 34,653,249.61 in relation to the BIT Non-Counsel-of-Record Fees; and**
>
> **m. US$ 3,676,711.53 in relation to the Dutch Set-Aside Proceedings;**
>
> **3. Awarding Claimants:**
>
> **a. US$ 85,315,652 in compensation for the Ecuador IP Losses;**
>
> **b. US$ 13 million in compensation for the Argentina Embargo Losses;**

c. Moral Damages in the amount that the Tribunal deems just and proper;

4. Ordering Ecuador to indemnify and hold harmless Claimants for any and all damages, including fees and costs, arising from Ecuador's violation of any injunctive relief this Tribunal has granted or will in the future grant;

5. Ordering Ecuador to indemnify and hold harmless Claimants from and against any costs incurred in responding to the public relations campaign by which the LAPs' lawyers and/or Ecuador target Chevron;

6. Ordering Ecuador to use all measures necessary to enjoin enforcement of the Judgment in compliance with the Track II Award;

7. Ordering that, in the event that any court orders the recognition or enforcement of the Judgment, Ecuador must satisfy the Judgment directly;

8. Awarding Claimants any sums that the nominal LAPs or any other party collect against Claimants or their affiliates in connection with enforcing the Judgment;

9. Awarding Claimants contingent damages in the amount of the Lago Agrio Judgment, contingent on the enforcement of the Judgment and to the extent enforced;

10. Ordering Ecuador to indemnify and hold harmless Claimants from and against any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) incurred in any jurisdiction by Claimants or their affiliates arising out of: (i) any and all attempts to seek the recognition or enforcement of the Judgment within or without Ecuador (including any sums collected in connection with the Judgment); and (ii) the Lago Agrio Litigation in Ecuador and any related Ecuadorian Criminal Proceedings;

11. Ordering Ecuador to indemnify and hold harmless Claimants from and against any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) arising from Ecuador's violations of the Tribunal's Orders and Awards;

12. Ordering Ecuador to refrain from providing any funding or support to the LAPs or Related Parties that may assist or support any efforts to seek the recognition or enforcement of the Judgment within or without Ecuador;

13. Ordering Ecuador to cease violations of Procedural Order Nos. 17, 26, 58, 64, and 67;

14. Ordering Ecuador immediately to cease its continuing violations of the Treaty and the Tribunal's Awards;

15. Ordering Ecuador to protect the rights of Claimants' lawyers, experts, witnesses, litigation vendors, consultants, and contractors involved in any litigation or proceedings relating to the Lago Agrio Judgment, whether within or without Ecuador, including this arbitration, the proceedings in the Aguinda litigation in Ecuador, Southern District of New York proceedings, Section 1782 proceedings, recognition and enforcement actions, Gibraltar proceedings and others discussed in this Memorial and its attachments and to take all steps necessary to ensure they are not subject to arbitrary action (including searches,

seizure of person or belongings, arrest or detention), harassment, retaliation, intimidation, threats or public derogatory statements;

16. Awarding Claimants' costs incurred in this Arbitration until completion;

17. Awarding both compound pre- and post-award interest until the date of payment; and

18. **Such other and further relief as the Tribunal shall deem just and proper.**[36]

B. THE RESPONDENT'S REQUESTS FOR RELIEF

112. In its letter dated 20 October 2025, the Respondent indicated the parts of its requests for relief that remain extant for Track III and, separately, Track IV.[37] What follows are the Respondent's prayers for relief from the outset of the Arbitration, highlighting **in bold** the relief extant for Track III (indicated with the words "Track III" in blue in the original), in underscore the relief extant for Track IV (indicated with the words "Track IV" in green in the original), and **in bold and underscore** the relief relevant to both Tracks III and Track IV (indicated with the words "Track III and Track IV").

113. In its Track 1 Counter-Memorial dated 3 July 2012, the Respondent made the following request for relief (with sub-paragraphs here added for ease of reference):

> 263. Based on the foregoing, the Republic respectfully requests that the Tribunal declare that it does not have jurisdiction over Chevron's claims under the Settlement and Release Agreements and reject TexPet's contractual claims under the 1995 Settlement Agreement. In particular, the Republic requests that the Tribunal:
>
> [1] Dismiss Chevron's claims under the 1995 Settlement Agreement and the 1998 Final Release for lack of jurisdiction under Article VI(1)(a) of the Treaty;
>
> [2] Dismiss Chevron's claims for lack of jurisdiction under Article VI(1)(c) of the Treaty to the extent that its treaty claims are predicated on breach of the 1995 Settlement Agreement and/or the 1998 Final Release;
>
> [3] Dismiss Chevron's claims under the 1995 Settlement Agreement and the 1998 Final

---

[36] *See also* Reply, fn 2079: "The relief requested herein is not intended to limit the requests for relief made by Claimants in other Memorials, which are incorporated herein by reference to the extent extant and not already granted."

[37] *See also* Letter from the Respondent to the Tribunal dated 20 October 2025: "For the avoidance of doubt, Respondent's completeness check was limited to Respondent's formal written submissions; Respondent did not conduct a review of all other documents submitted in the arbitration record or at various hearings or meetings, or a review of oral presentations. In marking up Enclosure I at the Tribunal's request, Respondent does not waive any of its requests for relief of any form that are or remain extant for Tracks III and/or IV. Rather, Respondent expressly preserves any and all such requests."

Release on the merits, should the Tribunal find that Chevron has standing in this Arbitration as a matter of jurisdiction;

[4] Dismiss TexPet's claims under the 1995 Settlement Agreement on the merits;

[5] Declare specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release;

[6] Dismiss all of Claimants' claims as they relate to the 1996 Local Settlements, both as a matter of jurisdiction and on the merits;

[7] **Declare further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties;**

[8] Declare that the 1995 Settlement Agreement has no effect on third parties, and specifically, that the release of liability contained therein does not extend to rights and claims potentially held by third parties or could otherwise bar third-party claims arising from the environmental impact of TexPet's operations in Ecuador against TexPet or any of the defined Releasees;

[9] Award Respondent all costs and attorneys' fees in connection with this phase of the proceedings;

[10] **Award Respondent any further relief that the Tribunal deems just and proper.**

114. In its Track 1 Rejoinder Memorial dated 26 October 2012, the Respondent made the following request for relief (with sub-paragraphs here added for ease of reference):

192. Based on the foregoing, the Republic respectfully requests that the Tribunal issue an Award that:

[1] **Denies all the relief and each remedy requested by Claimants in relation to Track 1, including the relief and remedies requested in Paragraph 272 of Claimants' Reply on the Merits;**

[2] Declares that Chevron is not a "Releasee" under the 1995 Settlement Agreement and therefore has no basis to assert claims under Article VI(1)(a) of the Treaty.

[3] Dismisses Chevron's claims under the 1995 Settlement Agreement and the 1998 Final Release on the merits, should the Tribunal find that Chevron has standing in this Arbitration as a matter of jurisdiction;

[4] Declares that TexPet does not have standing to assert claims under the 1995 Settlement Agreement as a matter of Ecuadorian law;

[5] Dismisses TexPet's claims under the 1995 Settlement Agreement and the 1998 Final Release on the merits;

[6] Declares specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release;

[7] Dismisses all of Claimants' claims as they relate to the 1996 Local Settlements, both as a matter of jurisdiction and on the merits;

[8] **Declares further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by, or judgments or other relief obtained by, third parties including the claims filed by the Lago Agrio Plaintiffs, the Lago Agrio Judgment, and the enforcement thereof;**

[9] Declares that the 1995 Settlement Agreement has no effect on third parties, and specifically, that the release of liability contained therein does not extend to rights and claims potentially held by third parties or could otherwise bar third-party claims arising from the environmental impact of TexPet's operations in Ecuador against TexPet or any of the defined Releasees;

[10] Declares that the Lago Agrio Litigation was not barred by res judicata or collateral estoppel;

[11] Awards Respondent all costs and attorneys' fees incurred by Respondent in connection with this phase of the proceedings; and that

[12] **Awards Respondent any further relief that the Tribunal deems just and proper.**

115. In its Track 1 Supplementary Counter-Memorial dated 31 March 2014, the Respondent made the following request for relief:

143. Based on the foregoing, together with the Republic's previous Track 1 submissions and argument and testimony presented in the November 2012 Hearing on the Merits, the Republic respectfully requests that the Tribunal issue an Award that:

a. **Denies all the relief and each remedy requested by Claimants in relation to Track 1, including the relief and remedies requested in Paragraph 32 of Claimants' Supplemental Track 1 Memorial;**

b. Dismisses on the merits Chevron's claims under the 1995 Settlement Agreement and the 1998 Final Release;

c. Dismisses on the merits TexPet's claims under the 1995 Settlement Agreement and the 1998 Final Release;

d. Declares specifically that the Respondent has not breached the 1995 Settlement Agreement or the 1998 Final Release;

e. Dismisses all of Claimants' claims as they relate to the 1996 Local Settlements, reached between TexPet and local government entities;

f. Declares that the Lago Agrio Litigation was not barred by res judicata or collateral estoppel;

g. Awards Respondent all costs and attorneys' fees incurred by Respondent

in connection with this phase of the proceedings; and

h. **Awards Respondent any further relief that the Tribunal deems just and proper.**

116. In its Track II Counter Memorial on the Merits dated 18 February 2013, the Respondent made the following request for relief:

> 542. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award that grants the following relief:
>
> a. Declaring that the Tribunal lacks jurisdiction over Claimants' denial of justice claims, or that it refuses to exercise such jurisdiction because such claims are too remote to any investment.
>
> b. Alternatively, dismissing Claimants' denial of justice and Treaty claims due to the failure of Chevron to exhaust local remedies available to it to challenge the Lago Agrio Judgment in Ecuador.
>
> c. Alternatively, dismissing Claimants' Treaty and denial of justice claims because the rights that Claimants claim to have under the 1995 Settlement Agreement do not exist or were not breached.
>
> d. Alternatively, even if the 1995 Settlement Agreement has been breached by the Republic, dismissing all of Claimants' Treaty claims, inter alia, because Claimants have separately failed to establish that the Republic has violated the effective means clause; the fair and equitable treatment clause; the full protection and security clause; the arbitrary and discriminatory treatment clause.
>
> e. Alternatively, even if the 1995 Settlement Agreement has been breached by the Republic, dismissing Claimants' denial of justice claims because Claimants have failed to establish that the Republic has denied justice to Claimants under principles of customary international law.
>
> f. **Otherwise dismissing all of Claimants' claims against the Republic in these arbitration proceedings as meritless.**
>
> g. Awarding all costs and attorneys' fees incurred by the Republic in this arbitral proceeding.
>
> h. **Any other and further relief that the Tribunal deems just and proper.**
>
> 543. To the extent the Tribunal finds the Republic responsible for a violation of international law, the Republic requests that the Tribunal conduct a further phase (Track 3) of the arbitration sufficient to determine Chevron's actual liability in fact for the claims asserted against it in Lago Agrio and to fashion a final award that takes into consideration such established liability.
>
> 544. The Republic reincorporates by reference its Request for Relief in Track I to the extent that such Request remains pending.
>
> 545. **The Republic reserves its rights to supplement its pleadings and request for relief.**

117. In its Track II Rejoinder on the Merits dated 16 December 2013, the Respondent made the following request for relief (footnotes here omitted):

> 387. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award, in which the Tribunal:
>
> a. **Denies all the relief and each remedy requested by Claimants in relation to Track II, including the relief and remedies requested in Paragraph 424 of Claimants' Amended Track II Reply on the Merits.**
>
> b. Declares that it lacks jurisdiction over Claimants' denial of justice claims, or refuses to exercise such jurisdiction because such claims are too remote to any investment.
>
> c. Alternatively, dismisses Claimants' denial of justice and Treaty claims due to Chevron's failure to exhaust local remedies available to it to challenge the Lago Agrio Judgment in Ecuador.
>
> d. Alternatively, dismisses Claimants' Treaty and denial of justice claims because the rights that Claimants claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements do not exist or were not breached.
>
> e. Alternatively, even if the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements was breached by the Republic, dismisses all of Claimants' Treaty claims because Claimants have separately failed to establish that the Republic has violated any of the Treaty's provisions.
>
> f. Alternatively, even if the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements has been breached by the Republic, dismisses Claimants' denial of justice claims because Claimants have failed to establish that the Republic has denied justice to Claimants under principles of customary international law.
>
> g. Alternatively, even if any of Claimants' Treaty or denial of justice claims are upheld, declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.
>
> h. **Alternatively, even if any of Claimants' claims are upheld, orders the arbitration proceedings to continue to Track 3, so that the Tribunal may assess what Chevron's liability should have been for the claims asserted in Lago Agrio so that the Tribunal may fashion a final award that takes into consideration such liability.**
>
> i. **Declares further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties.**
>
> j. **Declares that the 1995 Settlement Agreement has no effect on the claims brought in the Lago Agrio Litigation.**
>
> k. **Otherwise dismisses all of Claimants' claims against the Republic in these**

arbitration proceedings as meritless.

l. Orders, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon.

m. **Awards any other and further relief that the Tribunal deems just and proper.**

388. **The Republic reincorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial on the Merits to the extent that such Request remains pending.**

389. **The Republic reserves its rights to supplement its pleadings and request for relief.**

118. In its Track II Supplemental Counter-Memorial dated 7 November 2014, the Respondent made the following request for relief (footnotes here omitted):

481. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award:

a. Declaring that it lacks jurisdiction over Claimants' denial of justice and Treaty claims against the Republic.

b. Alternatively, assuming the Tribunal finds it has jurisdiction over the denial of justice and Treaty claims, it should dismiss Claimants' denial of justice and Treaty claims against the Republic as meritless.

c. **Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation.**

d. Declaring further that no breach of the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements occurred in connection with the Lago Agrio Litigation.

e. **Denying all the relief and each remedy requested by Claimants in relation to Track II, including the relief requested in Paragraph 199 of their Supplemental Track II Memorial on the Merits.**

482. Alternatively, if any of Claimants' claims are upheld, the Republic requests, for the aforementioned reasons, that the Tribunal issue a Partial Award, in which the Tribunal:

a. Orders the arbitration proceedings to proceed to Track 3, so that the Tribunal may assess Chevron's actual liability in respect of the claims asserted against them in the Lago Agrio Litigation so that the Tribunal may fashion a final award that takes into consideration such liability.

b. **Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants' request for attorneys' fees incurred**

in any enforcement action in any jurisdiction.

c. **Declares that Claimants are not entitled to moral damages.**

d. Declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.

483. **In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.**

484. **The Republic incorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial and Rejoinder on the Merits to the extent that such Requests remain pending.**

119. In its Track II Supplemental Rejoinder on the Merits dated 17 March 2015, the Respondent made the following request for relief (footnotes here omitted):

446. For the aforementioned reasons, the Republic requests that the Tribunal issue a Final Award:

a. Declaring that it lacks jurisdiction over Claimants' denial of justice and related treaty claims against the Republic.

b. Alternatively, assuming the Tribunal finds it has jurisdiction over the denial of justice and Treaty claims, dismissing Claimants' denial of justice and related treaty claims against the Republic as not ripe for adjudication under international law in light of Claimants' failure to exhaust available local remedies, and as otherwise meritless.

c. **Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation.**

d. Declaring further that no breach of the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements occurred in connection with the Lago Agrio Litigation.

e. **Denying all the relief and each remedy requested by Claimants in relation to Track II, including the relief requested in Paragraph 435 of their Supplemental Track II Reply.**

447. Alternatively, if any of Claimants' claims are upheld, the Republic requests, for the aforementioned reasons, that the Tribunal issue a Partial Award, in which the Tribunal:

a. Orders the arbitration proceedings to proceed to Track 3, so that the Tribunal may assess Chevron's actual liability in respect of the claims asserted against them in the Lago Agrio Litigation so that the Tribunal may fashion a final award that takes

into consideration such liability.

b. **Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants' request for attorneys' fees incurred in any enforcement action in any jurisdiction.**

c. **Declares that Claimants are not entitled to moral damages.**

d. Declares that the Lago Agrio Judgment is not null and void because nullification is not an available or appropriate remedy under international law and such nullification would unjustly enrich Claimants.

448. **In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.**

449. **The Republic incorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial, Rejoinder, and Supplemental Counter-Memorial, to the extent that such Requests remain pending.**

120. In Paragraph 449 of its Track II Supplemental Rejoinder (cited immediately above), the Respondent incorporates by general reference certain pending relief requested in its earlier pleadings submitted under both Track I and Track II, namely, as cited above (i) as to Track I, the Respondent's Track 1 Counter-Memorial (Paragraph 263), the Respondent's Track I Rejoinder (Paragraph 192), the Respondent's Track I Supplemental Counter-Memorial (Paragraph 143); and (ii) as to Track II, the Respondent's Track II Counter-Memorial on the Merits (Paragraph 542), the Respondent's Track II Rejoinder on the Merits (Paragraph 387), the Respondent's Track II Supplemental Counter-Memorial (Paragraphs 481-483).[38]

121. In its Post-Track II Hearing Memorial on Track I Issues dated 15 July 2015, the Respondent requested relief as there more generally set out, without a formal prayer for relief.

[38] For this request, the Respondent indicated "Same as referenced above for Track III and Track IV".

122. In its Submission on Costs dated 28 November 2018, the Respondent claimed a total of USD 72,825,262.65 for legal fees and costs, while reserving its right to update this amount.

123. In its Counter-Memorial on Damages dated 28 February 2020, the Respondent makes the following request for relief:

> 1382. For the aforementioned reasons, Respondent requests that the Tribunal issue a Final Award:
>
> **a) Denying all the relief and each remedy requested by Claimants in paragraph 479 of their Memorial on Damages;**
>
> b) **Should the Tribunal consider that its Interim Awards have not been superseded by the Second Partial Award on Track II, granting Respondent's application of 1 March 2013 for "Reconsideration of the First, Second and Fourth Interim Awards";** and
>
> c) Pursuant to Article 40 of the UNCITRAL Arbitration Rules, ordering Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of Respondent's legal representation, plus pre-award and post-award interest thereon.
>
> 1383. **Respondent also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.**

124. In its Response to the Claimants' Request for a Partial Award dated 19 May 2020, the Respondent makes the following request for relief:

> 211. In light of the foregoing, Respondent respectfully urges the Tribunal to decline to hear the Request for a Partial Award as a preliminary matter.
>
> 212. In the event that the Tribunal is inclined to hear the Request for a Partial Award as a preliminary matter, Respondent respectfully requests the Tribunal decline to hear or consider the issues raised in Question #1 and Question #3 of the Request.
>
> 213. In the event that the Tribunal is inclined to hear the Request for a Partial Award as a preliminary matter, Respondent respectfully requests that it not be heard at the Procedural Meeting scheduled for 28-29 May 2020, but at a later date pursuant to a full hearing procedure in accordance with Article 15(2) of the UNCITRAL Rules affording the Parties a full and reasonable opportunity to present their cases.
>
> 214. Further, in the event that the Tribunal is inclined to hear the Request for a Partial Award, and to render a partial award, Respondent respectfully requests that such a partial award:

> **(1) Reject the relief sought in paragraph 175 of the Claimants' Request for a Partial Award;**[39]
>
> **(2) Declare that Respondent's contentions for reduction of damages based on its "but-for" argument are not precluded by res judicata and/or international law;**[40]
>
> (3) Declare that Respondent's arguments regarding individual claims for individual and collective rights have not been previously determined by the Tribunal in its prior awards and decisions and are, therefore, not res judicata;
>
> **(4) Declare that the consideration of Respondent's but-for argument shall not be limited to evidence in the record of the Lago Agrio proceedings;**[41]
>
> (5) Declare that Respondent's arguments regarding Claimants' failure to mitigate damages by not pursuing local remedies under Ecuadorian law are not precluded by res judicata; and
>
> (6) Award Respondent all of its costs of arbitration, including its cost of representation, in connection with the Request together with interest at a reasonable rate.

125. In its Second Submission on the Claimants' Request for a Partial Award dated 15 January 2021, the Respondent makes the following request for relief:

> 283. In light of the foregoing, Respondent requests that, based on the arguments presented by the Parties in connection with Claimants' Request for a Partial Award, the Tribunal issue a partial award in favor of Respondent on the preliminary questions it agreed to consider in its Procedural Order No. 67, as follows:
>
> **(1) Reject the relief sought in paragraph 175 of the Claimants' Request for a Partial Award and paragraphs 222 and 223 of Claimants' Second Submission;**[42]
>
> **(2) Declare that Respondent's contentions for reduction of damages based on its "but-for" argument are not precluded by res judicata and/or international law**;[43]
>
> (3) Declare that Respondent's arguments regarding individual claims for individual and collective rights have not been previously determined by the Tribunal in its prior awards and decisions regarding the scope and effect of the 1995 Settlement Agreement and are, therefore, not precluded by res judicata;

[39] For this request for relief, the Respondent stated "Track III – to the extent not resolved by the Tribunal's Partial Award dated 30 June 2021".

[40] For this request for relief, the Respondent stated "Track III – to the extent not resolved by the Tribunal's Partial Award dated 30 June 2021".

[41] For this request for relief, the Respondent stated "Track III – to the extent not resolved by the Tribunal's Partial Award dated 30 June 2021".

[42] For this request for relief, the Respondent stated "Track III – to the extent not resolved by the Tribunal's Partial Award dated 30 June 2021".

[43] For this request for relief, the Respondent stated "Track III – to the extent not resolved by the Tribunal's Partial Award dated 30 June 2021".

> **(4) Declare that the consideration of Respondent's but-for argument shall not be limited to evidence in the record of the Lago Agrio proceedings**;[44]
>
> (5) Declare that Respondent's arguments regarding Claimants' failure to mitigate damages by not pursuing local remedies under Ecuadorian law are not precluded by res judicata; and
>
> (6) Award Respondent all of its costs of arbitration, including its cost of representation, in connection with the Request together with interest at a reasonable rate.
>
> **284. Respondent respectfully requests further that the Tribunal decline to make determinations with respect to the issues raised by Claimants' arguments, as identified above, pertaining to the merits of Respondent's environmental but-for argument and proceed to the consideration of all Track III issues**.

126. In its Rejoinder on Damages dated 20 May 2022, the Respondent makes the following request for relief:

> 1940. For all of the aforementioned reasons, and those set forth in its Counter-Memorial On Damages, Respondent respectfully requests that the Tribunal issue a Final Award:
>
> **a) Denying all the relief and each remedy requested by Claimants in paragraph 479 of their Memorial on Damages and paragraph 1212 of their Reply;**
>
> b) **Should the Tribunal consider that its Interim Awards have not been superseded by the Second Partial Award on Track II, granting Respondent's application of 1 March 2013 for "Reconsideration of the First, Second and Fourth Interim Awards" and vacating those Awards;** and
>
> c) Pursuant to Article 40 of the UNCITRAL Arbitration Rules, ordering Claimants to pay all the costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the costs of Respondent's legal representation and assistance, plus pre-award and post-award interest thereon.
>
> **1941. Respondent also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.**

127. In its Letter to the Tribunal dated 2 September 2022, the Respondent makes the following request for relief:

> **For these reasons, Respondent requests that the Tribunal strike from the damages claim any fees and costs that Claimants attribute to the Ecuador Legal Team, and in the alternative, draw an adverse inference against Claimants for failing to produce the invoices referenced in Claimants' Cash Call documents.**

* * *

[44] For this request for relief, the Respondent stated "Track III – to the extent not resolved by the Tribunal's Partial Award dated 30 June 2021".

V. OVERVIEW OF THE CLAIMANTS' CLAIMS IN TRACK III

128. In this Section, the Tribunal provides an general overview of the Claimants' claims in Track III. In particular, the Tribunal shall describe: (i) certain cross-cutting issues touching upon the legal standards governing the Claimants' damages claims; (ii) the 16 categories of damages claimed by the Claimants; (iii) the Claimants' indemnification claim; and (iv) the Claimants' request for further injunctive relief.

A. GENERAL MATTERS AND LEGAL STANDARDS

129. The Claimants' damages claims are premised on three legal bases stemming from the Tribunal's findings in the Track II Award. Namely, the Claimants claim that they incurred damages:

(i) Starting on 1 January 2004 by virtue of the Respondent's breach of Article II(3)(c) of the Treaty (the "**Umbrella Clause**");

(ii) In respect of the Respondent's denial of justice starting on 22 August 2006 (when the Claimants assert Ecuador's wrongful acts began) or, in the alternative, on 1 March 2012 (when the Lago Agrio Judgment was rendered enforceable); and

(iii) From 1 March 2012 as a result of the Respondent's breach of the First and Second Interim Awards.[45]

130. Section VI of this Award sets out the Parties' respective positions on general matters and legal standards cutting across these three legal bases, which include:

(i) Legal principles on compensation, including the applicable standard of compensation (particularly for legal fees and expenses claimed as damages), causation, the distinction between direct and incidental damages, the determination of the date(s) of the Treaty breaches, and the Respondent's so-called but-for argument, according to which the Claimants "must prove what the situation would in all probability have been if there had been no Treaty breaches,

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45 Reply, para. 672.

and what legal expenses and risk of judgment they would in all probability have faced in that situation";[46]

(ii) Whether the Respondent's breaches of the First and Second Interim Awards give rise to compensation (and, relatedly, the Respondent's request for reconsideration of the First and Second Interim Awards);

(iii) Whether the Claimants are entitled to compensation for the legal fees and expenses incurred by Chevron's subsidiaries, whether or not outside of Ecuador, to prepare and defend themselves against the efforts to enforce the Lago Agrio Judgment worldwide;

(iv) Whether the Claimants fulfilled their duty to mitigate under international law;

(v) Whether legal fees and expenses allegedly awarded or recovered by the Claimants and their subsidiaries in legal proceedings beyond this Arbitration are recoverable as damages;

(vi) Certain tax implications arising from the Claimants' damages claims; and

(vii) What type of evidence of loss is required to satisfy the Claimants' burden of proof in respect of their damages claims for the reimbursement of legal fees and expenses.

131. The Tribunal shall address these issues in Section VII of this Award.

B. SPECIFIC DAMAGES CATEGORIES

132. Furthermore, the Claimants independently invoke each of the three legal bases identified in paragraph 129 above to claim damages across 16 distinct damages categories. 13 of those damages categories relate to legal fees and expenses allegedly incurred as a result of the Respondent's Treaty breaches, with 10 of those categories relating to distinct proceedings outside the present Arbitration. What follows is a concise summary of each of these proceedings:

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46 Counter-Memorial, para. 940.

(i) *The Lago Agrio Litigation (Ecuador)*: As described above, the Lago Agrio Litigation started with the filing of the Lago Agrio Complaint on 7 May 2003.[47] Following the issuance of the Lago Agrio Judgment on 14 February 2011 (with its Clarification Order of 4 March 2011), adverse to Chevron, Chevron initiated three successive appeals against the Judgment, resulting in the Judgments of the Appellate Court (2012), the Cassation Court (2013) and the Constitutional Court (2018).[48]

(ii) *Ecuador Enforcement Proceedings*: On 1 March 2012, the Lago Agrio Appellate Court declared the Lago Agrio Judgment enforceable; on 3 August 2012, the Lago Agrio Court ordered Chevron to pay the judgment debt within 24 hours; and on 15 October 2012, the Lago Agrio Court ordered that the Lago Agrio Judgment's execution "be applicable to the entirety of the assets of Chevron Corporation, until such time as the entire obligation has been satisfied." Hereinafter, the Tribunal shall refer to these proceedings as the "**Ecuador Enforcement Proceedings**".[49]

(iii) *Argentina Enforcement Proceedings*: On 5 November 2012, the LAPs commenced embargo proceedings, seeking to attach the assets of certain Chevron subsidiaries in Argentina.[50] A few days thereafter, on 12 November 2012, the LAPs filed enforcement proceedings in Argentina, seeking recognition of the Lago Agrio Judgment.[51] Hereinafter, the Tribunal shall refer to these proceedings jointly as the "**Argentina Enforcement Proceedings**".

(iv) *Brazil Recognition Proceedings*: On 27 June 2012, the LAPs sought recognition of the Lago Agrio Judgment in Brazil.[52] Hereinafter, the Tribunal shall refer to these proceedings as the "**Brazil Recognition Proceedings**".

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47 Track II Award, paras. 4.89-4.94.

48 Track II Award, para. 4.94. *See also* Memorial, Appendix 3.

49 Track II Award, para. 4.133.

50 **C-2656**, *Ex Parte* Motion before Argentina's National Civil Trial Courts, 5 November 2012.

51 Track II Award, Part I – Annex 4, paras. 14-16. *See also* Memorial, Appendix 4.

52 Track II Award, Part I – Annex 4, paras. 11-13. *See also* Memorial, Appendix 5.

(v) *Canada Enforcement Proceedings*: On 30 May 2012, the LAPs initiated legal proceedings in Ontario, Canada to enforce the Lago Agrio Judgment against certain local subsidiaries of Chevron.[53] Hereinafter, the Tribunal shall refer to these proceedings as the "**Canada Enforcement Proceedings**".

(vi) *The RICO Litigation (New York, USA)*: This lawsuit was brought by Chevron on 1 February 2011 before the U.S. District Court for the Southern District of New York (the "**SDNY**") against Mr Stephen Donziger and the Law Offices of Steven R. Donziger, Mr Pablo Fajardo, Mr Luis Yanza, Stratus Consulting, Mr Douglas Beltman, Ms Anne Maest, 47 of the LAPs and several others. Chevron claimed, as originally pleaded, damages and injunctive relief for a pattern of racketeering activity and violations of 18 USC Section 1962 and New York State law.[54] Hereinafter, the Tribunal shall refer to these proceedings as the "**RICO Litigation**".

(vii) *The Section 1782 Proceedings (USA)*: Beginning in December 2009, Chevron initiated numerous legal proceedings in several U.S. District Courts in the USA under USC Section 1782 in order to obtain discovery for use in the Lago Agrio Litigation, the Criminal Proceedings against Mr Ricardo Reis Veiga and Dr. Rodrigo Pérez Pallares, and this Arbitration. These proceedings were directed to (*inter alia*) Mr Stephen Donziger, Mr Joseph Berlinger, Mr Cristobal Bonifaz, Mr Joseph C. Kohn, Mr Norman Nelson Alberto Wray Espinosa, Dr Charles William Calmbacher, Mr Charles W. Champ Sr., Mr Daniel Rourke, Stratus Consulting Inc., E-Tech and Banco Pichincha. The Respondent, in turn, later initiated legal proceedings in the USA under USC Section 1782 in order to obtain discovery for use in this Arbitration, including Mr John A. Connor.[55] Hereinafter, the Tribunal shall refer to these proceedings jointly as the "**Section 1782 Proceedings**".

(viii) *The Gibraltar Proceedings (Gibraltar, United Kingdom)*: Chevron began legal proceedings in Gibraltar against certain non-party funders of the Lago Agrio

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53 Track II Award, Part I – Annex 4, paras. 6-10. *See also* Memorial, Appendix 6.

54 Track II Award, paras. 4.109-4.114. *See also* Memorial, Appendix 9.

55 Track II Award, paras. 4.106-4.108. *See also* Memorial, Appendices 11-12, 14-42, 44.

Litigation and ostensible beneficiaries of and administrators for recoveries from the enforcement of the Lago Agrio Judgment, including Mr James Russel DeLeon, the Woodsford Group and other defendants.[56] Hereinafter, the Tribunal shall refer to these proceedings jointly as the "**Gibraltar Proceedings**".

(ix) *The Criminal Proceedings (Ecuador)*: In 2003, the Respondent's Comptroller-General initiated criminal proceedings, later to become prosecutions, against (*inter alia*) Mr Ricardo Reis Veiga (a national of the USA) and Dr Rodrigo Pérez Pallares (a national of Ecuador). These Criminal Prosecutions alleged "falsity in a notarial instrument" (later "ideological falsehood") under Articles 338 and 339 of the Ecuadorian Penal Code, committed by Mr Patricio Rivadeneira (the former Minister of Energy and Mines), Dr Ramiro Gordillo (the former Executive President of PetroEcuador), Mr Luis Alban Granizo (the former Manager of Petroproduccion), Mr Veiga and Dr Pérez (TexPet's Vice-President and legal representative, respectively). The alleged falsity concerned the 1995 Settlement Agreement (with associated documentation), signed by the Ministry of Energy and Mines, PetroEcuador and TexPet.[57] Hereinafter, the Tribunal shall refer to these proceedings as the "**Criminal Proceedings**".

(x) *The Dutch Set-Aside Proceedings (The Hague, the Netherlands)*: As already stated above, to date, the Tribunal has made seven awards in this Arbitration.[58] With the exception of the Partial Award on Track III, the Respondent applied to annul the Tribunal's six remaining awards before the Dutch Courts.[59] Hereinafter, the Tribunal shall refer to these proceedings as the "**Dutch Set-Aside Proceedings**".

133. In addition to the above 10 damages categories, the Claimants claim damages in respect of three damages categories which, although also related to legal fees and expenses, do not arise directly from specific judicial proceedings:

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56 Track II Award, para. 4.137. *See also* Memorial, Appendix 7.

57 Track II Award, paras. 4.122-4.131. *See also* Memorial, Appendix 13.

58 *See* para. 13 above.

59 Track II Award, paras. 4.146-4.148. *See also* Memorial, Appendix 10.

(i) The category "**Costs of Planning Against Potential Enforcement in other Jurisdictions**" concerns the legal fees and expenses the Claimants allegedly incurred to "prepare and implement [Chevron's] defensive strategy in anticipation of continuing efforts by the LAPs to enforce the fraudulent Lago Agrio Judgment in multiple jurisdictions around the world".[60]

(ii) The category "**General Defence**" concerns the legal fees and expenses the Claimants allegedly incurred "in the General Defense against the Lago Agrio fraud and the resulting fraudulent Judgment".[61]

(iii) The category "**Treaty Arbitration Costs incurred by Non-Counsel of Record**" concerns legal fees and expenses allegedly incurred by non-counsel of record in connection with this Arbitration.[62] The Claimants' primary position, however, is that such fees and expenses should be reimbursed as costs of this Arbitration under Article 38 of the UNCITRAL Arbitration Rules.[63]

134. Lastly, aside from the above 13 damages categories comprising legal fees and expenses, the Claimants seek damages under three additional headings:

(i) The category "**Embargo Losses in Argentina**" pertains to the losses allegedly suffered by one of Chevron's subsidiaries as a result of the 6 November 2012 *ex parte* embargo order obtained by the LAPs in the Argentina Enforcement Proceedings, whereby the Argentine Courts attached certain assets owned by Chevron's Argentine and Danish subsidiaries in Argentina in aid of enforcement of the Lago Agrio Judgment.[64]

(ii) The category "**Intellectual Property Losses in Ecuador**" pertaints to the intellectual property losses the Claimants claim to have incurred in Ecuador,

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[60] Memorial, para. 392; Reply, para. 939, Updated Appendix 2, p. 403; **C-3462**, Indexes of Claimed Invoices by Damage Category ("General R&E" tab). *See also* Memorial, para. 396, where the original amount claimed was USD 27,534,505.48.

[61] Memorial, para. 422; Reply, para. 1007.

[62] Memorial, para. 414; Reply, para. 981.

[63] Memorial, para. 414; Reply, para. 980.

[64] **C-2349,** Order issued by the National Civil Trial Court No. 61 of Argentina in Aguinda Salazar Maria vs. Chevron Corporation on Preventive Measures, 6 November 2012.

resulting from the 2012 embargo imposed by the Lago Agrio Court of trademarks and other intellectual property owned by three Chevron subsidiaries, which were earmarked for auction and sale for the benefit of the LAPs in aid of enforcement of the Lago Agrio Judgment.[65]

(iii) The category "**Moral Damages**" pertains to the moral damages the Claimants allegedly suffered as a result of the Criminal Proceedings, the Respondent's media campaign against the Claimants, and the Respondent's breach of the Tribunal's Interim Orders and Awards.[66]

135. The details of each of these 16 damages categories and the Parties' respective positions thereon are addressed in Sections VIII and IX below.

136. In total, the Claimants seek USD 793,879,967.74 for the 13 categories of damages related to legal fees and expenses.[67] They also request (i) USD 85,315,652 in damages for the Intellectual Property Losses in Ecuador; (ii) USD 13,000,000 in damages for the Embargo Losses in Argentina; and (iii) Moral Damages in the amount that the Tribunal deems just and proper.[68] In addition, the Claimants claim pre- and post- award interest from the date of occurrence of the damages until the Respondent's full and final payment.[69]

C. INDEMNIFICATION

137. Aside from the 16 aforementioned damages categories concerning pecuniary damages, the Claimants request under the heading of "Contingent Damages" that the Tribunal order the Respondent to indemnify them for any further damages resulting from pending or future enforcement actions of the Lago Agrio Judgment.[70] The Claimants clarify that they do not request that the Respondent establish an escrow account to ensure the availability

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65 Memorial, para. 431; Reply, paras. 1038-1039, 1082.

66 Memorial, paras. 150, 447; Reply, paras. 1114, 1122.

67 Reply, Updated Appendix 2, p. 1.

68 Reply, para. 1212(3).

69 Reply, para. 1132.

70 Memorial, paras. 154-155.

of funds for indemnification, but reserve the right to do so.[71] The Claimants' indemnification request is premised on the Tribunal's declaration in its Track II Award that "any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make full reparation under international law".[72]

138. The Tribunal shall address the Claimants' indemnity claim in Section XI below.

D. INJUNCTIVE RELIEF

139. Lastly, the Claimants point to several instances following the issuance of the Track II Award showing that the Respondent refuses to comply with the Track II Award.[73] Such instances include (i) declarations made by the Vice-President and the Attorney-General of Ecuador allegedly condemning the Award and stating the aim of avoiding its enforcement; (ii) an order issued by Ecuador's Ombudsman Office granting a request from Mr Fajardo seeking relief from potential disruptions to the enforcement of the Lago Agrio Judgment; and (iii) the granting of public funds to the ADF (the nominal beneficiary of the Lago Agrio Judgment).[74] Against this background, the Claimants request further injunctive relief as set out in their prayer for relief "to wipe out all of the consequences of Ecuador's internationally wrongful acts and to achieve the obligations of result that the Tribunal imposed."[75]

140. The Tribunal shall address the Claimants' request for injunctive relief in Section XII below.

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71 Memorial, para. 155.

72 Track II Award, para. 10.11.

73 Memorial, para. 156.

74 Memorial, paras. 157-160.

75 Memorial, para. 161. *See* Claimants' Request for Relief in Section IV.A above.

VI. THE PARTIES' POSITIONS ON GENERAL MATTERS AND LEGAL STANDARDS

A. LEGAL PRINCIPLES ON COMPENSATION

1. General Damages Principles

(a) The Claimants' Position

141. *Standard of compensation*: Noting that the Treaty is silent as to the standard of compensation for breaches of FET (including denial of justice) and its Umbrella Clause, the Claimants submit that customary international law fills the lacuna and provides the governing rules of compensation in this case, with *Chorzów Factory* providing the applicable standard of compensation.[76] Under *Chorzów Factory*, any award should "as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if the act had not been committed."[77] Therefore, the Claimants state, restitution is the preferred remedy, to be replaced by compensation for any financially assessable damage when restitution is not available.[78]

142. *Causation*: In respect of causation under international law, the Claimants acknowledge that it is generally understood as encompassing elements of factual and legal causation, including the principles that "the harm must not be too remote" and the breach "must be the proximate cause of the harm".[79] The Claimants therefore assert that "the relevant legal test here for proximate causation is whether a reasonable party in Ecuador's position could foresee that Chevron . . . could pursue the types of defensive and proactive legal

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[76] Memorial, paras. 163-167; **CLA-116**, *ADC Affiliate Limited and ADC and ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 481; **CLA-231**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 789.

[77] Memorial, paras. 168-170; **CLA-116**, *ADC Affiliate Limited and ADC and ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 493; **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 1928 PCIJ Series A, No. 17, 13 September 1928, p. 47.

[78] Memorial, paras. 171-176; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Articles 35 and 36.

[79] Memorial, para. 182; **CLA-463**, *S.D. Myers v. Canada*, Second Partial Award, 21 October 2002, para. 140. *See also* Track III Hearing Transcript, Day 1 (18 August 2022), p. 133 (Kehoe).

actions that Chevron did in response to Ecuador's wrongful conduct."[80] The Claimants specify that the question refers to the foreseeability of the type of damage, not its quantum.[81]

143. In the Claimants' view, however, the causation analysis may be simplified in circumstances of deliberate harm by the host State, in which case some investment tribunals have found that "there is no question of remoteness or foreseeability of damage",[82] and "a deliberate intent to harm . . . is a sufficient basis, by itself, for causation."[83] Citing to the International Law Commission's Articles on State Responsibility (the "**ILC Articles**") and Professor Bin Cheng, the Claimants deny the Respondent's argument that this is an "invented rule".[84]

144. The Claimants further cite the ILC Articles for the proposition that a State is responsible for harm caused for wrongful conduct, even if other factors contributed to the injury.[85] Flowing from this, the Claimants assert that Ecuador may not avoid responsibility for the harm resulting from its breaches of the Treaty by pointing to the acts of third parties, such as the LAPs and their representatives.[86] Rather, the Claimants submit that a State's responsibility for wrongful actions committed in concert with other actors is consistent with concepts of joint tortfeasor liability.[87] In turn, the Claimants reject the Respondent's suggestion that their damages are the product of contributory negligence, which, they note, is a "high bar" under international law and in any event is not met here: relying on

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80 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 129-130 (Kehoe).

81 Track III Hearing Transcript, Day 1 (18 August 2022), p. 137 (Kehoe).

82 Memorial, para. 183; **CLA-288**, James Crawford, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), pp. 204-205; **CLA-689**, *Ioannis Kardassopoulos v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, paras. 468-469.

83 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 53-54 (Bishop).

84 Reply, paras. 236-238; **CLA-682**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED TO INTERNATIONAL COURTS AND TRIBUNALS (1953), pp. 251-253; C**LA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Article 31, para. 10.

85 Memorial, para. 187; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Article 31, para. 12.

86 Memorial, para. 188; Reply, paras. 257-272; **CLA-418**, *United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), Judgment, 1980 ICJ Report 3, 24 May 1980, paras. 17-18; **CLA-550**, *The Corfu Channel Case* (Merits) (*United Kingdom v. Albania*), Judgment, 1949 ICJ Report 4, 9 April 1949, pp. 18-23.

87 Reply, paras. 272-277.

the expert opinion of Mr Joseph Ryan and the witness statement of Mr Peter Seley, the Claimants submit that a "reasonable" general counsel would have approached the dispute in a similar way as the Claimants effectively did.[88]

145. The Claimants also assert that the Tribunal's findings of liability should be understood within the meaning of Article 15 of the ILC Articles as treaty breaches arising out of a composite act, that is, "a series of actions or omissions defined in the aggregate as wrongful when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act."[89]

146. Regarding their claimed losses as direct damages, including legal fees and expenses, the Claimants assert that the Respondent misstates the test for proximate causation.[90] According to the Claimants, proximate causation is not based on determining whether causal links are "too remote", but on an analysis of the natural, objectively foreseeable consequences flowing from an international delict.[91] In any event, the Claimants state that proximate causation has already been established because the Tribunal has found that the Respondent deliberately harmed them,[92] namely:

> Much or all of the harm to Chevron was deliberately caused by Ecuador's refusal as a State to comply with its settlement obligations, by its Executive's refusal to investigate the evidence of fraud presented to them, by its Judiciary's refusal to consider or investigate the evidence of fraud presented, by the State's refusal to comply with this Tribunal's Interim Orders and Awards, and by the State's promotion of the enforcement of the Lago Agrio Judgment.[93]

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88 Reply, paras. 278-293; Ryan Expert Report, paras. 47-48; Seley Witness Statement , Section III.

89 Memorial, para. 189; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Art. 15(1).

90 Reply, para. 223.

91 Reply, paras. 231-235; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 31, para. 10; **CLA-682**, Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED TO INTERNATIONAL COURTS AND TRIBUNALS (1953), pp. 241-253.

92 Memorial, para. 185, Section IX; Reply, paras. 237, 239-240.

93 Memorial, paras. 185.

147. For the same reason, the Claimants contend that their damages were not only foreseeable, but actually foreseen by the Respondent.[94]

148. In response to the Respondent's but-for arguments on causation, the Claimants submit that the full reparation standard does not "require[] a party entitled to reparation to disprove all conceivable alternatives."[95] The Claimants contend that the Respondent seeks to impose a stricter causation standard on the Claimants than it does on itself.[96]

149. *Incidental damages*: If the Tribunal decides not to award the Claimants' legal fees and expenses as direct damages, the Claimants request, in the alternative, that the Tribunal award them as incidental damages, *i.e.*, forms of "reparation [that] include[] sums allowed in respect of expenses incurred by reason of the injury sustained."[97] Whether an expense qualifies as an "incidental expense", the Claimants note, depends on whether it was incurred to "repair damage" or "mitigate loss arising from the breach".[98] Further, they submit that incidental expenses that are "reasonably incurred" are recoverable, thus rejecting the Respondent's "attempts to graft an additional necessity requirement."[99] Such "reasonableness", the Claimants assert, is assessed case-by-case and in context.[100] The Claimants underlines that international law permits claimants to recover incidental expenses "reasonably incurred to prevent foreseeable damages caused by a State's breach", including costs incurred *before* a breach in order to prevent or mitigate foreseeable damages.[101] According to the Claimants, whether their damages are characterized as direct or indirect does not affect the Respondent's burden to prove its

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94 Reply, paras. 242-256.

95 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 168-172 (Silbert).

96 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 172-174 (Silbert).

97 Reply, paras. 294-298; **RLA-702**, Sixth report of the Special Rapporteur, Mr. F.V. García-Amador (13th session of the ILC (1961)), A/CN.4/134 and Add.1 (in Yearbook, 1961, vol. II), para. 166.

98 Reply, para. 296; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 36, para. 34.

99 Reply, paras. 303-309; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 36, para. 34; **CLA-652**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016), p. 305.

100 Reply, paras. 310-313.

101 Reply, paras. 360-365; Track III Hearing Transcript, Day 1 (18 August 2022), p. 74 (Bishop).

affirmative defence that Chevron failed to mitigate, but does affect the Claimants' burden to prove causation by adding a reasonableness test in addition to proximate causation.[102]

150. *Mitigation*: While the Claimants acknowledge that there is a duty to mitigate under international law,[103] they disagree with the Respondent's stance that only losses that "could not have been avoided by reasonable action" are recoverable.[104] Rather, the Claimants submit that "in accordance with the doctrine of mitigation recognized in international law, expenses are recoverable provided that they are incurred by the Claimant in reasonably attempting to mitigate its losses."[105] They add that there must be a causal link between the wrongful acts and the mitigation efforts.[106] The Claimants explain that "the causal link is established if the costs were reasonably incurred in response to either damage or potential loss, and the standard of proof for that, for reasonably incurred, is the proportionality of the Measures that were taken."[107] In the Claimants' submission, mitigation efforts are normally granted significant deference by both international tribunals and domestic courts, with decisions on measures taken and costs incurred appraised for whether they were "unreasonable or irrational".[108]According to the Claimants, respondents bear the burden of demonstrating that an award should be reduced because the claimants unreasonably failed to mitigate.[109]

151. *Burden of Proof*: With respect to their alternative claim for incidental damages, the Claimants contend that Ecuador's argument that Chevron unreasonably over-spent on its litigation is in essence an affirmative defence for failure to mitigate damages.[110] Being an

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102 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3395-3397 (Coriell).

103 Track III Hearing Transcript, Day 1 (18 August 2022), p. 85 (Coriell).

104 Reply, paras. 321-323.

105 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 86-87 (Coriell).

106 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 85, 88 (Coriell).

107 Track III Hearing Transcript, Day 1 (18 August 2022), p. 88 (Coriell).

108 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3407-3415 (Coriell).

109 Reply, paras. 324-330; **CLA-633**, *Himpurna California Energy Ltd v. PT (Persero) Perusahaan Listruik Nagara (PLN)*, Final Award, 4 May 1999, para. 258; **RLA-787**, *Hrvatska Elektroprivreda d.d. v. Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, para. 386.

110 Reply, paras. 367-380.

affirmative defence, the Claimants submit, Ecuador bears the burden of establishing that Chevron's litigation costs were unreasonable.[111]

(b) The Respondent's Position

152. *Standard of compensation*: The Respondent agrees that *Chorzów Factory* sets out the applicable customary international law standard for reparation for an internationally wrongful act.[112] It considers, however, that the Claimants overlook essential aspects of *Chorzów* – namely, it posits that no losses are recoverable other than those (i) actually suffered by claimants; (ii) directly caused by the breach; (iii) not reasonably avoidable; (iv) incurred after the breach, (v) reasonable and necessary; and (vi) sufficiently proven.[113] These requirements are addressed *seriatim*.

153. *Actual losses*: Citing to Article 36 of the ILC Articles, the Respondent posits that only losses actually suffered by the Claimants are recoverable, meaning that "uncertain, speculative or otherwise unproven losses are not recoverable, even if liability is established against the Respondent."[114] Otherwise, the Respondent notes, the aggrieved party would be put in a better position than the one it would have been in, had the breach not occurred.[115] Similarly, the Respondent asserts that only losses suffered by the Claimants, and not third parties, are recoverable, as claimants must "own the asset" they claim to have lost due to the breach.[116]

154. *Causation*: The Respondent submits that the Claimants must prove proximate causation for both direct and incidental damages.[117] The Respondent also distinguishes factual and

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111 Reply, paras. 367-380. *See also* Track III Hearing Transcript, Day 1 (18 August 2022), p. 48 (Bishop), pp. 89-98 (Coriell).

112 Counter-Memorial, para. 183.

113 Counter-Memorial, paras. 183-186.

114 Counter-Memorial, paras. 188-189; **RLA-103**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 45; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 36, para. 4.

115 Counter-Memorial, para. 190; **RLA-702**, ILC, International Responsibility: Sixth Report by F.V. Garcia Amador, Special Rapporteur, UN Doc. A/CN.4/134 and Add.1, 26 January 1961, para. 178.

116 Counter-Memorial, para. 191; **RLA-768**, *Emmis International Holding, B.V. et al. v. Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, para. 169.

117 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 265-266 (Tsutieva); Day 15 (7 September 2022), pp. 3532-3534 (Tsutieva).

legal elements in causation: "[f]actually, a claimant must prove that but-for the State's unlawful act, the harm would not have occurred"; "[l]egally, a claimant must show that the injury was proximately caused by the State's actions, and that it is not merely an indirect or remote consequence of the breach."[118] The Respondent considers the Claimants to have originally posited the correct test for proximate causation, namely, whether alleged losses, in terms of foreseeability from the standpoint of a reasonable person, "are the natural and foreseeable consequence of the State's treaty breaches".[119]

155. The Respondent derives the but-for requirement from *Chorzów*'s requirement to "reestablish the situation which would, *in all probability*, have existed if that act had not been committed."[120] This means that even if there was a breach, the Claimants must still show that the harm "would in fact have been averted if the respondent had acted in compliance with its legal obligations"[121] – a showing which, in the Respondent's view, the Claimants fail to make.[122]

156. In addition, the Respondent explains that proximate causation "serves to prevent liability for a potentially endless chain of events" by resorting to notions such as "directness, proximity and foreseeability of loss."[123] According to the Respondent, the consequences of failing to prove direct causation can include a finding of international responsibility without incurring an obligation to pay compensation[124] or the exclusion of specific categories of damages that are too remote or unrelated to a breach.[125] It is thus wrong, in

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118 Counter-Memorial, para. 194.

119 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 270 (Tsutieva).

120 Counter-Memorial, para. 195; **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Judgment, 1928 PCIJ Series A, No. 17, 13 September 1928, p. 47 (emphasis by the Respondent).

121 Counter-Memorial, paras. 196-203; **RLA-813**, *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 110; **CLA-640**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2007, para. 462.

122 Counter-Memorial, para. 203; Rejoinder, paras. 186-187.

123 Counter-Memorial, paras. 205-207; **RLA-719**, *Case of Aloeboetoe et al. v. Suriname*, IACHR, Judgment (Reparations and Costs), 10 September 1993, p. 12, para. 48; **RLA-738**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 115.

124 Counter-Memorial, para. 208; **CLA-642**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/2, Award, 6 May 2013.

125 Counter-Memorial, para. 209; **CLA-655**, *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, paras. 270-277.

the Respondent's view, to equate the requirement of legal causation to foreseeability alone, as the Claimants suggest.[126] Likewise, the Respondent rejects the Claimants' "invented" rule that the causation analysis may be "simplified" in cases of deliberate harm, as "deliberateness" does not equate to "proximity".[127] Regardless, the Respondent states that the Tribunal has not found that Ecuador acted with deliberate intent to harm.[128]

157. The Respondent further stresses that tribunals have deemed intervening acts by third parties to constitute the legal cause of a claimant's own losses, either because the conduct is the sole cause in the chain of events leading to the loss or because the intervening event renders the State's wrongful action too remote.[129] Similarly, the Respondent considers that a claimant's contribution to its own injury requires the denial or significant reduction of damages.[130] The Respondent adds that the "chain of causation requires reasonableness throughout the Claimants' efforts to mitigate."[131] The Respondent underlines that tribunals have significantly reduced or rejected damages where claimants have failed to establish causation.[132]

158. *Mitigation*: The Respondent further notes that the Claimants also have a duty to mitigate their damages reasonably, failing which they lose any entitlement to compensation for all damages that could have been avoided.[133] Mitigation is relevant to the Respondent's arguments that the Claimants and their lawyers failed to "exercise billing judgment" and

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126 Counter-Memorial, para. 210; Rejoinder, paras. 189-199; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 31, para. 10.

127 Counter-Memorial, paras. 211-212; Rejoinder, paras. 200-208; **RLA-807**, *UAB E energija v. Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, paras. 1143-1144.

128 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 272-273 (Tsutieva).

129 Counter-Memorial, paras. 213-214; Rejoinder, paras. 230-239; **CLA-463**, *S.D. Myers v. Canada*, Second Partial Award, 21 October 2002, para. 95; **CLA-614**, *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 926-927.

130 Counter-Memorial, paras. 215-216; Rejoinder, paras. 218-229; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 39, para. 5.

131 Track III Hearing Transcript, Day 2 (19 August 2022), p. 266 (Tsutieva).

132 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3544-3545 (Tsutieva).

133 Counter-Memorial, paras. 218-222; **CLA-670**, *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 25 September 1997, p. 55, para. 80.

to undertake specific action, as further elaborated in Section VI.D below.[134] The Respondent asserts that mitigation must be undertaken after the breach to be compensated and that compensable mitigation cannot begin in anticipation of a breach.[135]

159. *Incidental damages*: Recoverable incidental losses, the Respondent submits, are only those incurred after a breach (here, after the Lago Agrio Judgment became final in 2018)[136] and which were reasonable and necessary.[137] Citing to Ripinsky and Williams, the Respondent defines incidental expenses as those "which the investor has incurred (or is likely to incur) exclusively as a consequence of [the respondent's] unlawful conduct" – including legal expenses.[138] In the Respondent's view, all of the legal fees and expenses sought by the Claimants are incidental damages, and is critical of the Claimants' "volte-face" argument in their Reply that all of their claimed legal fees are now direct damages: in its view, the only "direct damage" that conceivably could have been caused by the Treaty breaches would have been payment of the final Lago Agrio Judgment amount.[139] As a consequence of their status as incidental damages, the Respondent submits that only legal fees incurred after the breach are potentially recoverable, as "incidental damages" are defined as arising from the breach.[140] The Respondent adds that the Claimants must show that their claimed incidental damages were both reasonable and necessary.[141] However, they dispute the Claimants' position that reasonableness can be met by showing proportionality.[142]

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134 Counter-Memorial, paras. 218, 222.

135 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3537-3543 (Tsutieva).

136 Counter-Memorial, paras. 224-227; Rejoinder, paras. 278-287; **CLA-221**, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 240(ii).

137 Counter-Memorial, paras. 228-232; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 36, para. 34.

138 Counter-Memorial, para. 223; **RLA-738**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 299.

139 Rejoinder, paras. 242-250.

140 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 259-260 (Tsutieva).

141 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 261 (Tsutieva).

142 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3535 (Tsutieva).

160. *Burden of proof*: The Respondent submits that the Claimants bear the burden of proving their losses, including "the fact and the amount of loss, . . . the causal link between the respondent's conduct and the loss",[143] as well as, for incidental damages,[144] the reasonableness[145] and the necessity of the loss.[146] The Respondent adds that its affirmative defence of failure to mitigate "doesn't become relevant until the Claimant first proves that it has incurred damages", including so-called mitigation expenses.[147] In addition, the Respondent asserts that the Claimants bear the burden to establish but-for causation for their damages.[148] The Respondent rejects the Claimants' assertion that the Respondent must determine which time entries are unreasonable as such position lies on two faulty assumptions: (i) incorrectly assuming equality of information; and (ii) assuming the integrity of their allocation of specific claimed fees and costs into categories.[149]

2. Legal Fees and Expenses as Damages

(a) The Claimants' Position

161. To make the Claimants "whole" and wipe out the consequences of the Respondent's breaches, the Claimants assert that they are entitled to recover, as a primary head of direct damages, the legal fees incurred in various proceedings as a consequence of the Respondent's delicts, including the costs and expenses of this Arbitration to which they claim they are separately entitled under the UNCITRAL Arbitration Rules.[150] Such legal fees and expenses, they claim, "are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach",[151] meaning that only

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143 Counter-Memorial, paras. 234-236; **RLA-738**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 162.

144 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 261-263 (Tsutieva).

145 Rejoinder, paras. 251-265.

146 Rejoinder, paras. 266-277.

147 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 237-238 (Schwartz).

148 Track III Hearing Transcript, Day 2 (19 August 2022), p. 275 (Tsutieva).

149 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3606 (Finsterwald).

150 Memorial, paras. 177-178. *See* para. 132 *ff* above for a list of the proceedings in respect of which the Claimants claim the reimbursement of legal fees and expenses.

151 Memorial, para. 178; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 36, para. 34.

a causal relationship between the State's breaches and a claimant's costs needs to exist.[152] According to the Claimants, awarding such costs in the amount actually incurred, and not any lesser amount, is "necessary to achieve the objective of 'full compensation'" when those costs were "incurred in the course of defending from the 'attacks' of the host country authorities" or "incurred to repair damage and otherwise mitigate loss arising from a breach."[153] The Claimants add that "cost-shifting regimes" are irrelevant here as they are "generally designed only to award partial legal costs, not full damages."[154] Further, the Claimants submit that their sought legal fees and expenses have already been market-tested, in that they have been reviewed and paid by Chevron.[155]

162. Should the Tribunal not award legal fees and expenses as direct damages, the Claimants request that they be awarded as incidental damages, as is often sought in accordance with *Chorzów Factory*'s full reparation principle.[156] The Claimants submit that a two-level analysis determines whether the legal costs are direct or indirect damages. First, the causation analysis must consider the measure taken. If the measure "was a natural consequence of Ecuador's breach or if it was intended by Ecuador or if it was foreseeable, then it's a direct damage".[157] If the measure is instead mitigation, then it constitutes incidental damage, and the Claimants must further prove that the measure was "a reasonable effort to mitigate against harm and potential harm".[158] The second level considers "how much a reasonable measure costs", where the Claimants submit that Ecuador bears the "burden to prove its affirmative defense of Chevron's alleged failure to mitigate its legal spend".[159]

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152 Memorial, para. 178.

153 Memorial, para. 178; **CLA-652**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016), pp. 299-300.

154 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 49-50 (Bishop), Day 15 (7 September 2022), p. 3480 (Kehoe).

155 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 49-50 (Bishop).

156 Reply, paras. 297-302; **CLA-903**, *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, paras. 541-542.

157 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3395 (Coriell).

158 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3395 (Coriell).

159 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3396 (Coriell).

163. Relying on the expert opinion of Professor Charles Silver, the Claimants posit that incurring legal fees and expenses was necessary to protect their rights and proactively mitigate damages flowing from the Respondent's Treaty breaches.[160] As to whether such legal fees and expenses were reasonable, the Claimants submit that they are where they meet two criteria: (i) "were those fees and costs paid by a party at a time when it had no assurance that it would be able to recover those costs[?]" and (ii) are the legal costs proportionate to what was at stake in the litigation?".[161] The Claimants offer witness testimony and expert opinion to the effect that their claimed fees and costs were reasonable.[162] Similarly, they also consider their mitigation strategy to be reasonable in view of the extent of the harm threatening Chevron, the urgency created by the threat of the Lago Agrio Judgment, the complexity of the Lago Agrio Litigation and the cost controls implemented by the Claimants.[163] In any event, the Claimants state that it is for the Respondent to prove its affirmative defence that the Claimants' acts of mitigation were unreasonable.[164]

(a) The Respondent's Position

164. In the Respondent's view, the Claimants' suggestion that the sole criterion for compensability is "whether legal expenses were actually paid" is an attempt to avoid the application of the standards of compensation under international law requiring that compensable legal expenses be proven, reasonable, and necessary in relation to the tasks to be performed.[165] According to the Respondent, it follows from such principles that detailed billing records are required to determine whether legal expenses, being incidental legal expenses, are compensable.[166] The Respondent derives ample recognition for the

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160 Reply, paras. 299-302; Silver Expert Report, paras. 141-152.

161 Track III Hearing Transcript, Day 1 (18 August 2022), p. 49 (Bishop). *See also* the Claimants' expert Professor Geoffrey Miller' explanation that the litigation expenditure of a public business corporation should be presumed reasonable unless the contrary is shown. Reply, paras. 312-313; Miller Expert Report, para. 18.

162 Reply, paras. 314-320; Litvack Expert Report; Lea Expert Report; Ryan Expert Report; Silver Expert Report; Miller Expert Report.

163 Reply, paras. 331-359; Silver Expert Report; Miller Expert Report; Ryan Expert Report.

164 Reply, paras. 367-380; **RLA-884**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 10.6.4.

165 Counter-Memorial, paras. 360-361, 363.

166 Counter-Memorial, paras. 362-363.

requirement that compensable legal expenses be reasonable and necessary from the decisions of international courts and tribunals.[167] In its view, the Claimants' attempts to "invent an entirely new standard" are unsupported by the legal authorities upon which they rely.[168] The Respondent is critical, in particular, of the Claimants' argument that their legal fees and expenses should be presumed reasonable because legal expenses deserve "significant deference",[169] since: (i) there is no deference for unreasonable expenses under international law;[170] (ii) the risks and amount at stake in the Lago Agrio Litigation do not entitle the Claimants to recover any unreasonable amount of damages;[171] and (iii) even in the context of assessing costs of arbitration, tribunals do not presume that the parties' expenses are reasonable just because they were paid.[172]

165. Similarly, the Respondent posits that major national jurisdictions also require that claimed legal expenses be reasonable and necessary.[173] In the Respondent's view, resorting to standards developed by national jurisdictions may be of use in circumstances where "international law has not yet developed its own intellectual tools of assessing whether particular expenditure has been incurred reasonably."[174] Among others, the Respondent identifies as relevant the standards applied in the United States,[175] Canada,[176] the United

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167 Counter-Memorial, paras. 364-369; **RLA-722**, *The Islamic Republic of Iran v. The United States of America*, IUSCTR, Cases Nos. A15 (IV) and A24-FT, Award No. 590- A15(IV)/A24-FT, 28 December 1998, paras. 57, 71, 120; **RLA-745**, *Case of Handölsdalen Sami Village and Others v. Sweden,* Judgment, ECHR Application No. 39014/04, 30 March 2010, para. 73; **RLA-766**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/1, Award, 27 November 2013, paras. 188-189; **RLA-817**; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary* , ICSID Case No. ARB/17/27, Award of the Tribunal, 13 November 2019, para. 439.

168 Counter-Memorial, paras. 370-379.

169 Rejoinder, para. 288.

170 Rejoinder, paras. 289-292; **RLA-787**, *Hrvatska Elektroprivreda d.d. v. Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, paras. 215, 400.

171 Rejoinder, paras. 293-296; **RLA-792**, *Peter A. Allard v. Barbado*s, PCA Case No. 2012-06, Award, 27 June 2016, paras. 308-309; **CLA-641**, *Libananco Holdings Co. Limited v. Turkey,* ICSID Case No. ARB/06/8, Award , 2 September 2011, paras. 559-569.

172 Rejoinder, paras. 297-304; **RLA-771**, *European American Investment Bank AG v. Slovakia,* PCA Case No. 2010-17, UNCITRAL, Award on Costs, 20 August 2014, para. 43; **CLA-706**, ICC Commission Report, DECISIONS ON COSTS IN INTERNATIONAL ARBITRATION (2015), pp. 5, 7, 12, 13, paras. 15, 19, 28, 65, 68, 70.

173 Counter-Memorial, paras. 380-407.

174 Counter-Memorial, para. 380; **RLA-738**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 306.

175 Counter-Memorial, paras. 381-386; **RE-35**, Leigh Expert Report; **RE-36**, Paige Expert Report.

176 Counter-Memorial, paras. 387-391; **RE-39**, First Knutsen Expert Report.

Kingdom,[177] other common law jurisdictions such as Australia, New Zealand, Singapore and Gibraltar,[178] Argentina,[179] Brazil[180] and the Netherlands.[181]

166. Flowing from such standards, the Respondent asserts that legal expenses can be proven to be reasonable and necessary only through contemporaneous and detailed billing records.[182] Without invoices, the Respondent submits, the Tribunal has no basis on which to award damages.[183] Relying on *Avco v. Iran*, the Respondent also argues that a lack of invoices may lead to a denial of damages outside the legal fees context.[184]

167. In the Respondent's view, the Claimants' claim for legal fees and expenses falls short of this standard. Relying on the expert report of Ms Mari Henry Leigh, the Respondent states that the lack of information on hours invoiced, fees invoiced, timekeeper identities and related billing narratives makes it impossible to:

- evaluate the appropriate number of hours which would have been spent on a given task;
- multiply such hours by a reasonable rate in a lodestar analysis;
- determine what discrete tasks were even performed in order to get a broad sense of the tangible and intangible work product prepared;
- determine the extent to which the costs were spent on non-legal efforts;
- determine the extent to which various timekeepers' efforts unnecessarily duplicated the work of other timekeepers in the various actions;

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177 Counter-Memorial, paras. 392-398; **RE-36**, Paige Expert Report.

178 Counter-Memorial, para. 399; **RE-36**, Paige Expert Report.

179 Counter-Memorial, paras. 400-401; **RE-38**, First García Pullés Expert Report.

180 Counter-Memorial, para. 402; **RE-37**, First Souza Godoy Expert Report.

181 Counter-Memorial, paras. 403-406; **RE-47**, Luycks Expert Report.

182 Counter-Memorial, paras. 408-417; **RLA-722**, *The Islamic Republic of Iran v. The United States of America*, IUSCTR, Cases Nos. A15 (IV) and A24-FT, Award No. 590- A15(IV)/A24-FT, 28 December 1998, para. 102; **RLA-769**, *The Islamic Republic of Iran v. The United States of America*, IUSCTR, Cases Nos. A15 (IV) and A24-FT, Award No. 620- A15(IV)/A24-FT, 2 July 2014, paras. 125, 154, 206-208.

183 Counter-Memorial, paras. 410-414; **RLA-764**, *Kiliç Ĭnşaat Ĭthalat Ĭhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, para. 9.2.7; **CLA-313**, *Bronner Case (United States v. Mexico)*, Award, 4 November 1874 in John Basset Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (1898), p. 3134; **CLA-665**, *Sylvania Tech. Sys, Inc. v. Iran*, Case No. 64, 8 IUSCTR., 27 June 1985, pp. 25-26.

184 Counter-Memorial, para. 415; **RLA-713**, *AVCO Corporation v. Iran Aircraft Industries, Iran Helicopter Support and Renewal Company of others*, IUSCTR Case No. 261, Partial Award No. 377-261-3, 18 July 1988, paras. 35-38.

- determine the extent to which excessive efforts were spent on given tasks;
- determine the extent to which the claimed costs include efforts a reasonable attorney would have known to be unfruitful and unnecessary;
- determine the extent to which Claimants improperly utilized attorneys whose hourly rate was not commensurate with the efficient performance of the task;
- determine the extent to which Claimants' submission includes work for which no additional efforts were needed as the work was previously performed at an earlier time or in conjunction with another work product.[185]

168. In this respect, the Respondent rejects the Claimants' attempt to shift the burden of proving that the incidental expenses they claim were reasonable: it denies the Claimants' characterisation of those legal fees as mitigation expenses (since many were paid before the Treaty breaches happened and, in its view, would have been paid irrespective of such breaches) and considers that the Tribunal has already placed that burden on the Claimants by its Procedural Order No. 65.[186]

169. The Respondent further considers that the Claimants have not proven (and the Tribunal has never held) that Ecuador intended to harm them – much less that it intended to inflict the specific losses claimed in this Arbitration, which is the showing required under international law.[187]

3. Date of Breach

170. The Parties disagree regarding the date of breach upon which the Respondent became responsible for the damages caused to the Claimants. In particular, the Parties reach diverging conclusions on the dates of breach applicable to the Respondent's denial of justice,[188] its breach of the Umbrella Clause by failing to abide by the 1995 Settlement

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185 Counter-Memorial, paras. 416-417; **RE-35**, Leigh Expert Report, paras. 80-89.

186 Rejoinder, paras. 251-265.

187 Rejoinder, paras. 209-217; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary on Art. 31, para. 10.

188 Track II Award, para. 10.6: "The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant for denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty; and the Tribunal rejects the defences pleaded by the Respondent".

Agreement[189] and to its breaches of the First and Second Interim Awards,[190] as further explained below.

(a) Denial of Justice and Umbrella Clause

1. The Claimants' Position

171. Based on the premise that the Tribunal's findings of liability should be understood as treaty breaches arising out of a composite act as defined under Article 15 of the ILC Articles, the Claimants state that the Tribunal must look at "the first of the actions or omissions in the series" for the purposes of establishing a date of breach upon which Ecuador became internationally responsible for each head of the Claimants' damages.[191] They request the Tribunal to consider all losses occurring after this date as fully recoverable in accordance with the *Chorzów Factory* full reparation principle.[192]

172. Applying this rationale, the Claimants identify the following dates of breach: (i) the Respondent's denial of justice is a composite act that began to occur on 22 August 2006, or, alternatively, 1 April 2008 or 1 March 2012; and (ii) the Respondent's Umbrella Clause breach began to occur on 1 January 2004 or, alternatively, 14 February 2011 or 1 March 2012.[193]

173. *Date of Denial of Justice Breach*: Relying, among others, on the *travaux préparatoires* of the ILC Articles, *Chevron v. Ecuador I* and *OAO Tatneft v. Ukraine*, the Claimants characterize the Respondent's denial of justice as a composite act comprised of several

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189 Track II Award, para. 10.9: "The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant under Article II(3)(c) of the Treaty for the non-observation of its obligations towards each of them as a "Releasee" under the 1995 Settlement Agreement; and the Tribunal rejects the defences pleaded by the Respondent".

190 Track II Award, para. 10.18: "The Tribunal confirms, as declared in its Fourth Interim Award on Interim Measures dated 7 February 2013, that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Art. 32(3) of the UNCITRAL Arbitration Rules and international law."

191 Memorial, paras. 189-190; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Art. 15(2); **CLA-693**, *Swisslion DOO Skopje v. Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, paras. 275-276, fn 340.

192 Memorial, para. 190.

193 Reply, para. 163. *See also* Reply, para. 175.

wrongful acts and omissions,[194] rejecting the Respondent's contrary position.[195] In their submission, the first wrongful act in the chain of events took place on 22 August 2006, when "Judge Yánez was blackmailed into granting the [LAPs'] improper request to terminate the proceedings".[196] After that point, the costs incurred by the Claimants "were not in service of defending its position in a fair and impartial proceeding. They rather responded to the series of fraudulent acts that characterized the remainder of the Lago Agrio Litigation."[197] Citing to the ILC Articles, the Claimants posit that this is the date from which damages begin to accrue, since the duration of a composite breach extends from the first contributing action or omission in the pattern through the action or omission that consummates the breach.[198]

174. In this respect, the Claimants reject as contrary to the principle of full reparation the Respondent's position that, even if its denial of justice is a composite breach, damages could not be predicated on acts or omissions predating the consummation of the breach.[199] In the Claimants' view, *Chorzów Factory* "logically requires that a State responsible for a composite breach make reparation for the entire breach—the entire series of actions or omissions from beginning to end."[200] The Claimants refer to similar approaches taken in connection with the treatment of genocide and creeping expropriations, which are also composite breaches.[201]

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194 Reply, para. 177.

195 Reply, paras. 181-187; **CLA-694**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, PCA Case No. 34877, Interim Award, 1 December 2008, paras. 299-301; **CLA-881**, International Law Commission, Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, (1997), Art. 25(3); **CLA-883**, *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits, 29 July 2014, para. 462; Track II Award, para. 8.76.

196 Reply, para. 178; Track II Award, para. 4.262.

197 Reply, para. 193.

198 Reply, paras.178-180; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Art. 15(2).

199 Reply, para. 187.

200 Reply, paras. 188-192; **CLA-913**, *Walter Bau AG (in Liquidation) v. Thailand*, UNCITRAL, Award, 1 July 2009, paras. 9.88, 13.2; **CLA-688**, Alwyn V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1973), p. 593.

201 Reply, paras. 190-192; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary of Art. 15, para. 2.

175. In the alternative, the Claimants submit that damages should be measured from the other wrongful acts comprising the denial of justice: the Cabrera fraud (1 April 2008), the Zambrano 'ghostwriting' (21 December 2010), the issuance of the Lago Agrio Judgment (14 February 2011), or the date on which said judgment became enforceable (1 March 2012).[202]

176. Lastly, the Claimants reject the Respondent's position that its liability began only on the date of the Constitutional Court Judgment (27 July 2018).[203] They assert that the Respondent misrepresents the Tribunal's finding that the denial of justice breach was consummated "as at 1 March 2012".[204] The Claimants also consider such position to be unsupported by case law[205] and inconsistent with (i) the Respondent's own argument that the Claimants should have mitigated damages before 2018, such as by failing to post a bond in 2011; and, relatedly (ii) the fact that the Claimants, as part of their efforts to mitigate their losses, had to defend themselves in Canada, Argentina and Brazil before local remedies where exhausted.[206]

177. *Date of Umbrella Clause Breach*: While acknowledging (as determined by the Tribunal in its Decision on Track I(B)) that the 7 May 2003 Lago Agrio Complaint pleaded both individual and diffuse claims,[207] the Claimants state that by the close of the evidentiary period on 29 October 2003, the LAPs had failed to present evidence to establish individual damages, meaning that from that point onwards the Lago Agrio Litigation was necessarily limited to diffuse rights.[208] Against this background, applying a standard of appropriateness in the circumstances to determine the time required for a "failure to act" to mature into an international wrong, the Claimants suggest that by 1 January 2004 (at the latest) the Ecuadorian government should have intervened to defend their rights under

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202 Reply, paras. 194-199; Track II Award, paras. 4.293-4.317, 5.245-5.247, 6.20-6.23, 7.133-7.152.

203 Reply, paras. 210.

204 Reply, paras. 201-203; Track II Award, paras. 8.59-8.60, 9.53-9.54, 9.75, 10.5.

205 Reply, paras. 207-209.

206 Reply, paras. 205-206.

207 Reply, para. 166; Decision on Track I(B), para. 186(1).

208 Reply, paras. 167-170.

the 1995 Settlement Agreement.[209] Since the Respondent failed to do so, the Claimants state that from that point forward they were exclusively incurring costs to defend against diffuse claims already barred by the 1995 Settlement Agreement, "which is precisely what the doctrine of *res judicata* is intended to prevent."[210] As such, 1 January 2004, the Claimants' proposed date of damages for the Umbrella Clause breach, is the date on which the Respondent "acting through its judiciary, began to violate the terms of the [1995 Settlement Agreement] when it refused to give [1995 Settlement Agreement] *res judicata* effect . . . against Chevron's explicit objection."[211]

178. In the alternative, the Claimants propose that damages for the breach of the Umbrella Clause run from 14 February 2011, the date of issuance of the Lago Agrio Judgment, which the Claimants reiterate was based exclusively on the released diffuse claims.[212] In the further alternative, the Claimants consider that damages should run from 1 March 2012, when the Lago Agrio Judgment became enforceable.[213]

2. The Respondent's Position

179. According to the Respondent, the date of issuance of the Judgment of the Constitutional Court (27 June 2018) is the earliest point at which a denial of justice and Umbrella Clause breach could have been consummated, meaning that the Claimants are not entitled to any legal expenses incurred before that date.[214]

180. First, as support for this proposition, the Respondent recalls the finality requirement of denial of justice, pursuant to which judicial decisions do not constitute breaches of international obligations until they constitute outcomes of the judicial system as a

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209 Reply, para. 172; **CLA-418**, *United States Diplomatic and Consular Staff in Tehran* (*United States v. Iran*), Judgment, 1980 ICJ Report 3, 24 May 1980, pp. 30-31; **CLA-550**, *The Corfu Channel Case (Merits)* (*United Kingdom v. Albania*), Judgment, 1949 ICJ Report 4, 9 April 1949, pp. 22-23.

210 Reply, para. 169.

211 Reply, para. 164. *See* **C-72**, *Lawsuit for Alleged Damages filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbíos; on May 7, 2003, by 48 Inhabitants of the Orellana and the Sucumbíos Province*, Superior Court of Nueva Loja, Chevron Answer to Lago Agrio Complaint, 21 October 2003, p. 5.

212 Reply, para. 174.

213 Reply, para. 175.

214 Counter-Memorial, Section IV(B)1, 2; Rejoinder, paras. 71-81.

whole.[215] In turn, the Respondent explains that exhaustion of local remedies is a substantive requirement that underscores the finality requirement: a claimant must have recourse to the court of last resort that is "reasonably available" to it in light of its situation.[216] In the Respondent's view, it follows from these principles that nothing preceding the final decision of the system can constitute or have the effects of the breach.[217] Similarly, the Respondent submits that the requirement of completeness of a breach through the acts of the judiciary also applies to the Tribunal's finding that the Respondent breached the 1995 Settlement Agreement "by the acts of its judicial branch".[218]

181. Taking note of these requirements, the Respondent submits that Chevron did not exhaust its local remedies against the Lago Agrio Judgment until the issuance of the Judgment of the Constitutional Court.[219] It recalls, in this regard, that the claims submitted in Chevron's petition to the Constitutional Court included the two claims that the Tribunal found resulted in the two Treaty breaches: (i) the alleged procedural fraud throughout the Lago Agrio Litigation; and (ii) the violation through the Cassation Court's decision of Chevron's "constitutional right to legal certainty in connection with the alleged existence of res judicata" in relation to the 1995 Settlement Agreement.[220] According to the Respondent, because Ecuador's legal system includes a constitutional appeal, the Claimants' resort to the Constitutional Court represents their exhaustion of local remedies: under relevant customary international law and within the paradigm of denial of justice, it is irrelevant whether the remedy is ordinary or special.[221] In the Respondent's

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215 Counter-Memorial, paras. 254-255; Rejoinder, paras. 61-70; **RLA-307**, *Jan Oostergetel and Theodora Laurentius v. Slovakia*, UNCITRAL, Final Award, 23 April 2012, paras. 272-273; **RLA-651**, *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, paras. 442-443.

216 Counter-Memorial, paras. 256-264; **CLA-44**, *Loewen Group, Inc. and Raymond L. Loewen v. United States,* ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 154; Track II Award, para. 7.117.

217 Counter-Memorial, para. 264.

218 Counter-Memorial, paras. 265-267; **RLA-812**, B. Demirkol, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION (2018), p. 83; Track II Award, para. 8.8.

219 Counter-Memorial, Section IV(B)(2)(a).

220 Counter-Memorial, para. 274; **C-2409**, Chevron's Extraordinary Action for Protection, pp. 60-61; **C-2551**, Constitutional Court Case No. 0105-14-EP, p. 67.

221 Counter-Memorial, paras. 268-270; **RLA-812**, Berk Demirkol, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION (2018), p. 87; **CLA-321**, Draft Articles on Diplomatic Protection with Commentaries (United Nations 2006), Art. 14(2).

view, the Tribunal adopted such approach in its Track II Award by consistently emphasizing that the Lago Agrio Judgment was left unremedied by the judicial system as a whole.[222] The Respondent applies the same analysis to the Umbrella Clause breach, recalling the Tribunal's ruling that the violation also occurred through the "acts of [the Respondent's] judicial branch" and was left unremedied by the Constitutional Court.[223]

182. The Respondent further rejects the Claimants' argument that the denial of justice and Umbrella Clause breaches consist of a composite act within the meaning of Article 15 of the ILC Articles[224] – an argument which, the Respondent notes, was neither argued by the Parties in the lead-up to the Track II Award nor mentioned by the Tribunal therein.[225] According to the Respondent, as a matter of law, "the term 'composite act' refers to obligations which can *only* be breached through a series of measures rather than through an individual act", such as obligations concerning genocide, apartheid or crimes against humanity.[226] In contrast, the Respondent notes, a denial of justice can occur in a single instance, so long as that instance represents the final outcome of the domestic legal system.[227] The Respondent rejects the Claimants' suggestion that the *travaux préparatoires* of the ILC Articles support the proposition that denial of justice is a "complex act" – a position which it claims is "predicated on a concept that was jettisoned" by the ILC on second reading.[228]

183. Should the Tribunal determine that the denial of justice and Umbrella Clause breaches consist of a composite act, the Respondent submits that damages for such breaches cannot be predicated on elements preceding the consummation of the breach, as Article 15 of the ILC Articles does not address awards of damages, only temporal issues for purposes of

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222 Counter-Memorial, paras. 271-273; Track II Award, paras. 8.26, 8.59-8.60, 8.71, 10.5.

223 Counter-Memorial, para. 276; Track II Award, paras. 8.6-8.8.

224 Counter-Memorial, paras. 277-283; Rejoinder, paras. 82-120.

225 Rejoinder, para. 84.

226 Counter-Memorial, paras. 278-279; **RLA-430**, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, pp. 62-63; **RLA-775**, Scott Vesel, *A 'Creeping Violation' of the Fair and Equitable Treatment Standard?,* ARB. INT'L, Vol. 30, No. 3, p. 556 (emphasis in original).

227 Counter-Memorial, paras. 280-282; Rejoinder, paras. 85-96; **RLA-812**, Berk Demirkol, JUDICIAL ACTS AND INVESTMENT TREATY ARBITRATION (2018), p. 84.

228 Rejoinder, paras. 97-107; **CLA-911**, James Crawford, STATE RESPONSIBILITY (2013), pp. 269-271.

jurisdiction.[229] The Respondent notes that the "handful" of cases that applied the "composite act" theory to cases involving findings of creeping expropriation "confirm that damages for a breach consisting of a composite act cannot be tied to elements preceding the culminating act or omission in the series."[230] It notes that there no cases where damages for legal fees and expenses incurred in legal proceedings prior to the culmination of a denial of justice were awarded.[231] Similarly, the Respondent rejects the Claimants' argument that the composite act theory extends back the date for accrual of legal fees to the date of the first act in the chain; rather, damages must be limited to proven legal costs with a requisite degree of certainty that are causally connected to the acts or omissions comprising the precise breach found by the Tribunal.[232]

184. Flowing from the above, the Respondent requests that the Claimants' claim for legal expenses incurred before the Judgment of the Constitutional Court be dismissed, as compensable loss "cannot be caused before an international delict has come into being."[233] According to the Respondent, this is true whether or not the denial of justice is seen as a composite act, as the date on which the breach crystallised remains the same.[234] Claiming damages preceding the breach as "investment expenditures" should also fail, in the Respondent's view, because defending a litigation is not an investment covered by the Treaty.[235] Similarly, no damages should be recovered for acts that were not part of the Treaty breaches, such as Judge Yánez's stopping of the judicial inspections[236] or the Cabrera fraud,[237] which the Tribunal determined were not the cause of the breaches. For the reason that the Ecuadorian Executive had no obligation to intervene in the Lago Agrio Litigation (as already determined in the Track II Award), the Respondent also rejects the

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229 Counter-Memorial, paras. 284-293; Rejoinder, paras. 121-131.

230 Counter-Memorial, paras. 285-289 (emphasis in the original); **CLA-227**, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 264; **CLA-228**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.5.32.

231 Counter-Memorial, paras. 290-291; Rejoinder, paras. 121-131.

232 Rejoinder, paras. 136-139; **CLA-693**, *Swisslion DOO Skopje v. Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, paras. 268, 275-276, 300, 304, 337, 349-350.

233 Counter-Memorial, paras. 294-303; Rejoinder, paras. 132-134.

234 Counter-Memorial, paras. 296-298.

235 Rejoinder, paras. 174-184.

236 Rejoinder, paras. 140-147.

237 Rejoinder, paras. 148-152.

Claimants' reliance on 1 January 2004 as the date of breach of the Umbrella Clause.[238] The Respondent makes the same observation in respect of the judicial branch's failure to dismiss the claims for diffuse rights at the outset of the litigation (for which the Tribunal did not fault the Respondent).[239]

185. Taking account of the above factors, according to the Respondent's legal fees expert Ms Leigh, the maximum potential obligation after excluding amounts pre-dating the 2018 Constitutional Court Judgment is expected to be less than USD 13,679,730[240] (later updated to USD 10,727,019).[241]

(b) First and Second Interim Awards

1. The Claimants' Position

186. According to the Claimants, the Respondent's breach of the First and Second Interim Awards is a continuing act that commenced on 1 March 2012, when the Lago Agrio Judgment was certified as enforceable.[242] Citing to the Track II Award,[243] the Claimants recall that such conduct was in breach of (i) the direction in the 25 January 2012 First Interim Award that the Respondent "take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment [against Chevron] in the Lago Agrio case";[244] and (ii) the instruction in the 16 February 2012 Second Interim Award that the Respondent "preclude any certification by the Respondent that would cause the said judgments to be enforceable against the First Claimant."[245]

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238 Rejoinder, paras. 153-168; Track II Award, paras. 9.28, 10.8; First Partial Award on Track I, paras. 76, 79.

239 Rejoinder, paras. 169-173.

240 Counter-Memorial, para. 301; **RE-35**, Leigh Expert Report, paras. 120, 123-133.

241 Rejoinder, paras. 132-134; **RE-61**, Second Leigh Expert Report, para. 84.

242 Reply, para. 163.

243 Reply, para. 214; Track II Award, paras. 7.130, 7.132.

244 Reply, para. 214; First Interim Award, *dispositif*, Section VI(2)(i).

245 Reply, para. 214; Second Interim Award, para. 3.

2. The Respondent's Position

187. As a threshold issue, the Respondent observes that the Claimants fail clearly to distinguish between breaches of the Treaty and breaches of the Tribunal's Interim Orders and Awards.[246] This notwithstanding, the Respondent maintains that "because separate damages cannot be awarded for the breaches of the Tribunal's Interim Orders and Awards, those breaches cannot alter the Date of Breach for the Treaty violations and no legal expenses incurred prior to the Constitutional Court Decision can be awarded."[247]

4. But-For Scenario

188. In its Counter-Memorial, the Respondent raised for the first time its but-for argument, which it summarized as follows:

> Under principles of international law . . . in order to prevail in their damages claims, Claimants must prove what the situation would in all probability have been if there had been no Treaty breaches, and what legal expenses and risk of judgment they would in all probability have faced in that situation. Specifically, Claimants must show what portion, if any, of any otherwise claimable legal expenses Chevron would not have had to incur in Treaty-compliant proceedings to defend against the LAPs' individual claims that were not settled by the 1995 Settlement Agreement as found by the Tribunal, in light of both the risk of any judgment against them that was reasonably possible and global enforcement of that judgment.
>
> But Claimants have made no such showing. Indeed, Claimants have failed even to address the situation that would in all probability have occurred had the breaches of the Treaty been avoided. This failure is fatal to all of Claimants' claims. They quite simply have failed to meet their burden of proving this fundamental element of the international law standard for compensatory damages.[248]

189. In its Partial Award on Track III, the Tribunal decided in a preliminary fashion three questions raised by the Claimants in connection with the Respondent's but-for argument, namely:

- *Question #1:* Is Ecuador's request for a reduction in damages based upon a hypothetical "but-for" scenario barred by the Tribunal's Track II finding that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption?
- *Question #2:* Do the Tribunal's prior rulings regarding the scope and effects of the 1995 and 1998 Settlement and Release Agreements, as well as its rulings on its own

246 Counter-Memorial, para. 1361.

247 Counter-Memorial, para. 1361.

248 Counter-Memorial, paras. 940-941.

jurisdiction, preclude both the claims that Ecuador's Counter-Memorial on Damages refers to as "collective" claims and any offset based on individual claims?

- *Question #3:* If any hypothetical "but-for" scenario offset were permitted here, would it be limited to the confines of those claims actually pursued by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record?

190. In respect of these questions, the Tribunal made the following declarations:

(i) Declares, in respect of Question #1, that there is no finding in the Tribunal's Track II Award that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption;

(ii) Declares, in respect of Question #2, that its prior rulings do not preclude an offset based on individual claims or collective claims, to the extent that it refers to the legal costs that the Claimants would in all probability have incurred in defending themselves against those claims in a Treaty-compliant Lago Agrio Litigation;

(iii) Declares in respect of Question #3, that any hypothetical but-for scenario offset should in principle at least be limited to the confines of the claims actually pleaded by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record. . .[249]

191. As also memorialized in the Partial Award on Track III, during the Hearing on a Partial Award held in March 2021, Counsel for the Respondent clarified that the Respondent is "not seeking any offset against [the Claimants'] legal costs damages claim for any environmental liability."[250]

192. With this preamble, the Parties' respective positions on the Respondent's but-for argument are summarized below.

(a) The Respondent's Position

193. The Respondent's but-for argument is based on the *Chorzów Factory* standard of full reparation, pursuant to which, as already stated above, the Tribunal must not only "wipe out all the consequences of the illegal act" but must also "reestablish the situation which would, in all probability, have existed if that act had not been committed."[251] Citing to contemporary cases for the proposition that what would have happened in domestic proceedings but-for the treaty breach must be considered in assessing any damages for

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249 Partial Award on Track III, para. 188 (i)-(iii).

250 Partial Award on Track III, para. 185.

251 Counter-Memorial, para. 945 (emphasis in the original); **CLA-406**, *Case Concerning the Factory at Chorzów (Merits) (Germany v. Poland)*, Judgment, 1928 PCIJ Series A, No. 17, 13 September 1928, p. 47.

the judicial system's conduct,[252] the Respondent argues that the Claimants must prove that the legal fees and expenses they incurred exceeded what they would in all probability have incurred had the Treaty breaches been avoided[253] with a sufficient degree of certainty.[254] In this connection, the Respondent posits that legal fees and expenses that were incurred to exhaust local remedies in the Lago Agrio Litigation are not compensable.[255]

194. Further, the Respondent rejects the Claimants' argument that a but-for analysis is inappropriate in a denial of justice case (a proposition which, it states, was rejected by the Tribunal its Partial Award in Track III)[256] and is also critical of the notion that it seeks a "do-over through a second but-for trial", as a but-for analysis is required under *Chorzów Factory*.[257] In particular, the Respondent explains that the Tribunal need not determine "who would have won, but what the litigation would have cost Chevron."[258]

195. The Respondent is critical of the Claimants' failure to meet their burden of proof in respect of the but-for scenario in their Memorial[259] and reiterates its position in response to the Claimants' Reply.[260] At the Track III Hearing, the Respondent explained that the but-for principle demonstrates that there can be no compensable damages where possible alternative scenarios evince a lack of a causal link between the breach and the alleged

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252 Counter-Memorial, paras. 946-952; **RLA-709**, *Sramek v. Austria*, Judgment, ECHR Application No. 8790/79, 22 October 1984; **RLA-793**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, para. 575, fn 838; **RLA-813**, *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 110; **CLA-686**, *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011, paras. 14.2.2-14.2.66.

253 Counter-Memorial, paras. 953-956; **RLA-351**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, PCA Case No. AA277, Final Award, 31 August 2011, para. 308.

254 Counter-Memorial, paras. 957-962; **RLA-813**, *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 168, 276.

255 Rejoinder, paras. 332-338; **RLA-1038**, *Lion Mexico Consolidated L.P. v. Mexico*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, paras. 847-848.

256 Rejoinder, para. 317; Partial Award on Track III, para. 171.

257 Rejoinder, paras. 315-321.

258 Rejoinder, paras. 453-459; **RLA-433**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, paras. 198-200.

259 Counter-Memorial, paras. 963-966.

260 Rejoinder, paras. 322-331; **RLA-813**, *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 110.

damages.[261] Such burden, the Respondent asserts, cannot be shifted to Ecuador,[262] and even if such was the case, the Respondent considers that it has satisfied it.[263]

196. In any event, the Respondent asserts that the Claimants cannot meet their burden of proof because "evidence shows that in all probability Chevron would have faced substantial individual claims for non-diffuse rights in the Lago Agrio Proceeding that had a reasonable possibility of prevailing."[264] In particular, the Respondent refers to a scenario where

> . . . had the Ecuadorian courts acted to prevent the defects of the first instance judgment from consummating a Treaty breach, Chevron would still have had to defend against the individual claims of the LAPs for violations of their individual and collective rights as asserted in the Lago Agrio Complaint. A decision of either the Constitutional Court or NCJ to nullify the judgment, as sought by Claimants, due to the improper rendering of the judgment, and the application of the 1995 Settlement Agreement to the LAPs' diffuse claims, would have avoided the Treaty breaches found by the Tribunal and resulted in litigation and adjudication of those individual claims.[265]

197. As regards this but-for scenario, the Respondent first argues, relying on the expert opinion of Dr Fabián Andrade, that correction of the Lago Agrio Judgment would have resulted in the remand of the case to the trial court for further adjudication[266] (or, in the alternative, either the appellate court or the trial court would have issued a Treaty-compliant judgment).[267] In connection with the earlier scenario, the Respondent recalls that, in bringing the Lago Agrio Complaint, the LAPs sought relief not only for violations of diffuse rights under Article 23(6) of the Constitution, but also for their individual claims for non-diffuse rights "violated and threatened by environmental contamination caused by TexPet's activities."[268] In any event, the Respondent believes that the likelihood of any of these scenarios lies in both the LAPs' "steadfast determination to vindicate their

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261 Track III Hearing Transcript, Day 2 (19 August 2022), p. 279 (Tsutieva).

262 Rejoinder, paras. 328-329; **RLA-1034**, *Muhammet Çap and Bankrupt Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, para. 728.

263 Rejoinder, paras. 330-331.

264 Counter-Memorial, paras. 967-1166.

265 Counter-Memorial, para. 967.

266 Counter-Memorial, paras. 971-977; Rejoinder, paras. 372-376; **RE-46**, Fourth Andrade Narváez Expert Report, paras. 13, 27-35.

267 Counter-Memorial, paras. 977-981.

268 Counter-Memorial, para. 978.

rights" and "significant evidence that their individual claims . . . were substantial and litigable".[269]

198. As such, the Respondent argues that adjudication of the LAPs' individual claims resting upon individual rights set out in the Lago Agrio Complaint (which, the Respondent recalls, were outside the scope of the 1995 Settlement Agreement, as confirmed by this Tribunal) could have proceeded, and the Claimants would have needed to defend against them.[270] Such individual claims, the Respondent notes, included individual claims based upon *individual* rights and individual claims based upon *collective* rights:[271]

(i) Individual claims based upon *individual* rights in the Lago Agrio Complaint, the Respondent states, encompassed three sets of individual rights capable of being threatened by environmental contamination: (1) their rights to health and to live in a healthy and ecologically balanced environment; (2) their property rights as individual landowners; and (3) their proprietary rights as owners to assets other than land.[272] Citing to the First Partial Award on Track I, the Respondent argues that such individual claims constitute "environmental claim[s] made by an individual in respect of personal harm in respect of that individual's rights separate and different from the Respondent", meaning that they were not released by the Respondent in the 1995 Settlement Agreement and thus must form part of the but-for scenario.[273] Likewise, the Respondent denies as impossible under Ecuadorian law the Claimants' argument that such claims were somehow abandoned.[274]

(ii) In turn, individual claims based upon *collective* rights concern, according to the Respondent, the collective rights of each of the Pimampiro, Rumipamba, San Pablo

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269 Rejoinder, paras. 382-383.

270 Counter-Memorial, paras. 973-976; Track II Award, para. 10.7: "The Tribunal (by a majority) declares, confirming its Decision on Track IB, that the Lago Agrio Complaint of 7 May 1998, as an initial pleading, included individual claims (for personal harm) resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement and that, therefore, the Lago Agrio Complaint was not wholly barred at its inception by res judicata under Ecuadorian law, by virtue of the 1995 Settlement Agreement." *See also* First Partial Award on Track I, para. 112(3); Decision on Track I(B), para. 186(1).

271 Counter-Memorial, para. 979; Rejoinder, para. 341.

272 Counter-Memorial, paras. 980-984; Rejoinder, paras. 342-344.

273 Rejoinder, paras. 346-351; First Partial Award on Track I, para. 112(3).

274 Rejoinder, paras. 390-394; 438-452; **RE-48**, Fifth Andrade Narváez Expert Report, paras. 10, 19, 22-23.

de Aguarico and Dureno municipalities to enjoy a healthy and ecologically balanced environment – a right which the Respondent asserts is guaranteed by Articles 23(6) and 88 of the 1998 Constitution.[275] Further, the Respondent asserts that those LAPs who are indigenous peoples (the inhabitants of San Pablo de Aguarico and Rumipamba) also made claims regarding rights to which they were entitled as indigenous peoples, including a claim for compensation under Article 15 of ILO Convention No. 169 to remedy the damage caused to their "natural surrounding and the loss of their territories, resources or traditional means of subsistence."[276]

(iii) According to the Respondent, such claims for collective rights are distinct from the LAPs' individual claims for diffuse rights (which, as noted above, could not be adjudicated by a Treaty-compliant Lago Agrio court in the but-for world).[277] In the Respondent's submission, a distinction exists in Ecuadorian law in that a collective right "corresponds to a collectivity identifiable by its group purpose and common interests", while a diffuse right belongs to "a community of indeterminate people."[278] In any event, the Respondent notes that claims based upon collective rights are claims for personal harm: "a violation of a collective right endangers the particular community's existence, which necessarily entails a specific harm to the members of a particular community."[279]

199. On this basis, the Respondent argues that substantial evidence of contamination injuring the LAPs' non-diffuse rights would have been available to support their individual claims for non-diffuse rights on remand.[280] In its Counter-Memorial, the Respondent reviewed such evidence, which included "analysis conducted by Respondent's experts during both

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275 Counter-Memorial, para. 986; **RE-40**, First Parraguez Ruiz Expert Report, para. 18; **RE-49**, Second Parraguez Ruiz Expert Report, para. 52.

276 Counter-Memorial, paras. 987-989, 991; Rejoinder, paras. 342-344.

277 Counter-Memorial, para. 992; Rejoinder, paras. 342-344.

278 Counter-Memorial, paras. 993-995; Rejoinder, paras. 354-367; **RE-40**, First Parraguez Ruiz Expert Report, paras. 8-9.

279 Rejoinder, paras. 363-367.

280 Counter-Memorial, paras. 997-1125.

Track III and prior phases of this proceeding."[281] In its Rejoinder, the Respondent provides an updated analysis, having taken note of the Tribunal's ruling in the Partial Award on Track III that both the evidence in the Lago Agrio Litigation record and that which "can be expected from the original complaint and surrounding circumstances" should be considered.[282]

200. By reference to the Tribunal's rulings in its Partial Award on Track III, the Respondent denies that a but-for scenario based on claims for violations of non-diffuse rights would render the 1995-1998 Settlement and Release Agreements illusory:[283]

> Ecuadorian law is clear that merely because the remedies for the types of individual claims pleaded in the Lago Agrio Complaint are similar to those for diffuse rights claims does not convert them into diffuse rights claims or otherwise render the Settlement Agreement illusory. As the Ecuadorian Supreme Court's decision in Delfina Torres demonstrates, seeking to remedy a "broad scope of environmental harm caused by a defendant's wrongdoing" through "a claim for relief in the form of remedial works d[oes] not, by [itself], affect the characterisation of a claim as an individual claim under Ecuadorian law." In light of this reasoning and the Tribunal's recognition that "[i]f there were to be individual claims for personal harm by the Aguinda or Lago Agrio Plaintiffs (not being diffuse claims) in further legal proceedings," remediation "in the former concession area" may be an available remedy, the existence of a remedy extending beyond the individual LAPs' properties in the but-for scenario does not render the Settlement Agreement illusory.[284]

201. According to the Respondent, the remedies available for the LAPs' individual claims for non-diffuse rights would have been substantial.[285] In its submission, such remedies could have included (*inter alia*): (i) an order to perform a program of environmental remediation and restoration, medical monitoring and pecuniary damages;[286] and (ii) a "comprehensive environmental remedy" which would have "likely cost more than USD 1 billion".[287] The Respondent considers that the Claimants' alternative proposed analysis, based on individual lawsuits litigated by TexPet, cannot establish that Chevron would not have faced significant liability, since the "comparatively low amounts-in-controversy of these

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281 Counter-Memorial, para. 1006. *See generally* Counter-Memorial, paras. 997-1125.

282 Rejoinder, paras. 399-430; Partial Award on Track III, para. 174.

283 Rejoinder, paras. 430-433; Partial Award on Track III, para. 164.

284 Rejoinder, para. 432; Track II Award, para. 8.75.

285 Counter-Memorial, paras. 1126-1158.

286 Counter-Memorial, paras. 1130.

287 Counter-Memorial, paras. 1141-1158. *See also* Track III Hearing Transcript, Day 2 (19 August 2022), pp. 288-299 (Ettinger).

lawsuits reflect the fact that the plaintiffs that brought them sought, for the most part, to vindicate limited personal-injury type claims and damages to proprietary rights."[288]

202. Based on the above arguments, the Respondent states that, on remand from a higher-instance court, there is a reasonable likelihood that the Lago Agrio Court would have granted the LAPs' individual claims, since, under relevant Ecuadorian legislation, the Claimants likely would not have been able to meet their burden to disprove harm, an absence of fault or the absence of a causal link according to the theory of sufficient cause.[289] Regardless of outcome, the Respondent considers that "litigating this issue would have caused Chevron to incur substantive legal fees", in particular given the amount Chevron actually spent.[290]

203. Lastly, the Respondent rejects as "procedurally impossible" the Claimants' proposed but-for scenario, in which the Lago Agrio Court could have avoided Treaty breaches "by dismissing the LAPs' entire case by the arbitrarily selected date of 1 January 2004".[291] Relying on the expert opinion of Dr Fabián Andrade, the Respondent denies that the court could have terminated the LAPs' case on that date based on Chevron's *res judicata* objection; rather, such objection would have been addressed in the normal course when the Lago Agrio Judgment was issued in 2011.[292] Even if the early dismissal of the claim in 2004 had been possible, the Respondent believes that it not have been the end of the litigation; instead, the LAPs would have likely continued to press their non-diffuse claims against the Claimants, either in the same or a different lawsuit.[293]

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288 Rejoinder, paras. 460-465. *See also* Rejoinder, paras. 466-477.

289 Counter-Memorial, paras. 1159-1165.

290 Track III Hearing Transcript, Day 2 (19 August 2022), p. 285 (Salgado). *See also* Track III Hearing Transcript, Day 2 (19 August 2022), p. 285 (Salgado); Day 15 (7 September 2022), pp. 3551-3553 (Ettinger).

291 Rejoinder, para. 384.

292 Rejoinder, paras. 384-385; **RE-46**, Fourth Andrade Narváez Expert Report, paras. 89-94.

293 Rejoinder, paras. 386-387.

(b) The Claimants' Position

204. Citing to the *Chorzów Factory* standard, the Claimants argue that the Respondent is not entitled to any reduction in damages under a hypothetical but-for scenario.[294]

205. First, the Claimants assert that the Respondent's proposed but-for analysis finds no roots in *Chorzów Factory* and is inappropriate in a denial of justice case.[295] In their view, adopting the Respondent's approach would remove any incentive for States to abstain from committing denials of justice: "[n]ot only would the victim of the denial of justice have to meet a very high standard for establishing the State's bad act, but even if the victim succeeds against those odds, the State would then get a do-over before the international tribunal, where the worst that can happen is that the State gets credited for hypothetically acting as it should have all along."[296]

206. Second, citing to past cases where the burden of proof was shifted where, as here, "the lack of real-world evidence resulted from the breaching party's fault", the Claimants consider that the Respondent has not met its burden of proving their damages in a but-for scenario.[297] Among other things, the Claimants state that the Respondent "has never specified the exact claims that would hypothetically be at issue, nor their relationship to the real-world Lago Agrio Litigation."[298]

207. Third, and in any event, the Claimants posit that the Respondent's proposed but-for analysis does not reflect the most likely scenario, as required under *Chorzów Factory*.[299] The Claimants consider the Respondent's but-for scenario to be disconnected from the actual historical record.[300] According to the Claimants, the "most likely scenario" must instead be determined by asking "what would have happened in a 'but for' world in which

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294 Reply, paras. 589-660.

295 Reply, paras. 594-595.

296 Reply, para. 595.

297 Reply, paras. 596-597; **CLA-664**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of Award, 18 April 2017, para. 224.

298 Reply, para. 597.

299 Reply, paras. 598-605. *See also* Track III Hearing Transcript, Day 1 (18 August 2022), pp. 179-185, 192-195 (Silbert) (arguing that the Respondent's proposed *but-for* scenario is detached from the historical record and speculative).

300 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 179-185 (Silbert).

Ecuador was in compliance with the Treaty and all other unrelated facts remain the same?"[301] In their view, such scenario would be as follows:

> The LAPs would have filed a Lago Agrio Complaint exactly as they did in the real Lago Agrio Litigation. The LAPs and their representatives would have prosecuted that Lago Agrio Complaint to the same extent, as to the same issues and claims, on the same record, and with the same degree of misconduct as they did in the real Lago Agrio Litigation. The essential difference in the most likely but-for scenario is that the Lago Agrio Court would have dismissed the Lago Agrio Complaint as to the diffuse claims by no later than January 1, 2004; this is the date by which . . . Ecuador ought to have addressed, and given effect to, the 1995 Settlement Agreement. That would have brought an end to the case with negligible litigation costs because, in the real world, the 48 LAPs chose not to pursue individual claims for personal harm.[302]

208. Against this scenario, the Claimants criticize the Respondent's proposed but-for hypothetical because it asks the Tribunal to assume: (i) a world in which the LAPs diligently pursued individual claims for personal harm against Chevron (when, in fact, the opposite happened); and (ii) the LAPs' team did not commit fraud and corruption (when, in fact, the LAPs' representatives "chose to go to the 'dark side' [] because the evidence developed during the judicial-inspection process disproved their claims against Chevron").[303]

209. Fourth, the Claimants assert that any but-for analysis involving individual claims for personal harm would require the Tribunal to rule on third-party claims and expose the Claimants to potential double liability.[304] In the Claimants' view, such a but-for world would be inconsistent with the Track II Award determination that a decision by the Tribunal on environmental issues could prejudice the determination of those same issues if they are argued anew by the Aguinda or Lago Agrio plaintiffs.[305]

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301 Reply, para. 598.

302 Reply, para. 599.

303 Reply, paras. 602-603.

304 Reply, paras. 606-609.

305 Reply, paras. 607-609; Track II Award paras. 7.13, 8.73; Partial Award on Track III, para. 141.

210. Fifth, in the Claimants' view, any but-for analysis would be severely limited by the Tribunal's Partial Award on Track III.[306] In particular, the Claimants derive the following implications from such Award:

(i) Any but-for analysis would be limited to an offset of "legal costs against legal costs", thus excluding any analysis of hypothetical liability or a hypothetical litigation against third parties.[307]

(ii) Environmental issues are outside the scope of Track III and no further environmental evidence is relevant as part of a purported set-off of damages, which is why the Claimants declined to submit further environmental evidence with their Reply.[308]

(iii) No but-for scenario will be accepted that renders the 1995-1998 Settlement Agreements "illusory", including, in particular, a hypothetical where alleged "collective rights for personal harm" are asserted.[309]

(iv) Any claims other than those by an individual claiming personal harm are precluded from the but-for world, as there is no such thing as an "individual claim for collective rights" in Ecuadorian law that falls outside of the 1995-1998 Settlement and Release Agreements:[310] (i) at the time of the Releases, the assertion of non-individual rights belonged exclusively to the State;[311] (ii) "diffuse" and "collective" rights are not "non-individual rights" and are not designed to vindicate individual claims for personal harm;[312] and (iii) a diffuse right does not lose its character as

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306 *See* Track III Hearing Transcript, Day 1 (18 August 2022), pp. 174-179 (Silbert).

307 Reply, paras. 611-613; Partial Award on Track III, paras. 141, 166.

308 Reply, paras. 614-615; Partial Award on Track III, paras. 186-187. *See also* Track III Hearing Transcript, Day 1 (18 August 2022), pp. 178-179 (Silbert).

309 Reply, paras. 616-621; Partial Award on Track III, para. 164; Track II Award, paras. 5.223-5.224; First Partial Award on Track I, paras. 106-107.

310 Reply, paras. 622-631.

311 Reply, para.625; Eighth Coronel Jones Expert Report, paras. 9, 10, 18.

312 Reply, paras. 626-627; Eighth Coronel Jones Expert Report, paras. 36(ii), 39, 40.

such merely because it is asserted by a claimant who belongs to a defined community.[313]

(v) Any but-for scenario is limited to individual claims for personal harm by the 48 named LAPs in the Lago Agrio Complaint and their evidence in the Lago Agrio Litigation record,[314] in respect of which the Claimants observe the following: (i) the Respondent has failed to articulate the nature and extent of the alleged individual claims for personal harm of the 48 LAPs;[315] (ii) the Lago Agrio Litigation record is "too suffused with fraud" to be a reliable source of any information;[316] and (iii) even if it could, such record includes no evidence of specific personal harm to the individual 48 named LAPs.[317]

211. Sixth, the Claimants recall that in the but-for world the Respondent would not be entitled to an offset based on an indemnification order, as "decisively rejected" by the Tribunal in its Partial Award on Track III.[318]

212. Seventh, should the Tribunal decide to undertake a but-for analysis, the Claimants consider that it should be based on the Claimants' actual litigation costs and other real-world evidence, which, in the Claimants' view, constitute the proper comparators.[319] Among other things, the Claimants explain that between 1995 and 2015 TexPet successfully defended against several real lawsuits for individual claims for personal harm allegedly caused by operations in the former concession area (the average amount in controversy was USD 484,114, a figure that could be applied to each of the 48 LAPs, reaching a total set-off of USD 23,237,474).[320] Based on this hypothetical amount in controversy and on the fact that, in the real world, they incurred only 4 to 9 cents in legal costs for each dollar of liability they faced under the Lago Agrio Judgment, the Claimants

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313 Reply, para. 628; Eighth Coronel Jones Expert Report, para. 38.

314 Reply, paras. 632-646.

315 Reply, paras. 634-639.

316 Reply, paras. 640-642; Partial Award on Track III, paras. 125, 127,

317 Reply, paras. 643-646.

318 Reply, paras. 647-648; Partial Award on Track III, para. 142.

319 Reply, paras. 650-660.

320 Reply, paras. 652-655; Claimants' Second Submission, Appendix of Individual Rights Cases.

estimate that their hypothetical legal fees and expenses to defend themselves in the but-for scenario would be between USD 929,498 and USD 2,091,372 (a "far cry" from the "up to 1.6 billion" offset sought by the Respondent).[321] The Claimants further note that the USD 161.5 million they actually spent in legal costs in the Lago Agrio Litigation include the work defending themselves from the Respondent's Treaty breaches, meaning that their legal fees and expenses defending against hypothetical individual claims for personal harm would have been "orders of magnitude lower" than the funds actually spent.[322] As to the evidence allowed in the hypothetical scenario, the Claimants note that it would be limited to properties owned by the 48 named LAPs (thus excluding the judicial inspection process of the former concession area that took place in the real world) and, even if evidence of personal harm were introduced, the Claimants believe that the scope of the but-for scenario would be significantly limited compared to the scope of the original Lago Agrio Litigation.[323]

213. Eighth, the Claimants submit that the Respondent cannot argue both that Chevron's real-world legal fees and expenses are excessive, while also stating that it would have spent roughly the same amount in the but-for Teaty-compliant scenario.[324]

214. Ninth, and last, the Claimants note that the Respondent's but-for scenario only pertains to legal fees and expenses Chevron would have spent in a Treaty-compliant Lago Agrio Litigation, and thus applies only to a subset of the Claimants' claims.[325]

B. NON-COMPLIANCE WITH INTERIM AWARDS

215. As already noted above,[326] the Claimants request damages not only in connection with the Respondent's breach of the Umbrella Clause and its denial of justice, but also as regards the Respondent's "refusal" to comply with the First and Second Interim Awards.

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321 Reply, paras. 656-659.

322 Reply, para. 658.

323 Reply, paras. 659-660.

324 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 166-167 (Silbert).

325 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 167-168 (Silbert).

326 *See* para. 129(iii) above.

216. In reply, the Respondent posits first that the First and Second Interim Awards have been superseded by the Track II Award.[327] Second, the Respondent maintains that, in any event, any purported breaches of those Awards would not give rise to compensable damages.[328] Third, the Respondent has also re-submitted its request for reconsideration of the First, Second and Fourth Interim Awards, as further described below.[329]

1. Non-Compliance

(a) The Claimants' Position

217. Recalling the Tribunal's findings in its Fourth Interim Award and Track II Award that Ecuador violated the Tribunal's First and Second Interim Awards by issuing a certificate of enforceability for the Lago Agrio Judgment on 1 March 2012, the Claimants affirm that they are entitled to damages as a result of such violations.[330] In the Claimants' view, the Respondent's breach of those Interim Awards was the natural and foreseeable cause of those damages incurred after the First Interim Award was issued on 25 January 2012,[331] meaning that the Claimants' failure to post a bond could not constitute an intervening cause that would sever the causal link between the breach and the damage.[332]

218. First, the Claimants reject the Respondent's argument that the Track II Award superseded the First and Second Interim Awards and that, as a result, they "cannot attempt to seek damages for interim measures that are no longer extant"; they cite in this respect the ILC Articles for the proposition that the obligation of reparation "arises automatically" upon breach of an international obligation.[333] Further, they consider the Respondent's interpretation to be at odds with the terms of the Track II Award, which imposes the same

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327 Counter-Memorial, paras. 1350-1353; Rejoinder, paras. 1877-1880.

328 Counter-Memorial, paras. 1354-1364; Rejoinder, paras. 1881-1885.

329 Counter-Memorial, paras. 1365-1376; Rejoinder, para. 1891.

330 Memorial, paras. 133-135, 156-161; Reply, paras. 381-395.

331 Reply, para. 393.

332 Reply, paras. 394-395.

333 Reply, paras. 383-384; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Commentary to Art. 31, para. 4.

interim relief in respect of the Respondent's ongoing violations for the future, and not for the past.[334]

219. Second, the Claimants reject the Respondent's argument that no damages can flow from the breach of the First and Second Interim awards because no arbitral tribunal "has the jurisdiction to enforce compliance with its interim awards":[335] in their view, such argument is based on an artificial distinction between a breach of an interim award and all other breaches of international law for the purpose of full reparation.[336] They recall that the Tribunal has asked the Respondent "to show cause . . . why [it] should not now compensate the First Claimant for any harm caused by the Respondent's violations of the First and Second Interim Awards . . .", meaning that the burden is on the Respondent to establish why full reparation should not be awarded in respect of such violations.[337]

(b) The Respondent's Position

220. As a threshold issue, the Respondent argues that the First and Second Interim Awards have been superseded by the Track II Award, thus rendering moot any claim for damages due to non-compliance with those awards.[338]

221. Even if the Tribunal were to find that those Interim Awards have not been superseded, the Respondent submits that the Claimants would still not be entitled to compensation for its breaches of those awards.[339] First, the Respondent asserts that there is no legal basis in the Treaty or international law for the premise that compensation can be awarded for breaches of interim awards: an international arbitral tribunal becomes *functus officio* once an award has been rendered and "has no ongoing legal role in promoting enforcement."[340]

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334 Reply, para. 385.

335 Reply, paras. 386-391.

336 Reply, paras-387-390; **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Art. 31(1).

337 Reply, para. 391.

338 Counter-Memorial, paras. 1350-1353; Rejoinder, paras. 1877-1880.

339 Counter-Memorial, paras.1354-1364.

340 Counter-Memorial, paras. 1356-1361; Rejoinder, paras. 1881-1885, 1918.

222. Second, the Respondent explains that a causal link must be established between a breach and the damages sought,[341] yet there is none between the Respondent's failure to prevent the certification of the Lago Agrio Judgment and the Claimants' alleged damages.[342] According to the Respondent, the Claimants' failure to post a bond with the Lago Agrio Court to prevent the enforcement of the Lago Agrio Judgment "constitutes an intervening cause that severs any chain of causality that might otherwise have existed between Respondent's breaches of the First and Second Interim Awards and the losses Claimants allege to have suffered in respect to preventing the enforcement of the Lago Agrio Judgment."[343]

223. Third, the Respondent further rejects as contrary to international law any possibility of a merger between the Treaty breaches and the breaches of the Interim Awards.[344] To the extent there has been a merger, the Respondent considers that

> any overlapping claim for damages for such violations would be subject to many of the same defenses that Respondent has interposed to the claims for damages resulting from the Treaty breaches, including without limitation those relating to principles of causation, mitigation of damages, and Claimants' failure to establish that the claimed fees and costs were reasonable and necessary or prove any of their other alleged losses.[345]

224. Lastly, the Respondent submits that it has complied with the Tribunal's orders in the Track II Award to the extent possible under Ecuadorian law.[346] It notes, in particular, that the content of the Track II Award was communicated to the President of the Republic, the Chief Judge of the Constitutional Court and the Chief Justice of the court sitting in Sucumbíos so that they could consider actions to take within the scope of their powers.[347] The competent authorities in Canada, Argentina and Brazil were also informed,[348] as was the President of the Provincial Court of Sucumbíos (who, in the understanding of the

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341 Track III Hearing Transcript, Day 2 (19 August 2022), p. 381 (Salgado).

342 Counter-Memorial, paras. 1362-1364; Rejoinder, paras. 1886-1887.

343 Counter-Memorial, paras. 1362-1364.

344 Rejoinder, para. 1888; **CLA-640**, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 2027, 26 February 2007, para. 469.

345 Rejoinder, para. 1889.

346 Rejoinder, paras. 1920-1925.

347 Rejoinder, para. 1920.

348 Rejoinder, para. 1921.

Attorney-General, will not certify any copies of the Lago Agrio Judgment going forward).[349]

2. The Respondent's Request for Reconsideration of the First, Second and Fourth Interim Awards

(a) The Respondent's Position

225. On 1 March 2013, following the issuance of the Fourth Interim Award, the Respondent submitted a request for reconsideration of the First, Second and Fourth Interim Awards on the following grounds:

> The First and Second Interim Awards did not explicitly provide that the Respondent would be expected to violate its own Constitution and laws in order to comply;
>
> - the premise of the First and Second Interim Awards (that harm to Claimants cannot be repaired by monetary compensation) is irreconcilable with the determination made in the Fourth Interim Award (that Respondent is now obliged to pay compensation for harm caused by breach of the First and Second Interim Awards);
> - the Fourth Interim Award fails to acknowledge Respondent's consistent position that it is constrained by international law from preventing the enforceability of an otherwise enforceable domestic judgment;
> - the Tribunal should revisit its reliance upon international law to conclude that the Respondent cannot invoke Ecuadorian law to excuse non-compliance with the Tribunal's First and Second Interim Awards;
> - the question of whether a State Party has complied with the obligation in Article IV(6) of the Treaty is not justiciable before a tribunal constituted to determine an investment dispute; and
> - Article VI(6) of the Treaty cannot be read in conjunction with Article 26 of the UNCITRAL Rules as conferring a legislative power upon an Article VI(3) tribunal to create a new international obligation for State Parties.[350]

226. Should the Tribunal consider that its Interim Awards have not been superseded by the Track II Award and to have been validly decided, the Respondent maintains its application for reconsideration.[351]

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349 Rejoinder, para. 1922.

350 Counter-Memorial, para. 1365.

351 Counter-Memorial, para. 1366; Rejoinder, para. 1891.

227. First, the Respondent asserts that the First and Second Interim Awards were based on the wrong premise that there is a "sufficient likelihood that [the] harm to the Claimants may be irreparable in the form of monetary compensation", and should be vacated for that reason.[352] In the Respondent's view, when first requesting interim relief from the Tribunal against the possibility of enforcement of the Lago Agrio Judgment, the Claimants "complained only of monetary harm and the inconvenience of litigation; the former can be cured by monetary compensation, and the latter the Tribunal has no mandate to shield Claimants from."[353]

228. Second, recalling that an arbitral tribunal cannot mandate that a State violate its internal laws in order to comply with procedural measures, the Respondent reiterates that there is no legal mechanism by which it could have prevented the Lago Agrio Judgment from becoming enforceable.[354]

229. Third, the Respondent asserts that its alleged breach of the interim awards cannot be interpreted as a breach of the Treaty, since Article VI(6) of the Treaty, providing for the final and binding character of awards, concerns only awards that resolve an "investment dispute", thus excluding awards on interim measures.[355]

(b) The Claimants' Position

230. In the Claimants' view, the Respondent has failed to substantiate its application for reconsideration.[356] First, the Claimants assert that the Respondent could have revoked the Ecuadorian court order that certified the Lago Agrio Judgment as enforceable, and note that the notion that the Respondent had no mechanism by which to render the Judgment unenforceable has been repeatedly rejected by the Dutch courts in set-aside proceedings.[357] Second, the Claimants reject the proposition that a breach of the

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352 Rejoinder, paras. 1892-1896; Second Interim Award, para. 2.

353 Rejoinder, para. 1895.

354 Counter-Memorial, paras. 1367-1372; Rejoinder, paras. 1897-1904; **RLA-15**, *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures, 6 September 2005, para. 43. *See also*, Track III Hearing Transcript, Day 2 (19 August 2022), pp. 382-383 (Salgado).

355 Counter-Memorial, paras. 1373-1376; Rejoinder, paras. 1909-1915.

356 Reply, paras. 396-399.

357 Reply, para. 397; **C-3147**, *The Republic of Ecuador v. Chevron Corporation et al*., C/09/570029 / HA ZA 19-268, Judgment, 16 September 2020, paras. 5.24-5.25, 5.44-5.46.

Tribunal's interim orders and awards does not constitute a breach of the Treaty: they recall that the UNCITRAL Arbitration Rules (which allow interim orders to be converted into interim awards) are incorporated into the Treaty through Article VI(3)(a)(iii), meaning that any such interim award is "final and binding" under Treaty Article VI(6).[358]

C. INTERNATIONAL SUBSIDIARIES

1. The Claimants' Position

231. The Claimants consider that they are entitled to compensation for the legal fees and expenses incurred by Chevron's subsidiaries, inside and outside of Ecuador, to prepare and defend themselves against the efforts to enforce the Lago Agrio Judgment worldwide.[359]

232. First, according to the Claimants, it is well established that parent-shareholders like Chevron may claim for losses which are incurred directly by wholly-owned subsidiaries and only indirectly by the parent.[360] As support for this proposition, the Claimants rely on the text of the Treaty (which defines "investments" as "any type of investment . . . owned directly or indirectly", including "companies, shares of stock or other interests in companies" and investment arbitral awards.[361] The Claimants further note that, while Chevron and its subsidiaries are distinct and legally separate entities, the attachment order of the Lago Agrio Court treats all of Chevron's subsidiaries as the same company. For this reason, the Claimants believe that the Respondent should be estopped from claiming that they cannot also claim damages for the subsidiary targets of the attachment order.[362]

233. Second, in the Claimants' view, the fact that some of the adverse effects of the Lago Agrio Court's attachment order occurred outside of Ecuador does not diminish the Respondent's

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358 Reply, paras. 398-399; Track II Award, para. 10.18.

359 Memorial, paras. 202-208.

360 Memorial, para. 203.

361 Memorial, paras. 203-205; Reply, paras. 406-417; **C-279**, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 11 May 1997, Art. I(1)(a)(ii); **CLA-605**, *Pope and Talbot Inc. v. Canada,* UNCITRAL, Award in respect of Damages, 31 March 2002, para. 80; **CLA-666**, *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, para. 367.

362 Memorial, para. 206; Reply, para. 417; Track II Award, paras. 7.111-7.112.

responsibility for them,[363] especially when, as here, the Respondent "used its domestic jurisdiction to inflict a series of transnational damages upon the investor."[364] Relying on *S.D. Myers v. Canada*, the Claimants deny that international law imposes any particular geographical limitation with respect to the location of losses recoverable by an investor.[365]

234. Third, in respect of the Respondent's argument that the Claimants are estopped from claiming damages incurred by Chevron's subsidiaries because they prevailed in the relevant enforcement proceedings by relying on the principle of corporate separateness, the Claimants posit that it was the Respondent's own judiciary that required it to raise the separateness defence, as the 15 October 2012 attachment order "illegally pierced the veil" of dozens of Chevron's subsidiaries and affiliates.[366] The Claimants further submit that corporate separateness does not mean that they cannot claim loss for the damages Chevron's international subsidiaries suffered, as the expenses incurred by the subsidiaries were the result of the "corrupt orders" of the Ecuadorian judiciary.[367]

235. Finally, the Claimants submit that they are entitled to recover for their subsidiaries' legal costs due to "Ecuador's breach of the international-law duties of good faith, just as the Tribunal found in Track II".[368]

2. The Respondent's Position

236. The Respondent denies the proposition that the Claimants may under international law claim as damages losses suffered by third-country subsidiaries with separate legal personalities, such as Chevron's Danish, Argentine, Brazilian or Canadian subsidiaries.[369]

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363 Memorial, para. 207; Reply, paras. 413-414; Track II Award, para. 7.27.

364 Reply, para. 416.

365 Memorial, paras. 207-208; **CLA-463**, *S.D. Myers v. Canada*, Second Partial Award, 21 October 2002, paras. 117-118.

366 Reply, paras. 418-420.

367 Reply, para. 421.

368 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 77-78 (Bishop).

369 Counter-Memorial, paras. 306-308, 312-315; Rejoinder, paras. 479-481, 494-507; **RLA-778**, *Khan Resources v. Mongolia*, PCA Case No. 2011-09, Award on the Merits, 2 March 2015, para. 388; **RLA-747**, *Gemplus S.A. and others v. Mexico and Talsud S.A. v. Mexico*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, paras. 12-50; **RLA-811**, *South American Silver v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 800.

In this connection, the Respondent rejects the Claimants' argument that the *lex specialis* of the Treaty recognizes that damage to a wholly-owned subsidiary "causes indirect equivalent value loss to the parent" because the Treaty's protections extend only to the Claimants' in Ecuador.[370] This proposition, in its view, is consistent with a bilateral investment treaty's primary objective to attract foreign investment to a particular host State.[371] Similarly, the fact that the Lago Agrio Court's attachment order permitted enforcement outside of Ecuador "does not move the needle", since those non-U.S. subsidiaries are neither claimants in this proceeding nor the Claimants' protected investment, meaning that the Tribunal lacks jurisdiction to adjudicate any losses they experienced.[372] The Respondent adds that only Chevron and TexPet have standing to assert damages in these proceedings.[373]

237. Even if international law permitted such recovery, in the Respondent's submission, the Claimants have failed to prove that they actually suffered losses as a result of the legal fees and expenses incurred by Chevron's subsidiaries.[374] In particular, the Respondent observes that the Claimants have failed to provide "information on profitability, sales, debt or tax liability . . . that Chevron paid its subsidiaries' invoices, or had to reimburse them for their expenses,"[375] information which the Respondent claims "is easily accessible to them."[376] It adds that the Claimants have not proven who incurred and paid for the expenses indicated in the claimed invoices.[377] The Respondent rejects as lacking

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370 Counter-Memorial, para. 309; **C-279**, Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, 11 May 1997, Art. I(1)(a), defining "investment" as "every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party". *See also* Track II Award, para. 7.70; Third Interim Award, para. 4.15.

371 Counter-Memorial, para. 311; Rejoinder, para. 486.

372 Rejoinder, para. 485. *See also*, Track III Hearing Transcript, Day 2 (19 August 2022), p. 303 (Maidman).

373 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 304-305 (Maidman).

374 Counter-Memorial, paras. 316-319; Rejoinder, paras. 482-483.

375 Counter-Memorial, paras. 319, 324; **CLA-659**, *Unión Fenosa Gas, S.A. v. Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, paras. 10.117-10.118, 10.120.

376 Counter-Memorial, para. 325.

377 Track III Hearing Transcript, Day 2 (19 August 2022), p. 301 (Maidman).

support Mr Kiran Sequeira's expert testimony that a parent incurs 100% of its subsidiary's loss.[378]

238. Similarly, the Respondent asserts that such claim should be dismissed on the basis of judicial estoppel, as it is inconsistent with the Claimants' position in the relevant enforcement proceedings,[379] where Chevron prevailed by relying on the separate legal personalities of its subsidiaries.[380] It also rejects as unsupported the Claimants own argument that the Respondent is estopped from denying liability for harm caused to Chevron and its subsidiaries – and, even if such estoppel argument had merit, the Respondent considers that it could not create jurisdiction over the subsidiaries' losses under the Treaty.[381]

239. Lastly, the Respondent notes that as part of document production the Claimants produced multiple engagement letters between their subsidiaries and law firms (none of which represented the Claimants at all) without indicating who paid those bills.[382] To the extent that the Claimants chose to pay other company's bills, the Respondent considers that such voluntary assumption would constitute a break in the chain of causation.[383]

D. FAILURE TO MITIGATE

1. Introduction

(a) The Respondent's Position

240. According to the Respondent, the Claimants' own conduct contributed to their increased or exacerbated costs, in breach of their duty to mitigate damages following the Treaty

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378 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3629 (Leonetti).

379 Counter-Memorial, paras. 320, 322; Track II Award, para. 7.107; **CLA-435**, *Chevron v. Ecuador*, 638 F.3d at 389 n. 9, p. 15.

380 Counter-Memorial, para. 321.

381 Rejoinder, paras. 487-492.

382 Rejoinder, paras. 508-511.

383 Rejoinder, para. 512; **RLA-1001**, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador,* ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, para. 263; Track III Hearing Transcript, Day 2 (19 August 2022), p. 305 (Maidman).

breaches.[384] Such instances of an alleged failure to mitigate include the Claimants' failure to: (i) to recuse Judge Zambrano; (ii) post a bond to suspend the enforceability of the Lago Agrio Judgment; (iii) file an action under the Collusion Prosecution Act (the "**CPA**"); and (iv) refrain from initiating the RICO Litigation.[385]

241. In its Partial Award on Track III, the Tribunal decided as a preliminary question whether "the Tribunal's prior rulings preclude Ecuador's argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law" (Question #4). The Tribunal answered this question in the negative, thus allowing the Respondent's mitigation defence to proceed.[386]

242. In this respect, the Respondent highlights in its Rejoinder the Tribunal's determination that the standard for exhaustion of local remedies is not the same as the standard for the duty to mitigate, as suggested by the Claimants.[387]

(b) The Claimants' Position

243. Generally, the Claimants assert that they fully mitigated their damages by (*inter alia*) obtaining interim orders and awards from the Tribunal requiring the Respondent to prevent the Lago Agrio Judgment from becoming or remaining enforceable.[388] They state that the Respondent could have stopped the Lago Agrio Judgment and the LAPs' enforcement efforts, but to this day has not done so,[389] in violation of the Tribunal's Track II Award.[390] Instead, the Claimants tried to mitigate their damages by (i) filing Section 1782 actions to obtain evidence to prevent enforcement of the Judgment; (ii) filing the RICO Litigation to thwart the risk of enforcement in the USA and elsewhere; (iii) filing the Gibraltar Proceedings to cut off enforcement funding; and (iv) preparing to defend

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384 Counter-Memorial, para. 1167; **RLA-813**, *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 204.

385 Counter-Memorial, paras. 1167-1201.

386 Partial Award on Track III, paras. 178-184, 188(iv).

387 Rejoinder, paras. 577-579.

388 Reply, para. 422.

389 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3383-3384 (Bishop).

390 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3391 (Bishop).

themselves against enforcement in numerous jurisdictions.[391] Regarding the sums disbursed, the Claimants reject the Respondent's accusation that Chevron had a motive to overspend.[392]

244. In respect of the Respondent's mitigation defence, the Claimants submit that (i) under international law they are not required to pursue remedies that are ancillary, discretionary or futile;[393] (ii) there is no requirement to exhaust local remedies in the mitigation context under the Treaty or international law;[394] and (iii) the Tribunal's reasons for rejecting Ecuador's exhaustion arguments apply equally to mitigation – and, relatedly, pursuing any of the Respondent's proposed remedies, in their view, "would have had the opposite effect of mitigation".[395] The Claimants further assert that the Respondent would have the Claimants mitigate, not in their desired manner (which worked), but rather in Ecuador's preferred manner (which would not have worked).[396]

2. Recusal of Judge Zambrano

(a) The Respondent's Position

245. The Respondent points to evidence on record indicating, in its view, that the Claimants' legal representatives had knowledge in real time about Judge Zambrano's corruption, including affidavits submitted by Chevron's lead trial lawyers in the RICO Litigation, the fact that the RICO action was filed two weeks before the Lago Agrio Judgment was issued, and the Claimants' publicizing of their ghostwriting allegations within hours after the Judgment issued.[397] According to the Respondent, as part of its own strategy, Chevron chose to allow the ghostwriting to take place.[398] In its view, the Claimants had several

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391 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 101-104 (Coriell).

392 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3389-3391 (Bishop).

393 Reply, paras. 430-433; **RLA-813**, *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 206-214.

394 Reply, paras. 434-436; **RLA-813**, *William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 213.

395 Reply, paras. 437-439; Track II Award, paras. 7.123, 7.132-7.135, 7.145, 7.154; Partial Award on Track III, para. 183.

396 Track III Hearing Transcript, Day 1 (18 August 2022), p. 123 (Coriell).

397 Counter-Memorial, paras. 1169-1177; Rejoinder, paras. 582-596.

398 Counter-Memorial, para. 1171.

means at their disposal to try to stop Judge Zambrano from carrying out what they believed to be his scheme and thus avert their alleged damages in their entirety, such as filing a complaint before the Judicial Council of Ecuador to remove Judge Zambrano or moving to recuse him on the basis of alleged corruption.[399]

(b) The Claimants' Position

246. The Claimants assert that the Respondent, in arguing that the Claimants should have recused Judge Zambrano, "entirely neglects the context of the Ecuadorian environment in which Chevron found itself in 2009 and 2010 and grossly misrepresents the underlying facts".[400] According to the Claimants, any attempt to recuse Judge Zambrano would have been futile and would have only resulted in sanctions for Chevron's Ecuadorian counsel.[401] To put these arguments into context, the Claimants recall instances of "public and government-sponsored animosity against Chevron" starting in 2009,[402] as well as instances of Ecuadorian judges as well as the Prosecutor General "turn[ing] a blind eye towards both the evidence Chevron submitted and its requests for a meaningful investigation in Ecuador."[403] In particular, the Claimants assert that the context omitted by the Respondent includes:

> (i) the lack of objective evidence of Judge Zambrano's overtures towards Chevron in 2009; (ii) the public pressure campaign against Chevron and its attorneys; (iii) not knowing that Judge Zambrano would assume jurisdiction over the case after Judge Ordóñez's recusal; (iv) the lack of objective evidence in 2010 of Judge Zambrano's agreement with the LAPs to enter a judgment against Chevron (much less of a ghostwriting and bribery scheme); (v) the fact that the ghostwritten Lago Agrio Judgment had not been issued; (vi) the lack of success in getting the Ecuadorian judiciary to investigate prior instances of judicial misconduct; and (vii) the fear of retaliation against Chevron's attorneys. Against this background, Claimants' decision not to attempt to recuse Judge Zambrano was reasonable.[404]

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399 Counter-Memorial, paras. 1176-1177. *See also* Track III Hearing Transcript, Day 2 (19 August 2022), pp. 384-390 (Schwartz).

400 Reply, para. 463.

401 Reply, paras. 463, 476.

402 Reply, paras. 467-470.

403 Reply, paras. 471-475; Track II Award, paras. 8.27, 8.34, 8.38, 8.59; Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3384-3386 (Bishop).

404 Reply, para. 478.

247. The Claimants cite Mr Veiga's assertion that recusing Judge Zambrano would not necessarily have brought an honest just to the case, as they state that at least four presiding judges were dishonest.[405]

248. Lastly, the Claimants request the Tribunal (i) to decline to undertake "a multitude of second-guesses made years [after the fact] applying an absolute standard to the [c]laimant's conduct with the benefit of hindsight";[406] and (ii) not to allow the Respondent to "profit from its own wrongdoing by pointing to Chevron's decisions taken in difficult circumstances created by Ecuador itself."[407]

3. Posting of a Bond

(a) The Respondent's Position

249. The Respondent submits that the Claimants could have delayed the Lago Agrio Court's certification of the Lago Agrio Judgment for enforcement by posting a bond, as allowed under the Ecuadorian Cassation Appeal Act.[408] While acknowledging that the Tribunal accepted the Claimants' contrary position for the purposes of exhaustion of local remedies in its Track II Award,[409] the Respondent asserts that the Tribunal did not take into account "all the evidence on record relating to potential amounts that Chevron would have to post", which, in its submission, could have been as low as 0.016 per cent of the lower instance court's USD 18.6 billion judgment (approximately USD 3 million).[410] As a result, the Respondent states, the LAPs would not have filed recognition proceedings in Canada, Argentina or Brazil until the second half of 2018.[411] Whether the proceedings

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405 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3388 (Bishop).

406 Reply, para. 482 (brackets in original); **CLA-659**, *Unión Fenosa Gas, S.A. v. Egypt,* ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 10.132.

407 Reply, para. 483.

408 Counter-Memorial, paras. 1178-1183; **C-316**, Law on Cassation Arts. 3, 5, 8, 10, and 11, Final Provisions and Sources (*update*), Arts. 10, 11.

409 Track II Award, paras. 7.125-7.135.

410 Counter-Memorial, paras. 1179-1180; Rejoinder, paras. 614-615.

411 Counter-Memorial, paras. 1181-1183.

were "laden with procedural irregularities", as the Claimants argue, does not, in the Respondent's submission, excuse their not posting a bond.[412]

(b) The Claimants' Position

250. The Claimants consider that their decision not to post a bond was reasonable in the circumstances.[413] They recall in this respect the Tribunal's findings in the Track II Award that Chevron acted reasonably by not posting a bond because (i) the company was entitled to rely on the Tribunal's Awards on Interim Measures aimed at ensuring that the Lago Agrio Judgment would not become enforceable;[414] and (ii) in the circumstances prevailing at the time, it would not have been reasonable to require the Claimants to post a bond of the required size (between USD 180 million and USD 14.6 billion) so as to suspend enforcement.[415] Similarly, the Claimants suggest that if they had posted a bond, the Respondent would now be liable also for the amount of the bond, since they would not have satisfied the Judgment upon completion of the appeals process.[416] The Claimants also deny that they had a duty under international law to post "costly financial security" to mitigate damages.[417]

4. Collusion Prosecution Act

(a) The Respondent's Position

251. According to the Respondent, the remedies available to the Claimants under the CPA, had they elected to file an action, would have included full nullification of the Lago Agrio Judgment, as well as damages, imprisonment, and disciplinary proceedings against those involved (including both the lawyers and the judges).[418] The Respondent recalls the Tribunal's finding in its Track II Award that Chevron had the possibility to pursue its

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412 Rejoinder, para. 616.

413 Reply, paras. 440-448.

414 Reply, para. 441; Track II Award, para. 7.132; First Interim Award, p. 16; Second Interim Award, para. 3.

415 Reply, paras. 443, 446.

416 Reply, paras. 444-445; Track II Award, paras. 7.134-7.135.

417 Reply, para. 445; **CLA-917**, *Cairn Energy PLC and Cairn UK Holdings Limited v. India*, PCA Case No. 2016-07, Final Award, 21 December 2020, para. 1894.

418 Counter-Memorial, paras. 1184-1185; Rejoinder, paras. 597-598; **RLA-493**, Collusion Prosecution Act, Arts. 4-7.

claims under the CPA, which, while not effective to stop the Judgment from becoming enforceable due to the duration of CPA proceedings, might have still ended the status of enforceability even prior to the date when the LAPs sought its first enforcement in Canada, on 30 May 2012,[419] and would have entailed only a small increase in the Claimants' alleged fees and expenses.[420] The Respondent asserts that the Claimants have recognised that the CPA was a potentially viable means of mitigation.[421] Instead, the Respondent notes, the Claimants elected to forgo this opportunity and institute the RICO Litigation in the United States, as further discussed below.[422]

(b) The Claimants' Position

252. The Claimants also consider reasonable their decision not to file a case under the CPA "because such action would not have been an appropriate and timely remedy",[423] as also found by the Tribunal in its Track II Award.[424] It was not appropriate, they say, because the Respondent had a duty to investigate the corruption within the court itself and "the State cannot leave remedial action to the efforts of private litigants."[425] Further, in the Claimants' submission, no timely relief would have been granted because a CPA case is subject to the *ultima ratio* condition (meaning that a CPA claim may only be filed when there is no other mechanism to resolve the matter), because during the pendency of a CPA action the Lago Agrio Judgment would have remained enforceable and because no Ecuadorian court would have granted such discretionary relief to Chevron in 2012.[426]

5. RICO Litigation

(a) The Respondent's Position

253. In the Respondent's view, the Claimants expended enormous resources in the RICO Litigation that did not advance their enforcement-resisting strategy, instead of resisting

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419 Counter-Memorial, paras. 1188-1189; Rejoinder, paras. 606, 608-610.

420 Rejoinder, para. 602.

421 Track III Hearing Transcript, Day 2 (19 August 2022), pp. 390-394 (Schwartz).

422 Counter-Memorial, para. 1190.

423 Reply, paras. 449-461.

424 Reply, paras. 451-452; Track II Award, paras. 7.145-7.148.

425 Reply, para. 452; Track II Award, para. 7.145.

426 Reply, paras. 453-458; Sixth Coronel Jones Expert Report, para. 29; Track II Award, para. 8.28.

enforcement defensively, a "far more effective and less expensive option".[427] Relying on the expert opinion of Professor S.I. Strong, the Respondent asserts that (i) there was little chance *ex-ante* that non-US courts would find a RICO judgment a persuasive authority; (ii) the relief obtained through the judgment (a constructive trust and an injunction against profiting from the Lago Agrio Judgment) "would likely be difficult to enforce outside the United States"; and (iii) within the USA, Chevron would have better been served by waiting to defend against an enforcement action.[428]

(b) The Claimants' Position

254. The Claimants' arguments regarding mitigation as regards the RICO Litigation are addressed in Section VIII.G below.

E. FEES ALLEGEDLY INCURRED IN OTHER PROCEEDINGS

1. The Claimants' Position

(a) Introduction

255. According to the Claimants, legal expenses incurred in other proceedings are recoverable as damages in this Arbitration to the extent that they are uncollectable in those proceedings, as confirmed in investor-State arbitration practice, commercial arbitration, and even U.S. law.[429] The Claimants confirm that they "do not seek and expressly disclaim any double recovery" arising from the damages they might be awarded in connection with those proceedings, while noting that, in any event, such damages are owed due to the Respondent's Treaty breaches and were not actually litigated or decided in the other cases.[430]

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427 Counter-Memorial, paras. 1191-1192, 1194-1200.

428 Counter-Memorial, paras. 1192-1194; **RE-44**, First Strong Expert Report, paras. 20-23, 81-83, 86, 89.

429 Reply, paras. 486-502; **CLA-605**, *Pope and Talbot Inc. v. Canada,* UNCITRAL, Award in respect of Damages, 31 March 2002, para. 85; **CLA-652**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016), p. 302; **CLA-688**, Alwyn.V. Freeman, THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1970), pp. 592-593; **CLA-907**, Final Award in ICC Case No. 14046, published in Albert Jan van den Berg (ed), Yearbook Commercial Arbitration, Volume XXXV, 2010, p. 245; Miller Expert Report, para. 35.

430 Reply, para. 501.

256. Further, the Claimants reject as faulty the Respondent's proposition that "in cases where Chevron has made a claim for an attorney fee award, it should be estopped from seeking larger damages in this Tribunal".[431] Relying on the expert opinion of Professor Geoffrey Miller, the Claimants note that here "Chevron has a low prospect of being paid by some of the parties who have been, or might be, ordered to compensate Chevron for its costs."[432]

257. On the basis that the Respondent is "conflating legal orders", the Claimants further reject the proposition that this Tribunal is bound by domestic laws or the *res judicata* effect domestic court decisions on legal fees.[433] The Claimants rely on past decisions of investor-State tribunals rejecting reliance on domestic law to reduce damages or interest under international law.[434] Similarly, the Claimants argue that *res judicata* does not apply between different legal orders.[435]

258. The Claimants' arguments in respect of each ancillary proceeding are addressed *seriatim*.

(b) RICO Litigation

259. As further discussed in Section VIII.G below, the Claimants claim the legal expenses incurred in the RICO Litigation as recoverable damages under international law. For this reason, the Claimants state that cost issues before U.S. courts under the RICO statute have no bearing on the assessment of damages in this case under international law.[436] In the alternative, the Claimants argue that they mitigated their damages by not pursuing the damages they seek in this Arbitration before U.S. courts against defendants "who were all individuals, starting with Mr Donziger and the LAPs", meaning that none of them

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431 Reply, para. 502.

432 Reply, para. 502; Miller Expert Report, paras. 35-36, 41-42.

433 Reply, paras. 503-508.

434 Reply, paras. 504-507; **CLA-242**, *Middle East Cement Shipping and Handling Co. S.A. v. Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 174; **RLA-851**, *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002, para. 53.

435 Reply, para. 507; **CLA-568**, *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, paras. 123-125; **RLA-81**, *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Peru, ICSID Case No. ARB/03/4*, Decision on Annulment, 5 September 2007, para. 87.

436 Reply, para. 523.

would have the assets necessary to honour a multi-hundred million dollar cost order.[437] Relying on the testimony of Mr Peter Seley, the Claimants explain that their RICO fee application sought only USD 32 million "in the interest of streamlining the Court's consideration of [Chevron's] application."[438]

(c) Enforcement Proceedings

260. Flowing from their position that *res judicata* cannot apply as between legal orders, the Claimants posit that the question before this Tribunal is whether the damages they seek for the legal expenses incurred in the Argentina and Canada Enforcement Proceedings and the Brazil Recognition Proceedings "qualify as recoverable damages under international law", which they claim they do.[439] In connection with such proceedings, the Claimants reiterate that the analysis and the standard to be applied by those national courts for awarding legal costs and by this Tribunal under international law are different (especially within the context of the Argentina Enforcement Proceedings, where Chevron did not seek a cost order).[440] The Claimants confirm that any costs that have been collected have been deducted from the amounts claimed in this Arbitration, meaning that no question of estoppel arises.[441]

261. In the alternative, to the extent that the Claimants did not pursue the recovery of their legal fees and expenses at the domestic level, the Claimants state that they did so to mitigate damages: they assert that any action to recover fees against the LAPs would have been futile because they did not have assets in those jurisdictions and sought to proceed in those countries *in forma pauperis*.[442]

(d) Gibraltar Proceedings

262. As further explained in Section VIII.I below, the Claimants state that their legal expenses in the Gibraltar Proceedings qualify as recoverable damages because they were necessary

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437 Reply, para. 525.

438 Reply, para. 525; Seley Witness Statement, para. 80.

439 Reply, paras. 513-517. *See also* Sections VIII.C, VIII.D, VIII.E below.

440 Reply, paras. 513-514.

441 Reply, para. 515.

442 Reply, para. 516.

to mitigate the injury "by targeting third-party funders and funding vehicles that were indispensable to fund the Lago Agrio Litigation and the LAPs' efforts to enforce the fraudulent Lago Agrio Judgment."[443] They deny the Respondent's suggestion that Chevron is violating the terms of the Gibraltar court orders awarding costs or confirming the settlement of costs issues by consent, as there is no *res judicata* effect of those court orders in this Arbitration and the settlements in question did not include Ecuador.[444] The Claimants further note that they have been unable to recover the costs they were awarded in the *Amazonia* Action, meaning that such award raises no issues of double recovery.[445]

(e) Section 1782 Proceedings

263. As further elaborated in Section VIII.H below, the Claimants also posit that the legal fees and expenses they incurred in the Section 1782 Proceedings qualify as well as recoverable damages, as "they proved critical in exposing the fraud against Chevron and were necessitated by Ecuador's internationally wrongful acts."[446] Rebutting the Respondent's argument that Chevron "promised not to seek to recover" in this Arbitration the legal fees and expenses it incurred in connection with the Section 1782 Proceedings, the Claimants refer to a Joint Stipulation filed by the parties in the Weinberg 1782 as evidence that they never undertook before U.S. courts that they would not seek their legal expenses against Ecuador as damages in this Arbitration.[447]

264. Similarly, the Claimants request an award for the legal fees and expenses incurred for Gibson Dunn and Jones Day's work in developing evidence for the purpose of this Arbitration through the Section 1782 Proceedings and the RICO Litigation.[448]

(f) Dutch Set-Aside Proceedings

265. The Claimants further request reimbursement as incidental expenses of the legal fees incurred in two set-aside proceedings in the Netherlands, namely: (i) the Respondent's

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443 Reply, paras. 518-521; Kobre Witness Statement, para. 14.

444 Reply, para. 519.

445 Reply, para. 519. *See* paras. 1870 *ff* for further information on the *Amazonia* Action.

446 Reply, para. 527.

447 Reply, para. 527.

448 Reply, paras. 531-538.

attempt to set aside the First, Second, Third and Fourth Interim Awards, all of which were rejected as of 12 April 2019; and (ii) the Respondent's request for annulment of the Track II Award.[449] They confirm, in this regard, that they are not conflating the set-aside proceedings for this Arbitration with the *Chevron v. Ecuador I* set-aside proceedings.[450]

266. In the Claimants' view, the Respondent's litigation in the Netherlands was "frivolous", largely consisting in "recycl[ing] and repackag[ing]" the jurisdictional arguments made before this Tribunal and in the preceding *Chevron v. Ecuador I* arbitration, which the Claimants characterize as dilatory litigation tactics for the purpose of hindering compliance.[451] The Claimants posit that their legal fees and expenses incurred in connection with those proceedings were reasonable, as well as the foreseeable consequence of the Respondent's breaches and the subsequent defence of the Tribunal's awards by the Claimants in set-aside proceedings.[452]

267. Lastly, noting that they do not seek the double recovery of any amounts, the Claimants withdraw from their damages claim the EUR 13,484.34 that they were granted by the Dutch courts in the Interim Awards set-aside proceedings.[453]

2. The Respondent's Position

(a) Introduction

268. The Respondent submits that the Claimants are not entitled to legal fees and expenses incurred in ancillary proceedings in which they could have recovered legal expenses;[454] in its view, the more appropriate forum to seek legal expenses is the forum in which those expenses were incurred.[455] The Respondent also requests that the Claimants not be

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449 Reply, paras. 539-542. *See* Section VIII.L below.

450 Memorial, Appendix 10; Reply, paras. 554-558.

451 Reply, paras. 545-553.

452 Reply, para. 559.

453 Reply, paras. 560-563.

454 Counter-Memorial, paras. 327-359; Rejoinder, paras. 517-524; **RLA-774**, *British Caribbean Bank Limited v. Belize*, PCA Case No. 2010-18, Award, 19 December 2014, paras. 110-114, 326; **CLA-219**, *Petrobart Limited v. Kyrgyzstan*, SCC Case No. 126/2003, Award, 29 March 2005, p. 6.

455 Counter-Memorial, para. 327.

allowed to recover certain fees and expenses that they promised not to seek to recover, as further detailed below.[456]

269. Additionally, the Respondent requests the Tribunal to be "mindful" of the fees already recovered by the Claimants in other proceedings so as to prevent them from seeking any double recovery. For instance, and as further elaborated below the Respondent alleges that the Claimants have recovered legal expenses before the Gibraltar, Canadian and Dutch Courts, which should be excluded from their damages claim in this Arbitration.[457] With the exception of those proceedings, the Respondent asserts that the Claimants have failed to identify which fees they and their subsidiaries have, and have not, requested in other proceedings, as well as the fees they have already recovered.[458]

270. In response to the Claimants' argument that it is conflating legal orders, the Respondent clarifies that it wishes the Tribunal to treat the determinations on costs of such domestic courts as persuasive when establishing whether such costs were reasonable and necessary under international law.[459]

271. The Respondent's arguments in respect of each ancillary proceeding are addressed *seriatim*.

(b) RICO Litigation

272. The Respondent recalls the Order received by Chevron in the RICO Litigation that it "shall recover of Donziger and the LAP Representatives, and each of them, jointly and severally, the costs of this action."[460] Chevron thereafter sought an award of USD 32,334,584 for attorney's fees that it claimed were "reasonable and necessary",[461] followed by a supplementary request for an additional USD 3,433,384.30 after the

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456 Counter-Memorial, paras. 354-357; Rejoinder, paras. 528-532.

457 Rejoinder, paras. 534-538.

458 Counter-Memorial, para. 358; Rejoinder, para. 533.

459 Rejoinder, paras. 525-527.

460 Counter-Memorial, para. 337; **C-2134**, Judgment as to Donziger Defendants and Defendants Camacho and Piguaje, Chevron Corporation v. Steven Donziger, et al., 11 Civ. 0691 (LAK), U.S. District Court, SDNY, para. 9; Track II Award, para. 4.483.

461 Counter-Memorial, para. 338; **R-1603**, *Chevron Corp. v. Steven Donziger*, SDNY. Case 1:11-cv-00691-LAK-RWL, D.E. 1890 Memorandum of Law Applications for Attorneys' Fees, 18 March 2014.

Claimants' Track III Memorial was filed.[462] The Respondent observes that such figures represent a total of 13% of the approximately USD 267 million of RICO fees that the Claimants claim in this proceeding.[463] In the Respondent's view, "Chevron's decision to request such a drastically reduced sum from the RICO court is compelling evidence that Chevron did not believe that it could recover a greater amount under the 'reasonable and necessary' standard that the RICO court must apply."[464]

(c) Enforcement Proceedings

273. Generally, the Respondent asserts that the Claimants should not recover any legal expenses incurred in connection with the enforcement proceedings in Canada, Brazil, and Argentina, as legal expenses in those jurisdictions cannot be claimed as damages; rather, it is for the courts to determine the scope of an award on costs to the extent that such costs were reasonable and necessary:

(i) *Canada*: According to the Respondent, in Canada, the Claimants or their subsidiaries "already recovered what they could reasonably recover"[465] – legal costs "were dealt with at each step of the proceedings", as foreseen under Ontario law, and were agreed upon between the parties or fixed by the Canadian courts at the appellate level.[466] The Claimants or their subsidiaries were awarded approximately CAD 375,000, as opposed to the approximately USD 40 million they seek in this Arbitration in relation to the Canada Enforcement Proceedings.[467] Relying on the expert opinion of Professor Erik Knutsen, the Respondent argues that the matter of costs in this litigation is closed, meaning that re-opening it would be contrary to the principle of *res judicata*.[468]

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462 Counter-Memorial, para. 338; **R-1610**, *Chevron Corp. v. Steven Donziger*, SDNY. Case 1:11-cv-00691-LAK-RWL, D.E. 2244 Chevron Memorandum of Law ISO Motion for Attorneys' Fees, 18 June 2019.

463 Counter-Memorial, para. 338.

464 Counter-Memorial, paras. 339-340.

465 Counter-Memorial, para. 341.

466 Counter-Memorial, para. 341, **RE-39**, First Knutsen Expert Report, pp. 20, 26-27.

467 Counter-Memorial, para. 342; **RE-39**, First Knutsen Expert Report, p. 25.

468 Counter-Memorial, paras. 343-344; **RE-39**, First Knutsen Expert Report, p. 20.

(ii) *Brazil*: Similarly, the Respondent explains that in Brazil there exists a mechanism for the winning party's attorneys to recover a success fee directly from the losing party, with such "court-mandated fee" (*sucumbência*) being established by the court.[469] On this basis, the Respondent says, the Brazilian Superior Court of Justice awarded the attorneys approximately USD 30,000, as opposed to the approximately USD 21 million that the Claimants demand for the Brazil Recognition Proceedings.[470]

(iii) *Argentina*: According to the Respondent, the Claimants' subsidiaries' lawyers had the opportunity to seek costs in the first of the Argentina Enforcement Proceedings (concerning the attachment of certain assets), which they won, but they declined to do so.[471] In the expert opinion of Dr García Pullés, the Claimants are now precluded from seeking costs in that litigation, as the statute of limitations has expired, but they may still do so in the separate proceedings concerning the recognition of the Lago Agrio Judgment in Argentina.[472] In circumstances in which the reasonable amount of recoverable costs should have been decided or can still be decided, the Respondent believes that the Claimants should not be able to recover those same costs in this Arbitration.[473]

(d) Gibraltar Proceedings

274. Noting that Ecuador was not a party to the Gibraltar Proceedings, the Respondent posits that the Claimants should not be able to recover any of their Gibraltar expenses, as they already received significant cost awards from the courts presiding over the *DeLeon* and *Amazonia* Actions – respectively, an award on costs for an amount yet to be determined in *DeLeon* and GBP 17,500 in *Amazonia*, where the court also awarded Chevron certain of its attorneys' fees incurred in the RICO Litigation in the amount of

469 Counter-Memorial, para. 346, **RE-37**, First Souza Godoy Expert Report, paras. 51-52.

470 Counter-Memorial, para. 347.

471 Counter-Memorial, paras. 348-349; **RE-38**, First García Pullés Expert Report, p. 43.

472 Counter-Memorial, para. 349; **RE-38**, First García Pullés Expert Report, pp. 11, 35.

473 Counter-Memorial, para. 350.

USD 28,035,219.37.[474] Similarly, the Respondent observes that the Claimants also settled many of the costs issues in the Gibraltar Proceedings, meaning that it violates the court orders adopting those stipulations by requesting such costs in this Arbitration.[475]

(e) Section 1782 Proceedings

275. The Respondent observes that in some of the Section 1782 actions, such as Kohn and MCSquared, Chevron stipulated that each party would bear its own fees and costs for the respective proceedings, and the courts approved such stipulations by entering them as court orders.[476] Thus, the Respondent requests that the Tribunal decline to award those same fees and costs to the Claimants, as doing so would be in breach of the relevant court orders.[477]

(f) Dutch Set-Aside Proceedings

276. According to the Respondent, the Dutch courts also adjudicated all legal expense issues between Chevron and Ecuador based on their own fixed remuneration fee system, pursuant to which the Respondent has already been ordered to pay the Claimants such amounts.[478] The Respondent considers the Claimants' claim for set-aside costs as an unprecedented "attack on fundamental principles of international arbitration", especially when, as here, no assertions were made that the initiation of the set-aside proceedings was abusive or had improper purposes.[479]

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474 Counter-Memorial, para. 351. *See* paras. 1861 *ff* and 1870 *ff* for further information on the *DeLeon* and *Amazonia* Actions.

475 Counter-Memorial, paras. 356-357.

476 Counter-Memorial, para. 355; **R-1605,** *In re Application of Chevron Corporation*, E.D. Pa. Case 2:10-mc-00208-JD, D.E. 86 Order of Dismissal, 9 February 2015; **R-1606**, *Chevron Corp. v. MCSquared PR, Inc*, SDNY. Case 1:14-mc-00392-LAK, D.E. 47 Stipulation of Dismissal, 17 August 2017.

477 Counter-Memorial, paras. 355, 357.

478 Counter-Memorial, para. 353; **RE-47**, First Luycks Expert Report, paras. 4.4.1-4.4.2.

479 Rejoinder, paras. 539-547.

F. TAX IMPLICATIONS

1. The Respondent's Position

277. The Respondent submits that the Claimants' damages claim fails to account for certain "tax implications".[480] First, according to the Respondent, the Claimants' alleged damages calculations must, but fail to, account for tax savings they incurred by deducting from their corporate income taxes the legal expenses they now claim.[481] Second, the Respondent asserts that the corporate tax rate that Claimants would pay on a potential award would be lower than the corporate tax rate at the time that they incurred the legal expenses in question; therefore, they "would receive a windfall if they were awarded interest now without adjusting for the lower tax rate environment."[482]

278. Regarding the first point, the Respondent emphasizes that international law does not allow recovery beyond actual loss.[483] The Respondent underlines that the Claimants admit to deducting the legal fees they claim as damages at the U.S. marginal tax rate for each year allegedly incurred.[484] Consequently, the Respondent states, the Claimants did not incur the full cost they seek to recover, and awarding their claimed fees without accounting for tax savings would unjustly enrich them.[485] The Respondent considers the Claimants' authorities cited to challenge this proposition inapposite,[486] and considers that the award in *Chevron v. Ecuador I* supports its position.[487]

279. As for the second point, the Respondent contends that granting interest on the amounts that the Claimants saved in taxes would constitute "an impermissible windfall", as

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480 Counter-Memorial, para. 1306.

481 Counter-Memorial, para. 1306.

482 Counter-Memorial, para. 1307; Rejoinder, para. 548; **RE-42**, First Flores Expert Report, para. 74 (The U.S. corporate income tax rate decreased from 35% (2003-2018) to 21% (2018 onwards)).

483 Rejoinder, paras. 548, 557-558; **RLA-430**, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, p. 105; **RLA-702**, ILC, International Responsibility: Sixth Report by F.V. Garcia Amador, Special Rapporteur, UN Doc. A/CN.4/134 and Add.1, 26 January 1961, para. 178.

484 Rejoinder, para. 548.

485 Rejoinder, para. 549.

486 Rejoinder, paras. 558-559.

487 Rejoinder, para. 560.

Claimants maintained use of the funds saved.[488] The Respondent rejects the Claimants' challenge that the corporate tax rate on the date they collect on the Award is unknown, and submit that the Tribunal, in any event, could state in the Award that "any amount owed by Ecuador must be adjusted to the extent that the tax rate has changed".[489]

280. The Respondent adds that the "Claimants seek to unfairly take advantage of the decrease in the U.S. corporate tax rate that occurred in 2018."[490] Until that change, the Claimants were able to reduce their taxes by 35% of their claimed fees and expenses; now, the Respondent submits, the Claimants will only pay tax on a possible award at 21%, profiting the 14% difference.[491]

2. The Claimants' Position

281. The Claimants submit that the Respondent's arguments on tax implications are speculative in that Ecuador assumes that the tax rates will not change before the Claimants collect on the Award on an unknown future date.[492] The Claimants add that the Respondent's argument is legally incorrect, as "[i]nternational jurisprudence has consistently held that the tax consequences of the Tribunal's award in the investor's home country are irrelevant for purposes of determining the amount of compensation owed, and it is improper for the tribunals to make such determinations."[493] The Claimants note that the Respondent cites no authority to the contrary.[494]

282. In addition, the Claimants explain that Ecuador's argument is distinct from scenarios in which tribunals subtract taxes that would have been owed to the respondent government

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488 Rejoinder, paras. 551, 561.

489 Rejoinder, para. 564.

490 Rejoinder, para. 552.

491 Rejoinder, para. 552.

492 Reply, paras. 568-572; Second Sequeira Expert Report, para. 117.

493 Reply, paras. 573-580; **CLA-240**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Award, 29 December 2004, para. 367; **CLA-766**, *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Poland*, PCA Case No. 2010-12, Final Award, 14 February 2012, para. 666; **RLA-760**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 485; **RLA-813**, *William Ralph Clayton, Bilcon of Delaware, Inc. and others v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 313.

494 Reply, paras. 575, 587.

in a but-for scenario.[495] The Claimants note that such was the case in *Chevron v. Ecuador I*, in which the Claimants owed tax liabilities to Ecuador (as opposed to the U.S. or California) which would have been due in the but-for scenario.[496] They further add that the *Chevron v. Ecuador I* tribunal stated that taxes only fall within the ambit of the tribunal's damages assessment where they can be deducted with certainty, and may be accounted for when there is a provision in an agreement or an established practice.[497] In the Claimants' view, none of these criteria is satisfied here.[498]

G. EVIDENCE OF LEGAL FEES AND EXPENSES

1. Introduction

283. *Evidence of Loss accompanying the Memorial on Damages*: As evidence that the Claimants incurred, documented and paid the legal fees and expenses they seek in Track III, the Claimants provided several witness statements and an expert report together with their Memorial on Damages:

(i) Ms Colleen Kent, Senior Business Analyst at Chevron, describes Chevron's billing procedures and systems as concerns the relevant Ecuador-related costs. She explains:

> Most invoices are submitted electronically from outside law firms and other vendors through the "Collaborati" e-billing software which transfers the invoice to the "TeamConnect" software used internally at Chevron for invoice review. . .
>
> Collaborati will reject an invoice outright (and not even migrate it to TeamConnect) if the invoice contains incorrect information, such as unapproved timekeepers, unapproved billing rates, etc. . . .
>
> TeamConnect is an electronic platform designed for electronic review, processing, and approval of invoices. . .
>
> Chevron's legal analysts will review the invoices and may reject outright, or reduce appropriately, invoices for non-conforming items such as unapproved expenses, excessive hours by individual timekeepers, etc. The legal analyst will

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495 Reply, paras. 581-587.

496 Reply, paras. 582-583; **RLA-351**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador,* PCA Case No. AA277, Final Award on the Merits, 31 August 2011, para. 311.

497 Reply, para. 583; **RLA-351**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador,* PCA Case No. AA277, Final Award on the Merits, 31 August 2011, para. 311.

498 Reply, para. 584.

> also review to ensure that tasks are performed at the appropriate level of seniority and may reject or adjust amounts accordingly. Chevron also typically will not pay for items such as administrative tasks. In addition, Chevron requires that all expenses be justified, and may reject payment of expenses if either element is missing. . .
>
> Invoices may nonetheless undergo up to three additional levels of internal Chevron review. . .
>
> Chevron implemented cost-saving and cost-control measures for the Ecuador Dispute, including the negotiation of discounts. . .
>
> Once an invoice is approved for payment through TeamConnect, the invoice moves from TeamConnect to the SAP system (Chevron's electronic payment system) and is placed in line for payment. . .
>
> All the amounts claimed by Chevron in this arbitration were actually paid by Chevron (or its subsidiaries).[499]

(ii) Mr E.J. Rankin, an eDiscovery Specialist at Chevron, explains that he was instructed to collect the billing data for each outside vendor that billed Chevron for Ecuador-related work for export to FTI Consulting ("**FTI**").[500] To do that, he collected three types of data:

> Structured Data, which is maintained in Chevron's TeamConnect billing system. Mr. Rankin obtained access to this Structured Data from Chevron's Information Technology group then transferred it to an electronic file transfer ("EFT") site maintained by FTI. . .
>
> Invoices. These include invoices that were not in Chevron's possession (for example, where a vendor sent the invoice to an outside law firm, the law firm paid the invoice, and then the law firm sought reimbursement from Chevron through the law firm's own bill). As with the Structured Data, Mr. Rankin transferred it to FTI's EFT site. . .
>
> Backup Data. Mr. Rankin also obtained all of the attachments to the invoices and transferred them to FTI's EFT site.[501]

(iii) David Turner, the leader of FTI's Data and Analytics Group for the Americas, describes the process of receiving the data described in Mr Rankin's witness statement, obtaining additional data directly from vendors and compiling all that data into a report titled "Summary of Fees and Costs Report", which is discussed in

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499 Kent Witness Statement, paras. 10-12, 14, 19, 23-26, 28, 33-34, 36.

500 Memorial, para. 196; Rankin Witness Statement, para. 7.

501 Memorial, para. 196; Rankin Witness Statement, paras. 9-14.

further detail below.[502] He explains how FTI then loaded the data into a database accessible to the Claimants' outside counsel for their review, following which FTI provided the information about the payments that are the subject of the Claimants' claims to Deloitte.[503]

(iv) Steve Stanton of Deloitte describes how Deloitte validated and confirmed that Chevron paid pursuant to its electronic payment system each outside law firm/vendor an amount that equals or exceeds the amount claimed by Chevron as damages in the "Summary of Fees and Costs Report".[504] Mr Stanton explains that 93% of the invoices could be validated via electronic matching, while he manually matched the remaining 7%.[505]

284. Mr Turner's "Summary of Fees and Costs Report", filed as Appendix 2 to the Memorial, is "a summary of the Claimants' claimed costs in each proceeding by law firm/vendor and amount, from 1 January 2004 through 9 May 2019."[506] In turn, Appendices 3 through 44 to the Memorial are "detailed narrative summaries of each of the litigation proceedings for which Chevron claims legal costs as damages, including discussions of their necessity, value and costs drivers, together with supporting evidence."[507]

285. *Purported Deficiencies Identified in Counter-Memorial on Damages*: In its Counter-Memorial, the Respondent argued that the Claimants' showing of compensable legal expenses in their Memorial fell "far short" of the minimum showing required.[508] More precisely, the Respondent was critical of how the Claimants, "rather than turning all of the relevant billing data and invoices" to the Respondent and the Tribunal for inspection, "used them to construct a thousand-plus page 'summary' that is as useless as it is voluminous", as it "omits crucial information concerning the dates on which services

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502 Memorial, para. 197, Appendix 2; Turner Witness Statement, paras. 2-18.

503 Memorial, para. 198; Turner Witness Statement, paras. 14-15, 18.

504 Memorial, para. 199; Stanton Expert Report, paras. 16-47.

505 Memorial, para. 200; Stanton Expert Report, para. 40.

506 Memorial, para. 12. An Updated Appendix 2 was enclosed with the Reply.

507 Memorial, para. 12.

508 Counter-Memorial, paras. 418-462.

were provided and costs incurred, as well as information showing who billed what time, at what rates, for what tasks, and for what purposes."[509]

286. In particular, the Respondent's Counter-Memorial identified numerous purported deficiencies in the Claimants' showing of compensable legal expenses.[510] The Respondent was generally critical of the witness expert and other evidence provided by the Claimants,[511] which the Respondent deemed insufficient[512] and, in its view, failed to include "evidence of billing judgment"[513] and to identify "who actually made payments and who actually received payments".[514] By "failing to submit the invoices that they allege Chevron paid", the Respondent argued, "Claimants fail to prove that the legal expenses claimed were reasonable and necessary."[515]

287. The Respondent further noted that the limited evidence produced by the Claimants with their Memorial showed that they had included significant amounts which, in its view, could not be justified.[516] For instance, fees were claimed for:

(i) "Entire categories of proceedings that were not caused by the breaches found by the Tribunal", such as the Criminal Proceedings, the Gibraltar Proceedings, the RICO Litigation and categories such as "general defense costs", the "costs of Chevron's media war with the LAPs and their supporters" and "planning and preparing costs";[517]

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509 Counter-Memorial, paras. 15.

510 Counter-Memorial, para. 418.

511 Counter-Memorial, paras. 418-441.

512 Counter-Memorial, paras. 446-450.

513 Counter-Memorial, paras. 442-443.

514 Counter-Memorial, paras. 444-445.

515 Counter-Memorial, paras. 451-462.

516 Counter-Memorial, paras. 463-594.

517 Counter-Memorial, paras. 465-473.

(ii) "Proceedings pursued by Chevron for purposes other than defending against the Lago Agrio Complaint and Judgment", such as the RICO Litigation and the Section 1782 Proceedings;[518]

(iii) Activities and proceedings the Respondent considers unnecessary, including the RICO Litigation, the Section 1782 Proceedings, certain pre-enforcement work (including for actions that were never filed) and a public relations campaign;[519]

(iv) "Costs that Chevron spent duplicating its own work", including, prominently, several instances of parallel Section 1782 Proceedings seeking production of the same materials;[520]

(v) "Unsuccessful activities", which, in the Respondent's view, are by definition not reasonable and therefore not recoverable, such as failed motions in the RICO Litigation and failed Section 1782 Proceedings;[521]

(vi) Activities unrelated to this Arbitration and to the Claimants' defence against enforcement of the Lago Agrio Judgment, such as "Chevron's defense of Veiga and Perez in criminal proceedings in Ecuador", Chevron's "media campaign", and attempts by Chevron to recover costs in the RICO Litigation, as well as "judgment discovery and motion practice against Donziger and third parties in an effort to locate assets to enforce its judgment";[522]

(vii) "Abandoned activities", including the abandonment of several of the Section 1782 Proceedings (MCSquared, Netflix, Weinberg Group) and portions of the RICO Litigation;[523]

(viii) "Frivolous activities", including (1) "sanctionable activities", such as Chevron "abusing the subpoena process" in the RICO Litigation; (2) "petty activities",

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518 Counter-Memorial, paras. 474-481.

519 Counter-Memorial, paras. 482-506.

520 Counter-Memorial, paras. 507-515.

521 Counter-Memorial, paras. 516-530.

522 Counter-Memorial, paras. 531-538.

523 Counter-Memorial, paras. 539-544.

generally characterized by the Respondent as "Chevron's 'unfortunate pattern of needlessly attacking other parties' counsel"; (3) "hopeless activities", including motions filed in the RICO Litigation, several of the Section 1782 Proceedings and the Lago Agrio Litigation "that never had a chance to succeed";[524] (4) "hypocritical activities", generally characterized by the Respondent as instances of Chevron taking "inconsistent positions in its litigation matters";[525] (5) "excessive activities", including instances of "excessive litigation", "overstaffing", "excessively large filings", or "excessive fees billed by Chevron's U.S. counsel in proceedings in non-US jurisdictions";[526] and

(ix) "Activities related to alleged abuses and excesses by the LAPs, their counsel, and other parties", which the Respondent notes it did not commit and constitute intervening acts cutting off the causal link between the Treaty breaches and the Claimants' losses.[527]

288. *Subsequent Production and Filing of Additional Evidence*: By its Procedural Order No. 65, the Tribunal (*inter alia*) provided guidance to the Parties as regards as to whether, "in order to satisfy the burden of proof for their claims . . . they must, in addition to the Damages Evidence presented by them . . . also produce the billing records or invoices underlying the said Damages Evidence".[528] Among other things, the Tribunal issued the following guidance:

> 84. . . . the Tribunal considers that the production of the following documents may be ordered, particularly where they have been relied on by the Claimants' experts and witnesses and form the basis of the Claimants' Damages Evidence:
>
> (i) invoices underlying the claimed fees and costs, along with documents identifying the timekeeper, expert or other vendor (which together form the basis of Appendix 2), as well as a brief narrative of the work done by each person, to be provided through either the production of the actual timesheets or any other document which discloses a brief narrative of the work done;

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524 Counter-Memorial, paras. 553-562.

525 Counter-Memorial, paras. 563-567

526 Counter-Memorial, paras. 568-585.

527 Counter-Memorial, paras. 586-592.

528 Procedural Order No. 65, para. 61.

(ii) documents showing payments of legal fees or costs, including amount, date, payer and payee, to be satisfied with emails, billing records, paid invoices or comparable materials;

(iii) documents disclosing fee caps, if any, imposed by the Claimants on counsel, expert or vendor fees and costs;

(iv) case records of the relevant proceedings, including submissions filed and orders and judgments issued;

(v) any claims for (and rulings on) costs raised in any of the proceedings for which the Claimants are seeking recovery of fees and costs;

(vi) documents identifying work done in relation to the proceedings prior to the issuance of the Lago Agrio Judgment where a direct causation with the Treaty breach is or could be established;

(vii) expert reports prepared in connection with the Ecuador dispute; and

(viii) any documents on the basis of which the expert reports and witness statements tendered in Track III of the proceedings have been prepared.

289. Further, by its Procedural Order No. 66, the Tribunal decided the Parties' outstanding document production requests set out in the Redfern Schedules filed with the Tribunal on 11 May 2020, including several requests for the production of documents concerning attorneys' fees and costs.

290. Thereafter, the Claimants filed their Reply and the Respondent filed its Rejoinder, both of which addressed new evidence on damages provided by the Claimants as described above. What follows are the Parties' positions on the sufficiency of the evidence of loss provided by the Claimants as drawn from those submissions.

2. The Claimants' Position

291. Generally, the Claimants posit that the evidence they have provided with their submissions shows that their damages were actually incurred, actually paid and reasonable "in the face of the extraordinary harm".[529] Such evidence includes the Claimants' claimed invoices and time entries,[530] the Appendices accompanying the

529 Reply, paras. 677-697.

530 *See* **C-3244** to **C-3437, C-3462**.

Memorial (and updated versions provided with their Reply),[531] expert reports and witness statements from the Claimants' in-house lawyer and external counsel.[532] In particular:

(i) The witness statements accompanying the Reply include the Fourth Witness Statement of **Ricardo Reis Veiga**, dated 29 July 2019; the Witness Statement of **Peter E. Seley**, dated 18 August 2021; the Witness Statement of **Robert A. Mittelstaedt**, dated 18 August 2021; the Witness Statement of **Steven Kobre**, dated 13 August 2021 and the second witness statement of **David Turner**, dated 19 August 2021. As explained by the Claimants, "the three major U.S.-based outside law firms—Gibson, Dunn & Crutcher, Jones Day, and Kobre & Kim—have each provided a witness statement from a partner responsible for that firm's invoices (respectively, Mr Seley, Mr Mittelstaedt, and Mr Kobre). They explain the work that each firm performed (or supervised, in the case of non-U.S. counsel) and why it was reasonable and necessary to accomplish Chevron's objectives and ultimately mitigate the harm resulting from Ecuador's unremedied breaches. In addition, one of the senior decision-makers within Chevron concerning the dispute with Ecuador, Mr Ricardo Reis Veiga, provides a supplemental witness statement explaining the substantial risks that Chevron faced (including a discussion on the vulnerability of Chevron's assets at the relevant time) and the reasons why Chevron was forced to defend itself and mitigate its harm through each of the claimed actions and their direct causal link to Ecuador's continuing misconduct. He also describes Chevron's hiring, case management, and internal review processes during the relevant time period. Finally, Mr David Turner of FTI Consulting provides a brief supplemental statement explaining the changes to Appendix 2 (*i.e.*, the Summary of Fees and Costs) and the USD 30,698,736.03 reduction in Chevron's damages claim since the first version of Appendix 2 was submitted with Claimants' Memorial on Damages."[533]

(ii) The expert reports accompanying the Reply include the Expert Report of **Steven F. Stanton**, dated 20 August 2021 ("who explains the closure of the small variance he

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531 *See* Reply, Updated Appendix 2.

532 Reply, para. 686.

533 Reply, para. 28.

observed in his first report to confirm Chevron's full payment of all the claimed invoices"); the Second Expert Report of **Kiran Sequeira**, dated 20 August 2021 ("who defends the interest rates used, updates his pre-award interest calculations, provides a dynamic model with "switches" which allows the Tribunal to make various determinations and easily assess the impact on quantum under different scenarios and alternative interest rates, and responds to Ecuador's critique of his calculation of Chevron's losses arising from the embargoed Argentine bank accounts"); the Fourth Expert Report of **Weston Anson**, dated 19 August 2021 ("who defends his (unchanged) valuation of Chevron's embargoed [IP] in Ecuador and responds to the criticisms of it by Ecuador and its counter-expert"); the Expert Report of **José Luis Barzallo Sacoto**, dated 19 August 2021 ("who refutes the erroneous claim of Ecuador and its expert that the embargo of Chevron's IP was not tantamount to a loss of control over those assets; he demonstrates that the embargo of Chevron's IP had the effect of limiting Chevron's right to use, enjoy and sell its property"); the respective Expert Reports of **Joseph P. Ryan, Sandy Litvack** and **Clyde Lea**, all dated 20 August 2021 ("three eminent former general or deputy general counsels of large multi-national companies . . . who explain their opinion that, from the perspective of decision-makers faced with the unprecedented risks Chevron faced, the USD 800 million in claimed legal fees and expenses was reasonable"); the Expert Reports of **Charles Silver** and **Geoffrey Miller**, respectively dated 19 August and 20 August 2021 ("renowned experts on attorneys' fees in the United States [who] observe that, despite the conclusion of Ecuador's experts that Chevron's claimed fees are supposedly 'shockingly high' and unnecessary, Ecuador's experts entirely ignore important and relevant considerations such as the success of Chevron's actions, Chevron's incentives to contain costs that they had no assurance of ever recovering from Ecuador (and the steps Chevron took to carefully monitor its spending to insure against inefficiency and waste), and the high stakes Chevron was facing"); the Expert Report of **Daniel Slottje**, dated 17 August 2021 ("who provides a statistically valid representative sample of about 400 invoices (to 95% accuracy) from the universe of 7,700-plus claimed invoices, which the experts were then able to review in further support of their conclusions that the fees and costs Chevron incurred were reasonable and lacked any material evidence of duplication, inefficiency, or other waste"); and the

expert report of **Mark A. McGrath**, dated 20 August 2021 ("[a]n expert on legal spend analytics, he applied data analytics on Chevron's claimed invoices to identify normative factors such as timekeeper rates and staffing leverage and tenure [and] concludes that the claimed invoices bear no unusual indicia and thus are per se consistent with standard billing practices, Chevron had strong processes in place to manage and control its legal spend, and Chevron's outside law firms and vendors generally exercised care and diligence in their billing practices").[534]

292. The Claimants assert that they used a robust billing procedure and accounting system for the dispute, which involved a multi-level process and Chevron's "Corporation and Affiliate 2007 Guidelines for Outside Counsel" (together with its subsequent versions, "**Chevron's Guidelines**"), which were routinely followed.[535]

293. Further, the Claimants consider that the amount of damage incurred and paid was reasonable in the circumstances and proportionate to the risks of the Lago Agrio Litigation (a criterion which, they note, is relevant only with respect to incidental damages, and not direct damages).[536] In the Claimants' view, contrary to the opinion of the Respondent's fee auditing experts, the Tribunal need not engage in an invoice-by-invoice line review item to reach the conclusion that their damages were reasonable, as those experts never reached the conclusion that Chevron "stood to gain by being profligate" or that "Chevron's expenditures were exceptional for litigations of this magnitude".[537] In their view, the Tribunal has discretion to assess the reasonableness of their fees and costs in other ways, "such as by reviewing billing and expense summaries, receiving fact and expert testimony, or relying on its members' experiences, knowledge and first-hand observations of proceedings."[538]

294. This notwithstanding, should the Tribunal decide to engage in such a detailed review, the Claimants consider that the expert opinion of Mr McGrath (a "legal and litigation spend

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534 *See* Reply, paras. 29-37.

535 Reply, paras. 678-679; Lea Expert Report, paras. 44-46.

536 Reply, paras. 680-692; Lea Expert Report, paras. 35, 40.

537 Reply, paras. 681-686; Silver Expert Report, paras. 28, 77, 90, 93; Miller Expert Report, para. 35.

538 Reply, para. 683.

management and analytics expert) it would confirm the reasonableness of their claimed fees and costs.[539] Similarly the Claimants' experts Mr Lea, Mr Ryan (both of who are former general counsel) and Professor Miller each reviewed a "statistically valid representative sample of about 400 invoices (to 95% accuracy) from the universe of 7,700-plus claimed invoices" provided by Mr Slottje of FTI (the "**Invoice Sample**"), with each of them confirming that the fees and costs claimed were reasonable.[540]

295. In addition, the Claimants posit that their litigation strategy was reasonable, including their decision to hire multiple law firms to spearhead their different litigation efforts.[541] Among other things, the Claimants state that all law firms involved devised strategies to ensure that litigation efforts were as seamless as possible, with Chevron's outside counsel actively working with in-house attorneys on a daily basis and ensuring that each firm's billing practices complied with the company's expectations.[542]

296. The Claimants reject the Respondent's criticisms of a limited number of invoice and time-entry allocations, asserting it disregards context.[543] In addition, the Claimants submit that the Respondent's experts are "unhelpful to this Tribunal" and do not provide a basis for the Tribunal to reduce the Claimants' damages.[544]

3. The Respondent's Position

297. According to the Respondent, the Claimants "essentially restarted their case at the Reply stage, but they did not cure their Memorial-state failure to prove that the fees and costs they claim are reasonable and necessary."[545] In its view, the Claimants' Reply failed to address many of the problems that the Respondent identified in the Counter-Memorial: for instance, the Respondent asserts that the Claimants failed to (i) indicate which entities

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539 Reply, para. 688; McGrath Expert Report, paras. 1, 26.

540 Reply, paras. 36, 690-692; **C-3243**, Representative Invoice Sample; Ryan Expert Report, para. 85; Miller Expert Report, para. 34; Lea Expert Report, para. 47.

541 Reply, paras. 661-665, 693-698.

542 Reply, paras. 694-697; Seley Witness Statement, paras. 12, 15, 18, 20-23.

543 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 201-202 (Silbert), Day 15 (7 September 2022), pp. 3485-3486 (Kehoe).

544 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3486-3494 (Kehoe).

545 Rejoinder, para. 619.

paid the invoices underlying their claim;[546] (ii) explain how they allocated USD 793 million in claimed fees across 13 of their damage categories;[547] (iii) show whether their outside law firms, vendors and experts established budgets or adhered to them;[548] (iv) provide an audit of the invoices;[549] or (v) remove unreasonable time entries from their claims.[550] Similarly, the Respondent considers that the non-invoice documents that the Claimants produced (which comprise correspondence, spreadsheets exported from Chevron's billing software TeamConnect and another version of Appendix 2 to the Memorial) fail to demonstrate billing judgment.[551] The Respondent also points out that the Claimants retracted their claim for over USD 30 million when the Tribunal ordered the production of invoices, which would otherwise likely have remained claimed. In the Respondent's view, this circumstance undermines the Claimants' stance for deference.[552]

298. As concerns invoice auditing, the Respondent considers the Claimants' Invoice Sample to be inadequate from a statistical perspective,[553] and criticises the "data analytics" expert opinion of Mr Mark McGrath as "superficial and outdated".[554] Instead, the Respondent invites the Tribunal to consider the audit performed by its legal fee expert, Mr John Trunko,[555] who identified "abundant amounts of unreasonable fees and costs in Claimants' invoices",[556] as also concluded separately by the Respondent upon its own review.[557] The Respondent offers a few examples of "unreasonable fees and costs and misallocated invoice time entries" that it found in its review, which include (*inter alia*):

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546 Rejoinder, paras. 627, 648-655.

547 Rejoinder, para. 628.

548 Rejoinder, paras. 627-632.

549 Track III Hearing Transcript, Day 2 (19 August 2022), p. 308 (Finsterwald).

550 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3604 (Finsterwald).

551 Rejoinder, paras. 646-647.

552 Track III Hearing Transcript, Day 2 (19 August 2022), p. 308 (Finsterwald).

553 Rejoinder, paras. 657-660; **RE-61**, Second Leigh Expert Report, paras. 51-60; **RE-65**, Lee Expert Report, paras. 9-14, 23-25.

554 Rejoinder, paras. 661-678.

555 Rejoinder, para. 660; **RE-51**, Trunko Expert Report.

556 Rejoinder, paras. 844-846.

557 Rejoinder, paras. 847-899.

(i) "Unrelated activities", such as fees for working in *Chevron v. Ecuador I*, public relations activities or lobbying;[558]

(ii) "Abandoned work", such as an unpursued complaint for declaratory judgment for a Chevron subsidiary in Argentina or work in preparation for a BIT arbitration against PetroEcuador that was never initiated;[559]

(iii) "Frivolous activities", such as an iPad bought by a Gibson Dunn attorney or time spent dining by attorneys;[560]

(iv) "Excessive activities", generally constituting alleged instances of overbilling or serial motions submitted in the RICO and 1782 Litigations;[561]

(v) "Billing time for working on client billing issues";[562]

(vi) "Administrative/clerical activities",[563] and "Training and background activities",[564] which the Respondent claims were billed "chronically" in violation of Chevron's Guidelines;

(vii) "Vaguely described activities" in the relevant time entries;[565]

(viii) "Non-working time and exorbitant travel expenses";[566]

(ix) "Time spent not working";[567] and

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558 Rejoinder, paras. 850-869.

559 Rejoinder, paras. 870-873.

560 Rejoinder, paras. 874-877.

561 Rejoinder, paras. 878-883.

562 Rejoinder, para. 884.

563 Rejoinder, paras. 885-887.

564 Rejoinder, para. 888.

565 Rejoinder, paras. 889-892.

566 Rejoinder, paras. 893-895.

567 Rejoinder, para. 896.

(x) "Misallocated fees and costs" among the Claimants' 13 damages categories pertaining to legal fees and expenses.[568]

299. The Respondent dismisses the Claimants' admonition to review time entries in context, noting that the context has been redacted.[569]

300. The Respondent further dismisses the witness statement of Ms Colleen Kent, who it notes was at the lowest level of Chevron's fee review hierarchy and only began reviewing invoices in January 2016.[570] The Respondent is also critical of the four lawyer witness statements provided by the Claimants in an attempt to prove that their litigation strategy was reasonable and necessary,[571] which include Mr Veiga (formerly of Chevron),[572] Mr Seley (of Gibson Dunn),[573] Mr Mittelstaedt (of Jones Day)[574] and Mr Kobre (of Kobre & Kim).[575] Similarly, the Respondent considers that the Claimants' legal fee experts also fail to demonstrate that the Claimants' claimed fees and costs are reasonable.[576] The Respondent adds that, at the Track III Hearing, the Claimants "did not provide testimony from witnesses who analyze and explain the fees and costs set forth in the invoices."[577] Rather, the Respondent contends that the evidence available demonstrates that Chevron failed to follow its own billing guidelines and control processes.[578]

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568 Rejoinder, paras. 897-899.

569 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3604 (Finsterwald).

570 Track III Hearing Transcript, Day 2 (19 August 2022), p. 307 (Finsterwald).

571 Rejoinder, paras. 679-737.

572 Rejoinder, paras. 681-709; Fourth Veiga Witness.

573 Rejoinder, paras. 717-718; Seley Witness Statement. *See also* Rejoinder, paras. 719-737.

574 Rejoinder, paras. 712-716; Mittelstaedt Witness Statement. *See also* Rejoinder, paras. 719-737.

575 Rejoinder, para. 718; Kobre Witness Statement. *See also* Rejoinder, paras. 719-737.

576 Rejoinder, paras. 738-840.

577 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3599 (Finsterwald).

578 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3601 (Finsterwald).

VII. THE TRIBUNAL'S ANALYSIS ON GENERAL MATTERS AND LEGAL STANDARDS

301. In this Section, the Tribunal presents its analysis and determinations on various general matters and legal standards that influence the overall evaluation of the Claimants' damages claims in Track III. For ease of reference, such matters comprise:

(i) Causation;

(ii) Non-compliance with Interim Awards;

(iii) International Subsidiaries;

(iv) Failure to Mitigate;

(v) Fees Allegedly Incurred in Other Proceedings;

(vi) Tax Implications; and

(vii) Evidence of Legal Fees and Expenses.

302. In accordance with these standards, the Tribunal shall consider in Sections VIII and IX below each of the 16 categories of damages asserted by the Claimants.

A. CAUSATION

1. Introduction

303. Any analysis of reparation under international law must start with the internationally wrongful conduct leading to the alleged injury. This is a corollary of the principle of customary international law reflected in Article 31(1) of the ILC Articles, pursuant to which "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act". It is also a corollary of the applicable full reparation standard set forth in *Chorzów Factory*, pursuant to which full reparation for an international illegal act "must, as far as possible, wipe out all the consequences of the

illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[579]

304. For ease of reference, the Tribunal recalls that the Claimants claim compensation for:

(i) Damages purportedly incurred in respect of the Respondent's denial of justice from 22 August 2006 (when the Claimants assert Ecuador's wrongful acts began) or, in the alternative, from 1 March 2012 (when the Lago Agrio Judgment was rendered enforceable);

(ii) Damages purportedly incurred after 1 January 2004 by virtue of the Respondent's breach of the Umbrella Clause of the Treaty; and

(iii) Damages purportedly incurred from 1 March 2012 as a result of the Respondent's breach of the First and Second Interim Awards.[580]

305. For the sake of simplicity, the Tribunal shall hereinafter use the following shorthand terms for the Respondent's internationally wrongful acts: (i) "**Denial of Justice Breach**" for its declarations in paragraphs 10.4 and 10.5 of the Track II Award concerning the Respondent's violation of Article II(3)(a) of the Treaty and customary international law for denial of justice; (ii) "**Umbrella Clause Breach**" for its declarations in paragraphs 10.7 and 10.8 of the Track II Award concerning the Respondent's violation of Article II(3)(c) of the Treaty (Umbrella Clause); and (iii) "**Interim Awards Breach**" for its declaration in paragraph 10.18 of the Track II Award concerning the Respondent's violation of the First and Second Interim Awards.[581]

306. Further, paragraph (2) of Article 31 of the ILC Articles describes the "injury" for the purposes of paragraph (1) as the subject matter of reparation: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a

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579 **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, pp. 31-32.

580 Reply, para. 672.

581 *See* para. 91 above for the full Operative Part of the Track II Award.

State".[582] Under this framework of analysis, the Tribunal is required to isolate the "injury resulting from and ascribable to" the Respondent's internationally wrongful acts from "any and all consequences flowing from" them to determine the extent to which reparation is warranted.[583]

307. The unusual circumstances of this case turn this causation analysis into a complex inquiry.

308. First, at least two of the Respondent's Treaty breaches were complex acts spanning multiple years and instrumentalities within the Ecuadorian State. The applicable principles of causation require the Tribunal to identify the appropriate reference point(s) or event(s) within the scope of the Treaty breaches by reference to which the injuries "caused by" those breaches can be identified.

309. Second, from the viewpoint of the injury caused by the Respondent's internationally wrongful acts, the Tribunal must stress the unconventional nature of the factual pattern it is required to analyse, as already advanced in the Track II Award:

> The Lago Agrio Litigation was therefore likely to involve, from its outset, numerous national jurisdictions other than Ecuador. This feature makes the present case unusual. Earlier cases on denial of justice have concerned an alleged wrong and an alleged injury taking place within the same State. Here, the injury to Chevron was always intended to take place, at least in part, in one or more foreign jurisdictions elsewhere than Ecuador, whether by the enforcement of the Lago Agrio Judgment or by an enforced "amicable" settlement. Thus, the Lago Agrio Litigation was transnational in the broadest sense, as confirmed by the multiplicity of foreign lawsuits and arbitrations in the USA, Argentina, Brazil, Canada, the Netherlands and elsewhere following the issuance of the Lago Agrio Judgment.[584]

310. Adding to the complexity of the inquiry before the Tribunal, the injuries for which reparation is sought in Track III to a large extent do not coincide with the injury that is said to have been the originally "intended" or foreseeable result of the wrongful act (*i.e.*, "the enforcement of the Lago Agrio Judgment or . . . an enforced 'amicable' settlement" as indicated in the above quote). As stated by the Claimants, "the vast majority of [their] actual damages result from the attorneys' fees and other costs that Claimants were obliged

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582 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (9).

583 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (9).

584 Track II Award, para. 7.27.

to incur in defending themselves against the massive fraud perpetrated through the Lago Agrio Litigation and enforcement proceedings and preparing for the defense of additional enforcement proceedings that may be brought in the future."[585] Such costs concern dozens of proceedings spanning multiple jurisdictions and occurring over many years, many of them starting *before* the issuance the Lago Agrio Judgment on 14 February 2011. Indeed, for a significant portion of those costs, the Claimants today claim compensation even if the Tribunal finds that they were incurred prior to the crystallisation of the Respondent's internationally wrongful acts.[586]

2. Track II Findings

311. Notwithstanding this complexity, the Tribunal must recall that many of the proximate causation issues that have been raised in Track III were already analysed and disposed of in the Track II Award. While the Tribunal there assigned for further submissions in Track III all issues as to reparation in the form of *compensation* for any injuries sustained by the Claimants,[587] it dealt extensively with other forms of reparation[588] – which, as already noted, must be premised on a finding of injury under international law as a matter of principle. Indeed, the Track II Award includes carefully circumscribed findings regarding the injury flowing from the Respondent's internationally wrongful acts.

312. The Tribunal will address more fully the connection between each of the Respondent's Treaty breaches and the Claimants' injuries in Section VII.A.4 below. In the paragraphs that immediately follow, the Tribunal will limit itself to identifying the Track II findings of injury with which it must remain consistent in this Award on Track III.

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585 Memorial, para. 144.

586 Track III Hearing Transcript, Day 12 (2 September 2022), p. 2788 (Paulsson): "The obligation to make full reparation for an injury caused by an internationally wrongful act does include an obligation to pay damages for costs incurred by the victim prior to the consummation of the breach; and such damages may be characterized either as direct damages or as incidental damages for costs of mitigation." *See also* Track III Hearing Transcript, Day 12 (2 September 2022), pp. 2794-2800 (Paulsson).

587 Track II Award, para. 10.14: "All issues as to reparation in the form of compensation for any injuries sustained by the First or Second Claimant, as claimed by the Claimants and denied by the Respondent, including any assessment of the amount of compensation, moral damages, indemnities, reimbursements, payments, expenses and interest, are currently assigned for further submissions by the Parties to Track III. These issues are not decided in this Award."

588 *See generally* Track II Award, Parts IX and X.

313. At the outset, the Tribunal recalls that the Track II Award ordered reparation in the form of several declarations and orders specifically targeted at wiping out the consequences of the recognition and enforcement of the Lago Agrio Judgment.[589] Of those measures, the Tribunal said:

> As to international law, the Tribunal has decided that the Respondent breached its obligations, by a denial of justice, in issuing the Lago Agrio Judgment, rendering it enforceable and maintaining its enforceability by the Lago Agrio Plaintiffs.
>
> In Part VIII above, as to the right of a party to receive a fair hearing before an impartial tribunal, the Tribunal has already referred to Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Articles 2 and 6 of the UN Basic Principles on the Independence of the Judiciary. The violation of such a right by judicial corruption is proscribed by the UN Convention against Corruption ratified by the General Assembly on 31 October 2003 (to which the Respondent is a Contracting Party). In *World Duty Free* (2006), in the context of corruption by bribery, the tribunal identified, as a matter of international public policy, an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It concluded: "In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States . . .". In the Tribunal's view, judicial bribery must rank as one of the more serious cases of corruption, striking directly at the rule of law, access to justice and public confidence in the legal system; and also, as regards the foreign enforcement of a corrupt judgment, at the law of nations. Accordingly, the Tribunal concludes that the Lago Agrio Judgment (with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts) violates international public policy. As a matter of international comity, it must follow that the Lago Agrio Judgment should not be recognised or enforced by the courts of other States.
>
> In the Tribunal's view, the reinstatement of the Claimants' rights under international law requires of the Respondent the immediate suspension of the enforceability of the Lago Agrio Judgment and the implementation of such other corrective measures as are necessary to "wipe out all the consequences" of the Respondent's internationally wrongful acts, so as to re-establish the situation which would have existed if those internationally wrongful acts had not been committed by the Respondent.
>
> The Tribunal considers that *these measures, subject to their elaboration in the form of declarations and orders below, are appropriate in the present circumstances of this case*. These circumstances do not require the Tribunal itself to declare the nullity of the Lago Agrio Judgment under international law.[590]

314. Critically, among these measures of reparation as are "necessary to 'wipe out all the consequences' of the Respondent's internationally wrongful acts" is the Tribunal's declaration that *any injury* caused by the recognition or enforcement of any part of the

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589 Track II Award, paras. 10.10, 10.11, 10.13.

590 Track II Award, paras. 9.15-9.18 (emphasis by the Tribunal).

Lago Agrio Judgment within or without Ecuador warrants reparation under international law:

> 10.11 The Tribunal declares that *any injury* to the First Claimant or the Second Claimant *caused by the recognition or enforcement of any part of the Lago Agrio Judgment* within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be *injuries for which the Respondent is liable to make reparation under international law*;[591]

315. In the same vein, the Tribunal's subsequent order to the Respondent to make full reparation *in the form of compensation* is specifically circumscribed to any injuries caused to the Claimants by the unremedied Lago Agrio Judgment,[592] subject to further determination in this Track III:

> 10.13 The Respondent shall, to the satisfaction of the Tribunal and as unconditional obligations of result (save where otherwise indicated):
>
> . . .
>
> (viii) subject to further order of this Tribunal in Track III, make full reparation in the form of compensation for *any injuries caused to the First Claimant and the Second Claimant by the Lago Agrio Judgment* (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts).[593]

316. One can extract several conclusions from the above rulings. First, the Tribunal identified the recognition and enforcement of any part of the Lago Agrio Judgment as the specific source of the injury caused by the Respondent's internationally wrongful acts. Second, any injuries caused to the Claimants by the unremedied Lago Agrio Judgment warrant reparation in the form of compensation in an amount to be determined in Track III. Third, no other forms of injury warranting reparation are identified in Parts IX or X of the Track II Award, the Tribunal having expressly stated that "[s]ave as aforesaid, the requests for relief made by the [Parties] for decision in this Track II are not granted".[594]

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591 Track II Award, para. 10.11 (emphasis by the Tribunal).

592 *See* Track II Award, para. 8.27: "By the shorthand terms "uncorrected" and "unremedied", here and elsewhere in this Award, the Tribunal means that the Lago Agrio Judgment (excepting its award of punitive damages) was considered by the Lago Agrio Appellate Court, Cassation and Constitutional Courts, in full knowledge of the complaints of serious procedural impropriety, without appropriate steps being taken to address the allegations of procedural fraud, judicial misconduct and 'ghostwriting' raised by Chevron at the time." Such terms are used with this same meaning in this Award.

593 Track II Award, para. 10.13(viii) (emphasis by the Tribunal).

594 Track II Award, para. 10.23.

317. In sum, the Tribunal has already identified the uncorrected Lago Agrio Judgment – and specifically its recognition and enforcement – as the primary source of the Claimants' injuries caused by the Respondent's internationally wrongful acts. As such, international law requires that any measure of full reparation implemented in Track III be targeted specifically at wiping out the injuries caused by the recognition and enforcement of the uncorrected Lago Agrio Judgment. Absent a finding of a separate and independent source of injury flowing from the Respondent's internationally wrongful acts, reparation cannot go beyond this limit.

3. Direct and Incidental Damages

(a) Introduction

318. Having reached this conclusion, the Tribunal is better placed to distinguish the injuries flowing from the Respondent's internationally wrongful acts that must be categorised as damages proximately caused by those acts (or 'direct damages' for shorthand) from those that constitute incidental damages "reasonably incurred to repair damage and otherwise mitigate loss" arising from those wrongs.[595] The Tribunal already addressed this distinction in Procedural Order No. 65, which, it must be recalled, was issued after the filing of the Respondent's Counter-Memorial and before the filing of the Claimants' Reply:

> The Tribunal further notes that an assessment of the individual claims under Categories (a)-(m) may be approached differently by it depending on the nature of the causal connection between the Treaty breaches and the alleged losses. In particular, a distinction may be established, at least, among those heads of damages that are proximately caused by the breaches; and those which are incidental, or otherwise incurred as the costs of reasonable mitigation measures. In line with this distinction, the relevant test for reasonableness may vary depending on the nature of each head of damages.
>
> In respect of damages claimed to have been proximately caused by the breaches of the Treaty, the assessment is fundamentally one of proximate causation, not of reasonableness. Yet, the reasonableness of the Claimants' actions in the face of wrongful conduct may still be relevant to this analysis. As per the commentary to the ILC Articles, "[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a 'duty to mitigate', this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent." Moreover, a certain degree of unreasonable conduct may break the chain of causation altogether or even constitute an

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595 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (34).

> independent contribution to the injury under Article 39 of the ILC Articles. Reasonableness is not as such an independent, positive element of the test for proximate causation under Article 31 of the ILC Articles.
>
> On the other hand, reasonableness does constitute a specific requirement for the recovery of incidental damages. The Claimants are bound to prove that such costs were "reasonably incurred to remedy or mitigate damage flowing from an internationally wrongful act".
>
> Accordingly, a reasonableness analysis may not be necessary where direct causation between the breach and the incurred fees and costs is clear and has not been severed (without prejudice to the actual spending having to be proved). It will, however, be necessary for all claims for incidental damages.
>
> As noted above, the Claimants contend that all of their claims under Categories (a)-(m) fall under the primary head of damages. At this stage, it is not entirely clear to the Tribunal whether there are any claims under Categories (a)-(m) and, if so, which are those claims for which the Claimants consider that some form of a reasonableness assessment might be undertaken by the Tribunal. For instance, it is not entirely clear to the Tribunal at this stage, whether the costs and fees pertaining to the Lago Agrio Litigation and the enforcement actions in Ecuador, Argentina, Brazil and Canada, and the Ecuadorian Criminal Proceedings (Categories (a), (d)-(g), and (k)) are claimed exclusively as damages proximately caused by the Respondent's breaches, potentially subjecting them to a different standard of scrutiny for reasonableness. Conversely, it is not entirely clear to the Tribunal at this stage whether the costs and fees associated with the § 1782 Actions, the RICO Litigation, the planning and preparation to defend against potential enforcement actions in other jurisdictions, and the Gibraltar Litigation (Categories (b)-(c) and (h)-(i)) are claimed alternatively as incidental costs and mitigation measures, potentially subjecting them to different standards. The Tribunal would consider it useful to be further briefed by the Parties on this issue in their second round of submissions in the Track III proceedings.[596]

319. Thereafter, the Claimants confirmed in their Reply and at the Track III Hearing that all of their claimed legal fees and expenses constitute direct damages and are recoverable in the alternative as incidental damages.[597] The Respondent disputes this, contending that they all constitute incidental expenses.[598]

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[596] Procedural Order No. 65, 10 July 2020, paras. 74-78. "Categories (a)-(m)", as referenced in this quote, correspond to the Claimants' claims listed in items (a) through (m) of paragraph 479(2) of their Memorial: "a. US$ 165,948,547.27 in relation to the Lago Agrio Litigation; b. US$ 66,286,194.18 in relation to the § 1782 Actions; c. US$ 328,258,466.65 in relation to the RICO Action; d. US$ 3,703,465.90 in relation to the Ecuador Enforcement Action; e. US$ 26,473,951.23 in relation to the Argentina Enforcement Action; f. US$ 21,682,698.55 in relation to the Brazil Enforcement Action; g. US$ 40,736,344.94 in relation to the Canada Enforcement Action; h. US$ 27,534,505.48 in relation to defense against recognition and enforcement in other countries and general recognition and enforcement work; i. US$ 39,651,933.78 in relation to the Gibraltar offensive actions and other offensive action against co-conspirators; j. US$ 57,768,063.05 in relation to the general defense against the Lago Agrio fraud and the resulting fraudulent Judgment; k. US$ 7,065,435.37 in relation to the Ecuadorian Criminal Proceedings; l. US$ 35,776,712.89 in relation to the BIT Non-Counsel-of-Record Fees; and m. US$ 3,692,384.48 in relation to the Dutch Set-Aside Proceedings."

[597] Reply, para. 17; Track III Hearing Transcript, Day 1 (18 August 2022), pp. 16-17 (Paulsson).

[598] Counter-Memorial, paras. 223, 228, 364; Rejoinder, paras. 243-251.

320. In accordance with the foregoing, the Tribunal makes preliminary determinations in this Section regarding the proper categorisation of the Claimants' claimed damages as direct or incidental damages and the showings required to grant compensation in each instance.

(b) Direct Damages

321. The Tribunal addresses first direct damages. Having determined that the uncorrected Lago Agrio Judgment is the primary source of the Claimants' injuries, the Tribunal can readily categorise any injury caused by the recognition or enforcement of any part of the Lago Agrio Judgment as a form of direct damage flowing naturally from the Respondent's internationally wrongful acts. Examples of conduct amounting to an enforcement, as identified by the Tribunal in the Track II Award, include, without limitation, "attachment, arrest, interim injunction [or] execution".[599] As further explained below, an embargo would also fit this description.[600] For instance, the arrest of an oil tanker owned by the Claimants premised on the recognition and enforcement of the Lago Agrio Judgment would constitute a form of direct damage.

322. As noted by the Tribunal in Procedural Order No. 65, the assessment of direct damages under international law is fundamentally one of proximate causation, not of reasonableness.[601] Indeed, reasonableness is a measure of the actions undertaken by the injured party when confronted with the injury, not of the injury itself.[602] In the instant case, the injury as particularized in the preceding paragraph flows naturally from the breach without any intervening action from the Claimants, obviating any need for a reasonableness analysis.

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599 Track II Award, para. 10.13(ii). *See also* Track II Award, para. 7.25: "Outside Ecuador, however, Chevron, with its large group of associated companies, indirectly owned (and still owns) substantial assets, including ocean-going vessels, bank deposits around the world, and other properties. By their nature, vessels and bank deposits were and remain vulnerable to arrest, attachment or seizure by the Lago Agrio Plaintiffs upon the Lago Agrio Judgment's enforcement in multiple jurisdictions, especially *ex parte* without prior notice. Even if Chevron were in a position to discharge promptly such an order freezing a bank deposit or arresting a vessel, the damage to Chevron and its associated companies from such repeated actions could have been very significant (as it may still be)."

600 *See* Section IX.A below, concerning Embargo Losses in Argentina.

601 Procedural Order No. 65, 10 July 2020, para. 75; **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (10).

602 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (10): "It is well established that incidental expenses are compensable if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the breach."

323. Furthermore, as agreed by the Parties, the onus is on the injured party (the Claimants) to establish proximate causation as regards direct damages.[603] However, any failure by the Claimants to mitigate such damage may preclude recovery to that extent.[604] The burden to prove that the Claimants did not fulfil this duty to mitigate lies with the Respondent.[605]

324. A matter related to the question of burden of proof is the standard of proof and, relatedly, the degree of granularity of the evidence required to establish damages under international law, whether direct or incidental.

325. As to the first question, the Tribunal has been given no reason to apply a different standard of proof to damages other than the generally applicable standard of balance of probabilities.[606]

326. In respect of the question of granularity, the Parties have brought no source to the attention of the Tribunal mandating a specific level of granular analysis of damages under international law.[607] As such, granularity is better dealt with as a question of sufficiency or adequacy of the evidence on damages.[608] The Tribunal will address this matter in full in Sections VIII and IX below. As more fully explained there, only three of the 16 damages categories analysed in this Award (Embargo in Argentina, Intellectual Property Losses in Ecuador, and Moral Damages) may be addressed within the purview of direct damages. All other damages categories concern legal fees and expenses and are therefore only compensable as incidental damages, an issue to which the Tribunal now turns.

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603 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1479 (Bishop), p. 1492 (Schwartz). *See also* **CLA-617**, *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 685.

604 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11).

605 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1478 (Bishop), p. 1492 (Schwartz).

606 Track II Award, para. 8.42; Track III Hearing Transcript, Day 7 (26 August 2022), p. 1482 (Bishop); Day 8, p. 1753 (Bishop). *See also* **CLA-617**, *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 685.

607 *See* Letter from the Tribunal to the Parties dated 23 August 2022, Question 8: "What is the degree of granularity required for proof of damages under international law or what principles determine the details that must be proven?"; Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1478-1491 (Bishop), pp. 1491-1503 (Schwartz); Day 8 (29 August 2022), pp. 1752-1765 (Bishop), pp. 1765-1778 (Schwartz).

608 *See* Procedural Order No. 65, 10 July 2020, paras. 81-85.

(c) Incidental Damages

1. The Requirement of Causation for the Compensation of Incidental Damages

327. The Tribunal turns now to incidental damages. Generally, such damages shall be compensable in this Arbitration if they were "reasonably incurred to repair damage and otherwise mitigate loss" arising from the recognition and enforcement of any part of the Lago Agrio Judgment. Under this framework of analysis, the legal fees and expenses reasonably incurred by the Claimants in attempting to repair damage and otherwise mitigate the enormous anticipated losses that would arise from the recognition and enforcement of the Lago Agrio Judgment will generally fall under the heading of incidental damages.[609] Building on the example in paragraph 321 above, while the actual arrest of an oil tanker owned by the Claimants premised on the recognition and enforcement of the Lago Agrio Judgment would constitute a form of direct damage, the legal fees and expenses reasonably incurred by the Claimants to anticipate and resist such an arrest, or to overturn the arrest after it has been enforced, would amount to incidental damages.[610]

328. As with direct damages, it is the Claimants' burden to establish causation between any incidental damages for which compensation is sought and the Respondent's wrongs.[611] Within the realm of incidental damages, however, the relevant causation assessment is not whether such damages flow naturally from a breach (*i.e.*, whether they were proximately caused by the breach) but rather whether they were incurred *in reaction* to an *injury* arising from a breach and were geared towards minimizing the effects of such injury (*i.e.*, whether they were "incurred to repair damage and otherwise mitigate loss

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609 **CLA-652**, Sergey Ripinsky, Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016), pp. 302-303: "*Professional fees*: Incidental expenses may be incurred in the course of defending from the 'attacks' of the host-country authorities"; **CLA-605**, *Pope & Talbot Inc. v. Canada,* UNCITRAL, Award in respect of Damages, 31 March 2002, para. 85; **CLA-655**, *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, para. 275.

610 The Tribunal observes that this classification as between direct and incidental damages might have required further refinement vis-à-vis discreet components on the Claimants' damages claims in circumstances where the aim of a recognition and enforcement action was to force an 'amicable' settlement on the Claimants and the Claimants made payments to settle the action (*see* para. 309 above). However, none of the Claimants' damages claims concerns such scenario. Accordingly, the Tribunal considers that its classification is correct for the purposes of this Award and notes that, in any event, any such reclassification would have no significant effect on the determination of the questions currently pending before the Tribunal.

611 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1479 (Bishop), p. 1492 (Schwartz).

arising from the breach").[612] In other words, incidental damages by definition seek to mitigate some form of direct damage – in this case, the damage arising directly from the recognition and enforcement of the uncorrected Lago Agrio Judgment. As such, incidental damages amount to a *secondary* source of injury, the primary source being any form of direct damage as just described.

329. Accordingly, to the extent they amount to a form of damage caused by the internationally wrongful act of a State, incidental damages also form part of the injury that constitutes the subject matter of reparation under Article 31(2) of the ILC Articles.[613] By way of example, if a fire is deliberately and unlawfully lit which will directly threaten a neighbouring property when it spreads, the injury can properly be said to arise before the fire actually reaches the neighbouring property, and the costs of reasonable measures to protect against the fire are recoverable.

330. In this respect, the Tribunal must observe that it is uncommon for a damages claim to be centred principally on incidental harm occurring outside the main chain of events of the treaty breach – here, the Lago Agrio Litigation occurring in Ecuador. While such circumstance is explained by the special features of this claim (including primarily the transnational risk of enforcement of the Lago Agrio Judgment),[614] it also raises an inevitable question of remoteness of the damage. Thus, in the Tribunal's view, the required causal link must be established clearly and in an itemized fashion for each mitigation measure to warrant reparation. Similarly, the Tribunal will bear in mind the need to distinguish between the legal fees and expenses spent to minimize the effects of the Respondent's Treaty breaches and those which form part of the normal cost of doing business in the host State, which by definition are not recoverable as damages.

331. In reaching this conclusion, the Tribunal has taken note of the Claimants' argument that damages must be deemed to be caused by the breach when they were deliberately caused

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612 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (34).

613 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (9) ("Injury includes *any* damage, whether material or moral, caused by the internationally wrongful act of a State") (emphasis by the Tribunal).

614 Track II Award, paras. 7.24-7.27.

by the wrongdoer.[615] The Tribunal considers this to be, at most, a factor that must be taken into account when performing a proximate causation analysis and only vis-à-vis direct damages;[616] it cannot serve as a basis to obviate the proximate causation analysis required under international law for the assessment of direct damages or the additional layer of analysis required for the assessment of incidental damages (*i.e.*, whether incidental damages were incurred *in reaction to* some form of direct damage).

2. The Requirement of Reasonableness for the Compensation of Incidental Damages

332. Aside from causation, and unlike direct damages, incidental damages are subject to a requirement of reasonableness – again, the notion of reasonableness implies an assessment of the Claimants' *reaction* to any direct damage flowing from the Respondent's internationally wrongful acts.[617] The onus is on the Claimants to prove that any legal costs spent to mitigate the injury were "reasonably incurred", as already indicated by the Tribunal in Procedural Order No. 65.[618]

333. According to the Claimants, however, the allocation of the burden of proof on reasonableness includes an additional layer of analysis. In their submission, once the Claimants have satisfied the burden to establish that a particular *measure* is reasonable, the burden shifts to the Respondent to establish that the *amount of costs* incurred in undertaking such measure is unreasonable. This is so, the Claimants say, because such challenge is tantamount to an affirmative defence of a failure to mitigate damage.[619]

334. The Tribunal finds no basis to adopt the twofold analysis proposed by the Claimants. The reasonableness requirement for the compensation of incidental damages is connected to

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615 Track III Hearing Transcript, Day 1 (18 August 2022), p. 35 (Paulsson).

616 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (10): "There is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation. In some cases, the criterion of 'directness' may be used, in others 'foreseeability' or 'proximity'. But other *factors* may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm was caused within the ambit of the rule which was breached, having regard to the purpose of that rule." (emphasis by the Tribunal)

617 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (34).

618 Procedural Order No. 65, 10 July 2020, para. 76.

619 Track III Hearing Transcript, Day 6 (25 August 2022), p. 1253 (Coriell).

the reasonableness criterion underlying the duty to mitigate but must not be conflated with it. When compensation is sought for incidental damages, reasonableness arises as a requirement for *compensation* under Article 36 of the ILC Articles and as such it must be established by the party requesting compensation. The breaching party may challenge the reasonableness of the amounts sought, but such challenge should not be equated to a failure to mitigate as an affirmative defence against a request for *reparation* (Article 31 of the ILC Articles), which seeks to address the injured party's failure to act reasonably when confronted by the *injury* and preclude recovery to that extent.[620] It is not concerned with the injured party's failure to mitigate *its own conduct*.

335. Consequently, having claimed compensation for incidental damages, the onus is on the Claimants to prove the reasonableness of both the mitigation measures they undertook and the amounts spent in connection with each of those measures.[621]

336. Lastly, the Parties have also briefed the Tribunal extensively regarding the applicable test for reasonableness as regards incidental damages.[622] Having assessed the materials before it, the Tribunal finds no need and no basis to formulate a comprehensive test for reasonableness in the abstract and detached from the factual matrix of the case: no such test has been fully settled yet in international law,[623] and in any event, as already noted elsewhere by the Tribunal, a reasonableness analysis is always context-dependent.[624] It is however prepared to accept, as agreed by the Parties, that the test for reasonableness is an

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620 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11): "Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the *injury*." (emphasis by the Tribunal).

621 *See e.g.* **RLA-738**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 305, fn 217: "In cases where a claimant seeks recovery of the cost of litigation with third parties, he will have to show that it was reasonable for him to defend in those proceedings, in addition to establishing the reasonableness of the amount of professional costs"; **RLA-722**, *Iran v. United States*, Cases Nos. A15 (IV) and A24-FT, Award No. 590- A15(IV)/A24-FT, 28 December 1998, para. 102: "The Tribunal expects Iran to show in the second phase of these proceedings what expenses it incurred with respect to each specific case and what was the particular justification for the specific sums it spent."

622 *See*, *inter alia*, Track III Hearing Transcript, Day 6 (25 August 2022), pp. 1261-1264 (Coriell), pp. 1266-1269 (Tsutieva).

623 **RLA-738**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 306: "Since international law has not yet developed its own intellectual tools of assessing whether particular expenditure has been incurred reasonably, national experiences will be of use."

624 Partial Award on Track III, para. 182.

objective one.[625] It also accepts necessity as a component of reasonableness, albeit not as an independent requirement of the test under international law, which finds no clear support in the authorities filed by the Parties. Proportionality – which is embedded separately in the test for proximate causation as regards compensation[626] – may also be regarded as a component of reasonableness when understood as proportionality between the measures undertaken and the mitigation goals sought by the injured party.[627]

337. The Tribunal has taken note of other factors suggested by the Parties as pertaining to the reasonableness test when applied to legal fees and expenses conceptualized as incidental damages.[628] The key factors or indicia proposed by the Claimants include the following:

(i) There is a presumption of reasonableness and deference to a claimant's business judgment.

(ii) Payment of legal fees and expenses without a guarantee of recovery constitutes strong evidence of reasonableness.

(iii) Reasonableness is assessed at the relevant time, not with the benefit of hindsight.

(iv) Consistent success constitutes evidence of reasonableness.

(v) Reasonableness is a range, not a fixed point.[629]

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625 Track III Hearing Transcript, Day 6 (25 August 2022), p. 1261 (Coriell), p. 1270 (Tsutieva).

626 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 34, Commentary (5): "The issue is whether the principle of proportionality should be articulated as an aspect of the obligation to make full reparation. In these articles, proportionality is addressed in the context of each form of reparation, taking into account its specific character . . . Compensation is limited to damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote."

627 **RLA-738**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 306: "This standard inevitably calls for a case-by-case consideration as to whether the mitigation expenses were reasonably incurred in the circumstances of a particular claim. It appears that the reasonableness of incidental expenses may generally be assessed by examining the *proportionality* of the measures taken in order to achieve the claimants' legitimate objectives." (emphasis in original)

628 Track III Hearing Transcript, Day 6 (25 August 2022), pp. 1263-1264 (Coriell), pp. 1264-1276 (Tsutieva).

629 Track III Hearing – Claimants' Presentation on Question 5 (25 August 2022), Slide 12; Track III Hearing Transcript, Day 6 (25 August 2022) pp. 1263-1264 (Coriell).

338. In turn, the Respondent's proposed factors include:

(i) A showing that the Claimants "were reasonably compelled in the prudent defense of their interests to undertake particular decisions",[630] which must be "a reasonable perception in light of the situation prevailing at the time".[631]

(ii) Fees must be the product of reasonable billing judgment by lawyers.[632]

(iii) Regardless of actual spending, all fees are subject to scrutiny for reasonableness and necessity.[633]

(iv) It is "ludicrous to treat the spending of hundreds of millions of dollars of legal fees as some kind of market determination that tribunals and courts are not permitted to review."[634]

339. The Tribunal will assess these factors in full within the context of each head of damages later in this Award. At this stage it will only share the observations that follow.

340. First, it is common ground between the Parties that reasonableness should be assessed contemporaneously and not with the benefit of hindsight. The Tribunal accepts this proposition as being consistent with Article 36 of the ILC Articles.

341. Accordingly, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific mitigation measures to undertake in real time,[635] particularly so in view of the global risk of enforcement of the Lago Agrio Judgment and the need to coordinate actions in multiple jurisdictions. However, the Tribunal finds no basis in international law for the proposition that the Claimants' exercise of business

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630 Track III Hearing Transcript, Day 6 (25 August 2022), p. 1265 (Tsutieva).

631 Track III Hearing Transcript, Day 6 (25 August 2022), p. 1270 (Tsutieva).

632 Track III Hearing Transcript, Day 6 (25 August 2022), p. 1268 (Tsutieva).

633 Track III Hearing Transcript, Day 6 (25 August 2022), p. 1271 (Tsutieva).

634 Track III Hearing Transcript, Day 6 (25 August 2022), p. 1274 (Tsutieva).

635 **RLA-817**; *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award of the Tribunal, 13 November 2019, para. 427: "Finally and in any event, the Tribunal notes that the record contains ample evidence of the Claimants' multiple efforts to mitigate the consequences of the loss of access to the land. This is not a surprise as mitigating the loss was primarily in the Claimants' interest. Absent compelling evidence to the contrary, the Tribunal is not prepared to speculate whether the Claimants should have exercised a better business judgment, for instance, by growing certain crops on specific parcels of land."

judgment could support a legal presumption of reasonableness. It is, at most, evidence supporting an inference of reasonableness to be weighed along with all other evidence.[636]

342. Similarly, the Tribunal is also prepared to accept 'payment without a guarantee of recovery' and 'consistent success' as indicia of reasonableness but not as dispositive factors. Such factors might assist to varying extents the Tribunal's reasonableness analysis, more so when establishing reasonableness in terms of the measures taken and to a lesser degree at the level of the amounts spent. Faced with the extraordinary figures claimed as incidental damages in Track III,[637] the Tribunal must conduct a particularly thorough review to satisfy itself, with sufficient confidence, that the amounts spent were reasonable in the circumstances.[638]

343. In any event, the Tribunal is wary of accepting any of the above factors as proxies for the causal link required under international law.[639] Regardless of the impact of such factors on the question of reasonableness, the Claimants must still establish that any mitigation measures undertaken sought to repair damage and otherwise mitigate loss caused by (the risk of) the recognition and enforcement of the Lago Agrio Judgment.

4. Date of Injury

(a) Introduction

344. The Tribunal will now address a particular point of contention between the Parties regarding temporal limits in compensation: is there a cut-off date (or dates) prior to which

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636 **CLA-665**, Separate opinion of Judge Holtzmann, *Sylvania Technical Systems, Inc. v. Iran* (1985) 8 Iran-US C.T.R 298, cited in *ADC Affiliate Limited v. Hungary*, ICSID Case No. ARB/03/16, 2 October 2016, 534.

637 The amount claimed by the Claimants for legal fees and expenses is USD 793,879,967.74 (Reply, Updated Appendix 2, p. 1). The Tribunal takes note of Respondent's following contention in this regard at Track III Hearing Transcript, Day 2 (19 August 2022), p. 227 (Schwartz): "12 years ago, Chevron's General Counsel declared: 'We're going to fight this until hell freezes over, and then we will fight it on the ice.' That call to arms pervades every single component of the extraordinary damages claim now before you. This was a holy war for Chevron, and it remains so to this day. In the Lago Agrio Litigation, and in every other proceeding it spawned worldwide, Chevron applied a level of overkill that only a corporate behemoth of its size could afford. It hired armies of lawyers and unleashed them on its adversaries, real and imagined. It threw its guidelines for outside counsel out the window. It empowered its lawyers to spend indiscriminately and, not surprising, that's exactly what they did. Far from exercising billing judgment, they went on a feeding frenzy, to borrow Professor Paulsson's phrase."

638 *See* para. 549 *ff* below.

639 *See* para. 328 above.

the Claimants are precluded from claiming damages in respect of each of the Respondent's internationally wrongful acts?[640]

345. The Respondent answers this temporal question in the affirmative: it submits that the Claimants are not entitled to claim any legal expenses incurred before the breaches found by the Tribunal were consummated by the decision of the Constitutional Court dated 27

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[640] The Tribunal recalls that the Parties were invited to address multiple facets of this question during the Track III Hearing.

First, on 19 August 2022 (Day 2 of the Track III Hearing), the Tribunal requested the Parties to prepare targeted presentations on the following questions: "1) How does each Party reconcile their proposed dates for the breach(es) of the Treaty (or the commencement thereof) with the Tribunal's decisions in the Operative Part of the Second Partial Award on Track II: a. "that the Respondent, by issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador, wrongfully committed a denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty" (paragraph 10.5, emphasis added); b. "that the said Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) decided only diffuse claims as distinct from individual claims for personal harm by the Lago Agrio Plaintiffs, whereby the Respondent violated its obligations towards the First Claimant and the Second Claimant as "Releasees" under the 1995 Settlement Agreement" (paragraph 10.8, emphasis added); and c. "that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law" (paragraph 10.18) and that "[t]he Respondent (by its judicial branch), in declaring the Lago Agrio Judgment to be enforceable with the Lago Agrio Appellate Court's order of 1 March 2012 and the Lago Agrio Court's enforcement order of 3 August 2012, did not comply with this Tribunal's Orders and Interim Awards" (paragraph 7.130)? 2) As regards the claimed pre-breach damages: a. Does the "obligation to make full reparation for the [a] injury [b] caused by [c] the internationally wrongful act" under Article 31 of the ILC Articles cover alleged damages having arisen prior to the breach of an international obligation? In other words, can they form part of the "injury" if they precede the internationally wrongful act? b. If so, how should they be characterized? As direct damages, as incidental damages (including mitigation costs), or otherwise? 3) Does the Second Partial Award on Track II provide any guidance as regards whether the Respondent's denial of justice constitutes a composite act under Article 15(1) of the ILC Articles? What is, if any, the relevance of Article 15(2) of the ILC Articles to the assessment of compensation in this case?" (*see* Letter from the Tribunal to the Parties dated 19 August 2022).

The Parties made presentations on Questions 3), 1), and 2) in the above quote, respectively, on Days 5, 11 and 12 of the Track III Hearing (*see* Track III Hearing Transcript, Day 5 (24 August 2022), pp. 971-982 (Paulsson), 983-992 (Tsutieva); Day 11 (1 September 2022), pp. 2600-2614 (Sobota), 2614-2624 (Tsutieva); Day 12 (2 September 2022), pp. 2787-2802 (Paulsson), 2802-2816 (Tsutieva)).

In addition, on Day 12 of the Track III Hearing (2 September 2022) the Tribunal put additional questions to the Parties in order to assist them in preparing their closing statements, including the following: "9) Suppose hypothetically that (i) the acts of the Ecuador courts in accepting the LAPs' application in 2004 and (ii) the acts of Judge Yánez in 2006 had been nullified by an appeal court in Ecuador in, say, 2008. Would those acts of 2004 and 2006 now amount to breaches of the Treaty? 10) Suppose hypothetically that Judge Zambrano had been apprehended for judicial bribery on the eve of issuing the Lago Agrio Judgment in 2011. Would the bribery now amount to a breach of the Treaty? 11) Suppose hypothetically that (i) the acts of the Ecuador courts in accepting the LAPs' application in 2004 and (ii) the acts of Judge Yánez in 2006, had not been nullified at any time by an appeal court in Ecuador. Would any purported breach of the Treaty on account of those acts arise in 2004, 2006, or when the requirements of the Denial of Justice doctrine have been exhausted without nullification of those acts? From which date would (a) the duty to make reparation, and (b) any duty to pay pre-award interest, arise? 12) Suppose hypothetically that the Lago Agrio Judgment had been overturned by the Cassation Court in 2013. Would the Lago Agrio Judgment now amount to breach of the Treaty?" (*see* Letter from the Tribunal to the Parties dated 2 September 2022).

June 2018. This is so, the Respondent says, because judicial decisions do not constitute breaches of international obligations until they become final outcomes of the judicial system as a whole.[641]

346. In turn, the Claimants consider the Respondent's "consummation-date theory" to be at odds with "basic principles of causation and damages" and posit that "elementary principles of damages for breach of contract ensure the recoverability of losses caused by the breach, whether past or future."[642]

347. The Tribunal considers it inappropriate to apply, without more, principles of contractual damages to the temporal assessment of injuries under international law as suggested by the Claimants, unless such principles find a direct and distinct equivalent within the realm of international law. Similarly, however, the Tribunal considers that the Respondent's proposed notion of 'date of breach' does not provide conclusive answers for the assessment of damages under international law. Article 31 of the ILC Articles makes no reference to the date of breach as a yardstick for the assessment of an injury. Naturally, the date of consummation of a breach remains a relevant heuristic to the extent that the injury must follow from the breach – and will therefore normally be composed of elements that also follow the unfolding of the breach in time. However, the definition of injury and causation under international law is broader than a factual analysis of cause and consequence and cannot be "satisfactorily solved by search for a single verbal formula".[643] The subject of reparation is the *injury* arising from and ascribable to an international wrongful act.[644] Thus, while causation under international law must be assessed on a case-by-case basis, to the extent that temporal limits may be relevant to this assessment, the date of the *injury* may provide a more accurate basis to ascertain those limits than the date of the *breach*.

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641 Counter-Memorial, para. 243.

642 Reply, paras. 152-153.

643 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (10).

644 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (9).

348. The foregoing is confirmed by the special features of this case, which, as already stated above, concerns complex acts as treaty breaches and transnational injuries. As also stated, however, the causation analysis required in Track III is substantially simplified in view of the Tribunal's Track II determination that the recognition and enforcement of any part of the unremedied Lago Agrio Judgment is the primary source of the injury caused by the Respondent's internationally wrongful acts.

349. The question remains nonetheless as to the appropriate date (or dates) that should act as a reference point from which the damages claimed can be said to have been "caused by" the Respondent's internationally wrongful acts. In accordance with the above, the Tribunal determines in this Section the applicable 'dates of injury' for direct damages and incidental damages, each requiring a distinct analysis.

(b) Date of injury for direct damages

350. The Tribunal can readily determine the appropriate anchor point for direct damages. By necessary implication, the Track II finding that the recognition and enforcement of the Lago Agrio Judgment is the primary source of the Claimants' injuries leads to the conclusion that the appropriate reference point for proximate causation purposes is 1 March 2012, the date on which the Lago Agrio Judgment became enforceable as a result of the Appellate Court's judgment and order.[645] Therefore, prospectively as from that date, any injury caused by the recognition and enforcement of the Lago Agrio Judgment in the proximate causation sense – again, any direct damage – must be repaired by the Respondent as a matter of principle.

351. In this respect, the Tribunal must disagree with the Respondent's proposition that damages only started to flow from the Respondent's internationally wrongful acts as from the date of the judgment of the Constitutional Court (27 June 2018), only as of which point the Respondent considers that a breach was consummated. In view of the unusual factual matrix of this case, it would be misguided to conflate the date of crystallisation of

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645 *See* Track II Award, para. 4.462: "*1 March 2012*: By its Order of 1 March 2012, the Lago Agrio Appellate Court denies Chevron's request of 23 February 2012. It confirms that the Lago Agrio Judgment, as upheld by the Appellate Court, is now enforceable. This Tribunal treats the Order of 1 March 2012 as the certificate of enforceability in Ecuador of the Lago Agrio Judgment by the Respondent. It was issued and maintained in non-compliance with the Tribunal's several Orders for Interim Measures."

the Treaty breaches with the date on which the injury caused to the Claimants started to flow from the breaches. Such approach would effectively exclude from a damages award any injury resulting from the enforcement of the "clearly improper and discreditable" Lago Agrio Judgment during the six years that lapsed between the date it became enforceable and the date of the judgment of the Constitutional Court.[646] In other words, it would leave materially unremedied the prolonged enforcement of a corrupt judgment that violates international public policy – an outcome that would severely undermine the prohibition against denial of justice.[647]

352. Critically, an assessment of the wrongfulness of prior conduct is only possible at this juncture because the Respondent's internationally wrongful acts have now been fully consummated, giving rise to the Respondent's obligation of reparation under international law at least in respect of the Denial of Justice and Umbrella Clause Breaches.[648] While the cause of action for denial of justice does not arise until a wrongful judicial act is combined with the exhaustion of all reasonably available and effective recourses against it, the wrongful conduct encompassed by the prohibition of denial of justice is not limited to the rejection of the final potential local remedy to a wrongful decision. Even more to the point, it does not render somehow licit the unremedied effects of outrageous judicial conduct underpinning a denial of justice.[649]

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646 Track II Award, para. 8.60.

647 *See* Track II Award, paras. 9.16, 10.10.

648 Track II Award, paras. 10.6, 10.9. In respect of the Interim Awards Breach, *see* Track II Award, paras. 10.18-10.20; para. 377 below.

649 Track II Award, para. 9.16: "[A]s to the right of a party to receive a fair hearing before an impartial tribunal, the Tribunal has already referred to Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Articles 2 and 6 of the UN Basic Principles on the Independence of the Judiciary. The violation of such a right by judicial corruption is proscribed by the UN Convention against Corruption ratified by the General Assembly on 31 October 2003 (to which the Respondent is a Contracting Party). In *World Duty Free* (2006), in the context of corruption by bribery, the tribunal identified, as a matter of international public policy, an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora. It concluded: 'In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States . . .' In the Tribunal's view, judicial bribery must rank as one of the more serious cases of corruption, striking directly at the rule of law, access to justice and public confidence in the legal system; and also, as regards the foreign enforcement of a corrupt judgment, at the law of nations. Accordingly, the Tribunal concludes that the Lago Agrio Judgment (with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts) violates international public policy. As a matter of international comity, it must follow that the Lago Agrio Judgment should not be recognised or enforced by the courts of other States."

353. Within the context of the foregoing analysis, the question whether the Denial of Justice Breach amounts to a 'composite act' in the sense of Article 15 of the ILC Articles – a matter that was extensively debated between the Parties – is irrelevant. Accordingly, it will not be addressed by the Tribunal.

(c) Date of injury for incidental damages

354. The Tribunal's conclusion that 1 March 2012 (the date on which the Lago Agrio Judgment was rendered enforceable) is the starting date for direct damages does not, however, extend to incidental damages, which originate from a different source – *i.e.*, the need to attempt to minimize the injury arising from an internationally wrongful act, as opposed to the injury flowing directly from the act itself – and are thus not coextensive. Put differently, the date on which the LAPs initiated their attempts to have the Lago Agrio Judgment recognized and enforced in multiple jurisdictions need not necessarily coincide with the date on which the Claimants started to incur legal fees and expenses in an attempt to mitigate the injury by thwarting those efforts.

355. The Claimants request compensation for incidental damages starting as early as 1 January 2004 – the date on which, in their submission, the Respondent began to violate the terms of the 1995 Settlement Agreement and thus the Umbrella Clause.[650] This raises the question of whether incidental damages can pre-date the injury flowing directly from the Respondent's internationally wrongful acts or even the acts themselves.

356. The appropriate anchor point for incidental damages needs to be ascertained by reference to each of the Respondent's internationally wrongful acts: the Denial of Justice Breach, the Umbrella Clause Breach, and the Interim Awards Breach. Each is addressed now in turn.

357. *Denial of Justice Breach*: The Tribunal's declarations pertaining to the Denial of Justice Breach in its Track II Award read:

> 10.4 The Tribunal declares that material parts of the Lago Agrio Judgment of 14 February 2011 (as clarified by order of 4 March 2011) were corruptly 'ghostwritten' for Judge Nicolás Zambrano Lozada, as a judge of the Lago Agrio Court, by one or more of the Lago Agrio Plaintiffs' representatives in return for a promise by such

650 Reply, para. 164.

representative(s) to pay to Judge Zambrano a bribe from the proceeds of the Lago Agrio Judgment's enforcement by the Lago Agrio Plaintiffs;

10.5 The Tribunal declares that the Respondent, by *issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment* (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) *and knowingly facilitating its enforcement outside Ecuador*, wrongfully committed a denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty;

10.6 The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant for denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty; and the Tribunal rejects the defences pleaded by the Respondent;[651]

358. The Tribunal recalls that its declarations regarding denial of justice were carefully circumscribed to specific facts and actors,[652] as already stated in its Partial Award on Track III:

> The Tribunal's finding of denial of justice is twofold. At paragraph 10.4, the Tribunal makes a factual finding in respect of the Lago Agrio Judgment: material parts thereof were corruptly 'ghostwritten' for Judge Zambrano by one or more of the Lago Agrio Plaintiffs' representatives. At paragraph 10.5, the Tribunal makes a further factual and legal finding: the Respondent's "issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment" and "knowingly facilitating its enforcement outside Ecuador" constitutes a denial of justice. As such, the 'ghostwriting' of the Lago Agrio Judgment and the Respondent's failure to correct the corrupt Judgment are the factual centrepieces of the Tribunal's finding of denial of justice. No findings are made there in respect of other aspects of the Lago Agrio Litigation, the Tribunal having expressly stated that "[s]ave as aforesaid, the requests for relief made by the [Parties] for decision in this Track II are not granted".[653]

359. The Tribunal there also stated that the actions of third parties had significance only as background elements for the Denial of Justice Breach:

> In sum, while the Tribunal deemed proven the improper conduct of the LAPs' representatives and other related actors in the above excerpts of the Track II Award, it attributed no significance to their actions other than as background elements of the Respondent's denial of justice; indeed, the Tribunal laid emphasis upon the fact that (i) such individuals "[were] not the object of the exercise required for [the Track II Award] under the Treaty applying international law"; and (ii) their conduct was not the cause of the Claimants' injuries – it was at most a "necessary condition". As such, the conduct of those third parties is solely "evidence establishing 'ghostwriting'", that is, proven facts upon

651 Track II Award, paras. 10.4-10.6 (emphasis by the Tribunal).

652 Partial Award on Track III, para. 125.

653 Partial Award on Track III, para. 116.

> which the Tribunal drew the conclusion that the Lago Agrio Judgment was 'ghostwritten', which is the factual underpinning of the Respondent's Treaty breach.[654]

360. In these paragraphs, the Tribunal confirmed its finding that the conduct of third parties pre-dating the 'ghostwriting' of the Lago Agrio Judgment "was not the cause of the Claimants' injuries": the earliest instance forming part of the Denial of Justice Breach was the issuance of the 'ghostwritten' judgment on 14 February 2011. Thus, as a matter of causation in fact, any events pre-dating the issuance of the Lago Agrio Judgment bear no relevance to the Claimants' injuries because they do not form part of the Denial of Justice Breach in the first place – they are 'background elements', as stated above.

361. Thus, any harm arising before the issuance of the Lago Agrio Judgment cannot constitute loss arising from the Denial of Justice Breach because it cannot be causally connected to any event of the series of the breach, which the Respondent committed "by issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador".[655]

362. The question is, therefore, whether incidental damages are compensable in principle if they were incurred starting as of the first event in the series of the Denial of Justice Breach: the date of issuance of the Lago Agrio Judgment (14 February 2011). The Tribunal considers that they are. A different conclusion would discourage mitigation efforts in the face of a clear impending injury. As from that date, the risks attached to the enforcement of the Lago Agrio Judgment, already described above, were no longer a matter of hypothesis: the findings of liability in the Lago Agrio Judgment made the potential and extent of its enforcement foreseeable beyond any reasonable doubt. Coupled with the fact that such expenses were incurred within the ambit of the chain of events constituting the Denial of Justice Breach, the Tribunal considers that a sufficient causal link exists as from 14 February 2011 between such expenses and the injury flowing

654 Partial Award on Track III, para. 124.

655 Track II Award, para. 10.5.

directly from the Denial of Justice Breach to satisfy the causation test for incidental damages under Article 36 of the ILC Articles.[656]

363. For these purposes, it is immaterial whether those incidental expenses were incurred with the purpose of minimizing the loss arising from the enforcement of the Lago Agrio Judgment ("whether by attachment, arrest, interim injunction, execution or howsoever otherwise"),[657] preventing the Lago Agrio Judgment from becoming enforceable after it was issued in the first place, or, to the extent such efforts were unsuccessful, thereafter seeking to render it unenforceable, as any of these courses of action would have served to mitigate the injury.

364. *Umbrella Clause Breach*: The analysis of incidental damages arising from the Umbrella Clause Breach leads to the same conclusion that the appropriate date of injury for incidental damages is 14 February 2011, the date of issuance of the Lago Agrio Judgment. As explained in the paragraphs that follow, this conclusion flows from the substantial factual overlap between the Denial of Justice Breach and the Umbrella Clause Breach.

365. For context, the Tribunal recalls that the Umbrella Clause Breach as declared in the Track II Award builds on the Tribunal's rulings in prior decisions and awards.

366. In its Partial Award on Track I, the Tribunal determined that both Claimants are "Releasees" under the 1995 Settlement Agreement and the 1998 Final Release and can therefore invoke their contractual rights thereunder. The Tribunal also determined that while the scope of such releases "does not extend to any environmental claim made by an individual for personal harm in respect of that individual's rights separate and different from the Respondent", "it does have legal effect under Ecuadorian law precluding any 'diffuse claim'" against the Claimants:

> (1) The First Claimant ("Chevron") and the Second Claimant ("TexPet") are both "Releasees" under Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release;
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> (2) As such a Releasee, a party to and also part of the 1995 Settlement Agreement, the First Claimant can invoke its contractual rights thereunder in regard to the release in

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656 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (34). *See also* para. 328 above.

657 *See* Track II Award, para. 10.13(ii).

Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release as fully as the Second Claimant as a signatory party and named Releasee;

(3) The scope of the releases in Article 5 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release made by the Respondent to the First and Second Claimants does not extend to any environmental claim made by an individual for personal harm in respect of that individual's rights separate and different from the Respondent; but it does have legal effect under Ecuadorian law precluding any "diffuse" claim against the First and Second Claimants under Article 19-2 of the Constitution made by the Respondent and also made by any individual not claiming personal harm (actual or threatened);[658]

367. In its subsequent Decision on Track I(B), a majority of the Tribunal decided that the Lago Agrio Complaint of 7 May 2003, as originally filed, included individual claims going beyond the scope of the releases and thus cannot be read (as the Claimants asserted and the Respondent denied) as pleading "exclusively" or "only diffuse claims". Accordingly, the Lago Agrio Complaint was not wholly barred at its inception by res judicata, under Ecuadorian law, by virtue of the 1995 Settlement Agreement:

(1) The Lago Agrio Complaint of 7 May 2003, as an initial pleading, included individual claims resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement (as invoked by the Claimants);

(2) The Lago Agrio Complaint was not wholly barred at its inception by res judicata, under Ecuadorian law, by virtue of the 1995 Settlement Agreement (as invoked by the Claimants);[659]

368. A majority of the Tribunal confirmed these findings of the Decision on Track I(B) in the Track II Award as part of the declaration of the Umbrella Clause Breach.[660] By doing so, it effectively rejected the proposition that the Respondent breached its obligations under the Treaty by assuming jurisdiction over the Lago Agrio Complaint:

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658 Partial Award on Track I, para. 112 (1)-(3).

659 Decision on Track I(B), para. 186 (1)-(2). *See also* Decision on Track I(B), Note of Dissent by Arbitrator Horacio Grigera Naón, paras. 7-9: "For the above reasons, I respectfully disagree with the Decision and its conclusions, including that the Complaint does not fall within the scope of the 1995 Settlement Agreement, consider that it is premature to address in any way at the present stage, on the basis of a limited record, and without simultaneously taking into account the circumstances mentioned in paras. 140-142 of the Decision, whether the Lago Agrio claims are or are not covered by the 1995 Settlement Agreement, and further also consider that the issues raised by the nature or characterization of the Lago Agrio claims and whether they are encompassed or not by the 1995 Settlement Agreement require being addressed in Track 2 of this arbitration in the light of the Parties' pleadings as to the 'collective' or 'diffuse' nature of such claims and the factors alluded to in the Decision's paras. 140-142."

660 Track II Award, paras. 10.7-10.9.

> Conversely, the Tribunal has *not* found the Respondent in breach of its obligations under the Treaty from the facts only that: (i) the Lago Agrio Plaintiffs commenced legal proceedings against Chevron before the Lago Agrio Court on 7 May 1993; (ii) the Lago Agrio Plaintiffs pleaded individual claims for personal harm against Chevron in their original Complaint filed in the Lago Agrio Litigation (not being diffuse claims); (iii) the Lago Agrio Court assumed jurisdiction over the Complaint (as regards non-diffuse claims), by reason of the undertaking in favour of Ecuadorian jurisdiction in the Aguinda Litigation;. . .[661]

369. Echoing its findings on the Denial of Justice Breach, the Tribunal also declared in the Track II Award that the Lago Agrio Judgment, left materially unremedied by the Lago Agrio Appellate, Cassation and Constitutional Courts, breached the 1995 Settlement Agreement. In its entirety, the Umbrella Clause Breach declaration reads:

> 10.7 The Tribunal (by a majority) declares, confirming its Decision on Track IB, that the Lago Agrio Complaint of 7 May 1998, as an initial pleading, included individual claims (for personal harm) resting upon individual rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement and that, therefore, the Lago Agrio Complaint was not wholly barred at its inception by res judicata under Ecuadorian law, by virtue of the 1995 Settlement Agreement;
>
> 10.8 The Tribunal *declares that the said Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) decided only diffuse claims* as distinct from individual claims for personal harm by the Lago Agrio Plaintiffs, *whereby the Respondent violated its obligations towards the First Claimant and the Second Claimant as "Releasees" under the 1995 Settlement Agreement*;
>
> 10.9 The Tribunal declares that the Respondent is liable to make full reparation to the First Claimant and the Second Claimant under Article II(3)(c) of the Treaty for the non-observation of its obligations towards each of them as a "Releasee" under the 1995 Settlement Agreement; and the Tribunal rejects the defences pleaded by the Respondent;[662]

370. Earlier in the Track II Award, the Tribunal identified the same set of facts as the factual underpinning of the Umbrella Clause Breach:

> In its First Partial Award, the Tribunal decided that Chevron and TexPet were both "Releasees" under Article 5.1 of the 1995 Settlement Agreement and Article IV of the 1998 Final Release. The Tribunal also decided that Chevron and TexPet could invoke their contractual rights as "Releasees" against the Respondent in regard to "diffuse" claims (as there described).

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661 Track II Award, para. 9.5 (emphasis by the Tribunal).

662 Track II Award, paras. 10.7-10.9 (emphasis by the Tribunal).

> In the Tribunal's view, such contractual rights correspond to an 'obligation' by the Respondent towards each of Chevron and TexPet within the meaning of the Umbrella Clause in Article II(3)(c) of the Treaty.
>
> *In Parts IV and V of this Award, the Tribunal has found that the Lago Agrio Judgment, with the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts, rests upon finding Chevron liable for diffuse claims in noncompliance with the Respondent's obligations to release Chevron (with TexPet and Texaco) from such liability under the 1995 Settlement Agreement.*
>
> In the Tribunal's view, by the acts of its judicial branch, attributable to the Respondent under Article 4 of the ILC Articles on State Responsibility, the Respondent violated its obligations under Article II(3)(c) of the Treaty, thereby committing international wrongs towards each of Chevron and TexPet.[663]

371. In view of the substantial factual overlap between the Denial of Justice and Umbrella Clause Breaches – whereby the same judgment, left unremedied, breached both Treaty standards – the Tribunal considers that the rationale applicable to causation within the ambit of the Denial of Justice Breach is applicable also to the Umbrella Clause Breach. Nothing in the Umbrella Clause Breach alters the conclusion that the Lago Agrio Judgment, once rendered enforceable, became the primary source of direct damage for the Claimants by way of its recognition and enforcement. For the same reason, incidental expenses geared towards mitigating any such harm that were incurred after the issuance of the Lago Agrio Judgment on 14 February 2011 remain compensable under the Umbrella Clause Breach. Lastly, as gleaned from above, the issuance of the Lago Agrio Judgment is the first event in the series of the Umbrella Clause Breach – just as it is for the Denial of Justice Breach – thereby excluding any harm arising before the issuance of the Lago Agrio Judgment from the scope of the compensable injury in this case.

372. *Interim Awards Breach*: Lastly, the Tribunal turns to the Interim Awards Breach. The Tribunal's declaration in its Track II Award as regards the Interim Awards Breach is as follows:

> The Tribunal confirms, as declared in its Fourth Interim Award on Interim Measures dated 7 February 2013, that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law;[664]

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663 Track II Award, paras. 8.5-8.8 (emphasis by the Tribunal).

664 Track II Award, para. 10.18.

373. For full context, the Tribunal in its Track II Award also said:

> The Respondent (by its judicial branch), in declaring the Lago Agrio Judgment to be enforceable with the Lago Agrio Appellate Court's order of 1 March 2012 and the Lago Agrio Court's enforcement order of 3 August 2012, did not comply with this Tribunal's Orders and Interim Awards.[665]

374. The Tribunal will address separately below the Respondent's argument that the First and Second Interim Awards have been superseded by the Track II Award and the Respondent's request for reconsideration of the First, Second and Fourth Interim Awards. For present purposes, the Tribunal limits its analysis to the issues that follow.

375. First, nothing in the Interim Awards Breach alters the conclusion that the recognition and enforcement of the Lago Agrio Judgment is the primary source of injury warranting mitigation (see paragraph 350 above). Those injuries are also the very harm that the Tribunal sought to prevent through its various orders and awards on interim measures, as noted in its Fourth Interim Award:

> The Tribunal determines that the Lago Agrio Judgment was made final, enforceable and subject to execution within Ecuador by the Respondent no later than 3 August 2012 (upon its judiciary's certifying the Lago Agrio Judgment's enforceability), in violation of the Tribunal's First and Second Interim Awards requiring the Respondent, respectively, "to take all measures at its disposal" and "to take all measures necessary" to suspend or cause to be suspended the enforcement and recognition both within and without Ecuador of that Lago Agrio Judgment.
>
> Thereafter, the status accorded by the Respondent to the Lago Agrio Judgment led directly to what the Tribunal was seeking expressly to preclude temporarily by its orders and awards on interim measures, namely the attempted enforcement and execution of the Lago Agrio Judgment against the First Claimant (with its subsidiary companies) by persons acting in the name of the Lago Agrio plaintiffs not only within but also outside Ecuador, currently in the state courts of Canada, Brazil and Argentina and possibly in the near future also in the state courts of other countries.[666]

376. Similarly, nothing in the Interim Awards Breach alters the subsequent conclusion that 1 March 2012 is the appropriate reference date for direct damages. Indeed, in its Track II Award, the Tribunal confirmed such date as the moment of consummation of the Interim Awards Breach:

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665 Track II Award, para. 7.130.

666 Fourth Interim Award, paras. 79-80.

> *1 March 2012*: By its Order of 1 March 2012, the Lago Agrio Appellate Court denies Chevron's request of 23 February 2012. It confirms that the Lago Agrio Judgment, as upheld by the Appellate Court, is now enforceable. This Tribunal treats the Order of 1 March 2012 as the certificate of enforceability in Ecuador of the Lago Agrio Judgment by the Respondent. It was issued and maintained in non-compliance with the Tribunal's several Orders for Interim Measures.[667]

377. Second, having already determined that direct damages and incidental damages are compensable in principle under the Denial of Justice and Umbrella Clause Breaches, the Tribunal need not decide whether they are independently compensable in connection with the Interim Awards Breach. While it is faced with multiple violations of the Treaty, the Tribunal is not called upon to assess separately the damages arising from each individual breach and add up those damages to produce a total amount of compensation. Indeed, the Claimants have clarified that they have "three independent legal bases on which to claim each category of damages", with each base corresponding to the Denial of Justice, Umbrella Clause and Interim Awards Breaches.[668] For this reason, and also in view of the Tribunal's finding that the recognition or enforcement of the Lago Agrio Judgment is the ultimate source of all injuries inflicted upon the Claimants, the Tribunal considers it appropriate to establish a single measure of reparation.

5. But-for Scenario

378. The Tribunal's determinations in the previous sections and in the Partial Award on Track III have simplified the analysis required for the Respondent's but-for argument, which was extensively debated between the Parties.

379. For ease of reference, the Respondent in its Counter-Memorial summarized its but-for argument as follows:

> Under principles of international law . . . in order to prevail in their damages claims, Claimants must prove what the situation would in all probability have been if there had been no Treaty breaches, and what legal expenses and risk of judgment they would in all

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667 Track II Award, para. 4.462. *See also* Track II Award, para. 7.130, fn 100: "In its Fourth Interim Award, the Tribunal decided that the Lago Agrio Judgment was made "final, enforceable and subject to execution within Ecuador by the Respondent no later than 3 August 2012". The Tribunal relied (inter alia) upon the Respondent's submissions at the hearing on 11 February 2012 (see February Hearing D1.167ff). For present purposes, the difference of some four months between 1 March and 3 August 2012 is not material." The Tribunal considers that the difference remains immaterial at this stage in the proceedings and confirms its finding that 1 March 2012 is the date at which the Lago Agrio Judgment became final, enforceable and subject to execution for the purposes of this Arbitration.

668 Reply, para. 672.

> probability have faced in that situation. Specifically, Claimants must show what portion, if any, of any otherwise claimable legal expenses Chevron would not have had to incur in Treaty-compliant proceedings to defend against the LAPs' individual claims that were *not settled* by the 1995 Settlement Agreement as found by the Tribunal, in light of both the risk of any judgment against them that was reasonably possible and global enforcement of that judgment.
>
> But Claimants have made no such showing. Indeed, Claimants have failed even to address the situation that would in all probability have occurred had the breaches of the Treaty been avoided. This failure is fatal to all of Claimants' claims. They quite simply have failed to meet their burden of proving this fundamental element of the international law standard for compensatory damages.[669]

380. Thus, reduced to its essence, the but-for argument as particularized by the Respondent requires that the Tribunal determine the legal costs and expenses that the Claimants would have incurred in hypothetical Treaty-compliant proceedings and reduce the Claimants' damages to that extent. Otherwise, says the Respondent, the Tribunal would not re-establish the situation which would, in all probability, have existed if that act had not been committed, as required under *Chorzów Factory*, but would rather leave the Claimants in a better position than they would have been absent the Treaty breaches.

381. The Claimants state that the Respondent's proposed approach finds no basis in *Chorzów Factory* and in any event consider that such but-for analysis is inappropriate in a denial of justice case.[670]

382. In its Partial Award on Track III, the Tribunal decided in a preliminary fashion several questions raised by the Claimants in connection with the Respondent's but-for argument. It there confirmed that *Chorzów Factory* provides the applicable rule of decision under international law for present purposes:

> The Tribunal observes that *Chorzów Factory* did not concern full reparation arising from an international denial of justice within the context of a domestic litigation. Thus, it did not directly address whether the "situation which would, in all probability, have existed" if the denial of justice had not occurred should be circumscribed to the claims as put before the domestic court and the underlying record of the litigation. The Tribunal has been assisted by argument from both sides on this question, but remains convinced that *Chorzów Factory* provides the applicable rule of decision under international law. While the legal authorities cited by the Parties could potentially provide guidance to the Tribunal at the stage of assessing the full merits of the but-for scenario, none of them purports to restate the

669 Counter-Memorial on Damages, para. 940.

670 Reply, paras. 594-595.

> *Chorzów Factory* standard under the paradigm of denial of justice or articulate an alternative rule by which to assess proximate causation in such a scenario.[671]

383. The Tribunal also made certain determinations regarding the scope of the applicable but-for scenario. Among other things, it confirmed that it would not countenance a but-for scenario that involves the protracted assertion against the Claimants of rights that did not survive the 1995-1998 Settlement and Release Agreements as determined in the Tribunal's previous decisions, or plaintiffs beyond the original 48 LAPs:

> Therefore, the question before the Tribunal is whether it should restrict its but-for analysis to the "claims actually pursued by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record" to establish "the situation which would, in all probability, have existed" if the Treaty had not been breached by the Respondent.
>
> Inevitably, the Tribunal's but-for analysis must depart from the factual matrix that led to the international delict that did in fact occur, as it provides the vantage point from which the Tribunal can discern that which would 'in all probability' have occurred, absent a Treaty breach, from other scenarios that arise only as a matter of possibility. In this case, the filing of the Lago Agrio Complaint, which the Tribunal has determined was not wholly barred at its inception by *res judicata*, is the triggering event of the Lago Agrio Litigation, which culminated in the Respondent's denial of justice. As such, the Lago Agrio Complaint constitutes a central and irremovable element of the chain of causation of the Treaty breach.
>
> From this standpoint, the Tribunal is not persuaded that a but-for exercise envisaging a complaint of a materially different magnitude than the one that was in fact presented before the Lago Agrio Court is a useful heuristic for proximate causation in this instance. Alternative scenarios envisaging substantially different theories of the case, numbers of plaintiffs or bodies of evidence than those that can be expected from the original complaint and surrounding circumstances pertain to the realm of possibility, but they are not effective depictions of that which would have occurred "in all probability" but-for the Treaty breach as required under *Chorzów Factory*. Such hypotheticals are too far removed from the factual matrix of the case to amount to anything other than speculation unconstrained by the actual historical record. In particular, the Tribunal will not countenance a but-for scenario that involves the protracted assertion of rights that did not survive the Settlement and Release Agreements as determined in the Tribunal's previous decisions, or plaintiffs beyond the original 48 LAPs.[672]

384. The Tribunal's prior determinations in this Award regarding the applicable dates of injury for direct and incidental damages have further reduced the scope of the but-for scenario. As already established, the injury flowing from the Respondent's internationally wrongful acts began no earlier than 14 February 2011 for the purposes of claiming incidental damages, being the date of issuance of the Lago Agrio Judgment and also the

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671 Partial Award on Track III, para. 171.

672 Partial Award on Track III, paras. 172-174.

earliest event in the series comprising the Respondent's Treaty breaches.[673] Accordingly, the date of issuance of the Lago Agrio Judgment is the appropriate departure point for any counterfactual analysis seeking to compare the situation which would in all probability have occurred absent the Treaty breaches from that which unfolded in the real world – and, critically, the legal expenses incurred by the Claimants in either scenario.

385. An analysis of the circumstances at the time of issuance of the Lago Agrio Judgment is thus in order.

386. At the outset, the Tribunal recalls that the Lago Agrio Judgment addressed and decided the LAPs' claims exclusively as "diffuse" claims only and not as individual claims made by a plaintiff seeking compensation for personal harm.[674] While, as decided by a majority of the Tribunal, the original Lago Agrio Complaint did include individual claims resting upon individual rights,[675] such claims were ultimately not adjudicated by the Lago Agrio Court.[676]

387. In respect, first, of these "diffuse" claims, the Tribunal has already held that it will "decide Track III in a manner consistent with its prior determination that the diffuse right under Article 19-2 of the 1998 Constitution was settled in full. It will under no circumstances accept a but-for scenario in which such settlement is rendered illusory."[677] Nor will the Tribunal accept, as stated in the quote in paragraph 383 above, a but-for scenario that involves the protracted assertion of "diffuse" claims that did not survive the 1995-1998 Settlement and Release Agreements.[678] Consistent with these determinations, the Tribunal must therefore reject any but-for scenario in which the Ecuadorian judiciary upholds these "diffuse" claims. Indeed, full reparation for an injury that started to flow in the real world upon the issuance of the findings of liability in the discreditable Lago Agrio Judgment[679] must be based on a but-for world in which such claims are rejected. That is

673 *See* paras. 350, 362 above.

674 Track II Award, paras. 5.121-5.133.

675 Decision on Track I(B), para. 186(1); Track II Award, para. 10.7.

676 Track II Award, para. 10.8.

677 Partial Award on Track III, para. 164.

678 Partial Award on Track III, para. 174.

679 *See* para. 362 above.

what the *Chorzów* formula mandates when it says that reparation "must, as far as possible, wipe out all the consequences of the illegal act". Any other conclusion would allow part of the injury to persist.

388. The "individual" claims pleaded in the Lago Agrio Complaint merit a separate analysis. The Tribunal has already determined that the Lago Agrio Judgment did *not* adjudicate these claims.[680] The Parties disagree, however, as to the underlying reason for such omission. The Claimants submit that the LAPs abandoned these individual claims,[681] whereas the Respondent asserts that they remained pending for adjudication, even if the Lago Agrio Judgment ignored them in favour of the "diffuse" claims.[682]

389. The fact remains that the Lago Agrio Judgment did not adjudicate the individual claims. Whether abandoned or simply ignored, the point of departure of the but-for scenario must thus be a hypothetical Lago Agrio Judgment that does *not* include an adjudication of these individual claims. If the assessment is what would have "in all probability" occurred in the but-for world, the only hypothetical judgment consistent with the prevailing factual matrix at the time of issuance of the Lago Agrio Judgment is one excluding individual claims.

390. Accordingly, the applicable but-for scenario should depart from a hypothetical Lago Agrio Judgment that dismisses the diffuse claims and at best ignores the individual claims.

391. This but-for scenario does not necessarily presume no appeal of the hypothetical Lago Agrio Judgment by the LAPs. However, it remains an open question what appellate level would have been reached in the counterfactual and whether any remaining individual claims would have ultimately been adjudicated by the upper courts (even presuming they were not abandoned at the trial court stage). What is clear, however, is that any appellate proceedings would have been much more limited in terms of scope and stakes than the real-world Lago Agrio Litigation.

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680 Track II Award, para. 10.8. *See also* fn 659 above regarding Dr Grigera Naón's dissent on this question.

681 Reply, para. 602.

682 Respondent's Second Submission on the Request for a Partial Award, para. 176; Rejoinder, para. 442.

392. The Tribunal derives two key implications from this but-for scenario. First, it is improbable that the Claimants would have continued to involve several international firms in the Lago Agrio Litigation when faced with a regular appeal of a hypothetical regular trial court judgment – still a significant litigation, but orders of magnitude removed from the stakes involved in the actual Lago Agrio Judgment. A team of local Ecuadorian counsel would have in all likelihood satisfied any ongoing litigation needs at the appellate stage. In turn, international law firms would have been involved to a much less significant degree and in all probability in a strict supervisory capacity or serving as liaison with the Claimants' headquarters in the United States.

393. Second, faced with more limited stakes, the fees and expenses of such teams of local and international counsel would have likely been only a portion of those that were effectively generated by the actual Ecuadorian team representing the Claimants in the real-world Lago Agrio Litigation.

394. Accordingly, in the Tribunal's view, the fees and expenses generated respectively by local and international counsel in the real-world Lago Agrio Litigation can be appropriately be regarded as caps on the fees that the Claimants would have incurred in the but-for world. A portion of those fees represents the amount of legal fees and expenses that the Claimants would have incurred in all probability but-for the Treaty breaches and which should therefore be discounted from the Claimants' damages award as per *Chorzów Factory.* The Tribunal will determine the exact amount of these discounts as part of its more comprehensive analysis of the Lago Agrio Litigation in Section VIII.A below.

395. In sum, in accordance with the applicable principles of causation under international law as enshrined in *Chorzów Factory*, the Tribunal concludes that the Claimants' damages claim must be reduced by a portion of the amount of legal fees and expenses generated by local Ecuadorian counsel and international counsel in the real-world Lago Agrio Litigation to re-establish the situation which would, in all probability, have existed if the Respondent's Treaty breaches had not been committed. Indeed, such costs could be considered as falling within the normal costs of doing business in Ecuador. The determination of this amount is addressed later in this Award.

6. Conclusions on Causation

396. For the foregoing reasons, the Tribunal determines, subject to a showing of proximate causation from the Claimants as examined later in this Award, that any direct damage sustained by the Claimants starting as of 1 March 2012 as a result of the recognition and enforcement of the Lago Agrio Judgment, whether by attachment, arrest, interim injunction, execution or howsoever otherwise, shall in principle be injuries for which the Respondent is bound to make reparation under international law.

397. The Tribunal also determines, subject to showings of causation and reasonableness from the Claimants as examined later in this Award, that any incidental damages sustained by the Claimants starting as of 14 February 2011 seeking to repair damage and otherwise mitigate loss arising from the recognition and enforcement of the Lago Agrio Judgment shall in principle be injuries for which the Respondent is bound to make reparation in the form of compensation under international law.

398. Lastly, the Tribunal determines that the Claimants' damages claim must be reduced by a portion of the amount of legal fees and expenses generated by local Ecuadorian counsel and international counsel in the real-world Lago Agrio Litigation to re-establish the situation which would, in all probability, have existed if the Respondent's Treaty breaches had not been committed. The determination of this amount is addressed later in this Award.[683]

399. The above conclusions are subject to the Tribunal's further rulings on other matters in dispute as set forth below.

B. NON-COMPLIANCE WITH INTERIM AWARDS

1. Introduction

400. As noted above, the Interim Awards Breach is one of the three alternative bases upon which the Claimants claim compensation in Track III.[684] Unlike the Denial of Justice and Umbrella Clause Breaches, which were accompanied by declarations specifically

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683 *See* paras. 731-738, 2291(ii) and 2292(iii) below.

684 Reply, para. 672.

requiring full reparation for those breaches in the Track II Award,[685] the Interim Awards Breach rests solely upon a declaration of breach.[686]

401. In Track III, the Respondent raises three issues in connection with the Interim Awards Breach. The Respondent argues, first, that the First and Second Interim Awards, being provisional in nature, have been superseded by the Track II Award. Second, it requests a decision on its application of 1 March 2013 for the reconsideration of the Tribunal's First, Second and Fourth Interim Awards. Third, it denies that the Interim Awards Breach can give rise to compensation. As the Tribunal understands the Respondent's submissions, the Respondent's argument on supersession and its request for reconsideration seek ultimately to render moot any claim for damages for the Interim Awards Breach in Track III.[687]

402. To address the issues raised by the Respondent in Track III in connection with the Interim Awards Breach the Tribunal must first recall the full context of the First, Second and Fourth Interim Awards.

403. By its First Interim Award, dated 25 January 2012 – that is, almost a year after the issuance of the Lago Agrio Judgment on 14 February 2011 – the Tribunal ordered the Respondent "to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case".[688] While clarifying that it would remain subject to modification and was without prejudice to the merits of the Parties' substantive and other procedural disputes, the Tribunal confirmed that the First Interim Award was to take

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685 Track II Award, paras. 10.6, 10.8.

686 Track II Award, para. 10.18.

687 Counter-Memorial, para. 1350; Rejoinder, paras. 1873-1876: "The Tribunal should not award any damages for alleged breaches of the interim measures or awards. This is true for several independent reasons. The First and Second Interim Awards lapsed when the Tribunal issued its Track II Second Partial Award; the interim measures are no longer required to avoid "aggravation" of the dispute, which has now been resolved on liability. . . As to any separate damages for "past violations" of the First and Second Interim Awards, Respondent has already shown that there is no authority or precedent for the Tribunal to issue monetary compensation for the violation of its interim measures, and Claimants' Reply adds nothing to the discussion. Claimants are not entitled to compensation for any such non-compliance, and if the Tribunal disagrees, the interim awards should be reconsidered."

688 First Interim Award, Section (VI), para. 2(i).

effect forthwith as an Interim Award under Articles 26 and 32 of the UNCITRAL Arbitration Rules, "being immediately final and binding upon all Parties as an award".[689]

404. Shortly following the First Interim Award, by the Second Interim Award of 16 February 2012 the Tribunal ordered *inter alia* the following measures:

> ***(i)*** the Respondent (whether by its judicial, legislative or executive branches) to take all measures necessary to suspend or cause to be suspended the enforcement and recognition within and without Ecuador of the judgments by the Provincial Court of Sucumbíos, Sole Division (*Corte Provincial de Justicia de Sucumbíos, Sala Unica de la Corte Provincial de Justicia de Sucumbíos*) of 3 January 2012 and of 13 January 2012 (and, to the extent confirmed by the said judgments, of the judgment by Judge Nicolás Zambrano Lozada of 14 February 2011) against the First Claimant in the Ecuadorian legal proceedings known as "the Lago Agrio Case";
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> ***(ii)*** in particular, without prejudice to the generality of the foregoing, such measures to preclude any certification by the Respondent that would cause the said judgments to be enforceable against the First Claimant; and
>
> ***(iii)*** the Respondent's Government to continue to inform this Tribunal, by the Respondent's legal representatives in these arbitration proceedings, of all measures which the Respondent has taken for the implementation of its legal obligations under this Second Interim Award;

405. As the First Interim Award, the Second Interim Award had the effect of an interim award, "being immediately final and binding upon all parties as an award", subject to modification and made strictly without prejudice to the merits of the Parties' substantive and other procedural disputes.[690] The Second Interim Award also determined that the First Interim Award would continue to have effect subject to the terms of the Second Interim Award.[691]

406. On 7 February 2013, after the Lago Agrio Judgment had been rendered enforceable by the Ecuadorian judiciary by the Order of 1 March 2012,[692] the Tribunal issued its Fourth

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689 First Interim Award, Section (VI), paras. 3-6.

690 Second Interim Award, paras. 7-9.

691 Second Interim Award, para. 6.

692 Track II Award, para. 4.462. *See also* Track II Award, para. 7.130, fn 100: "In its Fourth Interim Award, the Tribunal decided that the Lago Agrio Judgment was made "final, enforceable and subject to execution within Ecuador by the Respondent no later than 3 August 2012". The Tribunal relied (inter alia) upon the Respondent's submissions at the hearing on 11 February 2012 (see February Hearing D1.167ff). For present purposes, the difference of some four months between 1 March and 3 August 2012 is not material." As already noted, the Tribunal considers that the difference remains immaterial at this stage in the proceedings and confirms its finding that 1 March 2012 is the date at which the Lago Agrio Judgment became final, enforceable and subject to execution for the purposes of this Arbitration.

Interim Award. It there re-confirmed the terms and the binding effect of the First and Second Interim Awards under the Treaty, the UNCITRAL Arbitration Rules and international law:

> The Tribunal confirms and restates with full force and effect its earlier orders and awards on interim measures. Each of these orders and awards was and remains binding upon the Parties under the Treaty, the UNCITRAL Rules and international law. Under Article VI of the Treaty and Article 32(3) of the UNCITRAL Rules, the Parties undertook to carry out any award without delay, including the First and Second Interim Awards on Interim Measures of 25 January and 16 February 2012.[693]

407. With the above preamble, the Tribunal declared that, by its judiciary rendering the Lago Agrio Judgment enforceable, the Respondent had violated the First and Second Interim Awards:

> As regards the Respondent, these orders and awards were directed not only to the Respondent's executive branch but to all branches and organs that make up the Respondent as a State, including its judiciary and legislature. Neither disagreement with the Tribunal's orders and awards on interim measures nor constraints under Ecuadorian law can excuse the failure of the Respondent, through any of its branches or organs, to fulfil its obligations under international law imposed by the Treaty, the UNCITRAL Rules and the Tribunal's orders and awards thereunder, particularly the First and Second Interim Awards on Interim Measures.
>
> The Tribunal determines that the Lago Agrio Judgment was made final, enforceable and subject to execution within Ecuador by the Respondent no later than 3 August 2012 (upon its judiciary's certifying the Lago Agrio Judgment's enforceability), in violation of the Tribunal's First and Second Interim Awards requiring the Respondent, respectively, "to take all measures at its disposal" and "to take all measures necessary" to suspend or cause to be suspended the enforcement and recognition both within and without Ecuador of that Lago Agrio Judgment.[694]

408. Critically as regards compensation, the Tribunal on this basis ordered the Respondent to show cause why it should not compensate the First Claimant for any harm caused by the Respondent's violations of the First and Second Interim Awards:

> Accordingly, the Tribunal requires the Respondent to show cause to this Tribunal why the Respondent should not now compensate the First Claimant for any harm caused by the Respondent's violations of the First and Second Interim Awards in regard to the Lago Agrio Judgment's enforcement and execution, both within and outside Ecuador. The Tribunal intends presently to establish a further procedural timetable to address such compensation

693 Fourth Interim Award, para. 77.

694 Fourth Interim Award, paras. 78-79 (*see also* Part IV, para. 1).

> (including any issues as to causation and quantification) in consultation with the Parties, by a further procedural order.[695]

409. On 1 March 2013, the Respondent submitted its request for reconsideration of the First, Second and Fourth Interim Awards.[696] By its Procedural Order No. 16, the Tribunal decided that the "show cause" procedure would also address this request for reconsideration.[697]

410. Lastly, the Tribunal's Track II Award, dated 30 August 2018, confirmed the Interim Awards Breach and left the "show cause" issues and the Respondent's request for reconsideration for further submissions in Track III:

> 10.18 The Tribunal confirms, as declared in its Fourth Interim Award on Interim Measures dated 7 February 2013, that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law;[698]
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> 10.19 In accordance with the Tribunal's said Fourth Interim Award, at Paragraph 2 of Part IV (page 31), the 'show cause' issues relating to compensation claimed by the First and Second Claimants for the Respondent's violations of the said First and Second Interim Awards shall be addressed by the Parties in Track III of these arbitration proceedings;
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> 10.20 The Respondent's application of 1 March 2013 for the reconsideration of the Tribunal's First, Second and Fourth Interim Awards shall be further addressed by the Parties in Track III of these arbitration proceedings;

2. The Tribunal's Analysis

411. Having set out the relevant background for its decision, the Tribunal will now address the issues raised by the Respondent in connection with the Interim Awards Breach. The Tribunal does not consider it necessary for present purposes to decide every aspect of the Respondent's arguments. It will limit its analysis to the matters that follow.

412. The Tribunal turns first to the Respondent's argument that the First and Second Interim Awards have been superseded by the Track II Award. Reduced to its essence, the Respondent's argument is that the First and Second Interim Awards, being interim

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695 Fourth Interim Award, para. 81 (*see also* Part IV, para. 2).

696 Letter from the Respondent to the Tribunal dated 1 March 2013.

697 Procedural Order No. 16, 19 March 2013.

698 Track II Award, para. 10.18.

measures that are provisional in nature, cannot survive the rendering of the Tribunal's final award on the merits (the Track II Award), which includes several orders for injunctive relief "to the satisfaction of the Tribunal and as unconditional obligations of result."[699] In the Respondent's submission:

> Whether or not the interim measures were violated, at this post-liability stage, any injury allegedly suffered by Claimants as a result of the breaches of the First and Second Interim Awards is now superseded by their claim for monetary damages proximately caused by the Treaty breaches found by the Tribunal. Either Claimants are entitled to damages caused by the Treaty breaches or they are not. The interim measures do not play any part in that determination; time and process have left them behind.[700]

413. The Tribunal is not persuaded by the Respondent's argument. The Respondent seems oblivious of the Interim Awards Breach, as declared expressly in the Fourth Interim Award and confirmed in the Track II Award. The Tribunal there ruled that by violating the First and Second Interim Awards the Respondent was "in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law".[701] In other words, the Tribunal declared that the Respondent had committed a self-standing internationally wrongful act, independent of the Denial of Justice and Umbrella Clause Breaches. The rendering of the Tribunal's Track II Award cannot somehow retroactively "cure" the Interim Awards Breach confirmed in that same award, regardless of whether a series of interim measures form part of its factual background. Whatever legal consequences derive for the Respondent from the Interim Awards Breach, they cannot be negated by the Tribunal's finding of *other* Treaty breaches or by the fact that the First, Second and Fourth Interim Awards, being interim awards, were subject to the Tribunal's final determination on the merits of the dispute.

414. Second, the Tribunal turns to the Respondent's request for reconsideration of the First, Second and Fourth Interim Awards. For ease of reference, the grounds of the Respondent's request as summarized in its Counter-Memorial are as follows:

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699 Counter-Memorial, paras. 1351-1353; Rejoinder, paras. 1877-1880.

700 Rejoinder, para. 1880.

701 Track II Award, para. 10.18.

- The First and Second Interim Awards did not explicitly provide that the Respondent would be expected to violate its own Constitution and laws in order to comply;

- the premise of the First and Second Interim Awards (that harm to Claimants cannot be repaired by monetary compensation) is irreconcilable with the determination made in the Fourth Interim Award (that Respondent is now obliged to pay compensation for harm caused by breach of the First and Second Interim Awards);

- the Fourth Interim Award fails to acknowledge Respondent's consistent position that it is constrained by international law from preventing the enforceability of an otherwise enforceable domestic judgment;

- the Tribunal should revisit its reliance upon international law to conclude that the Respondent cannot invoke Ecuadorian law to excuse non-compliance with the Tribunal's First and Second Interim Awards;

- the question of whether a State Party has complied with the obligation in Article IV(6) of the Treaty is not justiciable before a tribunal constituted to determine an investment dispute; and

- Article VI(6) of the Treaty cannot be read in conjunction with Article 26 of the UNCITRAL Rules as conferring a legislative power upon an Article VI(3) tribunal to create a new international obligation for State Parties.[702]

415. The Tribunal has taken note of these arguments. However, to the extent that the Respondent seeks to have the Tribunal reconsider the Interim Awards Breach – again, the Tribunal's declaration in its Fourth Interim Award, as confirmed in the Track II Award, that the Respondent has violated the First and Second Interim Awards under the Treaty, the UNCITRAL Arbitration Rules and international law – the Tribunal is not in a position to do so. The Tribunal's Track II Award is immediately final and binding upon all Parties as an award under Article VI of the Treaty, Article 32(2) of the UNCITRAL Arbitration Rules and international law. To reconsider the Interim Awards Breach would be to infringe this basic tenet. Disagreement with the Tribunal's awards does not alter this conclusion.

416. Notwithstanding the foregoing, and as already stated above, the Tribunal remains mindful that the Respondent's argument that the First and Second Interim Awards have been superseded by the Track II Award and its request for reconsideration of the First, Second and Fourth Interim Awards seek ultimately to render moot any claim for damages arising

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[702] Counter-Memorial, para. 1365.

from the Interim Awards Breach.[703] In view of the Tribunal's decision in paragraph 377 above to establish a single measure of reparation on the basis of the Denial of Justice and Umbrella Clause Breaches alone, the Tribunal reiterates that it is unnecessary to decide whether compensation is warranted independently on the basis of the Interim Awards Breach. The losses said to have flowed from the Interim Awards Breach are subsumed within the losses flowing from the Denial of Justice and Umbrella Clause Breaches. For this reason, the Tribunal considers it unnecessary to address further the Respondent's arguments raised in connection with the Interim Awards Breach, to the extent it has not already done so.

3. Conclusions on Non-Compliance with Interim Awards

417. For the foregoing reasons, the Tribunal declines to reconsider and instead re-confirms, as declared in its Fourth Interim Award and confirmed its Track II Award, that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law.[704]

418. In view of its decision in paragraph 377 above to establish a single measure of reparation on the basis of the Denial of Justice and Umbrella Clause Breaches alone, the Tribunal considers it unnecessary to decide whether compensation is warranted independently on the basis of the Interim Awards Breach.

C. INTERNATIONAL SUBSIDIARIES

1. Introduction

419. The Claimants' damages claim is not limited to the losses they (the Claimants) suffered directly as a result of the Respondent's Treaty breaches. It also extends to the legal costs and expenses incurred by Chevron's wholly-owned subsidiaries inside and outside of Ecuador "in defending against the consequences of Ecuador's wrongs".[705] Their argument is predicated on several legal theories, including "reflective loss", good faith,

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703 Counter-Memorial, para. 1350; Rejoinder, paras. 1873-1876.

704 Track II Award, para. 10.18.

705 Reply, para. 400.

estoppel, and the fact that Ecuador allegedly treated Chevron and its subsidiaries as alter egos.[706]

420. The Respondent denies the proposition that the Claimants may under international law claim damages for losses suffered by third-country subsidiaries.[707] As a matter of fact, the Respondent further asserts that the Claimants have failed to prove that they actually suffered losses as a result of the legal fees and expenses incurred by its subsidiaries.[708]

421. At this stage, the Tribunal will limit its analysis to the question of whether Chevron may under international law claim damages for the losses suffered by its subsidiaries as a result of the Respondent's internationally wrongful acts. Whether the Claimants have proven such losses is a question of sufficiency of the evidence that will be addressed separately in Sections VIII and IX below.

2. Good Faith

422. As already noted, one of the approaches invoked by the Claimants to address the question of the recoverability of the losses suffered by Chevron's international subsidiaries is the principle of good faith as applied by the Tribunal in Track II. For the reasons that follow, the application of this principle leads to the conclusion that Chevron may in its own right claim damages for the losses caused to its international subsidiaries by the recognition and enforcement of the unremedied Lago Agrio Judgment.

423. The application of the good faith principle arose in Track II in connection with the Respondent's jurisdictional objections to Chevron's claims for lack of any relevant "investment" under Articles I(1), V(1)(a), V(1)(c), II(3)(a) and III(3)(c) of the Treaty.[709] As there explained by the Tribunal, the Claimants sought to preclude the Respondent from arguing that Chevron never had any assets in Ecuador on the basis that the Lago Agrio Judgment, being a product of the Respondent's judiciary, amalgamated Chevron

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706 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 78-79 (Bishop).

707 Counter-Memorial, paras. 306-308, 312-315; Rejoinder, paras. 479-481, 494-507.

708 Counter-Memorial, paras. 316-319; Rejoinder, paras. 482-483; Track III Hearing Transcript, Day 3 (22 August 2022), pp. 442-451 (Maidman).

709 Track II Award, para. 7.79.

and TexPet so as to hold Chevron liable for all wrongs committed by TexPet's and Texaco's activities in Ecuador:

> As the Claimants contend, the Respondent cannot, in good faith, 'have it both ways' as regards Chevron's "investment" in Ecuador. If the Respondent, through its judicial branch, took the position that Chevron had assets in Ecuador, standing in the shoes of TexPet and Texaco as the Lago Agrio Judgment states, the Respondent cannot now adopt the position that Chevron never had any assets in Ecuador, i.e. that it never had any investments in Ecuador. The Lago Agrio Judgment amalgamates completely Chevron with TexPet and Texaco as result of the "merger", so as to hold Chevron liable for all wrongs committed by TexPet's and Texaco's activities in Ecuador from 1964 onwards. Yet the Respondent in this arbitration now seeks, improperly according to the Claimants, to disassociate Chevron in full from any of TexPet's and Texaco's activities in Ecuador (including investments), for tactical jurisdictional purposes.[710]

424. The Tribunal there determined that the Arbitration Agreement derived from Article VI of the Treaty[711] precludes conduct by any Party in bad faith, calculated to defeat the object and purpose of the arbitration:

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710 Track II Award, para. 7.80.

711 For reference, Article VI of the Treaty provides, *inter alia*, as follows:

> Article VI(2): "In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
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> (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or
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> (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
>
> (c) in accordance with the terms of paragraph 3".
>
> Article VI(3): "(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
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> . . .
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> (iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); . . ."
>
> Article VI(4): "Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:
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> (b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention") . . ."

The Parties' obligations to resolve their dispute by consensual arbitration before an international tribunal derive from Article VI of the Treaty, subject to international law (as its applicable law). Under international law, as codified in Article 26 the Vienna Treaty on the Law of Treaties (the "VCLT"), parties are required to act in good faith in the performance of their obligations.

Article 26 of the VCLT provides: "Every treaty in force is binding upon the parties to it and must be performed in good faith". The International Law Commission stated in its commentary to the VCLT that: "In the case of treaties, . . . there is the special consideration that the parties by negotiating and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith." In *Nuclear Tests* (1974), the International Court of Justice decided: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith". That was decided in regard to unilateral declarations made by a State. In the ILC's subsequent "Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations" (2006), the first guiding principle declared that the binding character of such unilateral declarations "is based on good faith."

The Parties' mutual consent to arbitration derived from Article VI of the Treaty is not, [of] course, a treaty between two States. The Parties' consent is contained in the separate Arbitration Agreement subject to international law between the Claimants and the Respondent, that was formed upon the Claimants' written acceptance (by their Notice of Arbitration) of the Respondent's standing, general offer to arbitrate contained in Article VI of the Treaty. Under international law, the Parties' Arbitration Agreement, made pursuant to Article VI(2) of the Treaty, is legally autonomous, or "separable", from other provisions of the Treaty. This is not a State-State arbitration under the Treaty (as to which the Treaty contains a separate provision in Article VII). This investor-State arbitration was therefore commenced by the Claimants in their own right, not deriving from the USA's espousal of their claims. Moreover, the Parties' Arbitration Agreement incorporates Article 21(2) of the UNCITRAL Arbitration Rules, which recognises the legal autonomy of an arbitration provision physically, but not legally, contained in a substantive agreement. The Tribunal refers to the legal analysis of Article VI of the Treaty made by the US Court of Appeals for the Second Circuit in its judgment of 17 March 2011 in the New York Stay Legal Proceedings, to the effect that the Parties "have created a separate binding agreement to arbitrate" (see Part IV(G)(6) above).

In the Tribunal's view, the Parties' offer and acceptance imported into the Arbitration Agreement an obligation derived from the Treaty requiring all Parties to exercise their rights and to perform their obligations in good faith in the conduct of this arbitration. This obligation of good faith applies both to substantive provisions, such as Articles II(3)(a) and II(3)(c), but also to Article VI of the Treaty. Conversely, the Arbitration Agreement precludes conduct by any Party in bad faith, calculated to defeat the object and purpose of arbitration under Article VI of the Treaty: see, particularly, the Treaty's Preamble as to "fair and equitable treatment of investment" (set out in Part III(B) above), as interpreted under Article 31(1) of the VCLT. Moreover, where the lex arbitri is international law, the

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Article VI(5): "Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention."

Article VI(6): "Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement."

> obligation of good faith as a general principle of international law (with the meaning of Article 38(1)(c) of the ICJ Statute) applies to the Arbitration Agreement directly.[712]

425. Against this background, the Tribunal then established that the general principle of good faith under international law precludes a party's inconsistent statements calculated to thwart the integrity of the judicial process for its own benefit and to the other party's prejudice.[713] Within the context of this case, the Tribunal decided on the following application of the principle:

> Applying Article 26 of the VCLT and customary international law, the Tribunal decides that the Parties are bound to act in good faith in the exercise of their rights and the performance of their respective obligations under the Arbitration Agreement derived from Article VI of the Treaty. That duty of good faith precludes clearly inconsistent statements, deliberately made for one party's material advantage or to the other's material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can 'have it both ways' or 'blow hot and cold', to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.[714]

426. The Tribunal then noted the inconsistencies between the Lago Agrio Court's treatment of Chevron – which was treated as legally indistinct from Texaco and TexPet in the Lago Agrio Judgment – and the Respondent's position in the Arbitration, where it sought to distinguish between the respective legal personalities of Chevron and TexPet:

> The Lago Agrio Court, by the Lago Agrio Judgment, treated Chevron following the "merger" with Texaco in 2001, as legally indistinct from Texaco and TexPet (as described in Part V above). In particular, it was there decided (inter alia): " . . . the obligation to submit to Ecuadorian justice pending on Texaco Inc. was also transmitted to new company Chevron Texaco Corporation, *so that consequently Chevron Corp. cannot allege that it never operated in Ecuador to give grounds for lack of a legitimate opposing party*" (see Lines 299 to 302 of Annex 7 to Part V, emphasis here supplied). In other words, the Lago Agrio Judgment treated Chevron as if, like TexPet, it had operated in Ecuador from 1964 onwards as a party to the Concession Agreements of 1964 and 1973, with significant assets in Ecuador. Thus, according to the Lago Agrio Judgment (as upheld by the Lago Agrio Appellate and Cassation Courts), Chevron had assets equating [] to investments in Ecuador from 1964 onwards.
>
> These statements were unequivocally made in the Lago Agrio Judgment and left intact by the judgments of the Lago Agrio Appellate, Cassation and Constitutional Courts, forming part of the judicial branch of the Respondent. The acts of its judicial branch are attributable to the Respondent under international law: Article 4(1) of the ILC Articles on State

712 Track II Award, paras. 7.83-7.86.

713 Track II Award, paras. 7.87-7.105.

714 Track II Award, para. 7.106.

> Responsibility. The position of the Respondent by its judicial branch contrasts starkly with the position of the Respondent in this arbitration.
>
> Here, for its jurisdictional objections, the Respondent seeks to distinguish between the respective legal personalities of Chevron and TexPet (as also Texaco). The Respondent then seeks to draw, under Articles 1(1), II(3)(a), II(3)(c), VI(1)(a) and VI(1)(c) of the Treaty as regards relevant "investments", a material difference between Chevron on the one hand and TexPet (with Texaco) on the other. The Respondent contends unequivocally that, unlike TexPet, Chevron never had any presence in Ecuador, with no assets and no relevant investment in Ecuador. As described above, that difference is contradicted in the Lago Agrio Judgment.
>
> It is impossible for the Tribunal to reconcile the statements in the Lago Agrio Judgment as to the "merger" between Chevron, TexPet and Texaco with the submissions made by the Respondent in this arbitration. The Respondent's jurisdictional objections to Chevron's claims are manifestly inconsistent with the unequivocal statements made by the Respondent's own judicial branch in treating Chevron with TexPet and Texaco for all their activities in Ecuador from 1964 onwards.[715]

427. On this basis, the Tribunal concluded that the principle of good faith required the Respondent to treat Chevron as 'standing in the shoes' of TexPet, consistently with the statements made by the Respondent's judicial branch in the Lago Agrio Litigation, and accordingly upheld its jurisdiction over Chevron's claims:

> Applying the principle of good faith under international law to the exercise of rights and the performance of obligations under the Arbitration Agreement, the Tribunal decides that it is impermissible for the Respondent to 'blow hot and cold' or to 'have it both ways', to Chevron's detriment and to the Respondent's benefit. In other words, the Respondent cannot now defeat, under the principle of good faith, the object and purpose of the Arbitration Agreement derived from Article VI of the Treaty with a jurisdictional objection under Article 21 of the UNCITRAL Arbitration Rules treating Chevron so differently from TexPet and Texaco as regards assets and, therefore, "investments" in Ecuador from 1964 onwards. The Tribunal concludes that the Respondent is required in this arbitration, as a matter of good faith, to treat Chevron as 'standing in the shoes' of TexPet (with Texaco), consistently with the statements made and acted upon by the Respondent's judicial branch in the Lago Agrio Litigation.[716]

428. In the Tribunal's view, the application of the same principle of good faith under international law requires the Respondent in this Arbitration to treat the assets of Chevron's subsidiaries as indistinct from those of Chevron for the purposes of Track III.

429. By its order of 15 October 2012, the Lago Agrio Court ordered the execution of the Lago Agrio Judgment (the "**15 October 2012 Order**"). At its outset, in rejecting an

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715 Track II Award, paras. 7.108-7.111 (emphasis in original).

716 Track II Award, para. 7.112.

interlocutory petition brought by Chevron, the Lago Agrio Court recalls that the legal basis for the order is the doctrine of the piercing of the corporate veil, as already decided in a prior instance:

> . . .the petitioner must be reminded that it is not within the jurisdiction of this court to review, revisit or to give an opinion on what has already been ordered by the lower courts that have heard this case when ruling on the jurisdiction of each judge over the case. This is also the case with regards to the judgment being executed with respect to the exceptional doctrine of the piercing of the corporate veil and the disregard of the separate legal identity, since at this stage of the proceeding, it is not proper to question what has already been decided, but rather to enforce the ruling of the judgment being enforced.[717]

430. In the same vein, later in the order the Lago Agrio Court raises the proposition that the judiciary has the duty to correct the "improper and anti-social behaviour" of an "owner of rights and assets" who uses those assets "at its convenience" and at the same time declares those assets to be beyond its reach because they belong to a different another company of its corporate group:

> The idea that the owner of rights and assets, capable of invoking the rights and using the assets to its benefit and "at its convenience," can at the same time declare to the courts that these assets are not accessible to its creditors because supposedly they do not belong to it or are under the control of another company entity, is untenable and lacks an ethical and legal foundation. It is up to the administrators of justice to correct this improper and anti-social behavior, since it leads to the ignoring of orders issued by organs of the judicial branch, and this, after all, would destroy the social order. In this context, the actual possibility of enforcing a judgment (even if forcibly) is a cornerstone not only of the Administration of Justice, but of the Rule of Law, since to do otherwise would turn its decisions into mere recommendations, a useless thing, which would leave society without an effective system of conflict resolution, to open the way for one in which the strongest can impose their will.[718]

431. Against this background, and with Chevron being the sole named judgment debtor under the Lago Agrio Judgment,[719] the order stipulates that the execution of the Judgment is "applicable to the entirety of the assets of Chevron Corporation, until such time as the entire obligation has been satisfied."[720] Noting that it targets "a debtor that handles its investments in subsidiaries and affiliate companies, and has declared its refusal to comply with its obligations as set forth in the sentence under enforcement" the order states that

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717 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, pp. 2-3.

718 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, pp. 2-3.

719 **C-931**, Lago Agrio Judgment, p. 187; Track II Award, para. 8.9.

720 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, p. 2.

Chevron's assets "are composed of all the companies, affiliates and/or subsidiaries, listed in Attachment 21.1, as follows".[721] What follows is a list of dozens of Chevron's worldwide subsidiaries identified by name and place of incorporation, which thereby also became named judgment debtors of the Lago Agrio Judgment:[722]

> . . .since we are facing a debtor that handles its investments in subsidiaries and affiliate companies, and has declared its refusal to comply with its obligations as set forth in the sentence under enforcement, this explains the imposition of this enforcement of judgment over all assets owned by Chevron Corporation, with the understanding that these assets are composed of all the companies, affiliates and/or subsidiaries, listed in Attachment 21.1, as follows: Beta Offshore Nigeria Deepwater Limited, incorporated in Nigeria; Cabinda Gulf Oil Company Limited incorporated in Bermuda; Chevron and Gulf UK Pension Plan Trustee Company Limited incorporated in England; **Chevron Argentina S. R. L. incorporated in Argentina**; Chevron Australia Pty Ltd. incorporated in Australia; Chevron Australia Transport Pty Ltd. incorporated in Australia; Chevron (Bermuda) Investments Limited incorporated in Bermuda; Chevron Brasil Petróleo Limitada incorporated in Brazil; **Chevron Canada Finance Limited incorporated in Canada**; **Chevron Canada Limited incorporated in Canada**; Chevron Capital Corporation incorporated in Delaware (USA); Chevron Caspian Pipeline Consortium Company incorporated in Delaware (USA); Chevron Environmental Management Company incorporated in California (USA); Chevron Geothermal Indonesia, Ltd. incorporated in Bermuda; Chevron Global Energy Inc, incorporated in Delaware (USA); Chevron Global Power Company incorporated in Pennsylvania (USA); Chevron Global Technology Services Company incorporated in Delaware (USA); Chevron International (Congo) Limited incorporated in Bermuda; Chevron International Petroleum Company incorporated in Delaware (USA); Chevron Investments (Netherlands) Inc. incorporated in Delaware (USA); Chevron LNG Shipping Company Limited incorporated in Bermuda; Chevron Marine Products LLC incorporated in Delaware (USA); Chevron Mining Inc. incorporated in Missouri (USA); Chevron New Zealand incorporated in New Zealand; Chevron Nigeria Deepwater B Limited incorporated in Nigeria; Chevron Nigeria Deepwater D Limited incorporated in Nigeria; Chevron Nigeria Limited incorporated in Nigeria; Chevron Oil Congo (D.R.C.) Limited incorporated in Bermuda; Chevron Oronite Company LLC incorporated in Delaware (USA); Chevron Oronite Pte. Ltd. Incorporated in Singapore; Chevron Oronite S.A.S. incorporated in France; Chevron Overseas Company incorporated in Delaware (USA); Chevron Overseas (Congo) Limited incorporated in Bermuda; Chevron Overseas Petroleum Limited incorporated in the Bahamas; Chevron Overseas Pipeline (Cameroon) Limited incorporated in the Bahamas; Chevron Overseas Pipeline (Chad) incorporated in the Bahamas; Chevron Pakistan Limited incorporated in the Bahamas; Chevron Petroleum Chad Company Limited incorporated in Bermuda; Chevron Company incorporated in New Jersey (USA); Chevron Petroleum Limited Bermuda incorporated in; Chevron Philippines Inc. incorporated in the Philippines; Chevron Pipe Line Company incorporated in Delaware (USA); Chevron South Natuna B Inc., incorporated in Liberia; Chevron Synfuels Limited incorporated in Bermuda; Chevron Thailand Exploration and Production, Ltd. incorporated in Bermuda; Chevron (Thailand) Limited incorporated in the Bahamas; Chevron Thailand LLC incorporated in Delaware (USA); Chevron Transport Corporation Ltd incorporated in Bermuda; Chevron United

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721 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, p. 2.

722 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, pp. 2-3.

> Kingdom Limited incorporated in England and Wales; Chevron U.S.A. Holdings Inc. incorporated in Delaware (USA); Chevron U.S.A. Inc. incorporated in Pennsylvania (USA); Chevron Upstream and Gas incorporated in Pennsylvania (USA); Four Star Oil & Gas Company incorporated in Delaware (USA); Heddington Insurance Limited incorporated in Bermuda; Insco Limited incorporated in Bermuda; Iron Horse Insurance Co. incorporated in Vermont (USA); Oilfiel Consession [sic] Operator Limited incorporated in Nigeria; PT Chevron Pacific Indonesia incorporated in Indonesia; Saudi Arabian Chevron Inc. Delaware; Texaco Britain Limited England and Wales; Texaco Capital Inc. incorporated in Delaware (USA); Texaco Captain Inc. incorporated in Delaware (USA); Texaco Inc. Delaware; Texaco Overseas Holdings Inc. incorporated in Delaware (USA); Texaco Venezuela Holdings (I) Company incorporated in Delaware (USA); Traders Insurance Limited incorporated in Bermuda; TRMI-H LLC incorporated in Delaware (USA); Union Oil Company of California incorporated in California (USA); Unocal Corporation incorporated in Delaware (USA); Unocal International Corporation incorporated in Nevada (USA); Unocal Pipeline Company incorporated in California (USA); and West Australian Petroleum Pty Limited incorporated in Australia; inasmuch as we consider the declaration that they are all totally owned, directly or indirectly, by Chevron Corporation to be effective.[723]

432. In the above quotation, the Tribunal has highlighted in bold those of Chevron's subsidiaries against whom the LAPs eventually requested the enforcement of the Lago Agrio Judgment.[724] In the case of Argentina-based assets, the Lago Agrio Court further ordered the direct seizure of specific assets owned by Chevron's Argentinean and Danish subsidiaries citing to the Inter-American Convention on the Enforcement of Preventive Measures:

> Based on what has been stated as a preliminary measure the seizure of assets indicated by the petitioner, as indicated in the motion is ordered; that is: "A) Ownership interests ("membership interests" in Argentinean law) that CDC ApS and Norberto Priú S.R.L have in their name in Chevron Argentina S.R.L. B) Ownership interests ("membership interests" in Argentinean law) that CDC ApS and CDHC ApS have in their name in Norberto Priú S.R.L.;" consequently, and as the petitioner indicates, in relation to these goods the seizure covers "all economic rights associated with ownership interests or membership interests, as well as its withholding, which includes: The membership interests that CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS have the right to receive and which were issued as a consequence of exchange, capital subscription, exercise of preemptive rights and/or addition rights, supplementary membership interests to be issued according to article 151 of Law 19550 (t.o. 1984), capitalization of irrevocable investments, legal or optional reserves, reevaluation, states of accumulated results or other distributions in released membership interests, distribution of dividends in membership interests, or through mergers or spin-off of CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS by a new issue

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723 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, pp. 2-3 (emphasis by the Tribunal).

724 *See* **C-2349**, *Aguinda v. Chevron Corp*., Argentine National Trial Court 61, Case No. 91814/2012, Order, 6 November 2012 (for Argentina); **C-1380**, *Yaiguaje et al. v. Chevron Corp. et al*., Superior Court of Justice, Case No. CV-12-454778, Statement of Claim, 30 May 2012 (for Canada). In the recognition action initiated in Brazil the named defendant was Chevron Corporation (*see* **C-2815**, *Maria Aguinda Salazar et al. v. Chevron Corporation,* SE nº 8542 / EC (2012/0128296-4), Superior Court of Justice, Docket Sheet).

> of membership interests to replace the current interests of CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS, and by any other mechanism that involves any type of corporate restructuring or transformation of CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS, in which case the seizure will cover the interests or any other type of membership interest that replaces membership interests, and/or for any other cause or circumstance, with this list serving only as an example; any amount or quantity payable and/or delivered to CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS as a result of any reduction and/or reintegration of share capital, of irrevocable investments, of original issue or merger and any asset account, redemption, amortization and/or total or partial reimbursement of membership interests, or in final distribution of remaining assets of any type due to finalization of liquidation of CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS. Any amount or quantity payable and/or delivered to CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS as a result of any actual dividend payment made by CDC ApS, Norberto Priú S.R.L., and/or CDHC ApS in regards to the membership interests." Continuing with the petition, it also asks for the seizure of "C) Accounts that Chevron Argentina S.R.L. may have open at financial entities in the Republic of Argentina," and the "D) Proceeds that Chevron Argentina S.R.L. may have receivable as a result of its crude oil sales operations, conducted or to be conducted in the future, of the following companies: YPF S.A. (. . .), Shell Cía Argentina de Petróleo S.A. . . .), ESSO Petrolera Argentina S.R.L. (. . .), Petrobras Argentina (. . .)" but the official letter that requests the release "to the Central Bank of the Republic of Argentina, to notify the financial institutions that they should seize all accounts, deposits, credits, investments and/or any sum of present and/or future money, in Pesos or in Dollars, which is received for any reason and/or is available to Chevron Argentina S.R.L., and having deposited the frozen/seized sums in the judicial deposits bank, upon order of the intervening judge," shall be requested and ordered through the competent authority in the Republic of Argentina, in the same way as the "notification of the measure" to the companies indicated in section D) (YPF S.A.: Macacha Güemes 515, Ciudad Autónoma de Buenos Aires, República Argentina – Shell Cía Argentina de Petróleo S.A.: Av. Presidente R. S. Peña 788 2nd floor, Ciudad Autónoma de Buenos Aires, República Argentina – Esso Petrolera ARGENTINA s.r.l.: Carlos María della Paolera 265, 19th floor, Ciudad Autónoma de Buenos Aires, República Argentina – Petrobras Argentina S.A.: Maipú 1, Ciudad Autónoma de Buenos Aires, República Argentina.) and finally, according to what the petitioner has indicated, the seizure also extends to "E) Funds that Chevron Argentina S.R.L. has receivable in the court proceedings "Chevron Argentina S.R.L. v. Shell Argentina de Petróleo S.A. s-ordinary proceeding," underway before National Lower Commercial Court 17 – Office of the Secretary 34 (No. 073644, filed on May 22, 2012)."[725]

433. The majority of these assets were eventually attached by order of the Argentine judiciary in November 2012.[726]

434. The 15 October 2012 Order of the Lago Agrio Court – an organ of the Respondent's judiciary – must be attributed to the Respondent in accordance with Article 4 of the ILC Articles.[727]

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[725] **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, pp. 4-5.

[726] **C-2349**, *Aguinda v. Chevron Corp*., Argentine National Trial Court 61, Case No. 91814/2012, Order, 6 November 2012.

[727] *See* Track II Award, para. 7.109.

435. It follows that the Respondent, through the Lago Agrio Court, treated Chevron's assets as indistinct from those of its international subsidiaries for the purposes of the execution of the Lago Agrio Judgment. Critically, the order of the Lago Agrio Court sought to attach the assets of Chevron's international subsidiaries worldwide.[728] As noted above, the order was followed by enforcement actions in several jurisdictions outside of Ecuador.

436. In Track III, by contrast, the Respondent seeks expressly to preclude the recovery by Chevron of the losses suffered by its international subsidiaries.[729] It does so on the basis that the "Claimants have no legal right to Chevron's subsidiaries' assets, including claims to recover amounts that Chevron's subsidiaries spent on legal representation."[730] At this juncture, therefore, the Respondent seeks to draw a stark distinction between Chevron's assets and those of its subsidiaries to resist a claim for damages arising from the recognition and enforcement of the unremedied Lago Agrio Judgment.

437. Once again, therefore, the Tribunal finds it impossible to reconcile the statements made by the Respondent's judiciary – this time in the 15 October 2012 Order conflating Chevron's assets and those of its subsidiaries – with the submissions made by the Respondent in this Arbitration. By virtue of the principle in good faith in international law as applied to the exercise of rights and the performance of obligations under the Arbitration Agreement, the Tribunal concludes that the Respondent is required in this Arbitration, as a matter of good faith, to treat the assets of those of Chevron's subsidiaries listed in the 15 October 2012 Order of the Lago Agrio Court[731] as indistinct from those of Chevron, consistently with the statements made and acted upon by the Respondent's judicial branch in the Lago Agrio Litigation seeking to breach the corporate veil between Chevron and its subsidiaries for the purpose of executing the Lago Agrio Judgment.

438. As a result, the Tribunal concludes that Chevron may in its own right claim compensation in this Arbitration for the injuries to the assets of its subsidiaries listed in the 15 October

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728 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, p. 2.

729 Counter-Memorial, paras. 306-308; Rejoinder, paras. 479-481.

730 Counter-Memorial, para. 307.

731 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012.

2012 Order of the Lago Agrio Court[732] caused by the recognition and enforcement of the Lago Agrio Judgment.

439. The Tribunal has taken note of the Respondent's argument that the same principle of good faith must operate so as to preclude the Claimants' "new position that they share legal personalities with their subsidiaries for the purposes of damages", as opposed to the position held by Chevron's subsidiaries in enforcement proceedings, where they successfully achieved dismissal of enforcement actions against them by arguing that they had separate legal personalities.[733]

440. However, unlike the above application of the principle of good faith, which concerned statements made and acted upon by the Respondent through the Lago Agrio Court and statements made by the Respondent in this Arbitration, the Respondent's estoppel argument seeks to equate statements made by Chevron's *subsidiaries* in enforcement proceedings with statements made by Chevron *itself* in this Arbitration. What is more, when looked at more closely, the statements are not truly contradictory. Both Chevron and its subsidiaries maintain that treating them as a single entity is contrary to legal principle, even if they draw different consequences from this initial premise. The Tribunal considers these distinctions to be critical and on this basis rejects the Respondent's argument.

441. In closing, the Tribunal must recall once again for context purposes that the injury to Chevron through the recognition and enforcement of the unremedied Lago Agrio Judgment was always intended to take place outside of Ecuador, with Chevron's numerous associated companies around the world being the primary target:

> (1) *Transnational Enforcement*: Chevron had no significant realisable assets in Ecuador, whether owned directly or indirectly, before and after the "merger" with Texaco in 2001. Before the "merger", Chevron was a stranger to Texaco and TexPet. Texaco and TexPet had left Ecuador by 1992. Neither Texaco nor TexPet left behind any significant realisable assets in Ecuador. Following the "merger", therefore, Chevron's indirect ownership of Texaco and TexPet did not endow Chevron with any significant realisable assets in Ecuador.

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732 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012.

733 Rejoinder, para. 490.

> Outside Ecuador, however, Chevron, with its large group of associated companies, indirectly owned (and still owns) substantial assets, including ocean-going vessels, bank deposits around the world, and other properties. By their nature, vessels and bank deposits were and remain vulnerable to arrest, attachment or seizure by the Lago Agrio Plaintiffs upon the Lago Agrio Judgment's enforcement in multiple jurisdictions, especially *ex parte* without prior notice. Even if Chevron were in a position to discharge promptly such an order freezing a bank deposit or arresting a vessel, the damage to Chevron and its associated companies from such repeated actions could have been very significant (as it may still be).
>
> Hence, as confirmed by the "Invictus Memorandum" (see Part IV above), the Lago Agrio Plaintiffs' representatives always intended that the Lago Agrio Judgment should be enforced in multiple jurisdictions outside Ecuador, not limited to the USA. This Memorandum listed such other foreign jurisdictions expressly, including the Philippines, Singapore, Australia, Argentina, Brazil, Colombia, Venezuela, Canada, Kuwait, Nigeria, Saudi Arabia, South Africa, South Korea, Belgium, Indonesia, the Netherlands, the United Kingdom, Trinidad and Tobago, New Zealand and Russia. It would be possible to add many more jurisdictions to this list.
>
> The Lago Agrio Litigation was therefore likely to involve, from its outset, numerous national jurisdictions other than Ecuador. This feature makes the present case unusual. Earlier cases on denial of justice have concerned an alleged wrong and an alleged injury taking place within the same State. Here, the injury to Chevron was always intended to take place, at least in part, in one or more foreign jurisdictions elsewhere than Ecuador, whether by the enforcement of the Lago Agrio Judgment or by an enforced "amicable" settlement. Thus, the Lago Agrio Litigation was transnational in the broadest sense, as confirmed by the multiplicity of foreign lawsuits and arbitrations in the USA, Argentina, Brazil, Canada, the Netherlands and elsewhere following the issuance of the Lago Agrio Judgment.[734]

442. Indeed, this is not a case in which a claimant is attempting to circumvent the principle of corporate separateness vis-à-vis its subsidiaries to claim their losses as its own. It concerns the transnational enforcement of a corrupt judgment that is contrary to international public policy against the wholly-owned subsidiaries of an investor,[735] with those subsidiaries being the ultimate target of the fraud. While the Tribunal is not deciding the present question from the viewpoint of reflective loss, it must note, in passing, that it cannot obviate the economic impact on Chevron, as the holding company of its corporate group, of the losses incurred by its wholly-owned subsidiaries in defending against said

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734 Track II Award, paras. 7.24-7.27.

735 *See* **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, p. 2: "All the subsidiaries on the preceding list are totally owned, directly or indirectly, by Chevron Corporation."; Track III Hearing Transcript, Day 1 (18 August 2022), p. 78 (Bishop): "Now, in addition, Chevron is also entitled to recover under the 'reflective loss' principle because all of Chevron Corporation's subsidiaries are 100 percent owned by it, and therefore damage to its subsidiaries in the form of attorneys' fees is an equivalent loss to Chevron as the parent."

corrupt judgment, particularly in view of the global risk of enforcement of the Lago Agrio Judgment and the need to coordinate actions in multiple jurisdictions.[736]

443. In view of its above conclusions, the Tribunal does not consider it necessary to decide whether the Claimants are also entitled to claim compensation for losses incurred by Chevron's international subsidiaries under other theories proposed by the Claimants. For reasons of arbitral economy, the Tribunal declines to address them.

3. Conclusions on International Subsidiaries

444. For the foregoing reasons, the Tribunal declares that Chevron, as a matter of principle, is entitled to claim compensation in this Arbitration in its own right for the injuries to those of its subsidiaries listed in the 15 October 2012 Order of the Lago Agrio Court[737] caused by the recognition and enforcement of the Lago Agrio Judgment.

D. FAILURE TO MITIGATE

1. Introduction

445. According to the Respondent, the Claimants increased or exacerbated their legal costs by failing to pursue certain measures which, in its view, would have served to avert or at least mitigate the damage arising from the Respondent's Treaty breaches: (i) by failing to recuse Judge Zambrano; (ii) by failing to post a bond to suspend the enforceability of the Lago Agrio Judgment; (iii) by failing to file an action under the Ecuadorian Collusion Prosecution Act ('CPA'); and (iv) by initiating the RICO Litigation. The Respondent

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736 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 103-104 (Coriell): "Chevron had good reason to prepare itself to defend against enforcement in multiple jurisdictions, not just Argentina, Brazil, and Canada, where the cases were ultimately filed because a lot more were threatened. And so, mitigating against that risk meant looking at Invictus and seeing all of those target jurisdictions that were listed: Philippines, Singapore, Australia, Colombia, Venezuela, Angola, Chad, China--over a dozen more beyond those. All planned by the Lago Agrio Plaintiffs, as you see on screen: A global attachment risk; the threat to disrupt operations of Chevron worldwide; a leverage plan where the Lago Agrio Plaintiffs only have to win in one of 28 named jurisdictions in order to succeed. And by the way, where Chevron, until it defeats 28 possible enforcement actions, still faces the whole of that risks as to disruption of operations, attachments and things of that nature. So, that's the context. That's the risk. How can you reasonably expect to be successful in defending against it? How can you make sure that you'll go 28 for 28? And the answer is, in part, by preparing to defend yourself everywhere they've told you that they're likely to go, to varying degrees, depending on what's at risk and what's most likely, of course."

737 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012.

requests that the Tribunal "reject, or at a minimum substantially reduce, Claimants' damages claim as a result of their failure to take reasonable steps to mitigate."[738]

446. The Claimants posit that these arguments fail as a matter of fact and law and state that they fully mitigated their damages by, among other things, obtaining interim orders and awards from the Tribunal ordering the Respondent to prevent the judgment from becoming or remaining enforceable.[739]

447. The Parties' arguments raise preliminary questions regarding the content of the duty to mitigate in the present case, the moment at which a duty to mitigate arises, the meaning of the requirement that the injured party act "reasonably" when confronted with the injury, and the burden of proof on failure to mitigate. As further detailed below, these questions are partly dispositive of the Respondent's arguments. The Tribunal will therefore examine these matters first before addressing specific instances of the Claimants' alleged failure to mitigate.

448. First, in respect of the content of the duty to mitigate, the Tribunal finds useful guidance in the Commentary to the ILC Articles:

> A further element affecting the scope of reparation is the question of mitigation of damage. Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a "duty to mitigate", this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent. . .[740]

449. A necessary corollary of the requirement that an injured party "act reasonably when confronted by the injury" is that the scope of the Claimants' duty to mitigate must be determined by reference to the specific injury they faced in this case: the recognition and enforcement of the Lago Agrio Judgment. In other words, in the circumstances of this case, the Claimants' duty to mitigate required them to take steps to mitigate the injury arising from the recognition and enforcement of the Lago Agrio Judgment. As determined by the Tribunal in paragraph 363 above, the Claimants could have mitigated the injury in

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738 Rejoinder, para. 572.

739 Reply, paras. 422-425.

740 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11).

three different ways: (i) by preventing the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, by thereafter seeking to render the Judgment unenforceable; and (iii) by minimizing the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution or howsoever otherwise.

450. Against this backdrop, it becomes immediately apparent that the Claimants' decision to initiate the RICO Litigation instead of defending themselves in enforcement proceedings in the United States cannot be properly characterized as a failure to mitigate damage, as the Respondent suggests.[741] As part of the RICO Litigation, the Claimants sought and obtained interim relief restraining the LAPs and their representatives from enforcing the Lago Agrio Judgment before any court in the United States, which is clearly a mitigation measure as defined in the preceding paragraph.[742] Whether the Claimants "needlessly spent hundreds of millions of dollars on unnecessary and unsuccessful activities"[743] by pursuing the RICO Litigation is a separate question impacting upon the recoverability of the legal expenses incurred in that litigation as incidental damages, and, in particular, upon the reasonableness of the Claimants' choice of measures and the amounts spent in connection with those measures.[744] It has no bearing on whether the Claimants took *actual* steps to mitigate the damage arising from the recognition and enforcement of the Lago Agrio Judgment as described in the preceding paragraph. Thus, the Tribunal will not address the RICO Litigation under the present heading of failure to mitigate but as part of its analysis of this specific category of damages in Section VIII.G below.

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741 Counter-Memorial, paras. 1191-1201.

742 **C-972**, Order, 7 March 2011 (responding to Plaintiffs' motion, RICO Dkt., ECF No. 4): "For the foregoing reasons, Chevron's motion [DI 4] for a preliminary injunction is granted . . . All defendants . . . be and they hereby are enjoined and restrained, pending the final determination of this action, from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered in *Maria Aguinda y Otros v. Chevron Corporation*, No. 002-2003, in the Provincial Court of Justice of Sucumbios, Ecuador (hereinafter the "*Lago Agrio Case*"), or any other judgment that hereafter may be rendered in the *Lago Agrio Case* by that court or by any other court in Ecuador in or by reason of the Lago Agrio Case (collectively, a "*Judgment*"), or for prejudgment seizure or attachment of assets, outside the Republic of Ecuador, based upon a Judgment."

743 Counter-Memorial, para. 1201.

744 *See* para. 335 above.

451. Second, a question related to the scope of the Claimants' duty to mitigate is the date on which such duty arises. In this respect, the authorities filed by the Parties support the notion that the duty to mitigate arises only following the emergence of the injury, and more particularly when the victim of wrongful conduct is, in the words of the ILC, "confronted by the injury".[745] The Tribunal agrees with this proposition. While a claimant's failure to take effective steps to prevent a treaty breach may be relevant in other contexts, such as determining liability, it has no bearing on the question of the duty to mitigate. In sum, in the context of reparation under international law, the notion of duty to mitigate requires that the injured party take steps to minimize the *effects* of the breach, rather than to prevent the breach itself.[746]

452. This conclusion is immediately dispositive of the Respondent's argument that the Claimants failed to mitigate damages by failing to recuse Judge Zambrano. Under this heading, the Respondent points to several instances in the course of the Lago Agrio Litigation when, in the Respondent's view, the Claimants could have acted on their knowledge that Judge Zambrano was willing to accept a bribe from the LAPs by seeking to have him removed from office, thus averting the 'ghostwriting' of the Lago Agrio Judgment and as a consequence the entirety of the Claimants' damages.[747] However, all of these purported omissions pre-date the issuance of the Lago Agrio Judgment on 14 February 2011, which, as already determined by the Tribunal, is both the first event in the series of the Denial of Justice and Umbrella Clause Breaches and the earliest date on which the injury arising from the Respondent's internationally wrongful acts began to flow.[748] Thus, prior to the issuance of the Lago Agrio Judgment there was no injury requiring mitigation efforts from the Claimants. Nor was there any Treaty breach from

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745 **RLA-813**, *William Ralph Clayton, Bilcon of Delaware, Inc. and others v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 204: "The duty to mitigate applies if: (i) a claimant is unreasonably inactive following a breach of treaty; or (ii) a claimant engages in unreasonable conduct following a breach of treaty."; **RLA-787**, *Hrvatska Elektroprivreda d.d. v. Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, para. 386: "In the Commentary to Article 31 of the Articles on State Responsibility, the International Law Commission writes that '[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury.' As that passage makes clear, the victim must act reasonably when confronted by injury; in other words, at the time of the wrong."

746 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11).

747 Counter-Memorial, paras. 1169-1177; Rejoinder, paras. 588-602.

748 *See* para. 362, 371 above.

which the injury could be said to flow. The Claimants' conduct pre-dating the issuance of the Lago Agrio Judgment is therefore not germane to a failure-to-mitigate analysis.

453. Third, the Parties have debated at length the element of reasonableness embedded in the duty to mitigate under international law, which requires that the injured party "act reasonably when confronted by the injury".[749] Because the Parties' submissions under this heading centre principally on the use of certain remedies under Ecuadorian law, the Parties have focused on whether the Tribunal's conclusions on exhaustion of local remedies in its Track II Award – addressing those same remedies[750] – can be transposed to its analysis of the Claimants' duty to mitigate, particularly in view of the fact that both standards are subject to a requirement of reasonableness.

454. For context, the Tribunal recalls that the Track II Award examined the question whether the Claimants had exhausted local remedies as a requirement for asserting a claim for denial of justice:

> In the Tribunal's view, it is well settled that a claimant asserting a claim for denial of justice committed by a State's judicial system must satisfy, whether as a matter of jurisdiction or admissibility, a requirement as to the exhaustion of local remedies or, as now better expressed, a substantive rule of judicial finality. Even the grossest misconduct by a lower court or manifest unfairness in its procedures is not by itself sufficient to amount to a denial of justice by a State, unless the judicial remedies that exist in that State either do not correct the deficiencies in the lower court's judgment (once exhausted by the foreign national) or are such that none affords to the foreign national any reasonable prospect of correcting those deficiencies in a timely, fair and effective manner.
>
> . . .
>
> The Respondent contends that Chevron failed reasonably to pursue its effective legal remedies within the Ecuadorian legal system, particularly (as regards the alleged denial of justice) under the Ecuadorian Collusion Prosecution Act (the "CPA"). The Respondent also contends that Chevron's failure to request the Lago Agrio Appellate Court to fix the amount of a bond and to pay such bond, so as to suspend the enforceability of the Lago Agrio Judgment, led to the alleged injury of which the Claimants complain. It was, according to the Respondent, "an intervening direct and immediate cause of the enforceability of the Judgment, breaking the 'causal nexus' required for a showing of denial of justice"[751]

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749 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11).

750 Track II Award, paras. 7.116-7.148.

751 Track II Award, paras. 7.117, 7.120.

455. As noted by the Tribunal in the above paragraphs, the requirement of judicial finality may be fulfilled if none of the judicial remedies that exist in a State affords to the foreign national any *reasonable* prospect of correcting the deficiencies complained of in a timely, fair and effective manner. The Tribunal then applied this test to the present case as follows:

> For the present case, the Tribunal considers that the crucial part of the statements in *Loewen*, is that the availability of a local remedy "is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in light of its situation. . ." As also stated above, the local remedy must be available as "an effective and adequate appeal within the State's legal system." It clearly does not include any ineffective or inadequate or, equally, any untimely remedy. The test is similarly expressed in the later awards in *Jan de Nul* (2008) and *Pantechniki* (2009).
>
> In the Tribunal's view, the overall test for such availability is that of reasonableness applied to the complainant, assessed at the relevant time. Applied to the present case, it would be wrong in principle to require Chevron to have pursued at the time any local remedy in Ecuador that lacked any reasonable prospect of a timely, effective and adequate protection against the enforcement of the Lago Agrio Judgment within and, especially, without Ecuador. As with all its allegations, the legal burden of proving such ineffective protection, once a potential procedure has been identified by the Respondent, rests upon Chevron under Article 24(1) of the UNCITRAL Arbitration Rules.[752]

456. In its Partial Award on Track III, the Tribunal addressed the potential overlap between the above analysis and the assessment of reasonableness in a mitigation context:

> According to the Claimants, the standards applicable to exhaustion of local remedies and to mitigation of damages in this case are the same, seeing that they both refer to the same remedies and depend on the same single element: "whether it was 'reasonable' to expect Chevron to engage any of the mechanisms that Ecuador suggests would have remedied the harm or mitigated the damage from that harm."
>
> In the Tribunal's view, it would be misguided to conflate the standards for mitigation and exhaustion of local remedies as the Claimants suggest. While it is true that both standards contain a requirement of reasonableness, a determination of what conduct can be considered reasonable is always context-dependent. It is informed, amongst other things, by the objective pursued by the conduct in question. Exhaustion of local remedies requires that reasonable steps be taken to remedy a judicial wrong – in this case, to prevent the finality and enforceability of the Lago Agrio Judgment within and without Ecuador. Mitigation, on the other hand, requires the wronged party not to exacerbate the damage (here, the incurring of legal costs) and to take positive steps to minimize its effects. Conduct reasonably geared towards preventing the enforcement of a fraudulent judgment may also be deemed a reasonable means to reduce the legal costs arising from the threat of such enforcement, but not necessarily. There may be substantial overlap between the two analyses, but they remain legally distinct questions and are not coextensive. Whereas the

752 Track II Award, paras. 7.122-7.123.

> exhaustion of local remedies focuses on avoiding the consummation of the wrongful conduct itself, mitigation of damages focuses on minimizing its effects.
>
> It is thus not possible for the Tribunal to conclude in the abstract that its findings on exhaustion of local remedies and judicial finality apply without more to the Respondent's mitigation defence. It will be necessary to hear the Parties' arguments on mitigation in full before reaching a decision. The Tribunal does not exclude, however, that certain factual and logical parallels between its decisions on judicial finality and the mitigation defence may inform its analysis of the latter, including in respect of what conduct may be deemed reasonable under the applicable mitigation standard.[753]

457. In sum, at this juncture the Tribunal is required to determine whether, in light of all relevant circumstances, it would have been reasonable for the Claimants to pursue certain local remedies in Ecuador (*i.e.*, the posting of a bond and filing an action under the CPA) to minimize the injury arising from the recognition and enforcement of the Lago Agrio Judgment – and, conversely, whether their failure to do so was unreasonable. While the Tribunal's Track II rulings on the exhaustion of local remedies are not dispositive of this question, certain factual and logical parallels between its rulings and the Respondent's duty to mitigate defence may inform the present analysis.

458. Fourth, and last, the Parties agree that the onus of proving that the Claimants failed to mitigate their damages is with the Respondent.[754] Indeed, a distinction must be drawn between the burden of proof on incidental damages incurred to mitigate loss – which, as addressed above, lies with the party seeking the recovery of those damages[755] – and a failure to mitigate as an affirmative defence, for which the onus lies on the party pleading such defence.[756]

459. With this preamble, the Tribunal turns to the two instances of alleged failure to mitigate that have not yet been addressed by the Tribunal: the Claimants' failure to post a bond to suspend the enforceability of the Lago Agrio Judgment and file an action under the CPA.

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753 Partial Award on Track III, paras. 181-183.

754 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1478 (Bishop), p. 1492 (Schwartz).

755 *See* paras. 327-343 above.

756 **RLA-884**, *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, para. 10.6.4(4).

2. Posting of a Bond

460. According to the Respondent, by posting a bond under the Ecuadorian Cassation Appeal Act – resulting in the suspension of the enforcement of the Lago Agrio Judgment – the Claimants could have avoided all fees and expenses incurred defending enforcement proceedings until at least the issuance of the Judgment of the Cassation Court on 12 November 2013.[757] The question before the Tribunal at this juncture is whether it would have been reasonable for the Claimants to post a bond so as to minimize the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

461. In its Track II Award, the Tribunal determined the relevant sequence of events surrounding the Claimants' failure to post a bond, which resulted in the declaration of enforceability of the Lago Agrio Judgment:

> The enforcement of the Lago Agrio Judgment was suspended pending Chevron's appeal to the Lago Agrio Appellate Court. The Appellate Court issued its judgment, dismissing Chevron's appeal from the Lago Agrio Judgment, on 3 January 2012. It issued its Clarification Order on 13 January 2012. On 20 January 2012, Chevron filed a cassation appeal with the Appellate Court (of some 176 pages). Chevron there requested the Appellate Court (inter alia) to suspend the enforcement of its judgment (thereby continuing the suspension of the Lago Agrio Judgment's enforcement) and to declare that there was no requirement for Chevron to post a bond to suspend the Appellate Court's Judgment.
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> On 17 February 2012, the Appellate Court refused Chevron's request to suspend the enforcement of its judgment pending Chevron's cassation appeal. The Appellate Court decided also that its judgment would have been suspended pending the cassation appeal (thereby suspending the enforcement of the Lago Agrio Judgment) if Chevron had requested the posting of a bond and had posted a bond, which it had not done. On 24 February 2012, Chevron requested the Appellate Court to revoke its order of 17 February 2012. By order of 1 March 2012, the Appellate Court rejected Chevron's request, confirming the non-suspension of its judgment. It thereby declared the enforceability of the Lago Agrio Judgment.[758]

462. The Tribunal there laid emphasis upon the fact that, notwithstanding the Claimants' failure to post a bond, the Ecuadorian judiciary's declaration of enforceability of the Lago Agrio Judgment was in breach of the Tribunal's orders and Interim Awards:

> By the time of the Lago Agrio Appellate Court's order of 1 March 2012, this Tribunal, in order to preserve the rights of the Parties pending its decision on the merits, had already issued interim measures requiring the Respondent (including its judicial branch) not to permit the enforceability of the Lago Agrio Judgment: see its Orders and Interim Awards

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757 Counter-Memorial, paras. 1178-1183; Rejoinder, paras. 619-622.

758 Track II Award, paras. 7.125-7.126.

> on Interim Measures of 28 January 2011, 9 February 2011, 16 March 2011, 25 January 2012 and 16 February 2012. As already indicated above, the Tribunal had secured Chevron's cross-undertaking in damages for these interim measures with an order that the Claimants pay US$ 50 million to the PCA, which was duly paid by the Claimants and is held to the order of the Tribunal in this arbitration.
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> One of the grounds invoked by Chevron in support of its application of 20 January 2012 to the Lago Agrio Appellate Court was that the effect of this Tribunal's orders and awards, particularly its Order of 9 February 2011, was that the enforcement of the Lago Agrio Judgment was "currently suspended" by the Tribunal. . .
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> On 30 May 2012, consistent with the order of the Lago Agrio Appellate Court of 1 March 2012, the Lago Agrio Plaintiffs began enforcement proceedings in Canada, followed by enforcement proceedings in Brazil on 27 June 2012. On 3 August 2012, the Lago Agrio Court (i.e. the enforcement judge) ordered the enforcement of the Lago Agrio Judgment in the total amount of US$ 19,041,414,529.00, payable by Chevron within 24 hours.
>
> The Respondent (by its judicial branch), in declaring the Lago Agrio Judgment to be enforceable with the Lago Agrio Appellate Court's order of 1 March 2012 and the Lago Agrio Court's enforcement order of 3 August 2012, did not comply with this Tribunal's Orders and Interim Awards.[759]

463. Against the background of the Respondent's Interim Awards Breach, the Tribunal relied upon three factors to conclude that, in the circumstances prevailing at the time, it would not have been reasonable to require Chevron to post a bond so as to suspend the enforcement of the Lago Agrio Judgment. First, it noted that the Respondent should not be allowed to profit from its decision knowingly not to comply with the Tribunal's orders:

> The Tribunal recognised at the time of its orders and awards (as it does still) that national courts have legal responsibilities to discharge under their State's laws and constitution; that the exercise of such responsibilities may impinge upon the rights of third parties; and that in this new world of interaction between international tribunals and national courts, there is a need to proceed with mutual respect and sensitivity to each other's functions. Nonetheless, when the State has chosen to establish procedures in parallel to its national court system (as it has here under the Treaty), it is incumbent on the State to ensure that the commitments that it has agreed are not defeated or subverted by actions of its national agencies, including its judicial branch.
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> Before 1 March 2012, as already indicated, this Tribunal had ordered the Respondent, under its several orders and awards on interim measures, not to declare the Lago Agrio Judgment enforceable. Chevron was entitled to rely upon those orders and awards, which were legally binding upon the Respondent under the Arbitration Agreement to which the Respondent had decided to commit itself. Moreover, given that the Respondent (by its judicial branch) knowingly did not comply with these orders and awards, it would inappropriate for the

[759] Track II Award, paras. 7.127-7.130.

> Respondent now to profit from its own wrong under the general principle of international law known by its Latin maxim: *nullus commodum capere de sua injuria propria*.[760]

464. Second, the Tribunal noted that there were insufficient prospects of favourable relief on Chevron's appeal to the Cassation Court:

> The Tribunal also relies upon two further factors. First, at the time (after the Lago Agrio Appellate Court's judgment), there were insufficient prospects of favourable relief on Chevron's appeal to the Cassation Court. Such a cassation appeal could not be a full appeal addressing Chevron's multiple complaints regarding the Lago Agrio Litigation and Lago Agrio Judgment. Apart from relief against punitive damages ordered by the Lago Agrio Judgment, this was later to prove to be the case.[761]

465. Lastly, the Tribunal laid emphasis on the expected amount of the bond, which would have been "so high as to amount to a practical denial of access to the Cassation Court by Chevron":

> Second, the amount of the bond would, on the case advanced by both the Claimants and the Respondent, have been so high as to amount to a practical denial of access to the Cassation Court by Chevron. Dr Coronel testified that the amount of the bond would have been between US$ 1.9 billion and US$ 14.6 billion. At the Track II Hearing, the Respondent's Counsel stated that the amount of the bond would have been fixed in an amount between 1% and 5% of the amounts at stake. Applied to the Lago Agrio Judgment, as affirmed by the Appellate Court in the total sum of US$ 18 billion, the amount of the bond would have been between US$ 180 million and US$ 14.6 billion. These are not trifling amounts.
>
> In the circumstances prevailing at the time, the Tribunal does not consider it reasonable to require Chevron to have posted a bond of this size so as to suspend the enforcement of the Lago Agrio Judgment, as affirmed by the Lago Agrio Appellate Judgment. Moreover, upon the exhaustion of Chevron's appellate remedies with the Constitutional Court's Judgment of 27 June 2018, the failure to post a bond has now no legal significance: such a bond could only have suspended the enforcement of the Lago Agrio Judgment pending the completion of the appellate process; and the failure to exhaust a local remedy does not extinguish the underlying international wrong.[762]

466. Having assessed all relevant circumstances, in the Tribunal's view, these same factors lead to the conclusion that it would have been unreasonable to require Chevron to post a bond in the amount required by Ecuadorian law to minimize the injury arising from the recognition and enforcement of the Lago Agrio Judgment. The contrary conclusion would result in the Respondent profiting from its own wrong – the Interim Awards Breach – by

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760 Track II Award, paras. 7.131-7.132.

761 Track II Award, para. 7.133.

762 Track II Award, paras. 7.134-7.135.

way of a reduction in the Claimants' damages claim based on a failure to mitigate. Similarly, as already found by the Tribunal, Chevron's cassation appeal offered limited prospects of favourable relief, further underscoring the very limited usefulness of the posting of a bond ranging in the hundreds of millions to billions of dollars to suspend the enforcement of the Lago Agrio Judgment for an approximate period of a year and a half (between February 2012 and November 2013, as stated above).

467. For these reasons, the Tribunal rejects the Respondent's mitigation defence as regards the posting of a bond after the issuance of the Lago Agrio Appellate Judgment to suspend the enforcement of the Lago Agrio Judgment.

3. Collusion Prosecution Act (CPA)

468. In the Respondent's submission, another way in which the Claimants could have mitigated their damages is by initiating proceedings under the CPA seeking to nullify the fraudulently procured Lago Agrio Judgment.

469. The relevant provisions of the CPA are set out in full in Part III of the Track II Award.[763] As more succinctly described by the Tribunal in its analysis on the exhaustion of local remedies:

> Under Article 6 of the Collusion Prosecution Act (CPA), a party claiming to be the victim of collusive legal proceedings before an Ecuadorian Court may impugn the resulting judgment. It provides: "If the grounds for the claim are confirmed, measures to void the collusive proceeding will be issued, invalidating the act or acts . . . and redressing the harm caused. . . and, as a general matter, restoring the things to the state prior to the collusion". Articles 4 and 5 of the CPA permit the complaining party to present evidence and participate in a hearing under the CPA; and Articles 6 and 7 specify the CPA's remedies, including the judgment's nullification, damages against and imprisonment of the miscreants.[764]

470. As part of its analysis, the Tribunal made several determinations regarding the CPA remedy. First, an action under the CPA would have comprised one or more collateral proceedings independent of the Lago Agrio Litigation.[765] Second, "there was no possibility of interim measures under the CPA protecting Chevron's position during the

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763 Track II Award, paras. 3.68-3.71.

764 Track II Award, para. 7.136.

765 Track II Award, paras. 7.137-7.139, 7.145.

pendency of any CPA proceedings and subsequent appeals."[766] Third, noting the Respondent's indication that CPA proceedings take between 17 and 18 months on average to result in a judgment (excluding appeals and/or enforcement proceedings), the Tribunal ruled that "the timing of any CPA proceedings made them ineffective as a remedy for Chevron against the enforceability of the Lago Agrio Judgment."[767] As further elaborated by the Tribunal:

> As regards timing, it was essential that the risk of enforcement of the Lago Agrio Judgment, which could have been disastrous for Chevron (as envisaged in the Invictus Memorandum), be removed whilst the serious allegations of gross procedural and judicial improprieties in the Lago Agrio Court were addressed within the Ecuadorian legal system. That was not possible, given the fact that the Lago Agrio Judgment became enforceable under Ecuadorian law and, thus, enforceable outwith Ecuador on 1 March 2012. . . There was, therefore, insufficient time to complete any CPA proceedings (including one or more appeals) before the Lago Agrio Judgment became enforceable, with enforcement proceedings beginning shortly thereafter on 30 May 2012.[768]

471. Critically, the Tribunal also rejected the proposition that private litigants should be required to undertake remedial action in the face of judicial misconduct:

> . . .collusive action cases may be appropriate where it is alleged that there is collusion between parties, witnesses or legal representatives; but where the complaint raises procedural fraud, judicial misconduct and corruption within the Court itself, the State cannot leave remedial action to the efforts of private litigants – the State has its own responsibility to act by its several investigatory, prosecutorial and judicial agencies.[769]

472. For the above reasons, the Tribunal concluded that it would not have been reasonable to require the Claimants to pursue an action under the CPA to suspend the enforcement of the Lago Agrio Judgment:

> There is therefore no reason to assume, assessed objectively at the time, that any collateral (or parallel) relief under the CPA could have protected Chevron from the enforcement of the Lago Agrio Judgment in a sufficiently timely, effective and adequate manner. The Tribunal also notes the statement, in *Pantechniki*, that it may not be necessary for a claimant to resort to "oblique or indirect applications to parallel jurisdictions".
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> In the circumstances prevailing at the time, the Tribunal does not consider it reasonable to require Chevron to have begun collateral proceedings under the CPA in an attempt to

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766 Track II Award, para. 7.144.

767 Track II Award, paras. 7.143, 7.145.

768 Track II Award, para. 7.146.

769 Track II Award, para. 7.145.

> suspend the enforcement of the Lago Agrio Judgment, as affirmed by the Lago Agrio Appellate Judgment.[770]

473. The Respondent asserts that these findings have no bearing on the present mitigation analysis. Recalling that the above conclusions were reached in the context of exhaustion of local remedies, the Respondent observes, first, that the issue in Track III "is not whether a CPA action would have been reasonably likely to prevent the Lago Agrio Judgment from becoming enforceable in the first instance [but rather] whether a successful CPA action would upon its conclusion have rendered the Judgment a nullity and thus unenforceable *going forward*."[771] Second, the Respondent rejects the relevance, for present purposes, of the Tribunal's finding that the "State has its own responsibility to act" in the face of alleged misconduct, as "[t]he focus of the mitigation of damages defense is by definition on Claimants' omissions, not Respondent's."[772]

474. While the Tribunal acknowledges the distinction drawn by the Respondent between the rulings in the Track II Award and the present mitigation analysis, the Tribunal considers that the implications of the above findings still weigh heavily in favour of rejecting the Respondent's failure-to-mitigate defence based on the CPA. In particular, the Tribunal must underscore once again the inappropriateness of a State requiring a private litigant to initiate action against a situation of alleged judicial misconduct and corruption of which the State is aware – a duty that should lie primarily with investigatory, prosecutorial and judicial agencies of that State.

475. Even more crucially, as already observed above in the context of its analysis regarding the posting of a bond, the fact is that the Claimants did pursue mitigation measures by requesting this Tribunal to order the Respondent not to declare the Lago Agrio Judgment enforceable. The Claimants had a right to rely on the Tribunal's ensuing orders and awards, which would have had the effect of annulling the injury arising from the recognition and enforcement of the Lago Agrio Judgment until the Tribunal's determination on the merits had the Respondent complied with them.

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770 Track II Award, paras. 7.147-7.148.

771 Rejoinder, para. 616 (emphasis by the Respondent).

772 Rejoinder, para. 617.

476. Thus, the Claimants complied with their duty of mitigating the injury by requesting interim relief from the Tribunal, in relation to a matter that the Respondent had the power and the responsibility to investigate and if necessary remedy, in an attempt to prevent the Lago Agrio Judgment from becoming enforceable. Considering all of the above circumstances, the Tribunal cannot determine that it was somehow unreasonable for the Claimants to request interim relief from the Tribunal and *not* to initiate proceedings under the CPA instead, in breach of their duty to mitigate.

4. Conclusion on Failure to Mitigate

477. For the above reasons, the Tribunal dismisses the Respondent's defences based on the Claimants' failure to mitigate (i) by failing to recuse Judge Zambrano; (ii) by failing to post a bond to suspend the enforceability of the Lago Agrio Judgment; (iii) by failing to file an action under the CPA; and (iv) by initiating the RICO Litigation.

E. FEES ALLEGEDLY INCURRED IN OTHER PROCEEDINGS

1. Introduction

478. The Respondent requests that the Tribunal deny all of the Claimants' requests for fees and costs incurred in proceedings in which they recovered, or could have recovered, legal expenses.[773] Those proceedings include the RICO Litigation; the Argentina and Canada Enforcement Proceedings; the Brazil Recognition Proceedings; several of the Gibraltar and Section 1782 Proceedings; and the Dutch Set-Aside Proceedings.[774]

479. The Claimants, in turn, posit that all fees and costs from these proceedings are recoverable as damages, whether or not they were awarded in those proceedings, if they were not in fact collected. In the Claimants' view, the recoverability of the fees and costs in this Arbitration does not depend on their recoverability under domestic law in those other proceedings.[775]

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773 Counter-Memorial, para. 359.

774 *See* Counter-Memorial, paras. 336-358; Rejoinder, paras. 528-547.

775 Reply, para. 485.

480. As a threshold issue, the Tribunal must once again stress the distinction between a claim for the reimbursement of legal costs and a claim for legal expenses claimed exclusively as damages caused by the Respondent's Treaty breaches.[776] As noted above, the Tribunal must assess the Claimants' damages claims from the perspective of international law, ensuring full reparation for the Respondent's breaches as per *Chorzów Factory*.[777] More specifically, the legal fees and expenses incurred by the Claimants in domestic proceedings will generally be compensable as damages in Track III if they were reasonably incurred to repair damage and otherwise mitigate loss arising from the recognition and enforcement of the unremedied Lago Agrio Judgment – in other words, if they qualify as incidental damages.[778]

481. This is the applicable test. The fact that the Claimants had the ability to recover legal costs in domestic proceedings in no way requires the Tribunal to import domestic cost-shifting standards to rule on the Claimants' damages claims seeking the reimbursement of legal costs. These claims must still be assessed through the lens of the usual standards for damages applicable under international law.[779] Thus, for the purposes of Track III, any circumstances arising in domestic proceedings, including the Claimants' acts or omissions in seeking the recovery of attorney's fees before local courts, must be assessed as part of an overarching analysis on damages.

482. As a result, the Tribunal will generally not be bound by any determinations on costs made by local courts in domestic proceedings because, among other things, those determinations address an entirely different subject matter – *i.e.*, the allocation of costs in

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776 *See* Procedural Order No. 65, 10 July 2020, para. 71: "As a first point, the Tribunal considers it useful to clarify that the Claimants' claims for legal fees and costs under Categories (a)-(m), whether characterized as primary damages or incidental expenses, are not akin to a claim for legal costs in these proceedings. The Claimants' claims under Categories (a)-(m) consist of the legal fees and costs incurred by the Claimants in various legal proceedings conducted beyond this arbitration, and, which, according to the Claimants, arise out of the Respondent's Treaty breaches. These claims are properly characterized as claims for damages and not a claim for costs incurred in this arbitration, the latter being governed by Articles 38-40 of the UNCITRAL Rules." For an explanation on Categories (a)-(m), *see* fn 596 above.

777 **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, pp. 31-32.

778 *See* paras. 327-343 above.

779 Procedural Order No. 65, 10 July 2020, para. 73: "Accordingly, the Tribunal considers that the claims referred to under Categories (a)-(m) are to be analysed through the lens of the usual evidentiary standards for damages applicable under international law." For an explanation on Categories (a)-(m), *see* fn 596 above.

local proceedings, which are inevitably influenced by questions of local law and policy, as opposed to the Claimants' entitlement to incidental damages under the Treaty and international law.

483. Similarly, even when domestic cost-shifting standards incorporate an assessment of reasonableness – as in the case of the RICO Act[780] – the determinations made by local courts in application of those standards will be of limited relevance for the Tribunal's present analysis, which will be examined under a distinct standard under international law, *i.e.*, not the reasonableness of the legal fees and expenses in the context of individual local proceedings, but whether the legal fees and expenses incurred by the Claimants in the various legal proceedings served reasonably to mitigate the injury flowing from the Respondent's Treaty breaches. In other words, these assessments are distinct, and fixating on any overlap in these evaluations is more likely to be misleading than helpful.

484. With these caveats, the Tribunal turns now to the specific matters raised under the present heading. While the Respondent's arguments encompass many of the proceedings from which the Claimants' damages claims arise, when reduced to their essence they raise distinct questions cutting across those proceedings – namely, whether the Claimants should be entitled to recover in this Arbitration (i) legal fees and expenses they have already collected from opposing litigants in those proceedings; (ii) legal fees and expenses that have been awarded, but not collected; (iii) legal fees and expenses in addition to those that have already been awarded or collected; and (iv) legal fees and expenses incurred in proceedings in which the Claimants reached a settlement on costs that was later entered as a court order.

485. In this section, the Tribunal will address the four issues identified in the preceding paragraph as matters of principle only. The impact of the Tribunal's conclusions in this Section on each specific category of damages will be assessed in Section VIII below.

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780 **RLA-704**, 18 U.S.C. § 1964(c): "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . ."

2. Costs Collected in Other Proceedings

486. The first question before the Tribunal under the present heading is whether the Claimants may recover as damages legal fees and expenses already *collected* in domestic proceedings.

487. The Parties agree on the principle that fees already collected by the Claimants in local proceedings should be excluded from the Claimants' damages claim. Indeed, the Claimants have confirmed that they "do not seek and expressly disclaim any double recovery",[781] while also noting that "[a]ny costs that have been collected have been deducted from the amounts claimed in this arbitration; if they have not been collected, no such deduction has been made."[782] The Respondent, however, is critical of the Claimants' purported failure to "account for any such deductions, whether present or future" and to disclose "what specific amounts should be deducted". In the Respondent's view, "[b]y concealing this information, Claimants have failed to meet their burden to state their claim, much less prove it."[783]

488. The Tribunal concurs with the proposition that any fees collected by the Claimants or their subsidiaries in local proceedings must be deducted from the final amount of compensation to prevent any double recovery. Whether such deductions have been properly accounted for by the Claimants is an evidentiary question that will be addressed in respect of each specific category of damages in Section VIII below.

3. Costs Awarded but not Collected in Other Proceedings

489. Whether fees *awarded* to the Claimants by local courts, but ultimately *not collected*, should be reimbursed as incidental damages merits a separate analysis. The Claimants draw a distinction between "obtaining an award of fees and actually being able to collect them. If they are uncollectable, they can still form part of the damages suffered by the Claimants."[784] The Respondent rejects this approach: "Claimants cannot argue both that

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781 Reply, para. 501.

782 Reply, para. 515.

783 Rejoinder, para. 533.

784 Reply, para. 486.

they pursued the ancillary proceedings to mitigate damages and that they passed up the chance to recover their legal expenses for those proceedings to mitigate damages."[785]

490. In the Tribunal's view, the question of whether the Claimants should have sought to recover costs awarded in local proceedings must be addressed from the viewpoint of the Claimants' duty to mitigate. Under this duty, the Claimants had the obligation to pursue the collection of legal costs where there were reasonable chances of success so as to reduce their damages – on the assumption, however, that the expected yield was higher than the expenses of collection. If the Claimants unreasonably failed to carry out this duty, any amounts awarded as incidental damages should be reduced by the amount of the hypothetical yield of the Claimants' collection efforts, net of expenses.[786]

491. By the same token, however, it was appropriate for the Claimants to refrain from taking steps to collect costs that had been awarded but not paid, to the extent such attempts would have been in vain: any expenses associated with collection efforts known to be futile would have been unreasonably spent, thus precluding the recovery of any such expenses as incidental damages in these proceedings.[787]

492. It is clear, therefore, that the Claimants' choice between pursuing the collection of costs awarded by local courts and refraining from doing so is not as clear-cut as suggested by the Respondent. Indeed, while the Claimants were required to exercise reasonable judgment in deciding whether to attempt to collect costs, as already noted, the Tribunal is prepared to grant a certain level of deference to the Claimants' choice of mitigation measures under the circumstances then prevailing.[788]

493. Furthermore, while the Claimants are required to explain the reasons for their decision to refrain from attempting to collect on these costs awards, having raised a question of failure to mitigate the burden to prove that the Claimants' decision *not* to seek collection

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785 Rejoinder, para. 531.

786 *See* para. 323 above. *See also* **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11): "Although often expressed in terms of a 'duty to mitigate', this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery *to that extent*." (emphasis by the Tribunal)

787 *See* para. 327 above.

788 *See* para. 341 above.

was unreasonable lies with the Respondent as the injuring party.[789] The Tribunal will determine whether the Respondent has satisfied this burden in respect of each of the relevant proceedings in Section VIII below.

494. Lastly, to the extent that the Tribunal allows the reimbursement as damages of legal costs awarded and not collected by the Claimants later in this Award, the Tribunal's determinations shall remain strictly subject to the Claimants' express commitment against any double recovery.[790] Any such amounts collected by the Claimants after the issuance of this Award in local proceedings must be excluded from the final amount of compensation.

4. Costs In Addition to Those Awarded or Collected in Other Proceedings

495. The ensuing question is whether the Claimants may be reimbursed any legal costs *in addition* to those already awarded or collected in local proceedings. The Respondent answers this question in the negative, among others, in respect of the Enforcement Litigation in Canada, where the Claimants were awarded approximately CAD 375,000 for all phases of the proceeding, as compared to the more than USD 40 million they seek to recover as damages in relation to that litigation. In the Respondent's view, "[a]llowing Claimants to recover any further amount for the Canadian proceedings in this arbitration would be contrary to Canadian law, and the principles of *res judicata* and estoppel. It would enable the Claimants to bypass Canadian procedure, and to disregard the Canadian courts' assessment of their reasonable legal fees."[791]

496. The Tribunal is not persuaded by the Respondent's argument. As already noted, the exercise required for this Award under international law is full reparation for the Respondent's Treaty breaches, not a confirmation of the determinations on costs reached by local courts on the basis of domestic cost-shifting norms.[792] Under the standard of full reparation, if the Claimants incurred what the Tribunal considers to have been established as a matter of international law to be reasonable legal costs in domestic proceedings, in

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789 *See* para. 323 above.

790 Reply, para. 501.

791 Counter-Memorial, para. 344.

792 *See* paras. 480-483 above.

excess of the costs that they were awarded or were able to collect through the domestic court procedures, they are entitled to the resulting shortfall in this Arbitration to the extent required to make them whole for the Respondent's international wrongs. Full reparation requires in this context only that the Tribunal exclude from its award on incidental damages any amounts *collected* by the Claimants in local proceedings so as to avoid any double recovery, as explained above.

5. Costs Settled in Other Proceedings

497. The final question before the Tribunal under this heading is whether the Claimants should be entitled to recover legal costs that were *settled* in local proceedings, particularly when the settlement was confirmed by way of a court order. In the Respondent's view, by requesting those same amounts as damages, the Claimants materially breach their agreements with the defendants in those proceedings and violate the court orders adopting those stipulations.[793]

498. At the outset, the Tribunal recalls that the Claimants withdrew their claim for damages in respect of the Kohn and MCSquared Section 1782 Actions in their Reply.[794] These are the only two domestic proceedings in which *Ecuador* was a party and settled costs with Chevron.[795] This has narrowed the ambit of the question before the Tribunal: the only determination required at this stage is whether the Claimants may recover legal costs that were settled in local proceedings in which the Respondent was not a party.

499. To the extent Ecuador was not a party to the costs settlements at issue, the Tribunal finds no basis to conclude that the Claimants are violating those agreements – or the ensuing court orders – by requesting the reimbursement of the costs that were settled in those proceedings as damages in this Arbitration. The Tribunal notes that costs settlements, by their nature, will normally operate *inter partes*, such that each party waives the right to

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793 Counter-Memorial, para. 357.

794 Reply, fn 1063: "Claimants are no longer seeking damages for legal fees and costs incurred in the MCSquared and Kohn 1782s."

795 *See* Counter-Memorial, para. 355; Reply, paras. 518-521; 526-527; **R-1606**, *In re Application of Chevron Corporation*, E.D. Pa. Case 2:10-mc-00208-JD, D.E. 85 Stipulation of Dismissal, 5 February 2015; **R-1605**, *In re Application of Chevron Corporation*, E.D. Pa. Case 2:10-mc-00208-JD, D.E. 86 Order of Dismissal, 9 February 2015; **R-1925**, *Chevron Corp. v. MCSquared PR, Inc*, S.D.N.Y. Case 1:14-mc-00392-LAK, D.E. 47 Stipulation of Dismissal, 17 August 2017.

request the reimbursement of costs *from the other party*. It would be highly unusual for an agreement of this nature to display effects *erga omnes* or to include a forfeiture of claims against third parties such as Ecuador.

500. Indeed, the Tribunal has verified that none of the instruments confirming the settlement agreements at issue contains language of this nature. All of the relevant orders in the Gibraltar Proceedings include language to the effect that all costs orders in the action, or all costs obligations, were acknowledged as fully satisfied between the parties.[796] The settlement on costs included in the Joint Stipulation for Voluntary Dismissal in the Weinberg Section 1782 Action is circumscribed in a similar manner: "[t]he Parties agree that all costs and expenses related to this action shall be borne solely by the party incurring the same and that neither party will file any applications for costs in the 1782 proceeding."[797]

501. Crucially, none of the instruments referenced in the preceding paragraph includes a waiver by the Claimants of their claims for incidental damages arising from the Respondent's Treaty breaches, nor an acknowledgement that the Claimants have been made whole for those international wrongs or an agreement that the Claimants will be reimbursed any portion of their costs in those proceedings by the opposing parties – meaning that as of yet the Claimants have not recovered any of those costs. The

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[796] *See* **C-2970**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012- C-232, Supreme Court of Gibraltar, Consent Order, 18 February 2015: "It is ordered by consent that: 1 There shall be no order as to costs on discontinuance. 2 All existing costs orders made in these proceedings . . . shall stand as fully satisfied and there shall be no further proceedings for the assessment of costs or for the enforcement of any costs order."; **C-2985**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Consent Order, 18 February 2015: "It is ordered by consent that: 1 There shall be no order as to costs on the discontinuance of the claim against the Sixth Defendant. 2 All existing costs orders made in these proceedings between the Claimant and the Sixth Defendant shall stand as fully satisfied and there shall be no further proceedings for the assessment of costs or for the enforcement of any costs order."; **C-2989**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Consent Order, 4 May 2015: "It is ordered by consent that: 1 There shall be no order as to costs on discontinuance. 2 All existing orders made in these proceedings between the Claimant and the Second Defendant shall stand as fully satisfied and there shall be no further proceedings for the assessment of costs or for the enforcement of any costs order between the Claimant and the Second Defendant."; **C-3021**, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, Consent Order, 3 March 2015: "It is ordered by consent that: . . . 5 There shall be no order as to costs. 6 All existing costs orders made in this Claim shall stand as fully satisfied and there shall be no further proceedings for the assessment of costs or for the enforcement of any costs order." *See also* **C-2967**, Settlement Agreement Between Chevron and DeLeon Parties, 13 February 2015, paras. 14, 15, 17; **C-2988**, Woodsford's Executed Settlement Agreement with Chevron, 1 May 2015, paras. 10, 11, 13, 18.5.

[797] **R-1587**, *Chevron Corp. v. Weinberg Group*, D.D.C. Case 1:11-mc-00030-CKK, D.E. 46 Joint Stipulation for Voluntary Dismissal, 15 October 2012, p. 3.

Claimants' claim for damages in the present proceedings is thus entirely outside the scope of these settlement agreements and court orders.

502. As a result, the Claimants may in principle recover their legal costs in this Arbitration, even if were settled in local proceedings with third-party litigants, insofar as they qualify as incidental damages under the Treaty and international law.

503. This conclusion is subject, however, to the same caveat as above for costs awarded but not collected. If the Claimants unreasonably settled claims for legal costs where there were reasonable chances of success on those claims and the expected yield was higher than the expenses of prosecuting such claims, they may have violated their duty to mitigate damages and may be precluded from claiming incidental damages in these proceedings to the extent of the failure to abide by this duty.

504. The Tribunal will determine whether the Respondent has proven such a failure to mitigate in respect of each of the relevant settlements in Section VIII below.

6. Conclusion on Fees Recovered in Other Proceedings

505. For the foregoing reasons, the Tribunal declares the following:

(i) The Claimants are not entitled to recover as damages in this Arbitration any legal costs effectively collected in domestic proceedings.

(ii) The Claimants are precluded from recovering as damages any legal costs awarded, but not collected, in domestic proceedings only to the extent that the Claimants unreasonably failed to pursue the collection of those costs in breach of their duty to mitigate under international law. The burden of proof regarding the Claimants' failure to mitigate lies with the Respondent. To the extent the Tribunal allows the recovery of such costs in this Award, any amounts collected by the Claimants after the issuance of this Award in local proceedings must be excluded from the final amount of compensation.

(iii) The Claimants may recover as damages in this Arbitration reasonable legal costs in addition to those awarded or collected in domestic proceedings, to the extent those

additional legal costs qualify as incidental damages under the Treaty and international law.[798]

(iv) The Claimants may recover their reasonable legal costs in this Arbitration, even if they were settled in local proceedings with third-party litigants, insofar as they qualify as incidental damages under the Treaty and international law and such settlements do not breach their duty to mitigate under international law. The burden to prove such a breach of the duty to mitigate falls once again upon the Respondent.

F. TAX IMPLICATIONS

506. The Respondent requests that the Tribunal consider certain "tax implications" when assessing the Claimants' claim for the reimbursement of legal costs as damages. The Respondent's argument is predicated on the undisputed fact that the Claimants took a tax deduction for the legal fees they claim as damages in this Arbitration at the published marginal tax rate prevailing in the United States at the relevant times – which was 35% between 1993 and 2018 and 21% from 2018 onwards.[799] As acknowledged by the Claimants, this means that the Claimants reduced the amount of corporate income tax they owed by paying these costs.[800] According to the Respondent, those "tax savings" affect both the loss and the interest components of compensation.[801]

507. In respect, first, of the "loss" component, based on the premise that the Claimants will only have to pay taxes on any award they collect at the current 21% tax rate, the Respondent argues that the Claimants will be unjustly enriched by gaining an extra profit as a result of the change in the tax rate.[802] In the Respondent's view, this would be contrary to the full reparation principle, which "does not permit Claimants to profit in any way from tax deductions at Respondent's expense."[803] Accordingly, the Respondent requests that "[a]ny damages awarded must be reduced by at least the difference between

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798 *See* paras. 327-343 above.

799 Counter-Memorial, para. 1306; Reply, para. 567; Rejoinder, para. 548.

800 Reply, para. 567.

801 Rejoinder, paras. 548-556, **RE-42**, First Flores Expert Report, para. 70.

802 Rejoinder, para. 552.

803 Rejoinder, para. 555.

the marginal U.S. corporate tax rate when the applicable fees were deducted and the marginal tax rate when the damages award is paid."[804]

508. Second, for the purposes of determining the amount of an interest award, the Respondent requests that the Tribunal calculate any interest on the Claimants' losses net of tax savings, not on the full amounts spent as legal costs.[805]

509. Generally, the Claimants consider the Respondent's "tax savings theory" to be "legally incorrect" and also highly speculative, as the corporate tax rate that will be in effect whenever the Claimants are able to collect on this Award is unknown.[806]

510. The question of whether interest should be calculated on losses net of tax savings will be addressed as part of the Tribunal's more comprehensive analysis on interest in Section IX.B below. In this section, the Tribunal will only analyse the first component of the Respondent's argument, relating to the impact of these "tax considerations" on the determination of the final amount of compensation.

511. First, the Tribunal observes that the Respondent has failed to bring to the attention of the Tribunal any authority specifically supporting the proposition that compensatory awards must be "net of taxes". According to the Respondent, the assessment of the Claimants "tax savings" is required by the principle of full reparation, pursuant to which "a claimant is limited to recovering no more than its actual losses to ensure that it is not unjustly enriched".[807]

512. The Tribunal is not persuaded by this argument. As noted by several investment tribunals, the determination of the tax treatment of a compensatory award is consequential to the determination of compensation and thus cannot affect it.[808] For the same reason, tax deductions such as the ones at issue in this case must also remain outside the realm of the

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804 Rejoinder, para. 565.

805 Counter-Memorial, para. 1306.

806 Reply, para. 567.

807 Rejoinder, para. 548.

808 **RLA-351**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, PCA Case No. 2007-02/AA277, UNCITRAL, Final Award on the Merits, 31 August 2011, para. 311; **CLA-240**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, 29 December 2004, para. 367.

compensation analysis: whether those deductions will effectively translate into "tax savings" for the injured party will only be known after the amount of tax payable on the compensatory award is determined by the competent fiscal authorities.[809]

513. The instant case must be distinguished from others in which investment tribunals were required to analyse the issue of taxes as part of the calculation of the quantum of damages. For instance, the *Chevron v. Ecuador I* tribunal was required to take into account the fact that the claimants would have incurred taxes in Ecuador irrespective of the respondent's international wrongs – in other words, as part of its compensation analysis, the tribunal was required to assess the effect of Ecuadorian taxes in the but-for world:

> The Tribunal's approach follows from the principles enunciated in the *Chorzów Factory* decision, which both sides agree to be controlling authority: ". . .reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." In essence, the Tribunal's "but for" analysis must undo not only the damages that have arisen for the Claimants but for the wrong, but must also restore the liabilities that were avoided but for the wrong.
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> In this case, the Tribunal has been informed by the experts as to the extent of the Claimants' significant tax liabilities that would have arisen upon the issuance of a judgment in TexPet's favor by the Ecuadorian courts. Moreover, the Respondent has shown that the tax liabilities on Claimants' direct damages were simultaneously contractual obligations under the very agreements invoked by the Claimants in their lawsuits and were regularly withheld by the Ecuadorian Central Bank from payments made to TexPet in the normal course of the Consortium's operations. *The Tribunal must therefore assess the effect of Ecuadorian taxes as part of the situation that would have prevailed if the unlawful act had not been committed*.[810]

514. Crucially for the present analysis, the *Chevron v. Ecuador I* also said:

> *The above reasoning does not detract from the general rule that taxes are consequential to the compensation awarded*. In order to fall within the ambit of the Tribunal's assessment of damages, the taxes to be deducted must be determined with certainty and must be sufficiently connected to the same legal relationship between the parties that is the subject of the arbitration. Taxes may thus be taken into account when there exists a specific

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[809] *See*, albeit in the context of a requested award gross-up, **CLA-766**, *Les Laboratoires Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Poland*, PCA Case No. 2010-12, UNCITRAL, Final Award, para. 666: "Although the Tribunal has considered the possible tax ramifications of this Award, it can find no reason to speculate on the appropriateness, one way or another, of any proposed 'gross-up' to take into account potential tax liability, whether in Poland or in France. The ultimate tax treatment of an award representing the 'real value' of an investment must be addressed by the fiscal authorities in the investor's home jurisdiction as well as the host state."

[810] **RLA-351**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, PCA Case No. 2007-02/AA277, UNCITRAL, Final Award on the Merits, 31 August 2011, paras. 308-309 (emphasis by the Tribunal).

> provision in an agreement or an established practice between the parties relating to their allocation, collection, or withholding.[811]

515. In contrast with *Chevron v. Ecuador I*, the tax deductions at issue under the present heading only materialized as a result of the Claimants' spending of legal costs to mitigate the injury flowing from the Respondent's Treaty breaches. As such, these deductions are consequential to the Respondent's wrongs and therefore do not form part of the but-for scenario in this case.

516. Second, the specific circumstances of this case confirm the speculative nature of the exercise that the Respondent requests the Tribunal to perform.

517. In essence, the Respondent requests that the Tribunal gross down its award on damages to account for the fact that the Claimants deducted legal costs in their tax returns at a higher rate than that which will apply to the amount of compensation for those legal costs fixed in this Award, resulting in a windfall for the Claimants. As yet, however, the amount of this windfall cannot be established. While the Respondent has provided the U.S. marginal tax rates that have applied to the Claimants' historical taxable income – and corresponding deductions –[812] the precise tax liability that will apply to any amounts collected by the Claimants on the basis of this Award will only be known at the time of enforcement. The Parties disagree on the likelihood that the applicable corporate income tax rate in the United States will increase in future years, but there is no dispute on the basic fact that the rate is subject to change.[813] As such, the amount of the Claimants' purported "tax savings" – or even whether any "tax savings" will materialize at all at the time of collection – is uncertain. The Tribunal therefore lacks a reliable basis on which to determine the amount of these "tax savings" and to exclude them *ex ante* from the final amount of compensation.

518. To address this circumstance, the Respondent proposes that the Tribunal issue an award "that any amount owed by Ecuador must be adjusted to the extent that the tax rate as

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811 **RLA-351**, *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador*, PCA Case No. 2007-02/AA277, UNCITRAL, Final Award on the Merits, 31 August 2011, para. 311 (emphasis by the Tribunal).

812 Counter-Memorial, para. 1307; Reply, paras. 565-567; **RE-42**, First Flores Expert Report, para. 74; Second Sequeira Expert Report, para. 112.

813 Reply, para. 568; Rejoinder, paras. 563-564.

changed, up or down, as of the time of collection".[814] The Tribunal must reject this approach: it is not prepared to reduce the determination of the tax liability of this Award to a simple arithmetical exercise as suggested by the Respondent, particularly without having had the benefit of evidence from tax experts on this particular matter.[815] Such determination may be subject to ramifications that are not yet apparent, including potential tax liabilities arising from the enforcement of this Award in jurisdictions other than the United States. The Tribunal also considers that it has not been sufficiently informed on the full impact of the Treaty breaches on the Claimants' overall tax situation during the relevant period, which may well have affected the Claimants' tax liability in numerous ways other than by way of tax deductions.

519. In sum, for the foregoing reasons, the Tribunal rejects the Respondent's request that the Tribunal reduce its damages award on account of the Claimants' purported "tax savings".

G. EVIDENCE OF LEGAL FEES AND EXPENSES

1. Introduction

520. One of the questions lying at the heart of Track III is the sufficiency of the evidence filed by the Claimants to prove their claims for the reimbursement of legal fees and expenses as damages – which, as already stated, encompass the vast majority of the Claimants' compensation claims.[816]

521. As more fully detailed in Section VI.G above, this question has been addressed multiple times and to varying extents during the present phase of the Arbitration owing, among other things, to the voluminous pool of invoices and billing information underlying the Claimants' claim for USD 793 million in legal fees and expenses incurred over 15 years, as well as the difficulties that have arisen when collecting, producing, and analysing such unprecedented amount of data.[817] At this juncture, the Tribunal faces analogous practical challenges in its analysis of the evidence.

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814 Rejoinder, para. 564.

815 *See* First Sequeira Expert Report, para. 5; **RE-42**, First Flores Expert Report, para. 1.

816 *See* para. 310 above.

817 *See* para. 530 below.

522. In this Section, the Tribunal will first recount the process by which this corpus of evidence on legal fees and expenses became part of the record of the Arbitration, including the reasons underlying the Tribunal's order that the Claimants produce the relevant billing information to the Respondent. The Tribunal will then describe the Parties' proposed methodologies for the Tribunal's analysis of this evidence and the tailor-made damages models prepared by their experts to assist the Tribunal with this exercise. Against this background, and bearing in mind its conclusions on other general matters set out in Sections VII.A-F above, the Tribunal will establish the methodology it will apply in its analysis of each of the Claimants' main heads of damages corresponding to legal fees and expenses.

523. For context, the Tribunal recalls that the Claimants' claims for Moral Damages and for other types of pecuniary damages (*i.e.*, Intellectual Property Losses in Ecuador and Embargo Losses in Argentina) are outside the scope of the Claimants' legal fees and expenses claim.[818] While the Tribunal may make limited references to such claims in its below analysis, the conclusions reached in the present Section shall apply only to the Claimants' damages claims seeking the reimbursement of legal fees and expenses.

2. Evidence of Litigation Costs

524. The evidence on legal fees and expenses initially submitted by the Claimants together with their Memorial on Damages included several witness statements and an expert report describing (i) Chevron's billing procedures; (ii) the collection of the billing data for each outside vendor that billed Chevron; (iii) the compilation of that data into a report titled "Summary of Fees and Costs Report" filed as Appendix 2 to the Memorial; and (iv) the process of validating the payment of all invoices against Chevron's electronic payment system.[819] In its Counter-Memorial, the Respondent argued that this evidence fell "far

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818 *See* para. 134 above. *See also* Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1501-1502 (Schwartz): "Then there are the intellectual property damages and the alleged damages for intellectual property and the alleged damages for the bank losses. All of that can be determined independent of any fee issues. Everything we have been talking about with regard to practical and effective means of claim resolution, really applies to the fees. These categories are of a nature more like what you see in other types of investment arbitration disputes."

819 *See* paras. 61, 63 and 283 above.

short" of the minimum showing required – noting, in particular, that the Claimants had failed to provide all of the underlying billing data and invoices.[820]

525. By its Procedural Order No. 65, the Tribunal provided guidance to the Parties on whether "in order to satisfy the burden of proof for their claims . . . they must, in addition to the Damages Evidence presented by them . . . also produce the billing records or invoices underlying the said Damages Evidence".[821] The Tribunal there declined to address the issue of the adequacy of the Claimants' damages evidence pending a full presentation on the Parties' positions:

> As regards the issue of the adequacy of the Claimants' Damages Evidence . . . the Tribunal does not consider it appropriate for it to address this issue at this stage of the proceedings pending a full presentation of the Parties' positions on this matter. It is for the Claimants to consider whether they wish to produce contemporaneous evidence in support of their damages claims under Categories (a)-(m), also in view of the Tribunal's clarification in ¶ 73 above that the evidentiary threshold that must be satisfied by the Claimants in support of these claims is that of damages and not arbitration costs. The Tribunal considers it sufficient to note at this stage that the Claimants' Damages Evidence does not appear to be contemporaneous evidence of the incurrence and reasonableness of the claimed legal fees and costs.[822]

526. While the Tribunal did not make any findings in Procedural Order No. 65 regarding the sufficiency of the Claimants' damages evidence, it addressed the distinct question of whether the Claimants should be required to *produce* further evidence on damages to the Respondent. Indeed, while the Respondent's Track III document production requests were only properly decided thereafter in Procedural Order No. 66,[823] in Procedural Order No. 65 the Tribunal laid out certain preliminary considerations regarding the relevance, materiality and necessity of the billing data and invoices for which the Respondent had requested production from the Claimants.[824] *Inter alia*, the Tribunal determined that the Claimants were required to produce the invoices underlying their damages claims for

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820 Counter-Memorial, paras. 15, 418-594.

821 Procedural Order No. 65, 10 July 2020, para. 61.

822 Procedural Order No. 65, 10 July 2020, para. 81. For an explanation on Categories (a)-(m), *see* fn 596 above.

823 Procedural Order No. 66, 16 July 2020.

824 Procedural Order No. 65, 10 July 2020, paras. 82-85.

legal fees and expenses to the extent they had been relied upon by the Claimants, their witnesses, or their experts:

> As regards the relevance and necessity of the invoices underlying the Claimants' claims under Categories (a)-(m), the Tribunal recalls its determinations in ¶¶ 64 and 65 above that the Claimants must provide the Respondent with the invoices underlying their claims for legal fees and costs under Categories (a)-(m) to the extent that the said invoices have been relied on by the Claimants or have been relied on by the Claimants' experts and witnesses in their expert reports and witness statements presented by the Claimants in these Track III proceedings. In view of this determination, the Tribunal does not consider it necessary to separately assess at this stage of the proceedings whether the production of the invoices by the Claimants is also necessary from the perspective of meeting the Claimants' burden of proof requirements.[825]

527. On this basis, the Tribunal also provided a list of categories of documents for which production may be ordered, without opining on whether the production of all categories of documents would be required in order to prove each head of damages:

> The relevance and materiality of the documents whose production is sought by the Respondent may depend on the particular basis or bases of the claim for damages and the applicable legal test or tests, to the extent that such distinction has been drawn by either side in relation to the various categories of the claims. However, in principle, the Tribunal considers that the production of the following documents may be ordered, particularly where they have been relied on by the Claimants' experts and witnesses and form the basis of the Claimants' Damages Evidence:
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> (i) invoices underlying the claimed fees and costs, along with documents identifying the timekeeper, expert or other vendor (which together form the basis of Appendix 2), as well as a brief narrative of the work done by each person, to be provided through either the production of the actual timesheets or any other document which discloses a brief narrative of the work done;
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> (ii) documents showing payments of legal fees or costs, including amount, date, payer and payee, to be satisfied with emails, billing records, paid invoices or comparable materials;

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[825] Procedural Order No. 65, 10 July 2020, para. 82. *See also id.,* paras. 64, 66: "The Tribunal concurs with the Respondent that the Claimants must produce the invoices underlying their claims for legal fees and costs under Categories (a)-(m) to the extent that the said invoices have been relied on by the Claimants or have been relied on by the Claimants' experts and witnesses in their expert reports and witness statements presented in these Track III proceedings. . . For the purposes of the Tribunal's [prior] observation[] . . . it is not relevant whether or not the Tribunal considers that "[f]or these Track III Proceedings . . . the Tribunal need[s] to review each of the 7,440 invoices and approximately 700,000 time entries line-by-line . . . The pertinent question is whether the Respondent has the right to test the Claimants' Damages Evidence. The Tribunal concurs with the Respondent that it has the right to test the Claimants' Damages Evidence, for which the production of the invoices underlying Appendix 2 and the witness statements and expert reports presented by the Claimants is necessary. The Tribunal also concurs with the Respondent that its right to defend itself against the Claimants' damages claim outweighs any burden that producing the invoices might impose on Claimants."

(iii) documents disclosing fee caps, if any, imposed by the Claimants on counsel, expert or vendor fees and costs;

(iv) case records of the relevant proceedings, including submissions filed and orders and judgments issued;

(v) any claims for (and rulings on) costs raised in any of the proceedings for which the Claimants are seeking recovery of fees and costs;

(vi) documents identifying work done in relation to the proceedings prior to the issuance of the Lago Agrio Judgment where a direct causation with the Treaty breach is or could be established;

(vii) expert reports prepared in connection with the Ecuador dispute; and

(viii) any documents on the basis of which the expert reports and witness statements tendered in Track III of the proceedings have been prepared.

The above list does not imply that production of all the mentioned categories of documents will be required in order to prove each head of damages, or that the relevant categories of documents to prove damages are limited to what is stated in such list. As already noted, the Tribunal's specific determinations as to document production will be issued in a separate order, on the basis of both Parties' respective requests.[826]

528. Following the issuance of Procedural Orders Nos. 65 and 66, the Claimants withdrew "a portion (approximately 3%) of their pecuniary damages claim", reflecting both the removal of entire invoices and the removal or reduction of individual time entries and/or costs, and thereafter submitted a Revised Appendix 2 reflecting the reduced amounts.[827]

529. Thereafter, the Claimants filed their Reply and the Respondent filed its Rejoinder, both of which addressed new evidence on damages provided by the Claimants as described above. The Parties' respective positions on the sufficiency of such evidence are fully set out in Section VI.G above.

530. The relevant evidence on legal fees and expenses presently on record consists of approximately 6,800 invoices and 495,000 fee and expense entries corresponding to the

826 Procedural Order No. 65, 10 July 2020, paras. 84-85.

827 *See* Procedural Order No. 70, 13 November 2020, paras. 3-5; Letter from the Claimants to the Tribunal, 23 November 2020. As background for their decision to withdraw a portion of their claims, the Claimants referred to "serious concerns about providing Ecuador and those aligned with it (*i.e.*, Donziger, the Lago Agrio Plaintiffs, and their associates) access to Claimants' communications with their outside counsel and counsel's work product as reflected in years of attorney (and other vendor) invoices", noting that the Respondent had "violated confidentiality orders in the past". For its part, the Respondent rejected these contentions as unsubstantiated and observed that there is no evidence suggesting that the Respondent's legal team would disregard the confidentiality obligations set out in Procedural Order No. 67. *See* Procedural Order No. 70, 13 November 2020, fn 1.

services provided by over 50 different law firms and nearly 100 various other experts and vendors, totalling more than USD 793 million in fees and costs. Within this body of evidence, the time records submitted by the Claimants contain nearly 1.2 million hours and represent over USD 600 million in fees billed by over 2,000 different timekeepers.[828]

3. The Parties' Proposed Methodologies

531. During Track III, the Tribunal had the benefit of expert evidence and extensive briefing from the Parties touching upon the sufficiency of the Claimants' damages evidence to prove their claims for legal fees and expenses, as well as the degree of granularity that the Tribunal should apply in its evidentiary analysis to determine the appropriate measure of compensation.

532. In particular, at the Track III Hearing the Parties made targeted presentations on the Tribunal's "Question 8", which framed the matters under the present heading as follows:

> Considering the voluminous evidence offered in the present case and, at the same time, the Respondent's criticism of the adequacy of the Claimants' damages evidence:
>
> a. Who bears the burden(s) of proof on the various aspects involved in the quantification of the Claimants' damages?
>
> b. What is the relevant standard of proof under international law?
>
> c. What is the degree of granularity required for proof of damages under international law or what principles determine the details that must be proven?
>
> d. What are the consequences of a failure to meet the burden(s) or standard(s) of proof in respect of all or part of the claim? For instance, would it lead to (i) a dismissal of the claim; (ii) an opportunity to reformulate the claim and/or to adduce additional materials; (iii) any remedy that the Tribunal deems appropriate in its discretion; or (iv) any other consequence?
>
> e. May the Arbitral Tribunal, without purporting to [*sc.,* act] ex aequo et bono, nevertheless determine the amount of compensation on an equitable or practical basis (for instance, by assessing the margin of error that all claimed costs were not "reasonable or necessary", "reasonable", or "proximate", without, however, undertaking a line-by-line analysis of each claimed cost)? If so, which circumstances are to be taken into consideration?

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828 Mc Grath Expert Report, para. 37; **RE-51**, Trunko Expert Report, paras. 5-7; Track III Hearing, Day 10 (31 August 2022), pp. 2316-2317 (Trunko); Day 11 (1 September 2022), p. 2548 (McGrath).

> f. What is the impact of paragraph 81-85 of Procedural Order No. 65, and in particular paragraph 84 thereof, on the answers to each of the foregoing questions?[829]

533. The Parties' proposed methodologies for the Tribunal's evidentiary analysis, corresponding to their answers to Question 8(e) above, differ widely. In essence, the Claimants propose that the Tribunal determine compensation on a practical basis by reference to a "commercial reasonableness test", which would obviate the need for a line-by-line analysis of the billing data and invoices on the record:

> Now, the fifth question [Question 8(e) in the quote in paragraph 532 above]--and I'll take a little more time on this question--it's in two parts. First: May the Arbitral Tribunal determine the amount of compensation on an equitable or practical basis? And then, the second question: If so, what are the circumstances to be taken into account?
>
> Well, the answer to the first question is, yes. You can determine compensation on a practical basis. The Tribunal can apply a practical test to make that assessment and does not need to undertake a line-by-line analysis of 6,800 invoices or 495,000 time entries.
>
> Now, the answer to the second question is that the most principled and objective way to assess the reasonableness of attorneys' fees and expenses when they're claimed as damages, is to apply the commercial reasonableness test, which was discussed by Professor Silver.
>
> And to summarize the relevant factors under that test, first of all, if a sophisticated corporate client has actually paid all of the legal bills with no assurance at the time it paid them, that it would be able to recover them, and it's used a reasonable process to avoid unnecessary or excessive costs, and the amount spent is proportionate in the aggregate to the overall stakes of the litigation, then the costs can be found to be reasonable on that basis alone, without undertaking a painstaking review of every invoice.[830]

534. Before providing their answer to Question 8, the Claimants had also cautioned the Tribunal against performing a "fee audit", particularly in view of the ultimate success of the Claimants' mitigation efforts:

> And let's be honest. We know where we would be if Chevron had not spent this money, had not achieved this success. We would be hearing today, and that's an area that I just gave where we pay the $9.5 billion Judgment or it's enforced against us, we would be hearing today from Ecuador, my goodness, why didn't you mitigate? So much was at stake?
>
> So, this . . . really shows you . . . why this . . . shouldn't be a fee audit. Think about the logic of Ecuador's approach. Chevron has to justify every dollar spent after the fact, based

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[829] Letter from the Tribunal to the Parties dated 23 August 2022. For a description of paragraphs 81-85 of Procedural Order No. 65 *see* paras. 525-527 above.

[830] Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1487-1488 (Bishop). *See generally* Silver Expert Report.

> purely on the line items in the invoices that Chevron actually reviewed, evaluated and paid out of its own pocket years ago, invoice by invoice, line by line, dollar by dollar.
>
> Now, set aside the massive irony of how much legal spend that process would involve, it's just not the standard. If it were, I could spend today walking through the invoices that they complain about, the time entries one by one. We could spend hours pointing out that when, for example, they criticize Ms. Neuman for watching a movie, the movie was Crude; could point out that when they criticize a lawyer for renting a bicycle to get around town for meetings, that lawyer had no taxi expenses that would have cost more, that's how they were getting around town on a bicycle for the meetings. And we could go on and on.
>
> And, of course, throughout this Hearing, we're happy to answer any questions that the Tribunal might have about particular invoices of concern. But the key point is that that's not the exercise. Claimants' legal spend mitigated against 12, or actually, 24 times as much in damages.[831]

535. The Respondent, in turn, proposes a multi-tier inquiry ensuring that each category of damages is subject to "a particularized review at an appropriate level of detail":

> So, the question is: May the Tribunal, without purporting to act ex aequo et bono, nevertheless determine compensation in some equitable or practical manner? Our answer is "yes," but we don't think you have unbridled discretion to do that. We think you can do that, but only in a structured manner that addresses the legal issues impacting multiple categories first, and then ultimately ensures that each category is subject to a particularized review at an appropriate level of detail, and that particularized review and level of detail needs to be right-sized to each of the particular categories because while some bear some similarities, there are many differences between and among them.[832]

536. As a first step of the inquiry, the Respondent proposes that the Tribunal determine legal issues that impact multiple categories, such as the issues of date of breach, the Claimants' purported failure to mitigate the injury or the but-for scenario.[833]

537. Second, the Respondent proposes that the Tribunal determine whether there are heads of damages that are entirely non-compensable and remove them from its analysis. More circumscribed components within those categories of damages may also be non-compensable, according to the Respondent, and thus should also be removed.[834]

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831 Track III Hearing Transcript, Day 1 (18 August 2022), pp. 121-122 (Coriell).

832 Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1496-1497 (Schwartz). *See also* Track III Hearing Transcript, Day 8 (29 August 2022), pp. 1777-1778 (Schwartz); Respondent's Disclaimers to the Parties' Damages Models, 18 November 2022, para. 4.

833 Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1497-1498 (Schwartz).

834 Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1498-1501 (Schwartz).

538. Third, after excluding all non-compensable categories and components from the compensation inquiry, the Respondent proposes that the Tribunal rely on the audit work performed by its expert, Mr John Trunko, to reduce the residual compensable costs "without going through every single line of the [c]laim that remains".[835]

539. According to Mr Trunko, his audit of the law firm fees claimed by the Claimants as damages reveals "numerous problematic issues reflecting unreasonable fees and costs", including "block billing", "vague billing", "administrative and clerical activities", "getting up to speed and training", "media and public relations activities", "nondefense related activities", "multiple attendance", "duplicative activities", "long billing days and excessive time", "double billings", and "inadequately documented fees".[836] Against this background, Mr Trunko opines that "significant reductions are warranted to Claimants' claimed fees and costs",[837] which should be particularized as an across-the-board percentage reduction to the residual fees to account for the "pervasive issues" identified in his review. Based on his experience when addressing similar issues in U.S. litigations, Mr Trunko noted: "[o]ften these percentage reductions will be around 30 percent or in some cases even higher".[838]

540. As an alternative to Mr Trunko's proposed approach, the Respondent invited the Tribunal to consider the appointment of a Tribunal expert who could opine on reasonableness and necessity with regard to the residual costs still under consideration.[839]

541. Fourth, and last, the Respondent noted that the Claimants' claimed damages for the embargo of intellectual property and Chevron's bank accounts in Argentina could be examined independently of the above determinations, which apply only to legal fees and expenses as damages.[840]

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835 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1501 (Schwartz).

836 **RE-51**, Trunko Expert Report, para. 8.

837 **RE-51**, Trunko Expert Report, para. 56.

838 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2338 (Trunko).

839 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1502 (Schwartz): Day 8 (27 August 2022), p. 1775 (Schwartz).

840 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1501 (Schwartz).

4. The Parties' Damages and Interest Models

542. The Parties' damages experts (Mr Kiran Sequeira of Secretariat and Mr Daniel Flores of Quadrant Economics) each submitted dynamic Microsoft Excel damages models together with their expert reports.[841] The models are derived from the same dataset reflecting the billing information supporting the Claimants' damages claims for legal fees and expenses – not so for other types of pecuniary damages.[842] Among several other functionalities, both models include "switches" enabling the user to set parameters for the calculation of the amount of compensation, such as the start date for the inclusion of fees and costs in respect of each category of damages or the applicable rate of interest.

543. Following discussions with the Parties and their respective damages experts at the Track III Hearing, by its Procedural Order No. 83 the Tribunal invited the Parties to agree on a joint model for the calculation of damages and interest based on the models already on record.[843] The Parties were directed to include a series of additional features and "switches" in the joint model that the Tribunal may require at the time of performing its damages analysis.[844] The Parties were also invited to attempt to agree on a final list of

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841 Second Sequeira Expert Report, **Appendix G.1**; **RE-56**, Second Flores Expert Report, **QE-50**, Updated Interest Calculations.

842 Track III Hearing, Day 13 (5 September 2022), pp. 3081-3082 (Flores).

843 Procedural Order No. 83, 14 October 2022.

844 Procedural Order No. 83, 14 October 2022, para. 4. The features requested by the Tribunal included: "(i) a switch to apply a nominal amount discount to any given category of damages; (ii) a switch to apply a percentage discount to any given category of damages; (iii) a switch to limit the calculation of damages and interest for a given category of damages to a tailored date range (as opposed to a single cut-off/starting date); (iv) the option to use the dates work was performed, payment dates or invoice dates for purposes of implementing starting dates or date ranges; (v) a switch to include/exclude and/or apply nominal amount or percentage discounts to any particular law firm or vendor; (vi) a cross-reference to the data compiled by the Respondent's expert, Mr. John L. Trunko (reconciled, to the extent possible, as per the Claimants' observations and the Respondent's responses regarding duplication and other numerical adjustments), with respect to certain disputed billing practices and other elements, in order to be able to perform a percentage reduction on an invoice level to the principal amount of each or all such element(s); (vii) switches that would permit the Tribunal, insofar as possible, to itemize and apply percentage discounts corresponding to the principal amounts of each additional discrete component or element that is contested by the Respondent; (viii) fixing the apparent discrepancy between the two existing models in the calculation of interest based on weighted average cost of capital or, alternatively, explaining the reason for the discrepancy and including a switch in respect thereof; (ix) built-in options for any alternative interest rates canvassed by Dr. Flores but not included in the existing models. . .; (x) the possibility to apply granular (at least 0.1%) adjustments to the premium, or the negative adjustment, on benchmark interest rates; (xi) a switch to independently apply the two types of tax implications mentioned by the Respondent . . .; (xii) an indication of the damages and interest calculation underlying each Party's main positions (either through an additional switch, if technically and practically feasible, or through a chart or screenshot reflecting the relevant combination of switch selections); (xiii) a reset button that restores the Joint Model to its original version as submitted to the Tribunal;

"components" and "elements" divided by category to be implemented in the joint model.[845]

544. Ultimately, the Parties were unable to submit an agreed joint model. Instead, each submitted a model prepared on the basis of the Tribunal's instructions set out in Procedural Order No. 83, with accompanying disclaimers and video tutorials (respectively, the "**Claimants' Damages Model**" and the "**Respondent's Damages Model**").[846]

5. The Tribunal's Methodology

545. As gleaned from the above, the Tribunal is required to decide the Claimants' incidental damages claims for USD 793 million in legal fees and expenses[847] based on a volume of evidence that is unprecedented for a claim of this sort in the investment arbitration context. The task before the Tribunal is to determine an appropriate methodology for the assessment of this corpus of evidence guided by the applicable principles of international law governing the resolution of the Claimants' claims.

546. The point of departure in the determination of the Tribunal's methodology is Article 25(6) of the UNCITRAL Arbitration Rules, which reads: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." This provision grants ample discretion to the Tribunal as regards all evidentiary matters, including the assessment of the evidence underlying the Claimants' claims.

(xiv) a user manual for the Joint Model (including, if appropriate, a video tutorial). . .; (xv) a private helpdesk system for the Tribunal to be able to consult confidentially and jointly with Mr. Sequeira and Dr. Flores for troubleshooting purposes or to verify the proper functioning of the Joint Model; and (xvi) any additional switch or feature that the Parties may agree upon."

845 Procedural Order No. 83, 14 October 2022, para. 9.

846 Letter from the Claimants to the Tribunal dated 2 November 2022; Letter from the Respondent to the Tribunal dated 2 November 2022; Letter from the Claimants to the Tribunal dated 18 November 2022; Respondent's Disclaimers to the Parties' Damages Models, 18 November 2022; E-mail from the Respondent to the Tribunal dated 10 December 2022.

847 The Claimants request the reimbursement of USD 793,879,967.74 for legal fees and expenses claimed as damages (Reply, Updated Appendix 2, p. 1). In addition, the Tribunal recalls that they also request (i) 85,315,652 for Intellectual Property Losses in Ecuador; (ii) USD 13 million for the Embargo in Argentina; and (iii) Moral Damages in the amount that the Tribunal deems just and proper (Reply, para. 1212(3)).

547. The Parties agree on the fact of the Tribunal's discretion but disagree on the manner in which it should be applied in the circumstances of this case. As explained above, the Claimants favour the application of a high-level "commercial reasonableness test", while the Respondent requests that the Tribunal apply its discretion in a "structured manner that addresses the legal issues impacting multiple categories first, and then ultimately ensures that each category is subject to a particularized review at an appropriate level of detail".[848]

548. In envisaging a methodology for the assessment of damages, the Tribunal must exercise its discretion in a manner consistent with its above determinations that (i) the onus is on the Claimants to prove every element of their damages claim,[849] and (ii) the applicable standard of proof is the balance of probabilities.[850] One of the implications derived from these determinations is that the Claimants are not required to prove their damages with absolute precision: it is sufficient for the Claimants to show that it is more likely than not that they suffered the damages they claim and that such damages are not speculative or uncertain. By the same token, the Tribunal is only required to exercise *reasonable* precision in the assessment of damages, particularly if achieving absolute precision would be disproportionately burdensome when compared with the margin of error.[851]

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848 Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1487-1488 (Bishop); pp. 1497-1498 (Schwartz).

849 *See* paras. 328, 335 above.

850 *See* para. 325 above.

851 While the proposition that investment treaty tribunals must only exercise reasonable precision in the assessment of damages has been applied chiefly in circumstances where tribunals were required to apply valuation methods to ascertain future losses – such as the 'discounted cash flow' method or 'DCF' – the Tribunal considers that the same proposition applies with equal force in circumstances where, as here, the fact of the loss is certain and the amount and complexity of the damages evidence on record is of such magnitude that a line-by-line analysis could not conceivably yield a scientifically precise result. For a description of the evidence on legal fees and expenses on record *see* para. 530 above. *See also* **CLA-617**, *Gold Reserve Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 686: "Because of this element of imprecision, it is accepted that tribunals retain a certain amount of discretion or a 'margin of appreciation' when assessing damages, which will necessarily involve some approximation"; **RLA-789**, *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 871: "Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself"; **CLA-228**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award 20 August 2007, para. 8.3.16: "The fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science"; **CLA-659**, *Unión Fenosa Gas, S.A. v. Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, para. 10.101: "The assessment of compensation is rarely a science or an exercise of arithmetical precision by an arbitration tribunal. Complex factual, legal and expert issues of compensation, dividing the disputing parties and their expert witnesses, can require a margin of appreciation by a

549. The Tribunal's prior decisions concerning the requirements for the compensation of incidental damages define the meaning of 'reasonable precision' in the circumstances of this case. Chief among them are the Tribunal's determinations that (i) the required causal link must be established clearly and in an itemized fashion for each mitigation measure to warrant reparation;[852] and (ii) the onus is on the Claimants to prove the reasonableness of both the mitigation measures they undertook and the amounts spent in connection with each of those measures.[853] These determinations require the Tribunal to adopt a reasonably detailed level of review and will also inform the Tribunal's determination of the level of detail required for such exercise.

550. In view of these findings, the Tribunal rejects as disproportionately onerous a line-by-line analysis of the billing data and invoices on the record – which, in any event, the Parties agree is not required in the instant case.[854] Similarly, however, the Tribunal must reject the Claimants' proposed "commercial reasonableness test" as being insufficiently precise for present purposes.

551. Having considered all of the above factors, the Tribunal sets out below the methodology it will follow in Section VIII for the assessment of the Claimants' damages claims for legal fees and expenses. As part of its assessment, the Tribunal will be assisted by the models prepared by the Parties' respective damages experts, both of which permit a detailed analysis of the evidence on record.

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tribunal. . ."; **CLA-116**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 521: "However the Tribunal feels bound to point out that the assessment of damages is not a science . . . But at the end of the day, the Tribunal can stand back and look at the work product and arrive at a figure with which it is comfortable in all the circumstances of the case"; **RLA-717**, *Southern Pacific Properties (Middle East) Limited v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, para. 215: "This determination necessarily involves an element of subjectivism and, consequently, some uncertainty. However, it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred"; **CLA-660/RLA-433**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 246: "Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss."

852 *See* para. 330 above.

853 *See* para. 335 above.

854 Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1487-1488 (Bishop); pp. 1497-1498 (Schwartz).

552. For the purposes of this methodology, the Tribunal will use certain shorthand terms appearing in Procedural Order No. 83 with the same meaning stated therein,[855] namely:

(i) "**Categories**" shall mean "each of the main heads of damages listed in items (a) through (m) of paragraph 479.2 of the Claimants' Memorial on Damages, dated 31 May 2019";[856]

(ii) "**Components**" shall mean "distinguishable subcategories of costs or actions that are specific to each category or main proceeding for which damages are claimed (e.g., count IX of the RICO proceedings, each of the § 1782 actions, etc.)";[857] and

(iii) "**Element**" shall mean "any other cost subsets that may be present in several categories, and the recoverability of which is disputed on the basis of the nature of the expenditure, the observation of pathological or allegedly inadequate billing practices or other reasons (e.g., block billing, public relations, etc.)"[858]

(a) First Step: Analysis of Incidental Damages "Categories"

553. Each of the damages categories in the instant case is connected with varying degrees of remoteness to legal proceedings. Certain categories relate to costs incurred directly within the context of legal proceedings, such as the Lago Agrio or RICO Litigations. The category "General Defence" relates to costs attributable to furthering and coordinating Chevron's overall defence against the Lago Agrio Judgment.[859] In turn, the category "Costs of Planning Against Potential Enforcement in Other Jurisdictions" concerns costs incurred in anticipation of enforcement actions that were not ultimately filed.[860]

554. Determining, without more, whether each of these heads of damages is compensable would be inconsistent with the requirement that the Tribunal assess the existing evidence on damages at an appropriate level of detail. However, there is room for the Tribunal to

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855 Procedural Order No. 83, 14 October 2022, para. 8.

856 *See* para. 558 below for a full list of all "Categories".

857 *See* para. 568 below for a full list of all "Components".

858 *See* para. 574 below for a full list of all "Elements".

859 Reply, para. 1008.

860 Reply, para. 939.

exclude individual categories involving legal fees and expenses from further analysis if any such category, in the terms in which it has been particularized by the Claimants, fails to meet the requirements of causation and reasonableness for the compensation of incidental damages under international law.

555. First, the notion of causation as regards incidental damages requires the Tribunal to determine whether the legal fees and expenses claimed under each of the Claimants' main heads of damages, when considered as a whole, were incurred to minimize loss and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment.[861] The Tribunal has already determined three possible ways in which the Claimants could have mitigated the injury: (i) by preventing the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, by thereafter seeking to render the Judgment unenforceable; and (iii) by minimizing the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution or howsoever otherwise.[862] The costs incurred in connection with each category, considered globally, must have pursued one of these three objectives for a causal link to be established.

556. Incidental damages are subject to an additional requirement of reasonableness: to warrant compensation, legal fees and expenses must have been *reasonably* incurred to mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment.[863] The determination required at this first level of analysis, however, is one of reasonableness of the mitigation *measures* undertaken by the Claimants, not of the *amounts* spent, which require a more particularized review as further described below. As such, the test for reasonableness as regards categories must also centre upon the goals sought by the Claimants when taking a particular course of action; in other words, the question that will be addressed by the Tribunal is whether the Claimants' choice of measures was a reasonable means by which to mitigate the injury.

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861 *See* para. 328 above.

862 *See* para. 363 above.

863 *See* para. 332 above.

557. Any categories that fail to meet the requirements of causation and reasonableness as described in the preceding paragraphs will be excluded from the Tribunal's analysis going forward. In turn, where the Claimants have established that a particular category of damages meets these requirements, the Tribunal will treat all legal fees and expenses within that category as compensable, except where the Respondent has raised additional arguments or objections concerning matters falling under that category – such as questions on the compensability of a specific component included in that category – which the Tribunal shall then address. In adopting this approach, the Tribunal acts consistently with the applicable standard of proof (balance of probabilities),[864] as well as the Parties' agreement that it may adopt a practical approach to the determination of damages.[865]

558. For ease of reference, the 13 damage categories identified by the Parties involving legal fees and expenses are set out below. Where the Parties have referred to a category by a name different from that adopted by the Tribunal in this Award, the Tribunal has noted such difference below. Going forward, the Tribunal shall employ only the defined terms for each category indicated in paragraphs 132-133 above. The list that follows reflects the order in which the Tribunal will consider each category in this Award, rather than the order in which they were presented by the Parties.

(i) Lago Agrio Litigation (Ecuador) (previously defined as "Lago Agrio Litigation");

(ii) Enforcement Litigation in Ecuador (previously defined as "Ecuador Enforcement Proceedings");

(iii) Enforcement Litigation in Argentina (previously defined as "Argentina Enforcement Proceedings");

(iv) Enforcement Litigation in Brazil (previously defined as "Brazil Enforcement Proceedings");

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864 *See* para. 325 above.

865 *See* paras. 533, 535, 546-547 above.

(v) Enforcement Litigation in Canada (previously defined as "Canada Enforcement Proceedings");

(vi) Costs of Planning Against Potential Enforcement in Other Jurisdictions;

(vii) RICO Litigation (USA) (previously defined as "RICO Litigation");

(viii) Section 1782 Litigations (USA) (previously defined as "Section 1782 Proceedings");

(ix) Gibraltar Proceedings;

(x) General Defence;

(xi) Criminal Proceedings (Ecuador) (previously defined as "Criminal Proceedings");

(xii) Dutch Set-Aside Proceedings; and

(xiii) Treaty Arbitration Costs Incurred by Non-Counsel of Record.[866]

(b) Second Step: Analysis of Incidental Damages "Components"

559. Having determined which categories fulfil the requirements of causation and reasonableness in the terms described in the preceding section, as a second step the Tribunal will determine, within each damages category, whether the Claimants have established the requirements for each individual costs "component" to qualify as incidental damages.

560. In this respect, the Tribunal recalls again its determination that the required causal link must be established clearly and in an itemized fashion for each mitigation measure to warrant reparation.[867] In the Tribunal's view, performing this assessment by reference to components – not overarching categories – is a sufficiently granular form of review in the circumstances of this case.

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[866] Letter from the Respondent to the Tribunal dated 21 October 2022; Letter from the Claimants to the Tribunal dated 22 October 2022, Attachment A.

[867] *See* para. 330 above.

561. In identifying components, the Tribunal will draw guidance from the lists of components submitted by the Parties together with their respective damages models, but will also preserve flexibility to make more detailed causation assessments on other aspects of the Claimants' claims when the circumstances so require.[868] For the avoidance of doubt, the Tribunal also clarifies that its determination that a line-by-line analysis of the billing data and invoices on the record is disproportionately onerous[869] should not be read to preclude the Tribunal from analysing certain invoices or entries of interest to the extent it considers it necessary to assess any particular component.

562. In addition, the Tribunal will assess the factors governing the question of reasonableness as regards incidental damages set out in Section VII.A.3 above vis-à-vis each individual component and also more circumscribed aspects to the extent it is required.[870] In practice, however, the determination of reasonableness may be contextual, meaning that several components may need to be considered jointly to perform that assessment. For instance, where the Tribunal is required to assess the reasonableness of hiring of a specific law firm as a "component", the Tribunal may determine that it was reasonable for the Claimants to retain that law firm to defend themselves against attempts to enforce the Lago Agrio Judgment in a particular jurisdiction and at the same time conclude that hiring additional law firms for the same purpose was unreasonable in the circumstances.

563. The Tribunal further observes that many of the components identified by the Parties concern activities that have also been identified as cross-cutting "elements" impacting multiple categories (*e.g.*, activities relating to media and public relations, activities relating to government relations, non-defence-related activities, administrative and clerical activities. . . etc.).[871] The Tribunal will therefore defer its assessment of many of these activities to its analysis of cross-cutting "elements" in Section VIII.N below to the extent it considers it appropriate in each specific instance.

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868 Letter from the Respondent to the Tribunal dated 21 October 2022; Letter from the Claimants to the Tribunal dated 22 October 2022, Attachment A.

869 *See* para. 550 above.

870 *See* paras. 339-343 above.

871 *See* para. 574 below.

564. As explained above, the onus of proving the reasonableness of the mitigation *measures* that were taken by the Claimants and also of the *amounts* spent in connection with each measure/component lies with the Claimants.[872] Thus, when addressing components of the Claimants' damages claim, the Tribunal will also assess the reasonableness of the amounts claimed in connection with each individual component, albeit only to the extent it can perform a targeted assessment at this stage of analysis. In this respect, the Tribunal observes that many of the factors potentially impacting upon the reasonableness of the amounts claimed by the Claimants have also been identified by the Parties as cross-cutting "elements" impacting multiple categories (*e.g.*, block billing, double billing, vague billing entries, multiple attendance at events, excessive billing days and excessive time. . . etc.).[873] As more fully explained in section VII.G.5(c) below, these "elements" can only be addressed by the Tribunal *after* the Tribunal has addressed all components identified by the Parties. In other words, it is not possible for the Tribunal to perform a full assessment of the reasonableness of the amounts claimed by the Claimants at this stage of analysis. The Tribunal will thus defer many aspects of such assessment to Section VIII.N below.

565. For these reasons, the Tribunal will often refrain from making express determinations on the reasonableness of the amounts corresponding to individual components and sub-components at this intermediate stage of analysis. This approach is also required in view of the fact that specific amounts or invoices will often fall, in full or in part, within the scope of multiple components identified by the Parties, meaning that any determinations made regarding a certain component may indirectly reduce the amounts that may still be recovered in connection with other components. By way of example, by determining that the legal fees charged by a specific law firm as a whole are not compensable, the Tribunal may also be indirectly excluding from compensation certain amounts claimed in connection with other components concerning activities performed by that same law firm.

872 *See* para. 335 above.

873 *See* para. 574 below.

566. In sum, the Tribunal's analysis of components should not be deemed to exhaust its assessment of the reasonableness of the amounts spent by the Claimants in connection with each of those components.

567. Lastly, at this stage of analysis, the Tribunal will also factor in (i) the exclusion of legal fees and expenses incurred prior to the date of issuance of the Lago Agrio Judgment, as explained in Section VII.A.4 above;[874] (ii) the exclusion of fees collected, awarded or settled in other proceedings from the Claimants' damages claims described in Section VII.E above;[875] and (iii) the implications of the Tribunal's conclusions on the Respondent's but-for argument, set out in Section VII.A.5 above.[876] The Tribunal will also address other arguments raised by the Parties in connection with specific aspects of each damages category that have not been expressly identified as a component.

568. For ease of reference, the components identified by the Parties within each damages category are set out below. Where the Parties were unable to agree on the name to be assigned to a specific component, the Claimants' and the Respondent's respective given names for that component are marked "(CLA)" or "(RES)", as applicable. The list that follows reflects the order in which the Tribunal will consider each category and component in this Award, rather than the order in which they were presented by the Parties.

(i) **Lago Agrio Litigation**

i. PR Firms (Creative Response Concepts; Benjamin Ortiz Brennan);

ii. Adrian Briggs; Autonomy – Introspect; Fernando Morales; Fernando Sierra; Gus R Lesnevich Inc.; Harris Corp Government Communication System; Jan Paulsson (billed through Freshfields); RICOH USA Inc/Formerly IKON;

iii. Lago Agrio WestLaw/Lexis charges;

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874 *See* para. 362 above.

875 *See* para. 503 above.

876 *See* paras. 395, 398 above.

iv. (CLA) Lago Agrio fees and costs allegedly relating to administrative and clerical activities / (RES) Lago Agrio fees and costs relating to administrative and clerical activities; and

v. Lago Agrio charges relating to translation.

(ii) **Ecuador Enforcement Proceedings**

i. (CLA) Expenses alleged to be for temporary employees / (RES) Temporary employee expenses.

(iii) **Argentina Enforcement Proceedings**

i. (CLA) Fees and costs before the LAPs' enforcement strategy became known to Claimants / (RES) Fees and costs before the Invictus Memorandum became known to Chevron (January 2011);

ii. Fees for services rendered by Arslanian and Asociados and Emilio Jorge Cardenas not accompanied by *facturas*;

iii. (CLA) Fees solely related to media and public relations / (RES) Fees for media and public relations;

iv. Fees and costs incurred before November 5, 2012, the date the Argentine proceedings were filed;

v. (CLA) Fees incurred solely for monitoring service, dockets, and service refusal activities / (RES) Fees for monitoring service, dockets, and service refusal activities;

vi. (CLA) Fees incurred solely in connection with the challenge to the LAPs' *in forma pauperis* status / (RES) Fees incurred in connection with the challenge to the LAPs' *in forma pauperis* status;

vii. (CLA) Fees incurred solely in connection with unsuccessful challenges of judges / (RES) Fees incurred in connection with unsuccessful challenges of judges; and

viii. Fees incurred in carrying out activities alleged to be prohibited under Argentine law.

(iv) **Brazil Recognition Proceedings**

i. (CLA) Fees and costs before the LAPs' enforcement strategy became known to Claimants / (RES) Fees and costs before the Invictus Memorandum became known to Chevron (January 2011);

ii. (CLA) Fees incurred solely in connection with the challenge to the LAPs' *in forma pauperis* status / (RES) Fees incurred in connection with the challenge to the LAPs' *in forma pauperis* status;

iii. Media and public relations;

iv. Government relations;

v. Amounts billed by the Mattos Firms under the matters "Ecuador Decision– PGPA [Policy, Government, and Public Affairs]" and "Relações Governamentais [Governmental Relations]";

vi. Fees and costs incurred before the date the Brazilian proceeding was filed;

vii. Costs of Portuguese/English translations between May 2013 and July 2015;

viii. Costs of English/Spanish translations; and

ix. (CLA) Law firms that represented Chevron's Brazilian subsidiary (Mattos Engelberg Advogados; Mattos Muriel Kestener Advogados) / (RES) Law firms that purportedly represented Chevron's Brazilian subsidiary (Mattos Engelberg Advogados; Mattos Muriel Kestener Advogados).

(v) **Canada Enforcement Proceedings**

i. (CLA) Fees and costs before the LAPs' enforcement strategy became known to Claimants / (RES) Fees and costs before the Invictus Memorandum became known to Chevron (January 2011);

ii. (CLA) Amount awarded by the Canadian courts, allegedly adjusted for full indemnity / (RES) Amount awarded by the Canadian courts, adjusted for full indemnity;

iii. (CLA) Fees Chevron argued were reasonable under domestic rules governing costs applications in the Canadian courts / (RES) Fees Chevron argued were reasonable in Canadian courts;

iv. Pre-filing fees;

v. Fees and Costs of U.S. Law Firms: Gibson, Dunn & Crutcher LLP; Stern Kilcullen & Rufolo LLC; Jones Day; Boies Schiller & Flexner LLP; Gardere Wynne Sewell; Covington & Burling LLP;

vi. (CLA) Alleged coordination of moots / (RES) Coordination of moots; and

vii. (CLA) Law firms that represented Canadian subsidiaries (Goodmans; Lax O'Sullivan) / (RES) Law firms that represented the non-Claimant Canadian subsidiaries (Goodmans; Lax O'Sullivan).

(vi) **Costs of Planning Against Potential Enforcement in Other Jurisdictions**

i. (CLA) Fees and costs before the LAPs' enforcement strategy became known to Claimants / (RES) Fees and costs before the Invictus Memorandum became known to Chevron (January 2011);

ii. (CLA) Fees incurred solely for monitoring dockets in jurisdictions where no action was ever filed / (RES) Fees for monitoring dockets in jurisdictions where no action was ever filed; and

iii. (CLA) Fees incurred solely for drafting pleadings in jurisdictions where no action was ever filed / (RES) Fees for drafting pleadings in jurisdictions where no action was ever filed.

(vii) **RICO Litigation**

i. (CLA) Fees Exceeding US$ 32,334,584 / (RES) Fees Exceeding US$ 32,334,584 (amount requested in fee application);

ii. (CLA) Work relating solely to Count IX (including Preliminary Injunction) / (RES) Work relating to Count IX (including Preliminary Injunction);

iii. Work related to bringing a Complaint Against NY State Comptroller DiNapoli;

iv. Work related to opposing John Keker's *pro hac vice* application;

v. (CLA) Work related solely to the Second Amended Complaint / (RES) Work related to the Second Amended Complaint;

vi. (CLA) Work relating solely to Unjust Enrichment / (RES) Work relating to Unjust Enrichment;

vii. Work dedicated to withdrawn demand for money damages;

viii. Fees and costs claimed for period prior to filing complaint;

ix. (CLA) Work related solely to pursuing civil contempt proceedings against Donziger / (RES) Work related to pursuing civil contempt proceedings against Donziger;

x. Kobre & Kim LLP;

xi. Rivero Mestre LLP;

xii. Covington & Burling LLP;

xiii. Stern Kilcullen & Rufolo LLC;

xiv. Barros Letelier & Compania Abogados;

xv. Gardere Wynne Sewell LLP;

xvi. Jan Paulsson (billed through Freshfields);

xvii. Three Crowns LLP;

xviii. Bullard, Falla & Ezcurra Abogados;

xix. Boies Schiller & Flexner LLP;

xx. Asesorias Bofill Escobar;

xxi. Kroll Associates;

xxii. Daniel Cooperman; and

xxiii. Anil Shivdasani.

(viii) **Section 1782 Proceedings**

i. (CLA) Work related solely to pursuing sanctions against the LAPs' law firms / (RES) Pursuing sanctions against the LAPs' law firms;

ii. (CLA) Fees and costs billed by Rivero Mestre and Covington & Burling in connection with their representation of Perez and Veiga (Rivero Mestre and Covington & Burling) / (RES) Fees and costs billed by Perez and Veiga's law firms (Rivero Mestre and Covington & Burling); and

iii. "Defensive" 1782s.

(ix) **Gibraltar Proceedings**

i. Fees and expenses allegedly incurred before Gibraltar strategy was launched;

ii. Fees and expenses from firms other than Kobre & Kim and Attias & Levy;

iii. Fees and expenses related to work in non-Gibraltar jurisdictions or to Complaints that were never filed; and

iv. (CLA) Fees and expenses from Kobre & Kim allegedly related to global oversight / (RES) Fees and expenses from Kobre & Kim related to global oversight.

(x) **General Defence**

i. Work relating to Government Relations;

ii. Work relating to Media and PR;

iii. (CLA) Allegedly Nondefense-Related Activities, Including Shareholder Relations / (RES) Nondefense-Related Activities, Including Shareholder Relations.

(xi) **Criminal Proceedings** (no components identified by the Parties)

(xii) **Dutch Set-Aside Proceedings**

i. Costs awarded by Dutch court; and

ii. Any amount in excess of what the Dutch court awarded as costs.

(xiii) **Treaty Arbitration Costs Incurred by Non-Counsel of Record**

i. Fees and expenses incurred prior to the Notice of Arbitration;

ii. NautaDutilh N.V.; and

iii. Three Crowns LLP.[877]

(c) Third Step: Analysis of Cross-Cutting "Elements"

569. After fixing a preliminary amount of compensation for incidental damages, as a third step the Tribunal will analyse in Section VIII.N below certain "elements" or issues potentially impacting multiple categories of incidental damages. Because of their cross-cutting nature, these elements cannot be addressed in a self-standing manner as components of the Claimants' claims; rather, they affect the global assessment of the amount of compensation.

570. For instance, some of the elements identified by the Parties and both sides' experts include potential instances of block billing, excessive billing, time billed for non-work travel or time billed for training-related activities.[878] Depending on their prevalence and overall significance, these elements may impact, to varying extents, the causal link between the

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877 Letter from the Respondent to the Tribunal dated 21 October 2022; Letter from the Claimants to the Tribunal dated 22 October 2022, Attachment A.

878 *See* McGrath Expert Report, para. 26; **RE-51**, Trunko Expert Report, para. 8; Letter from the Respondent to the Tribunal dated 21 October 2022; Letter from the Claimants to the Tribunal dated 22 October 2022.

Claimants' claimed costs and the injury flowing from the Respondent's Treaty breaches, the reasonableness of these costs, or the satisfaction of the Claimants' burden of proof.

571. Other issues in dispute between the Parties are also likely to impact multiple categories. For instance, the Respondent is critical of the evidence submitted by the Claimants to prove that Chevron paid all of the costs the Claimants claim as damages in this Arbitration.[879] Another transversal question requiring a ruling from the Tribunal is whether date range limitations for the compensation of incidental damages should be based on the date on which the underlying services were performed, the date of issuance of the corresponding invoice, or the date of payment.[880]

572. In the Tribunal's view, the implications of these cross-cutting elements for the Claimants' damages claims for legal fees and expenses must be addressed only after an itemized review of the categories, components and other aspects of the Claimants' claims as described above, as the impact of some of these elements may have been partly addressed by the Tribunal in prior steps of its analysis.

573. Having assessed these elements in full, the Tribunal will decide how they should affect the amount of compensation due for the Claimants' damages claims for legal fees and expenses, whether by way of an across-the-board percentage reduction as suggested by Mr Trunko or otherwise.[881]

574. For ease of reference, the elements identified by the Parties are set out below. Where the Parties were unable to agree on the name to be assigned to a specific element the Claimants' and the Respondent's respective given names for that element are marked "(CLA)" or "(RES)", as applicable.

(i) (CLA) Fees That Allegedly Would Have Been Incurred But-For The Treaty Breaches / (RES) Fees That Would Have Been Incurred But-For The Treaty Breaches;

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879 Track III Hearing Transcript, Day 8 (29 August 2022), pp. 1775-1777 (Schwartz).

880 Letter from the Claimants to the Tribunal dated 18 November 2022, p. 6.

881 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2338 (Trunko).

(ii) Claimants' Alleged Failure to Mitigate (Zambrano Recusal, Collusion Prosecution Act, Appeal Bond);

(iii) (CLA) Subsidiaries – PDF invoices addressed to Non-Claimant Chevron Corp. subsidiaries / (RES) Subsidiaries – PDF invoices addressed to Non-Claimants;

(iv) (CLA) Activities allegedly relating to Media and Public Relations / (RES) Activities relating to Media and Public Relations;

(v) (CLA) Activities allegedly relating to Government Relations (including but not limited to USTR) / (RES) Activities relating to Government Relations (including but not limited to USTR);

(vi) (CLA) Allegedly Nondefense-Related Activities / (RES) Nondefense-Related Activities;

(vii) (CLA) Alleged Block Billing / (RES) Block Billing;

(viii) (CLA) Allegedly Vague Billing Entries / (RES) Vague Billing Entries;

(ix) (CLA) Alleged Administrative and Clerical Activities; (RES) Administrative and Clerical Activities;

(x) (CLA) Alleged Getting Up to Speed and Training / (RES) Getting Up to Speed and Training;

(xi) Multiple Attendance at Events;

(xii) (CLA) Alleged Excessively Long Billing Days and Excessive Time; (RES) Excessively Long Billing Days and Excessive Time;

(xiii) (CLA) Alleged Double Billing Entries; (RES) Double Billing Entries;

(xiv) Veiga / Perez Criminal Proceedings;

(xv) Cash Calls; and

(xvi) King & Spalding/Three Crowns Amounts Claimed as Damages.[882]

(d) Fourth Step: Determination of Amount of Compensation based on the Parties' Damages Models

575. As a fourth and final step, in Section VIII.O below the Tribunal will input its determinations derived from prior steps of its analysis into the Parties' respective damages models to determine the amount of compensation due for the Claimants' damages claims for legal fees and expenses. At this stage, the Tribunal will address any divergences between the outcomes of each model – to the extent that they arise – having regard to all relevant circumstances.

576. The determination of the interest rate that shall apply to the Tribunal's compensatory award for legal fees and expenses will be addressed separately in Section IX.B below.

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[882] Letter from the Respondent to the Tribunal dated 21 October 2022; Letter from the Claimants to the Tribunal dated 22 October 2022, Attachment A.

VIII. DAMAGES CATEGORIES CONCERNING LEGAL FEES AND EXPENSES

577. In this Section, the Tribunal shall address individually each of the 13 categories of damages relating to legal fees and expenses that the Claimants allegedly incurred as a result of the Respondent's Treaty breaches.

578. For ease of reference, the Tribunal indicates in the table below the order in which it will address these categories, as well as the amount requested by the Claimants in connection with each category, excluding interest.

§	Category	Amount Claimed
A.	Lago Agrio Litigation	USD 161,525,161.89
B.	Ecuador Enforcement Proceedings	USD 3,582,889.44
C.	Argentina Enforcement Proceedings	USD 25,695,438.12
D.	Brazil Recognition Proceedings	USD 20,668,398.44
E.	Canada Enforcement Proceedings	USD 39,798,158.90
F.	Costs of Planning Against Potential Enforcement in Other Jurisdictions	USD 26,166,897.09
G.	RICO Litigation	USD 323,180,099.51
H.	Section 1782 Proceedings	USD 62,363,592.93
I.	Gibraltar Proceedings	USD 38,421,547.26
J.	General Defence	USD 47,213,917.33
K.	Criminal Proceedings	USD 6,933,905.69
L.	Dutch Set-Aside Proceedings	USD 3,676,711.53
M.	Treaty Arbitration Costs Incurred by Non-Counsel of Record	USD 34,653,249.61
	Grand Total Claimed	**USD 793,879,967.74**

[*see Reply, Updated Appendix 2, p. 1*]

579. After addressing each of the above damages categories, the Tribunal shall address certain cross-cutting "elements" potentially impacting multiple categories in Section VIII.N.

Lastly, in Section VIII.O below the Tribunal shall determine the amount of compensation due to the Claimants in connection with each of the above damages categories.

* * *

A. LAGO AGRIO LITIGATION

1. The Claimants' Position

(a) Description of the Proceedings[883]

580. Recalling its scope, magnitude, and duration, the Claimants submit that the Lago Agrio Litigation caused Chevron to spend "an inordinate amount of resources" and that it should have never been filed or allowed to proceed because, *inter alia*, it was against the "wrong party" and under a purported expedited procedure unfit for the complexity and nature of the underlying claims.[884] The Claimants claim that the Lago Agrio Litigation was tainted almost from its inception with grave procedural irregularities, leading to a judgment "obtained by fraud, coercion, bribery, extortion, and collusion".[885] This notwithstanding, the Claimants argue, all six judges who presided over the trial phase and the issuance of the Lago Agrio Judgment ignored Chevron's claims and evidence regarding its constitutional and due process rights, as did the appellate judges, who were irregularly appointed and failed to conduct a *de novo* review of the record as required.[886]

581. The case then followed two parallel tracks. On the one hand, Chevron filed a "Cassation" appeal before the National Court of Justice, which issued a decision on 12 November 2013 striking down the punitive damages portion of the Lago Agrio Judgment but otherwise sustaining the ruling and stating (unlawfully, in the Claimants' view) that neither that court nor the lower courts had jurisdiction to consider Chevron's fraud allegations.[887] Chevron then filed an Extraordinary Action for Protection before Ecuador's Constitutional Court, which was denied on a similar basis on 27 June 2018,

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883 For a detailed description of the full chronology of these proceedings, *see generally* Memorial, Appendix 3.

884 Memorial, paras. 210-211.

885 Memorial, paras. 211-212; Track II Award, paras. 8.59, 10.5.

886 Memorial, paras. 213-215; **R-299**, Lago Agrio Appeals Court, Appellate Decision Clarifying the Appellate Judgment, 13 January 2012 at 8:57 a.m., pp. 3-4; **R-982**, Direct Testimony of Adolfo Callejas Ribadeneira, filed in RICO, *Chevron v. Donziger*, Case No. 11 Civ. 0691 (LAK) (SDNY), 9 October 2013, Exh. A, paras. 20, 74; **C-879**, Lago Agrio Court Order at point 10, 9 November 2010 at 5:32 p.m., Record pp. 109, 210; **C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court,, 3 January 2012 at 4:43 p.m., p. 10.

887 Memorial, para. 217; **C-288**, Constitution of the Republic of Ecuador (2008), Art. 76; **C-1068**, Chevron's Cassation Appeal, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), 20 January 2012 at 8:50 a.m; **C-1975**, Ecuador National Court of Justice, Cassation Judgment, 12 November 2013 at 3:00 p.m., pp. 95, 97-98.

allegedly "under pressure" from the council in charge of evaluating the performance of the judges of the Court at the time.[888]

582. On the other hand, the Claimants explain, the LAPs sought enforcement of the Lago Agrio Judgment within Ecuador, as well as orders from the Ecuadorian enforcement court which would later be submitted to foreign courts.[889]

(b) Costs Incurred

583. The Claimants posit that the costs incurred by Chevron in the Lago Agrio Litigation reflect the intricacy and duration of the case, as well as the necessary work performed by Chevron's lawyers, environmental experts and vendors to defend it adequately from the LAPs' claims (allegedly including "diffuse" claims) and to challenge, investigate, and present evidence of the LAPs' fraud.[890] In particular, the Claimants note that the Lago Agrio Litigation required many thousands of lawyer-hours in briefing the case through all levels of the judicial system and significant experts' costs arising from the judicial inspections.[891]

584. In sum, the legal fees and expenses allegedly incurred by the Claimants between February 2004 and August 2018 in the Lago Agrio Litigation amount to USD 161,525,161.89, consisting of (i) USD 88,817,244.23 in legal fees; (ii) USD 25,592,719.87 in costs incurred by different law firms; (iii) USD 25,730,278.83 in experts' costs; and (iv) USD 21,384,918.96 in vendors' costs.[892]

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888 Memorial, para. 218; **C-2409**, Chevron's Extraordinary Action for Protection, 23 December 2013; **C-2551**, Ecuadorian Constitutional Court, Decision on Chevron's Extraordinary Action for Protection, 27 June 2018; **C-2653**, Chevron Motion filed with the Ecuadorian Constitutional Court, 22 May 2018; **C-2654**, *Amicus Curiae* filed with the Ecuadorian Constitutional Court, 15 November 2017 at 12:59 p.m.

889 Memorial, para. 219.

890 Memorial, para. 221.

891 Memorial, para. 222.

892 Reply, para. 699; Appendix 2, Updated Summary of Chevron's Fees and Costs Claimed as Damages in Track III, 4 August 2021; **C-3462**, Indices of Claimed Invoices by Damage Category. The Claimants also rely on the witness statements of Ms Kent, Mr Rankin, and Mr Turner, and the expert report of Mr Stanton. *See also* Memorial, para. 226.

(c) Request for Full Reparation of Direct Damages

585. The Claimants contend that the Respondent's breaches of its obligations under international law "are the natural and foreseeable cause" of the legal fees and expenses they incurred in connection with the Lago Agrio Litigation, as those costs would not have been incurred had the Respondent complied with its obligations under the 1995-1998 Settlement and Release Agreements.[893] These costs, the Claimants add, greatly increased with the extensive procedural misconduct and fraud of the Ecuadorian judicial system, such that it was foreseeable that Chevron would be forced to expend significant resources to defend its rights in those proceedings.[894]

586. For these reasons, the Claimants submit that they are entitled to full reparation for all legal fees and expenses incurred after 1 January 2004 in connection with the Lago Agrio Litigation as direct damages by virtue of the Respondent's Denial of Justice and Umbrella Clause Breaches.[895]

587. The Claimants reject the Respondent's contrary position for three main reasons.[896] First, the Claimants contend that Chevron's expenses in the Lago Agrio Litigation were the natural, foreseeable, proximate, and direct consequence of the Respondent's breaches of international law, which include: (i) allowing the Lago Agrio Litigation to vindicate exclusively diffuse rights that had been previously settled; (ii) failing to investigate the wrongdoing of the various Ecuadorian judges who corrupted the proceedings; (iii) affirmatively issuing the certificate of enforceability of the Lago Agrio Judgment; and (iv) allowing the Lago Agrio Judgment to become enforceable internationally by issuing letters rogatory and apostilling the judgment.[897] According to the Claimants, these acts and omissions of Ecuador required Chevron's lawyers, environmental experts, and vendors to spend thousands of hours developing legal pleadings and robust technical

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893 Memorial, para. 224; Reply, para. 700.

894 Memorial, para. 225.

895 Reply, paras. 701, 739. *See also* Memorial, paras. 223, 225.

896 *See* Reply, paras. 702-703.

897 Reply, paras. 703-704.

evidence both to defend Chevron and to respond to the LAPS' "antics", including at the appellate level.[898]

588. The Claimants further assert that the Tribunal (i) never "blessed" the Lago Agrio proceeding; (ii) found that the Claimants had no liability or responsibility for environmental impact regarding the exact issue in the Lago Agrio Litigation; and (iii) concluded that Petroecuador's liability for environmental impact was a real and continuing issue.[899] With respect to the Respondent's argument that many of the Claimants' expenses were unrelated to its misconduct, the Claimants argue that (i) the but-for scenario according to which they would have incurred substantial expenses to defend against individual claims does not meet *Chorzów*'s "in all probability" standard, the hypothetical "individual claims for collective rights" being just "repackaged" diffuse claims barred by the 1995-1998 Settlement and Release Agreements; and (ii) Ecuador is responsible for the misconduct of its judiciary and for failing to stop the Lago Agrio Litigation through its executive and judiciary on numerous occasions, causing Chevron to incur further litigation expenses.[900]

589. Second, the Claimants insist that they have proven that they incurred and paid the legal fees and expenses they claim, noting, with regard to the Respondent's purported ignorance over the identity of Chevron's attorneys, that every motion submitted before the Lago Agrio Court and the appellate courts identifies the attorney(s) submitting the motion.[901] The Claimants add that Ecuador "publicly singled out and attacked" Chevron's Ecuadorian attorneys for many years, while it also knows the identity of the timekeepers at the international law firms engaged by Chevron through the Section 1782 proceedings, the official dockets, and the privilege logs and motions for costs filed before U.S.

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898 Reply, para. 705.

899 Reply, para. 706; Track II Award, paras. 4.71, 9.5(iii), 9.25-9.26.

900 Reply, paras. 707-712; **C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, 14 February 2011, pp. 33, 138; Second Partial Award on Track II, paras. 5.229, 8.7; Partial Award on Track III, para. 174.

901 Reply, paras. 714-716, 724; **R-1545**, Copy of the Lago Agrio Record provided to P. Juola to review prior to submitting 27 January 2013 report; **R-1545A**, Supplement to the Lago Agrio Record provided to P. Juola. The Claimants further note that they have no burden to prove that the Lago Agrio Litigation expenses (which are claimed in the first instance as direct damages) were "reasonable and necessary", although they claim they were.

courts.[902] The Claimants further explain that, as in any litigation, fees and costs varied each month depending on the events taking place in the Lago Agrio Litigation, such that, for instance, law firm expenses would be higher during those times when the firm was preparing for submissions, oral argument, or other key events in the case.[903] Based on the witness statements of Mr Ricardo Reis Veiga and Mr Robert. A. Mittelstaedt, as well as the opinion of several experts, the Claimants assert that Chevron's fees in the Lago Agrio Litigation are reasonable.[904]

590. Third and last, the Claimants deny having engaged in "abusive litigation tactics", restating that their overall defence strategy against the threat of enforcement of the Lago Agrio Judgment was entirely reasonable and that, in any event, reasonableness is only relevant for incidental damages or when unreasonable conduct breaks the causal chain.[905] The Claimants opine that the Respondent has no basis to complain about Chevron's litigation efforts and tactics considering that it was required to defend itself in a proceeding lacking in due process and fairness, and assert that Chevron's attorneys in Ecuador did their best to represent the company amidst open hostility against it, including personal attacks on its lawyers.[906]

591. Contrary to the Respondent's criticism, the Claimants observe that Chevron required extensions of deadlines at various stages to give effect to its constitutional right to be heard, which is not a form of unreasonable behaviour that would amount to a failure to mitigate, a break in the chain of causation or an independent contribution to the injury.[907]

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902 Reply, paras. 717-718; **R-300**, Chevron's Appendix to Its Privilege Logs, filed in *Chevron Corp. v. Salazar* (S.D.N.Y.); **R-982**, Direct Testimony of Adolfo Callejas Ribadeneira, filed in RICO, *Chevron v. Donziger, Case*, No. 11 Civ. 0691 (LAK) (S.D.N.Y.), 9 October 2013, para. 1; **C-1966**, Presidential Address, 28 September 2013; **C-2947**, *In re the Application of the Republic of Ecuador [Borja]*, No. 3:10-mc-80225 (N.D. Cal.), Docket, 10 September 2010. In any event, the Claimants argue that this contention is moot because the Respondent has now received all relevant invoices.

903 The Claimants refer to the "*alegatos*" filed by Chevron on 16 September 2010 and 6 January 2011 as examples of events leading to a higher amount of billed fees. Reply, paras. 719-722. *See* Memorial, Appendix 2, Appendix 3.

904 Reply, para. 723; Fourth Veiga Witness Statement, 29 July 2021, para. 102; Mittelstaedt Witness Statement, 18 August 2021, Section V.

905 Reply, paras. 725-726.

906 Reply, paras. 727-730; **R-982**, Direct Testimony of Adolfo Callejas Ribadeneira, filed in RICO, *Chevron v. Donziger, Case*, No. 11 Civ. 0691 (LAK) (S.D.N.Y.), 9 October 2013, paras. 110-111.

907 Reply, para. 731.

The Claimants underscore that "Chevron did not secure a fraudulent military report" with regard to the Guanta judicial inspection, and that Chevron, justifiably and reasonably, took all available measures to protect its Ecuadorian counsel and team members from harm by the LAPs and Ecuador.[908] Similarly, the Claimants contend that Chevron was entitled to file essential error petitions under Ecuadorian law, and indeed filed at least 26 of these petitions by 2010 to preserve its right to defend against the falsified or otherwise irregular technical data in the LAPs' expert reports.[909] The Claimants posit that the remainder of the Respondent's criticisms are "contrivances with the benefit of hindsight", including purported limitations of Ecuadorian law and procedure, and that none of them justifies a finding that Chevron behaved unreasonably to the degree required to break the chain of causation.[910]

592. In the alternative, the Claimants submit that they are entitled to recover USD 134,948,000 for Lago Agrio Litigation legal fees and expenses incurred as direct damages after 22 August 2006 (*i.e.*, the order terminating the judicial inspections), on the basis that Ecuador's failure to investigate the corrupt and fraudulent conduct of its judiciary between 2006 and 2010 forms part of its composite denial of justice.[911]

593. In the second alternative, the Claimants submit that they are entitled to recover USD 55,526,000 for the Lago Agrio Litigation legal fees and expenses incurred as direct damages after 1 March 2012 as a natural and foreseeable result of Ecuador's breaches of the Treaty and, in particular, the Tribunal's First and Second Interim Awards (*i.e.*, due to its failure to prevent the Lago Agrio Judgment from becoming enforceable).[912]

(d) Request for Full Reparation of Incidental Damages

594. In the event that any portion of the Claimants' Lago Agrio Litigation expenses are not considered direct damages, the Claimants submit that they are entitled to them as

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908 Reply, paras. 732-735; **R-982**, Direct Testimony of Adolfo Callejas Ribadeneira, filed in RICO, *Chevron v. Donziger, Case*, No. 11 Civ. 0691 (LAK) (S.D.N.Y.), 9 October 2013, paras. 94, 98, 102.

909 Reply, para. 736; **C-34**, Ecuadorian Civil Code (*update*), 24 June 2005, Art. 258.

910 *See* Reply, paras. 737-738.

911 Reply, paras. 740-741; Track II Award, paras. 4.262, 10.5.

912 Reply, paras. 742-743.

incidental damages under the principle of full reparation.[913] Indeed, the Claimants argue that the legal fees and expenses incurred in the Lago Agrio Litigation (i) served to mitigate and repair the damage that had already been suffered; and (ii) were reasonable, as they intended to achieve the legitimate purpose of pre-empting, mitigating, and remediating the losses caused by the Respondent's anticipated and then materialized Treaty breaches.[914]

2. The Respondent's Position

595. The Respondent submits that the Claimants have not provided adequate proof that their expenditures in the Lago Agrio Litigation are reasonable, necessary, or related to a Treaty breach, and hence they are not recoverable and should be denied in their entirety.[915] Overall, the Respondent criticizes the "excess" in these expenditures and the Claimants' efforts to "over-complicate" the proceeding, some of which are not related to or did not advance the Lago Agrio Litigation at all – noting that, where not intentional, such excesses occurred through negligent acceptance of invoices with no meaningful cost oversight.[916]

596. The Respondent insists that the Claimants must show that their fees and costs were directly caused by its Treaty breaches, recalling that the Tribunal (i) specified that the Lago Agrio Litigation itself and the assumption of jurisdiction by the Lago Agrio Court did not amount to a Treaty breach; (ii) made clear that the Lago Agrio Complaint contained both diffuse and individual claims; (iii) refused to declare that the Claimants had "no liability or responsibility for environmental impact"; and (iv) emphasized that the conduct of the LAPs' representatives was "not attributable to the Respondent under international law".[917]

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913 Reply, paras. 744, 747.

914 Reply, paras. 745-747.

915 Counter-Memorial, paras. 595, 610, 673; Rejoinder, paras. 901, 907. *See also* Counter-Memorial, paras. 600-602.

916 Counter-Memorial, paras. 597-599; Rejoinder, paras. 900-906.

917 Accordingly, the Respondent says, the Treaty breaches did not become final until the ruling of the Ecuadorian Constitutional Court on 27 June 2018, meaning that the Claimants can only recover damages incurred after that date. Counter-Memorial, para. 596; Track II Award, paras. 5.229, 9.5(iii), 9.25-9.26, 9.68-9.70, 10.4; Decision on Track IB, para. 181.

597. In the alternative, the Respondent submits that the Tribunal must "massively" discount the Claimants' damages claim, noting that any ambiguity in the presentation of their alleged expenditures should be resolved against the Claimants.[918]

(a) The Ecuador Legal Team

598. The Respondent posits that the Tribunal should deny recovery for all costs related to the group of Chevron's local attorneys known as the "Ecuador Legal Team"[919] (USD 47,697,340.66 in fees and costs allegedly paid from 2004 to 2019), because the Claimants have failed to carry their burden of proof and their evidence provides no information regarding the cause, reasonableness, or necessity of the activities of the Team.[920]

599. The Respondent observes that the 167 documents supporting the claim for legal fees and expenses charged by the Ecuador Legal Team are requests for advance payments to cover a list of estimated expenses for the following month, labelled as "cash calls".[921] However, it argues that these "cash calls" do not substantiate whether the expenses claimed are reasonable, necessary, or related to the Treaty breaches, noting that about a third of them contain only a cover page. In several cases a second page is available, providing a breakdown of the expense items, but without the accompanying receipts.[922]

600. Referring to the Tribunal's document production orders, the Respondent contends that the "cash calls" do not disclose the relevant timekeepers or what work they did, and are impossible to correlate to the Claimants' high-level summary of the legal fees and expenses charged by the Ecuador Legal Team.[923] In the Respondent's view, the "cash calls" suggest the existence of a retainer agreement for a lump sum that is unrelated to the

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[918] Rejoinder, para. 908.

[919] The Claimants have explained that the payments related to the "Ecuador Legal Team" were sent by Chevron "to the attention of three individuals over the course of the dispute [*i.e.*, the Lago Agrio Litigation]—Adolfo Callejas, Rodrigo Perez Pallares, and Eduardo Borja—and were used to pay for fees and costs in Ecuador". *See* Reply, para. 874; **C-3459**, Claimants' Letter to Ecuador, 4 November 2020.

[920] Rejoinder, paras. 910-914; **RE-51**, Trunko Expert Report, para. 39, **SM L-1**.

[921] Rejoinder, para. 915. *See e.g.* **C-3418**, CVX-Track III-20014634.

[922] The Respondent claims that Chevron regularly rejected this sort of evidence in other contexts in the Lago Agrio Litigation. Rejoinder, paras. 915-920; **C-3418**, CVX-Track III-20014638.

[923] Rejoinder, paras. 921-923; Procedural Order No. 65, para. 84; **C-3459**, Claimants' Letter to Ecuador, 4 November 2020, p. 4; Fourth Veiga Witness Statement, paras. 103-105. *See also* Counter-Memorial, para. 604.

work performed, notwithstanding the Claimants' "substitute explanation" and the fact that no corresponding agreements, contracts, or letters of engagement have been produced.[924] The Respondent adds that the "cash calls" do not include the information on invoices required under Chevron's Guidelines, and that studying the signature blocks of the motions submitted in the Lago Agrio Litigation would not indicate which attorneys actually performed the work.[925]

601. In addition, the Respondent asserts that many of the expenses described in the "cash-calls" are unrelated to the Lago Agrio Litigation and have no link to any Treaty breaches, such as general overhead expenses and public relations, the payment of which is not standard practice under Chevron's Guidelines.[926] The Respondent disputes the Claimants' claim for the "enormous expenditures" that Mr Veiga allegedly approved without requiring detailed backup, and insists that, if any kind of retainer agreement existed regarding the Ecuador Legal Team, the Claimants should have provided it.[927] The Respondent is also critical of (i) several instances in which the Claimants seek an amount that exceeds the actual expenses amount shown on the "cash call"; (ii) the reductions in the amounts claimed after they were ordered to produce the underlying invoices; and (iii) the dramatic variation in the alleged non-hourly retainer amounts by month.[928]

602. Lastly, the Respondent contends that the Ecuador Legal Team "engaged in excessive and abusive litigation tactics to slow down the proceedings and overburden the Lago Agrio Court", which escalated the costs of the Lago Agrio Litigation and should not be

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924 Counter-Memorial, para. 604; Rejoinder, paras. 923-928; Memorial, Appendix 2: Summary of Fees and Costs, p. 173; Claimants' Updated Appendix 2, p. 145; **R-3459**, Claimants' Letter to Ecuador, 4 November 2020; **R-2129**, Claimants' Letter to Ecuador, 4 November 2021, p. 2.

925 Rejoinder, paras. 930-933; **C-3230**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00016929—CVX-Track III-00016961), 2007, Sections 8.3-8.4. The Respondent further criticizes that the Claimants' latter argument represents an inversion of the burden of proof. *See* Rejoinder, para. 934.

926 Rejoinder, paras. 935-940; **RE-58**, Sixth Andrade Expert Report, para. 13(d); **C-3230**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00016929—CVX-Track III-00016961), 2007, section 2.2; **C-3418**, CVX-Track III-20014634, CVX-Track III-20014669.

927 Rejoinder, paras. 941-948; Fourth Veiga Witness Statement, paras. 105, 133, 135; Lea Expert Report, para. 47(d).

928 Counter-Memorial, para. 604; Rejoinder, paras. 949-954.

compensated.[929] The Respondent identifies the following examples of "procedural misconduct":

(i) excessive and duplicative evidentiary petitions and other motions, which often challenged irrelevant aspects of court orders or were unnecessarily fragmented;[930]

(ii) multiple requests for extensions, many of which were "clearly unreasonable";[931]

(iii) a large number of motions to correct minor clerical or spelling mistakes in court orders, as well as other "[f]rivolous" and unnecessary efforts;[932]

(iv) a "fraudulent" military report secured and submitted to request the postponement of a judicial inspection, which was allegedly drafted "as a personal favour" and without military endorsement, and eventually led to another lawsuit filed by the indigenous Cofan people against Chevron;[933]

(v) pursuing appeals and other vertical judicial review mechanisms in contravention of Ecuadorian law and procedure;[934] and

(vi) numerous attempts to annul the proceedings by challenging the LAPs' signatures and ratification of the complaint and powers of attorney, which were excessively expensive and, in any event, not viable under Ecuadorian law.[935]

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929 Rejoinder, paras. 955-956, 976. *See generally* Counter-Memorial, paras. 611-673.

930 Counter-Memorial, paras. 633-653; Rejoinder, paras. 957-961. *See* Track II Hearing, Day 3 (23 April 2015), pp. 620-622 (Guerra); **C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, 3 January 2012, p. 15.

931 Counter-Memorial, paras. 612, 619; Rejoinder, paras. 962-963.

932 Counter-Memorial, paras. 649-650, 654-660; Rejoinder, para. 964.

933 Counter-Memorial, paras. 612-618; Rejoinder, paras. 965-969; **R-475**, Chevron Letter to the Lago Agrio Court, Lago Agrio Record at 81426, 18 October 2005; **R-477**, Intelligence Report, Lago Agrio Record at 81410, 18 October 2005; **R-479**, Reports filed with and Letters to the Lago Agrio Court, Lago Agrio Record at 93031-37, 3-8 February 2006; **R-2051**, "Indigenous Group Sues Chevron for Defamation Over Bogus Military Report," 14 November 2007, *available at* https://chevroninecuador.org/news-and-multimedia/2007/1114-indigenous-group-sues-chevron-for-defamation.

934 Counter-Memorial, paras. 629-631.

935 Counter-Memorial, paras. 661-672; Rejoinder, paras. 970-975; **RE-46**, Fourth Andrade Expert Report, paras. 95–113.

(b) US Law Firms

603. The Respondent generally questions the necessity of retaining eight U.S. law firms for the Claimants' representation before Ecuadorian courts in addition to the Ecuador Legal Team. The Respondent further submits that the Claimants have failed to prove that the legal fees and expenses allegedly incurred by those law firms (amounting to USD 60,563,756.70) were necessary, reasonable, or traceable to any Treaty breaches, and, accordingly, they are not compensable.[936]

604. First, the Respondent notes that the Claimants have not presented a detailed review of all of their own invoices and fees as would be necessary.[937] Further, the Respondent contends that the "representative sample" the Claimants rely upon is neither representative nor supportive of their claims.[938] The Respondent explains that the Claimants' invoices reveal many "dubious" time entries for work that did not advance the Lago Agrio Litigation, including with regard to (i) procedures or concepts foreign to the Ecuadorian legal system; (ii) charges for a repository to locate filings and decisions in U.S. federal court cases; (iii) the arbitral proceedings in *Chevron v. Ecuador I* (Commercial Cases); and (iv) other activities of no relevance to the issues at the heart of the Lago Agrio Litigation.[939]

605. The Respondent further argues that the Claimants cannot recover the legal fees and expenses incurred for work that is unrelated to the Treaty breaches found by the Tribunal, including on (i) a potential defamation lawsuit and other "offensive steps" against the LAPs or their counsel; and (ii) searching for potential legal actions against the prosecutor who brought the Criminal Proceedings against Chevron's employees Mr Veiga and Mr Pérez Pallares.[940] The same approach would apply, the Respondent says, to the legal fees and expenses for activities (i) to pressure the Ecuadorian government; and (ii) related

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936 Counter-Memorial, paras. 581, 584-585, 605; Rejoinder, paras. 977-979; **RE-51**, Trunko Expert Report, **SM L-1**.

937 Rejoinder, para. 980.

938 Rejoinder, paras. 980-981, 1007-1009.

939 Rejoinder, paras. 982-991. *See also* Counter-Memorial, para. 606-607.

940 Rejoinder, paras. 993-1001; Track II Award, paras. 5.229, 5.241, 8.17(iv); **C-3287.002**, Gibson, Dunn & Crutcher LLP (Member) – 2010.xlsx; **C-3303.001**, Jones Day (Member) - 2008.xlsx; **C-3303.002**, Jones Day (Member) - 2009.xlsx; **C-3303.005**, Jones Day (Member) - 2012. *See also* Counter-Memorial, para. 607.

to other proceedings in which Chevron engaged in response to the Lago Agrio Litigation.[941]

606. Second, the Respondent refers to "non-legal work" conducted by the Claimants' U.S. counsel which did not represent any reasonable effort to advance Chevron's position in the Lago Agrio Litigation and hence does not arise from the Treaty breaches.[942] This work concerns (i) various public relations and media outreach activities to raise doubts regarding Chevron's environmental responsibility in Ecuador; and (ii) lobbying activities.[943]

607. Third, the Respondent challenges the fees sought by the Claimants with regard to translation services, noting that (i) the information provided is incomplete, as it does not describe the work performed or include the underlying invoices; (ii) some claims pertain to matters other than the Lago Agrio Litigation; and (iii) some entries raise double-billing concerns.[944]

608. Fourth, the Respondent asserts that the U.S. firms were not merely playing a coordinating role with respect to the Ecuador Legal Team, and that their work was sufficiently central in the Lago Agrio Litigation as to amount to the unauthorized practice of law in a foreign jurisdiction, which is not compensable.[945] As stated by the Respondent's expert, Dr Fabián Andrade, the U.S. firms seem to have regularly drafted and edited court filings, which constitutes the practice of Ecuadorian law that only attorneys enrolled with the bar in Ecuador are authorized to undertake.[946] Moreover, the Respondent contends, the U.S. firms' practice of Ecuadorian law was excessive, unnecessary and a significant part of

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941 Rejoinder, paras. 1002-1006.

942 Rejoinder, para. 1010.

943 The Respondent further recalls that the Tribunal did not find that Ecuador's political statements amounted to a denial of justice or were the cause of any of the Claimants' injuries. Rejoinder, paras. 1011-1023; Track II Award, paras. 8.68-8.69. *See e.g.* **C-3303.001**, Jones Day (Member) - 2008.xlsx; **C-3303.003**, Jones Day (Member) - 2010.xlsx; **C-3287.004**, Gibson, Dunn & Crutcher LLP (Member) - 2012.xlsx; **C-3260.005**, Boies Schiller & Flexner LLP (Member) - 2014.

944 Rejoinder, paras. 1024-1030. *See, e.g.,* **C-3303.002**, Jones Day (Member) - 2009.xlsx; **C-3303.004**, Jones Day (Member) - 2011.xlsx; **C-3303.005**, Jones Day (Member) - 2012.xlsx; **C-3303.009**, Jones Day (Member) - 2016.

945 Rejoinder, paras. 1031-1032.

946 Rejoinder, paras. 1033-1036; **RE-58**, Sixth Andrade Expert Report, paras. 13(a), 73-80.

Chevron's "abusive" practices in the Lago Agrio Litigation, in particular through the regular abuse of two procedural mechanisms: (i) "essential error petitions", which serve only to correct technical mistakes of expert reports that are material to the outcome of the proceedings, but were instead improperly used to raise "repetitive" legal arguments, also leading to further related costs; and (ii) requests to have the LAPs' experts render judicial confessions, even if under Ecuadorian law only the parties to a proceeding can render them.[947]

609. Fifth and last, the Respondent submits that the time entries corresponding to the U.S. firms do not meet the standards described by the Claimants' experts and witnesses, since they do not enable an understanding of the work performed or its relationship to the Lago Agrio Litigation, and they often lack key supporting documentation or violate Chevron's Guidelines.[948] The Respondent mentions several examples of the U.S. firms' time entries that, according to it, "fall far short" of the activity description required by Chevron's Guidelines, which shows the company's "lack of oversight".[949] The Respondent contends that this renders the corresponding fees non-compensable, and could even hide further issues such as double billing or unreasonable or unnecessary work.[950]

610. The Respondent highlights the following deviations from Chevron's Guidelines:

(i) the corresponding invoices for the temporary employees hired by Jones Day between 2008 and 2018 have not been provided, while some of their time entries

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947 Counter-Memorial, paras. 145-146, 601, 622-628; Rejoinder, paras. 1037-1052; **RE-46**, Fourth Andrade Expert Report, Section 7.6.2, paras., 62-63, 65-66, 76-77, 103-105, 110-113; **RE-58**, Sixth Andrade Expert Report, para. 85. *See e.g.* **C-3287.001**, Gibson, Dunn & Crutcher LLP (Member) – 2009.xlsx; **C-3287.002**, Gibson, Dunn & Crutcher LLP (Member) – 2010.xlsx; **C-3303.003**, Jones Day (Member) - 2010.

948 Rejoinder, paras. 1053-1057; Lea Expert Report, paras. 43, 45, 47; Mittelstaedt Witness Statement, paras. 20-24; Kent Witness Statement, para. 21.

949 Rejoinder, para. 1058.

950 Rejoinder, paras. 1058-1067; **C-3230**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00016929—CVX-Track III-00016961), 2007, Section 8.3; **RE-58**, Sixth Andrade Expert Report, para. 83. *See e.g.* **C-3287.004**, Gibson, Dunn & Crutcher LLP (Member) – 2012.xlsx; **C-3303.004**, Jones Day (Member) - 2011.xlsx; **C-3303.011**, Jones Day (Member) - 2018.

show "unexplained extravagances" suggesting that Chevron "abandoned effective oversight wholesale";[951]

(ii) the U.S. firms' travel expenses demonstrate non-compensable excessive expenses, as many entries fail to provide sufficient information or are incompatible with any reasonable effort to contain travel costs;[952]

(iii) the Claimants seek to recover various types of overhead costs of the U.S. law firms that are not reimbursable under Chevron's Guidelines;[953]

(iv) many entries show services billed at higher rates despite being performable at a lower level of seniority and billing rate;[954]

(v) many entries did not follow the prescribed format, which required each activity to be separated and time to be stated in hourly increments;[955] and

(vi) other deviations from Chevron's Guidelines, such as spending an excessive amount of time on certain activities, fees and expenses being claimed for activities performed by non-timekeepers or for recruitment and training, and legal research time entries not providing the required information.[956]

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951 Rejoinder, paras. 1068-1075; **C-3240**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017738—CVX-Track III-00017800), 2017, Section 8.3. *See e.g.* **C-3303.001**, Jones Day (Member) - 2008.xlsx; **C-3303.002**, Jones Day (Member) - 2009.xlsx; **C-3303.010**, Jones Day (Member) - 2017.

952 Rejoinder, paras. 1076-1080; **C-3233**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017065—CVX-Track III-00017119), 2010, Section 9.1. *See e.g.* **C-3287.004**, Gibson, Dunn & Crutcher LLP (Member) – 2012; **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013; **C-3303.003**, Jones Day (Member) - 2010.xlsx; **C-3303.006**, Jones Day (Member) - 2013.

953 Rejoinder, paras. 1081-1083; **C-3240**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017738—CVX-Track III-00017800), 2017, Sections 2.2, 8.4; **RE-51**, Trunko Expert Report, **SM L-6**. *See e.g.* **C-3303.002**, Jones Day (Member) - 2009.xlsx; **C-3303.003**, Jones Day (Member) - 2010.

954 Rejoinder, paras. 1084-1088; **C-3233**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017065—CVX-Track III-00017119), 2010, Section 2.2; Mittelstaedt Witness Statement, para. 23; Kent Witness Statement, para. 23. *See e.g.* **C-3303.002**, Jones Day (Member) - 2009.

955 Rejoinder, paras. 1091-1093; **C-3233**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017065—CVX-Track III-00017119), 2010, Section 8.7. *See e.g.* **C-3303.002**, Jones Day (Member) - 2009.

956 Rejoinder, paras. 1089-1090, 1094-1099. *See e.g.* **C-3287.004**, Gibson, Dunn & Crutcher LLP (Member) – 2012; **C-3303.003**, Jones Day (Member) - 2010.xlsx; **C-3303.005**, Jones Day (Member) - 2012.

(c) Additional Ecuadorian and Foreign Firms

611. The Respondent submits that the legal fees and expenses of the additional firms based in Ecuador, Chile, and the British Virgin Islands (amounting to USD 6,148,866.74) are not recoverable, since the invoices the Claimants provided fail to meet the burden of proof, and the underlying activities are otherwise frequently unrelated to the Lago Agrio Litigation and not necessary, reasonable responses to the Treaty breaches.[957]

612. First, the Respondent observes that many of the documents produced by the Claimants to support their claim, such as *proformas*, do not meet the necessary requirements to establish an expense in Ecuador.[958] Many of the invoices produced, the Respondent adds, do not show how the charges are related to the Lago Agrio Litigation, since they are incomplete and often suggest the existence of more detailed documents which have not been provided, such as retainer agreements.[959]

613. Second, the Respondent warns that the Claimants seek to recover a variety of fees and expenses for activities that are entirely unrelated to the Lago Agrio Litigation, including work on (i) the criminal proceedings against Mr Pérez, Mr Veiga, and Dr Calleja, which were not related to any Treaty breaches; (ii) other cases and matters; and (iii) intellectual property matters by Dr Alfredo Corral.[960]

614. Third, the Respondent states that Chevron's additional Ecuadorian counsel engaged in a significant amount of non-legal work, especially regarding public relations.[961]

615. Fourth, the Respondent reiterates that Chevron's additional law firms resorted to "unreasonable, vexatious, and otherwise excessive legal tactics", as these firms (i) were

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957 Rejoinder, paras. 1100-1102, 1134; **RE-51**, Trunko Expert Report, **SM L-1**.

958 Rejoinder, paras. 1103-1105; **RE-58**, Sixth Andrade Expert Report, Section 8.1.2, paras. 13, 63-72; **C-3243**, CVX-Track III-20014998; **C-3245**, CVX-Track III-20008955.

959 Rejoinder, paras. 1106-1111; **RE-58**, Sixth Andrade Expert Report, paras. 13(a), 72; **C-3396**, CVX-Track III-20008863; CVX-Track III-20008891; **C-3401**, CVX-Track III-20018189.

960 Rejoinder, paras. 1112-1120; **RE-58**, Sixth Andrade Expert Report, para. 81(b); Track II Award, paras. 4.339, 5.241; **C-3245**, CVX-Track III-20015462; **C-3401**, CVX-Track III-20010440, CVX-Track III-20010486, CVX-Track III-20010587. *See also* Counter-Memorial, para. 607.

961 Rejoinder, paras. 1121-1123; **C-3245**, CVX-Track III-20015498.

sometimes hired well before their purported work would reasonably have begun; and (ii) engaged in activities prohibited by Ecuadorian law.[962]

616. Fifth and last, the Respondent argues that many of the invoices provided by the Claimants lack basic information or contain ambiguous descriptions, showing that Chevron's Guidelines were not enforced as required by the relevant retainer agreements.[963]

(d) Experts and Vendors

617. The Respondent contends that the Claimants have failed to meet their burden of proof that they are entitled to USD 47,115,197.79 in costs and expenses allegedly paid to 31 experts and vendors in connection with the Lago Agrio Litigation.[964]

618. On the one hand, the Respondent posits that the vendor invoices produced for this category provide little or no information on the work that they performed, which is in direct contravention of Chevron's Guidelines – and often the underlying engagement letters – and makes it impossible to determine whether such work was reasonable, necessary, or caused by a Treaty breach.[965]

619. On the other hand, the Respondent states that the invoices of the experts and vendors also show examples of fees requested for non-compensable categories, such as travel and overhead costs, as well as unrecoverable fees paid towards public relations consulting.[966]

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962 Rejoinder, paras. 1124-1129; Mittelstaedt Witness Statement, para. 33; Fourth Veiga Witness Statement, para. 115, fn 126; **RE-58**, Sixth Andrade Expert Report, Section 8.2.1, para. 85(b).

963 Rejoinder, paras. 1130-1133; **R-2070**, Retainer Agreement of Dr. Ricardo Vaca Andrade with Claimants, CVX-Track III-20018404 (14 October 2011); **C-3245**, CVX-Track III-20010280; **C-3396**, CVX-Track III-20008894.

964 Rejoinder, para. 1135. *See* **RE-51**, Trunko Expert Report, **SM L-3**.

965 Rejoinder, paras. 1136-1145; **C-3231**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00016962—CVX-Track III-00016999), 2008, Section 8.4.1; **C-3232**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017000—CVX-Track III-00017043), 2009, Sections 8.4.2, 8.4.4; **C-3354**, CVX-Track III-20000253; **C-3367**, CVX-Track III-20002289, CVX-Track III-20002558. *See also* Counter-Memorial, paras. 608-609.

966 Rejoinder, paras. 1146-1149; **C-3387**, CVX-Track III-20005339.

3. The Tribunal's Analysis

(a) Introduction

620. The Claimants' damages claim in Track III includes three different categories concerning separate yet related chains of events taking place in parallel in Ecuador. Under the present heading, the Tribunal will address only the Claimants' claim for reimbursement of the legal fees and expenses disbursed in connection with the Lago Agrio Litigation. The Claimants' damages claim for the reimbursement of the legal fees and expenses disbursed in connection with the Ecuador Enforcement Proceedings is addressed separately in Section VIII.B below, while the Claimants' claim concerning the embargo of Chevron's trademarks in Ecuador will be addressed separately in Section IX.B below.

621. The Lago Agrio Litigation was formally initiated with the LAPs' filing of the Lago Agrio Complaint against Chevron on 7 May 2003.[967] Following years of proceedings before various courts within the Ecuadorian judicial system, the Lago Agrio Litigation concluded with the judgment of the Constitutional Court on 27 June 2018.[968] During this 15-year period, the proceedings generated a court file of over 237,000 pages, including dozens of legal submissions and expert reports, multiple hearings, judicial inspections, and other procedural matters.[969]

622. Before addressing the main factual aspects of the Lago Agrio Litigation, the Tribunal must recall its earlier finding that any harm arising before the issuance of the Lago Agrio Judgment on 14 February 2011 cannot constitute loss arising from the Respondent's internationally wrongful acts, and is hence excluded from the scope of the compensable injury in this case.[970] It is thus unnecessary for the Tribunal to recount here the trial stage of the Lago Agrio Litigation (2003-2011), which culminated in the Lago Agrio Judgment.[971]

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967 **C-71**, *Lawsuit for Alleged Damages filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbios; on May 7, 2003, by 48 Inhabitants of the Orellana and the Sucumbios Province*, Superior Court of Nueva Loja, Complaint, 7 May 2003.

968 *See* **C-2551**, Constitutional Court Case No. 0105-14-EP, 27 June 2018; para. 636 below.

969 *See* Track II Award, para. 5.11.

970 *See* paras. 361, 364, 371 above; *see also* paras. 644-645 below.

971 *See* paras. 644-645 below.

623. As previously explained, the Lago Agrio Judgment was issued on 14 February 2011 by the Lago Agrio Court.[972] The Judgment partially upheld the LAPs' complaint, ordering Chevron to pay the costs of various reparation measures including (i) USD 600,000,000 for groundwater remediation; (ii) USD 5,396,160,000 for soil remediation; (iii) USD 200,000,000 for the recovery of flora, fauna and aquatic life; (iv) USD 150,000,000 for drinking water remediation; (v) USD 1,400,000,000 for delivery of healthcare; (vi) USD 100,000,000 for cultural damage to indigenous people; and (vii) USD 800,000,000 for related cancer cases.[973] In addition, the Lago Agrio Court awarded punitive damages equal to 100% of this sum (*i.e.*, an additional USD 8,646,160,000) which "may be replaced, at the defendant's option, by a public apology in name of Chevron Corp., offered to those affected by [TexPet]'s operations in Ecuador", to be "published at the latest within 15 days".[974] Finally, the Lago Agrio Judgment ordered Chevron to pay 10% of the awarded amount (*i.e.*, USD 864 million or, potentially, USD 1.82 billion) to the ADF as additional reparation for damages.[975]

624. On 17 February 2011, Chevron filed a motion arguing that the Lago Agrio Judgment lacked sufficient and precise reasoning and requesting the expansion and clarification of several issues.[976] On 4 March 2011, the Lago Agrio Court issued a Clarification Order, which expanded and clarified the Lago Agrio Judgment to a limited extent without altering the compensation order against Chevron.[977]

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[972] *See* para. 87 above.

[973] **C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron,* 14 February 14, 2011, at 8:37 a.m., pp. 179-184.

[974] The Court considered that this public apology "if fulfilled, shall be considered a symbolic measure of moral redress and of recognition of the effects of its misconduct, as well as a guarantee of no repetition". **C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron,* 14 February 14, 2011,at 8:37 a.m., pp. 184-186.

[975] The Judgment ordered the establishment of a trust with the ADF as beneficiary to hold the sums awarded by the Judgment. The Court also awarded costs in favour of the LAPs. **C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron,* 14 February 2011, at 8:37 a.m., pp. 186-188.

[976] **C-970**, Chevron's Motion to clarify and amplify, 17 February 2011 at 8:00 a.m.

[977] **C-1367**, Lago Agrio Clarification Order of the Judgment, 4 March 2011 at 3:10 p.m. *See also* **R-1193**, Lago Agrio Clarification Order of the Judgment (Revised English translation of C-1367, p. 4).

625. Thereafter, the proceedings within the Lago Agrio Litigation following the issuance of the Lago Agrio Judgment and the Clarification Order involved three distinct motions at three levels of the Ecuadorian judiciary.

626. First, on 9 March 2011, Chevron filed a 198-page appeal against the Lago Agrio Judgment and the Clarification Order (the "**First Instance Appeal**") before the Provincial Court of Justice of Sucumbíos (the "**Appellate Court**"). Specifically, Chevron requested that the Lago Agrio Judgment be revoked and declared null and void, seeking as its principal petition the "[n]ullity of the entire proceeding" on various grounds related to "errors" that purportedly impaired the validity of the proceeding.[978] As subsidiary petitions, Chevron requested, alternatively, (i) a partial nullification of at least those proceedings subsequent to 26 August 2010; (ii) that the court recuse itself and abstain from deciding on the merits; (iii) that the Lago Agrio Judgment be revoked and that the complaint be dismissed on the grounds that the Lago Agrio Plaintiffs lacked standing; and/or (iv) that the Lago Agrio Judgment be revoked and that the lawsuit be dismissed on the grounds of lack of evidence.[979] The submission was signed by Dr Adolfo Callejas Ribadeneira as Legal Counsel of Chevron, and also authorized Mr Enrique Carvajal Salas, Mr Patricio Campuzano Merino, Mr Alberto Racines Enríquez, and Mr Diego Larrea Alarcón to intervene in the proceedings on behalf of the company.[980]

627. Aside from the First Instance Appeal, the proceedings before the Appellate Court included, *inter alia*, the following submissions and procedural events:

(i) motions whereby Chevron restated its main arguments and requests for relief, and proffered additional evidence (including various expert reports) of the LAPs' alleged fraud and 'ghostwriting' of the Lago Agrio Judgment;[981]

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978 **C-1178**, Chevron's Appeal of the Lago Agrio Judgment, 9 March 2011 at 4:05 p.m., pp. 186-187.

979 *See* **C-1178**, Chevron's Appeal of the Lago Agrio Judgment, 9 March 2011 at 4:05 p.m., pp. 188-191.

980 **C-1178**, Chevron's Appeal of the Lago Agrio Judgment, 9 March 2011 at 4:05 p.m., pp. 191-192.

981 **C-1155**, Chevron's Motion, 19 September 2011 at 1:15 p.m.; **C-1412**, Chevron's Appellate *Alegato*, submitted to the Substitute Judges of the Provincial Court of Sucumbios, 5 May 2011 at 10:50 a.m.

(ii) a partial appeal filed by the LAPs against the Lago Agrio Judgment, whereby the LAPs sought additional damages that had not been granted by the first instance ruling;[982]

(iii) attempts by Chevron to challenge the designation of the appellate panel and to recuse one of the judges based on an alleged conflict of interest;[983] and

(iv) further written submissions from both Chevron and the LAPs on Chevron's Appeal and fraud allegations.[984]

628. On 3 January 2012, the Appellate Court denied Chevron's First Instance Appeal almost in its entirety and ratified the Lago Agrio Judgment.[985] On 13 January 2012, and further to a request of the LAPs for the clarification and expansion of the ruling, the Appellate Court issued an order clarifying, *inter alia*, that Chevron's "accusations with respect to irregularities in the preparation of the trial court judgment . . . ha[d] been considered, but no reliable evidence of any crime ha[d] been found".[986]

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982 Specifically, the LAPs' appeal was based on the following categories of damages: "(1) the economic losses incurred by the plaintiffs; (2) Damage involving the ancestral lands of the indigenous nationalities of the area; (3) damage generated by Texaco's spraying of crude oil on the roads, as well as damage to other structures and lands" (Claimants' translation). **C-1231**, Motion to the Lago Agrio Court, 5 April 2011 at 8:40 a.m; **C-2640**, Lago Agrio Plaintiffs' Motion, 17 February 2011 at 5:05 p.m..

983 **C-1299**, Chevron's Nullity Motion Addressing the Appellate Panel, 30 March 2011 at 5:31 p.m.;; **C-1302**, Chevron's Motion for Recusal against Judge Orellana, 27 September 2011, at 4:40 p.m.; **C-1303**, Chevron's Motion for Recusal against Judge Orellana, 13 April 2011 at 5:12 p.m. The recused judge had apparently acted as counsel for another individual in a different proceeding against Chevron. While the recusal was dismissed a few months later, the judge had previously resigned upon acceptance of another public position. *See* **C-1304**, Decision Regarding the Recusal of Substitute Judge Orellana, 9 November 2011 at 4:00 p.m.

984 *See*, *e.g.*, **C-2642**, Lago Agrio Plaintiffs' Motion, 8 July 2011; **C-2643**, Chevron's Motion to the Lago Agrio Appellate Court, 26 July 2011 at 5:48 p.m.; **C-2898**, Lago Agrio Plaintiffs' Motion to the Lago Agrio Appellate Court, 14 November 2011 at 11:40 a.m.; **C-2911**, Lago Agrio Plaintiffs' Motion to the Lago Agrio Appellate Court, 6 December 2011 at 4:40 p.m., Record at 14,830 (appellate); **C-2912**, Lago Agrio Plaintiffs' Motion to the Lago Agrio Appellate Court, 6 December 2011 at 4:42 p.m., Record at 14,831 (appellate); **C-2913**, Chevron's Motion to the Appellate Court, 6 December 2011 at 4:47 p.m., Record at 17,367; **R-1285**, Lago Agrio Court Record at 18,069-86, Chevron's Letter to the Appellate Court, 21 December 2011 at 4:28 p.m.

985 **C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, 3 January 2012 at 4:43 p.m., p. 16.

986 The Appellate Court further noted that "it stay[ed] out of these accusations, preserving the parties' rights to present formal complaint to the Ecuadorian criminal authorities or to continue the course of the actions that have been filed in the United States of America". **R-299**, Lago Agrio Appeals Court, Appellate Decision Clarifying the Appellate Judgment, 13 January 2012 at 8:57 a.m., pp. 3-4. *See also* **C-1066**, Plaintiff's Request for Clarification, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), 6 January 2012; **R-1289**, Chevron's Response to the Plaintiffs' Request for Clarification of the Appellate Court Decision, 12 January 2012.

629. Shortly thereafter, on 20 January 2012, Chevron filed a 175-page cassation appeal against the judgment and clarification and expansion order of the Appellate Court (the "**Cassation Appeal**").[987] In the Cassation Appeal, Chevron requested that the nullity of the proceeding be declared and, alternatively, that the Lago Agrio Judgment be quashed and that the Lago Agrio Complaint be dismissed "as having no basis in the facts or in law".[988] In addition, Chevron requested the suspension of the enforcement of the Lago Agrio Judgment pending resolution of the present Arbitration.[989] The submission was signed by Dr Adolfo Callejas Ribadeneira as Legal Counsel for Chevron, as well as by Dr Santiago Andrade Ubidia, Dr Juan Carlos Andrade Dávila, and Dr José Meythaler Baquero as co-defence counsel.[990]

630. Around the same time of the filing of the Cassation Appeal, the LAPs requested that Chevron be required to post a bond to suspend the enforcement of the Lago Agrio Judgment, failing which the Judgment would become "fully enforceable".[991] Chevron opposed the LAPs' request, insisting that the Appellate Court should abide by this Tribunal's First Interim Award.[992] Eventually, on 17 February 2012, the Appellate Court issued an order whereby it (i) confirmed that the Cassation Appeal fulfilled the relevant formal requirements; and (ii) refused to stay the recognition and enforcement of the Lago

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987 **C-1068**, Chevron's Cassation Appeal, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), 20 January 2012 at 8:50 a.m.

988 Chevron also requested that the LAPs be ordered to pay court costs, including Chevron's attorneys' fees. **C-1068**, Chevron's Cassation Appeal, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), 20 January 2012 at 8:50 a.m., pp. 159-160.

989 **C-1068**, Chevron's Cassation Appeal, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), 20 January 2012 at 8:50 a.m., pp. 160-162.

990 **C-1068**, Chevron's Cassation Appeal, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), 20 January 2012 at 8:50 a.m., p. 163.

991 **C-1037**, Pablo Fajardo's Submission to Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceeding), 17 January 2012, at 9:00 a.m.; **C-1038**, Pablo Fajardo's Submission to Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceeding), 25 January 2012, at 4:22 p.m., p. 5.

992 Mittelstaedt Witness Statement, **RM-3**, Provincial Court of Justice of Sucumbios, Case No. 106-2011-S-CPJS, Chevron's Motion, 3 February 2012 at 4:39 p.m. In its First Interim Award, the Tribunal, *inter alia*, ordered the Respondent "to take all measures at its disposal to suspend or cause to be suspended the enforcement or recognition within and without Ecuador of any judgment against the First Claimant in the Lago Agrio Case". *See* para. 403 above.

Agrio Judgment, noting, *inter alia*, that it did "not find it fitting to impose the [First Interim Award] above prevailing human rights obligations".[993]

631. In addition, the Cassation Appeal proceedings included, *inter alia*, the following submissions:

(i) motions filed by Chevron providing further evidence of the LAPs' alleged fraud, including additional expert reports and affidavits, as well as submissions of both parties on these evidence and allegations;[994]

(ii) submissions of Ecuador's Attorney General regarding the ongoing developments in the present Arbitration; and[995]

(iii) multiple additional written submissions from both Chevron and the LAPs on the legal merits of the Cassation Appeal.[996]

632. As already noted, on 1 March 2012 the Lago Agrio Court certified the Lago Agrio Judgment as enforceable, and ordered its execution on 15 October 2012. The full description of the Ecuador Enforcement Proceedings is set out in Section VIII.B below.

633. On 12 November 2013, the National Court of Justice of Ecuador (the "**Cassation Court**") partially quashed the Judgment of the Appellate Court (the "**Cassation Judgment**"), nullifying the punitive damages imposed for Chevron's omission to apologise publicly

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993 First Paulsson Expert Report; **Paulsson-16**, Clarification Order in Proceedings No 2011-0106 of the Sole Division of the Sucumbíos Provincial Court in the matter of *Aguinda, et al v Chevron Corporation*, 17 February 2012, p. 3 (Claimants' translation). The Cassation Appeal was admitted for consideration on 22 November 2012. *See* **C-2644**, Order issued by the National Court of Justice, 22 November 2012 at 10:30 a.m.

994 *See* **C-2435**, Cassation *Alegato* on fraud, 3 May 2013 at 2:30 p.m.; **C-2956**, Chevron's Cassation *Alegato*, 30 May 2013 at 1:39 p.m. Among other things, the LAPs argued that the discovery proceedings pursued by Chevron in the United States violated their human rights, which led to further submissions on this matter. **C-2436**, Cassation *Alegato* on fraud, 3 September 2013 at 9:22 a.m. (referring to an additional submission by the LAPs of 29 May 2013). *See also* **C-2957**, Order issued by the National Court, 31 May 2013 at 5:30 p.m.

995 *See* **C-2953**, Attorney General's Motion, 6 February 2013 at 11:32 a.m.; **C-2955**, Attorney General's Motion, 27 February 2013 at 8:14 a.m.

996 *See* **C-2121/C-2137**, Lago Agrio Plaintiffs' Cassation *Alegato*, 29 November 2012 (the LAPs' initial submission opposing the Cassation Appeal, which was 227 pages long); **C-2306**, Chevron's Cassation *Alegato*, 3 May 2013; **C-2410**, Chevron Cassation *Alegato* regarding due process violations, 24 May 2013; **C-2307**, Chevron Cassation *Alegato*, 12 September 2013 (referring to an additional submission by the LAPs of 6 August 2013). *See also* **C-2958**, Order issued by the National Court, 27 June 2013 at 9:30 a.m.; **C-2959**, Order issued by the National Court, 12 August 2013 at 8:50 a.m.; **C-2960**, Order issued by the National Court, 20 September 2013 at 11:30 a.m.

(as required by the Lago Agrio Judgment) and hence reducing the damages awarded to USD 8,646,160,000, plus 10% of this amount as additional reparation in favour of the ADF.[997] No litigation costs were awarded with respect to the Cassation Appeal.

634. On 23 December 2013, a few weeks after the issuance of the Cassation Judgment, Chevron filed an extraordinary action for protection before the Constitutional Court of Ecuador (the "**Constitutional Action**").[998] In its petition, Chevron requested that the Constitutional Court (i) declare that the Cassation Judgment, to the extent that it had confirmed the rulings of the Lago Agrio Court and the Appellate Court, had violated various constitutional rights; and (ii) order "full redress" of Chevron's rights, including that the Cassation Judgment be left without effect and that the proceedings go back to the state corresponding to the earliest violation of Chevron's constitutional rights.[999] Again, the submission was signed by Dr Adolfo Callejas Ribadeneira, as Legal Counsel of Chevron, and by Dr Santiago Andrade Ubidia, who was also authorized to make filings in these proceedings.[1000]

635. The Constitutional Court admitted Chevron's action as compliant with the relevant formal requirements on 20 March 2014.[1001] The proceedings before the Constitutional Court included, *inter alia*, the following submissions and procedural events:

(i) submissions by the LAPs and *amici curiae*;[1002]

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997 **C-1975**, Ecuador National Court of Justice, Cassation Judgment, 12 November 2013 at 3:00 p.m, p. 222. *See generally* Track II Award, paras. 5.172-5.179.

998 The petition was accompanied by an Annex on the alleged "fraud" of the LAPs. **C-2409**, Chevron's Extraordinary Action for Protection, 23 December 2013.

999 **C-2409**, Chevron's Extraordinary Action for Protection, 23 December 2013, p. 108. The constitutional rights invoked by Chevron included, *inter alia*, the right to due process, the right to defence, the right to equality and non-discrimination, and the right to a sanction that is proportional to the violation. **C-2409**, Chevron's Extraordinary Action for Protection, 23 December 2013, pp. 6-7.

1000 **C-2409**, Chevron's Extraordinary Action for Protection, 23 December 2013, pp. 1, 109.

1001 **C-2647**, Order by the Constitutional Court, 20 March 2014.

1002 *See* **C-2551**, Constitutional Court, Case No. 0105-14-EP, 27 June 2018, pp. 30-41; **C-2654**, *Amicus Curiae* filed with the Constitutional Court, 15 November 2017 at 12:59 p.m.

(ii) submissions by Ecuador's Attorney General with respect to the ongoing developments in the present Arbitration;[1003]

(iii) two public hearings;[1004] and

(iv) requests from Chevron that the judges of the Constitutional Court temporarily refrain from hearing the case due to an alleged conflict of interest.[1005]

636. On 27 June 2018, the Constitutional Court of Ecuador rejected Chevron's extraordinary action for protection, declaring that there had been no violation of any constitutional rights.[1006] This ruling brought an end to the Lago Agrio Litigation since, following its issuance, Chevron effectively had "no judicial remedy under the Ecuadorian legal system against the enforcement and execution of the Lago Agrio Judgment under Ecuadorian law".[1007]

637. Before beginning its analysis of the Claimants' damages claim in respect of the Lago Agrio Litigation, the Tribunal recalls the Claimants' position that all of their claimed legal fees and expenses incurred in connection with these proceedings constitute direct damages and are recoverable in the alternative as incidental damages.[1008] As explained in

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1003 **C-2649**, Motion by Ecuador's Attorney General, 15 July 2015; **C-2650**, Motion by Ecuador's Attorney General, 21 July 2015. Representatives of Ecuador's Attorney General's Office also participated in the Track III Hearing in this Arbitration.

1004 *See* **C-2648**, Certificate from the Constitutional Court Regarding Hearing, 16 July 2015; **C-2551**, Constitutional Court, Case No. 0105-14-EP, 27 June 2018, pp. 35, 43. A second hearing (to be held in a plenary session) was scheduled "given the context of the case and the length of time that ha[d] passed between submission of the draft [judgment] and [then]". *See* **C-2652**, Order by the Constitutional Court, 25 July 2017 (Claimants' translation). *See also* **C-2651**, Clerk Certification, 2 October 2015; Mittelstaedt Witness Statement, paras. 61-62.

1005 *See* **C-2653**, Chevron Motion filed with the Constitutional Court, 22 May 2018; **C-2655**, Chevron Motion filed with the Constitutional Court, 5 June 2018. Chevron's request was based on the fact that the judges were then being evaluated by the Transitional Citizen Participation and Public Oversight Council, an organ presided and comprised by individuals who, allegedly, had previously acted against Chevron and/or supported the LAPs. Chevron's motion was later rejected. The judges of the Constitutional Court were eventually removed a few weeks after the issuance of the decision on the Constitutional Action. *See* Mittelstaedt Witness Statement, **RM-4**, CPCCS-T ratifies removal of Constitutional Court Judges and resolves to start a Selection Process, Transitional Citizen Participation and Public Oversight Council Press Release No. 193, 31 August 2018.

1006 **C-2551**, Constitutional Court, Case No. 0105-14-EP, 27 June 2018, p. 148. *See generally* Track II Award, paras. 5.180-5.224.

1007 Track II Award, para. 5.216. The reasons why the Tribunal does not consider an action under the Collusion Prosecution Act (CPA) to be a reasonable recourse against the Lago Agrio Judgment are set forth in Section VII.D.3 above.

1008 Reply, para. 699.

paragraph 327 above, the legal fees and expenses reasonably incurred by the Claimants in attempting to repair damage and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment are compensable only as *incidental* damages, *not* as *direct* damages. The costs incurred by the Claimants on account of any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[1009]

638. To the extent that they arose within the main chain of events of the Treaty breaches, the Tribunal acknowledges that the legal fees and expenses incurred by the Claimants in connection with the Lago Agrio Litigation are more closely connected to the source of the Claimants' injuries than the Claimants' other damages categories addressed in this Award. However, this does not affect the proper characterization of these costs as incidental damages, as opposed to direct damages. In particular, the legal fees and expenses claimed under the present heading did not flow naturally from the recognition and enforcement of the uncorrected Lago Agrio Judgment (whether by attachment, arrest, interim injunction, or execution) without any intervening action from the Claimants.[1010] Rather, these alleged losses, as particularised by the Claimants, were incurred in reaction to the injury arising from the Respondent's internationally wrongful acts with direct intervening action from the Claimants, who decided to exercise their right to challenge the Lago Agrio Judgment before the Ecuadorian courts and retained legal representation – as well as other expertise and services – for that purpose.[1011] As such, the Tribunal reiterates that the legal fees and expenses claimed under the present heading are only compensable as incidental damages under international law.

1009 *See* para. 317 above.

1010 *See* paras. 321-322 above.

1011 See para. 328 above. "Chevron was forced to continue its legal battle in Ecuador through three different appeal levels all the way to the National Court of Justice and then to the Constitutional Court". Fourth Veiga Witness Statement, para. 54 Mr Veiga declares that he "oversaw the day-to-day defense of the Lago Agrio Litigation" from 2003 to 2009, and later became a member of the committee "which supervised, and made the key decisions relating to this dispute". Fourth Veiga Witness Statement, para. 9. *See also* Third Veiga Witness Statement, para. 12; Track III Hearing Transcript, Day 1 (18 August 2022), pp. 63-64 (Bishop).

639. Accordingly, whether the Claimants were "forced" to pursue the Lago Agrio Litigation after the issuance of the Lago Agrio Judgment is a separate question impacting only upon the questions of causation and reasonableness for the assessment of incidental damages.

640. With this preamble, following the methodology laid out in Section VII.G.5 for the assessment of incidental damages in this case, the Tribunal finds that the Claimants' claim for compensation in respect of the Lago Agrio Litigation must be granted for the reasons and to the extent set out below.

(b) First Step: Analysis of Incidental Damages "Category"

641. As a first step of its analysis, the Tribunal must determine whether the Lago Agrio Litigation category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

642. First, as noted in paragraph 555 above, the notion of causation applied to the reimbursement of legal fees and expenses as incidental damages requires the Tribunal to determine whether the legal fees and expenses claimed under the present heading, when considered as a whole, were incurred to minimize loss and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment. To warrant compensation, as also stated in paragraph 555 above, the Claimants' efforts must have been geared towards one of three mitigation goals: (i) preventing the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, thereafter seeking to render the Judgment unenforceable; or (iii) minimizing the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution or howsoever otherwise.

643. Second, as noted in paragraph 556 above, incidental damages are subject to an additional requirement of reasonableness: to warrant compensation, legal fees and expenses must have been *reasonably* incurred to mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment. At this level of analysis, the Tribunal's determination concerns the reasonableness of the mitigation *measures*

undertaken by the Claimants, not of the *amounts* they spent, which will be examined in a subsequent step of the analysis.[1012]

644. As a preliminary matter, the Tribunal notes that the costs claimed by the Claimants under this category were incurred starting in 2004, *i.e.*, shortly after the initiation of the Lago Agrio Litigation.[1013] However, as explained earlier, the Tribunal has already determined that incidental damages are only compensable in principle in this Arbitration if they were incurred starting as of 14 February 2011, the date of issuance of the Lago Agrio Judgment. This was the date upon which the risks connected to the enforcement of the Judgment became foreseeable and was thus also the date as of which the Claimants' mitigation efforts could be said to respond to the injury arising from the recognition and enforcement of that Judgment – *i.e.*, the injury flowing from the Respondent's internationally wrongful acts. Whatever harm the Claimants may have suffered by undertaking work before 14 February 2011 to engage in the Lago Agrio Litigation and oppose the Lago Agrio Complaint was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[1014]

645. Accordingly, the Tribunal clarifies that its analysis of this damages category will be limited to the costs incurred by the Claimants in connection with the Lago Agrio Litigation *after* the issuance of the Lago Agrio Judgment. It is unnecessary for the Tribunal to address the trial stage of the Lago Agrio Litigation.

646. The Lago Agrio Litigation following the issuance of the Lago Agrio Judgment comprised proceedings before three different levels of the Ecuadorian judiciary. Each is addressed consecutively in the paragraphs that follow.

647. First, the Tribunal refers to the First Instance Appeal. By filing this appeal, Chevron sought the nullity of the Lago Agrio Judgment and of the entire proceedings leading to it as its main request for relief.[1015] Chevron's subsidiary petitions likewise sought a partial

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1012 *See* para. 556 above.

1013 *See* para. 621 above; Reply, paras. 699-700.

1014 *See* paras. 362, 368, 373, 397 above.

1015 *See* para. 626 above; **C-1178**, Chevron's Appeal of the Lago Agrio Judgment, 9 March 2011 at 4:05 p.m., pp. 186-188.

nullification of the proceedings from a moment prior to the issuance of the Judgment, or that the Lago Agrio Court dismiss or abstain from deciding the Lago Agrio Complaint.[1016] If granted, any of these requests would have resulted in the reversal of the Lago Agrio Judgment, and, as such, they were suitable to prevent the Lago Agrio Judgment from becoming enforceable as described in item (i) in paragraph 642 above.

648. As for the reasonableness of filing the First Instance Appeal, the Tribunal notes that appealing the Lago Agrio Judgment before the very Ecuadorian court that issued the ruling was, quite possibly, the most natural, immediate, and accessible way to prevent the Lago Agrio Judgment from becoming enforceable. Consequently, pursuing the First Instance Appeal was a reasonable measure in the circumstances then prevailing.

649. Second, the Tribunal turns to the Cassation Appeal, whereby Chevron again sought the nullity of the proceedings leading to the Lago Agrio Judgment or, alternatively, that the Judgment be quashed and that the Lago Agrio Complaint be dismissed.[1017] Thus, for the same reasons that are applicable to the First Instance Appeal, the Cassation Appeal, had it been fully granted, could have prevented the Lago Agrio Judgment from becoming enforceable after its issuance. In particular, the Cassation Appeal requested specifically that the enforcement of the Lago Agrio Judgment be suspended, which further confirms that this measure was suitable to prevent the Lago Agrio Judgment from becoming enforceable as described in item (i) in paragraph 642 above. Accordingly, this Appeal meets the causation requirements for the compensation of incidental damages.

650. The Tribunal is also persuaded that it was reasonable for Chevron to pursue the Cassation Appeal. While the outcome is not determinative for assessing reasonableness, the Tribunal considers that the reasonableness of pursuing the Cassation Appeal is confirmed, *inter alia*, by the fact that the Cassation Judgment nullified the punitive damages imposed on Chevron, removing half of the damages awarded in the Lago Agrio Judgment.[1018]

1016 *See* para. 626 above; **C-1178**, Chevron's Appeal of the Lago Agrio Judgment, 9 March 2011 at 4:05 p.m., pp. 188-191.

1017 *See* para. 629 above; **C-1068**, Chevron's Cassation Appeal, Provincial Court of Justice of Sucumbíos (Lago Agrio appellate proceedings), 20 January 2012 at 8:50 a.m., pp. 159-160.

1018 **C-1975**, Ecuador National Court of Justice, Cassation Judgment, 12 November 2013, p. 222.

651. Third, and last, the Tribunal refers to the Constitutional Action, which sought that the Cassation Judgment (and, ultimately, the Lago Agrio Judgment) be left without effect.[1019] Unlike in the case of Chevron's First Instance and Cassation Appeals, the Lago Agrio Judgment had already become enforceable by the time the Constitutional Action was filed on 23 December 2013.[1020] However, this does not alter the fact that the Constitutional Action, if granted, would have required the Lago Agrio Litigation to re-start from a stage prior to the issuance of the Lago Agrio Judgment.[1021] As such, the Constitutional Action also amounts to a measure capable of rendering the Judgment unenforceable in the sense described in item (i) in paragraph 642 above.

652. It was also reasonable for Chevron to explore all these available remedies to challenge the Lago Agrio Judgment, including the Constitutional Action, in the very jurisdiction where it came into existence. Considering the existing circumstances and the nature of the Action (which was based on an alleged violation of various fundamental rights), the Tribunal finds no reason to conclude that pursuing the Constitutional Action was unreasonable.

653. Having determined that the Claimants' pursuit of the First Instance Appeal, the Cassation Appeal, and the Constitutional Action meets the requirements of causation and reasonableness for the compensation of incidental damages under international law, the Tribunal concludes that the Lago Agrio Litigation category of damages as a whole (as of 14 February 2011) meets these requirements. In this respect, the Tribunal recalls that the Respondent has not *per se* disputed the reasonableness of pursuing these appeals, and has in fact suggested that Chevron should have "pursued remedies under Ecuadorian law to nullify the [Lago Agrio Judgment] based on the evidence of fraud".[1022]

654. In reaching this conclusion, the Tribunal remains mindful that Chevron filed numerous ancillary submissions in support of the First Instance Appeal, the Cassation Appeal, and the Constitutional Action. While some of these motions might not have had the direct and

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1019 *See* para. 634 above; **C-2409**, Chevron's Extraordinary Action for Protection, 23 December 2013, p. 108.

1020 *See* para. 630 above; **C-1114**, Providencia issued by the Lago Agrio Appellate Court, 1 March 2012 at 8:42 a.m. *See also* Track II Award, para. 4.462.

1021 *See* para. 634 above.

1022 *See* Counter-Memorial, para. 1202.

immediate objective of leaving without effect the Lago Agrio Judgment – thus rendering it unenforceable – they are ancillary in nature to these three actions. Accordingly, these supplemental motions do not affect the Tribunal's conclusion that Chevron's pursuit of the First Instance Appeal, the Cassation Appeal and the Constitutional Action, when considered as a whole, was a reasonable means of mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

655. The Tribunal will address several of the abovementioned supplemental motions as part of its analysis of the components of the present category of damages to the extent they are relevant to that analysis. However, having already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the Lago Agrio Litigation damages category as a whole as of 14 February 2011, the Tribunal does not consider it necessary to make a particularized assessment of each individual motion filed by the Claimants during those proceedings. Moreover, it would not be appropriate for the Tribunal to apply hindsight to the legal strategies employed by the Claimants in the course of the Lago Agrio Litigation.[1023]

(c) Second Step: Analysis of Incidental Damages "Components"

656. As a second step of its analysis, the Tribunal must determine, within the Lago Agrio Litigation category, whether the Claimants have established the requirement for each individual costs "component" identified by the Parties to qualify as incidental damages. The Tribunal must also examine other issues raised by the Parties in connection with this particular damages category to determine whether any other portion of the legal fees and expenses claimed under the present heading should be excluded from the final amount of compensation.[1024]

657. The Parties have identified five components involving the legal fees and expenses incurred by the Claimants in the Lago Agrio Litigation in Ecuador, which are addressed *seriatim* below. Other issues raised by the Parties in connection with this damages category but not expressly identified by them as components are addressed immediately thereafter. Lastly, the Tribunal will address the implications that its conclusions regarding

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1023 *See* para. 340 above.

1024 *See* paras. 559-565 above.

the Respondent's but-for argument may have on the assessment of the damages to be awarded for this category.[1025]

1. PR Firms (Creative Response Concepts; Benjamin Ortiz Brennan)[1026]

658. The Respondent argues that the Claimants are not entitled to recover USD 676,331.13 for the work performed by two public relations consultants, Creative Response Concepts and Benjamin Ortiz Brennan, since the Claimants' choice to hire public relations firms to "burnish their image" is not reasonable, necessary or connected to a Treaty breach.[1027]

659. As a preliminary matter, the Tribunal observes that all costs pertaining to Benjamin Ortiz Brennan (USD 165,900.94 in total) were incurred in 2004, that is, before the issuance of the Lago Agrio Judgment.[1028] In light of the Tribunal's earlier finding that any harm suffered prior to 14 February 2011 was not caused by the Respondent's Treaty breaches, the Tribunal concludes that the costs claimed with regard to Benjamin Ortiz Brennan are not compensable in this Arbitration.[1029]

660. The same conclusion applies to the costs pertaining to Creative Response Concepts that were incurred between November 2008 and December 2010.[1030] As for the remaining costs related to this vendor – which were incurred between March and December 2011 – [1031]the Tribunal reserves its decision for a later stage of its analysis. Indeed, given that the issue of media and public relations impacts multiple damages categories, the question of whether fees related to such activities are generally recoverable in this Arbitration will be addressed as part of the Tribunal's analysis of cross-cutting "elements" in Section VIII.N below.

661. Although not expressly included under this component, the Tribunal takes note that the Respondent has also questioned further media and public relations work allegedly

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1025 *See* para. 398 above.

1026 For an explanation of the names assigned to components *see* para. 568 above.

1027 Rejoinder, para. 1149; **RE-51**, Trunko Expert Report, **SM L-3**; Reply, Updated Appendix 2, pp. 299-320.

1028 *See* Reply, Updated Appendix 2, pp. 299-320.

1029 *See* paras. 622, 644 above.

1030 *See* Reply, Updated Appendix 2, pp. 309-313.

1031 *See* Reply, Updated Appendix 2, pp. 314-316.

performed by the Claimants' lawyers in the Lago Agrio Litigation, arguing that any fees arising from such activities should not be recoverable. In particular, the Respondent has identified spending related to activities regarding, *inter alia*, "public relations and newspaper publications", participation in a "legal media committee", the preparation of "media statements even for events that did not occur", "human rights" outreach, a "media campai[gn]", and "lobbying".[1032] The Respondent also contests that the Claimants should be reimbursed for the legal fees and expenses incurred in relation to activities to pressure the Ecuadorian government, such as research on purported "human trafficking violations" by the government.[1033]

662. For the reasons stated in paragraph 660 above, to the extent that the Claimants request compensation for fees and expenses related to media and public relations work (and comparable activities) in the Lago Agrio Litigation that were not charged by the two vendors falling under the present component (and which were incurred after the issuance of the Lago Agrio Judgment), the Tribunal will also address them as part of its analysis of cross-cutting "elements" in Section VIII.N below.

2. Adrian Briggs; Autonomy – Introspect; Fernando Morales; Fernando Sierra; Gus R Lesnevich Inc.; Harris Corp Government Communication System; Jan Paulsson (billed through Freshfields); RICOH USA Inc/Formerly IKON

663. The Respondent argues that the Claimants have not met their burden of proof with respect to their claim for USD 47,115,197.79 in costs and expenses allegedly paid to 31 experts and vendors in connection with the Lago Agrio Litigation.[1034] According to the Respondent, the invoices produced by the Claimants for these costs "provide little to no insight into the work conducted", making it impossible to draw any solid connection between the work done and any Treaty breach.[1035] This lack of detail in the vendor and

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[1032] Rejoinder, paras. 940, 1010-1023, 1121-1123; **C-3260.005**, Boies Schiller & Flexner LLP (Member) - 2014.xlsx; **C-3303.003**, Jones Day (Member) - 2010.xlsx; **C-3303.005**, Jones Day (Member) - 2012.xlsx; **C-3401**, CVX-Track III-20010587.

[1033] Rejoinder, paras. 1002-1004.

[1034] Rejoinder, para. 1135; Reply, Updated Appendix 2, pp. 271-320; **RE-51**, Trunko Expert Report, **SM L-3**.

[1035] Rejoinder, paras. 1136-1143; Track III Hearing Transcript, Day 2 (19 August 2022), p. 328 (Ettinger).

expert invoices, the Respondent says, also directly contradicts Chevron's Guidelines and, in many instances, the engagement letters concluded with the vendors themselves.[1036]

664. For their part, the Claimants generally explain that

> Chevron's lawyers, environmental experts, and vendors were required to spend thousands of hours in developing legal pleadings and robust technical evidence both to defend Chevron and to respond to the LAPs' antics, preparing for oral arguments at judicial inspections, drafting appellate pleadings, preparing expert reports, and performing the underlying analysis necessary to defend against diffuse claims . . . .[1037]

665. The Claimants add that "Chevron also strategically used lower cost vendors when it was confident that work could be managed consistent with Chevron's larger strategic concerns".[1038]

666. While this component, as described by the Parties, only covers eight experts and vendors,[1039] the Respondent appears to dispute the Claimants' right to recover all fees and expenses allegedly incurred by the 31 experts and vendors involved in the Lago Agrio Litigation.[1040] The Tribunal will therefore address the legal fees and expenses of all of these experts and vendors in this section, except for Benjamin Ortiz Brennan and Creative Response Concepts, which have already been covered as part of the "PR Firms" component.[1041]

667. At the outset, the Tribunal notes that the costs pertaining to, at least, the following experts and vendors were incurred in their entirety before 14 February 2011: ERM Peru S.A. –

1036 Rejoinder, paras. 1144-1145; **C-3231**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00016962—CVX-Track III-00016999), 2008, Section 8.4.1; **C-3232**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017000—CVX-Track III-00017043), 2009, Sections 8.4.2, 8.4.4; **R-2048**, Arrangement Letter between King & Spalding and CH2M HILL International, Ltd., CVX-Track III-00018305, 8 September 2005; **R-2049**, Arrangement Letter between King & Spalding and Geomatrix Consultants, Inc., CVX-Track III-00018318, 31 January 2006.

1037 Reply, para. 705.

1038 Reply, para. 697; Mittelstaedt Witness Statement, para. 22.

1039 Letter from the Respondent to the Tribunal, 21 October 2022, p. 16; Letter from the Claimants to the Tribunal, 22 October 2022, Attachment A, p. 21.

1040 *See* Rejoinder, para. 1135; Track III Hearing Transcript, Day 2 (19 August 2022), p. 328 (Ettinger).

1041 *See* paras. 658-660 above.

IP,[1042] The RETEC Group, Inc,[1043] Fernando Morales (billed through Simon Bolivar University),[1044] Fernando Sierra,[1045] Douglas Southgate,[1046] Transperfect Translations,[1047] and TestAmerica.[1048] In line with the Tribunal's previous findings, as these costs could not have been incurred in response to the injury arising from the recognition and enforcement of the Lago Agrio Judgment, they fall outside of the scope of compensable injury in these proceedings.[1049]

668. The Tribunal further notes that several other experts and vendors incurred the majority of their costs prior to the issuance of the Lago Agrio Judgment.[1050] These costs also fall outside the scope of compensable injury in these proceedings.

669. In relation to the costs claimed post 14 February 2011 by the experts and vendors referred to in paragraph 668 above and other experts and vendors at issue,[1051] based on the invoices submitted by the Claimants, these experts and vendors appear to have provided a variety

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1042 *See* Reply, Updated Appendix 2, pp. 271-320.

1043 *See* Reply, Updated Appendix 2, pp. 271-220.

1044 *See* Reply, Updated Appendix 2, pp. 271-320. This does not include the costs of Fernando Morales that were billed separately, which will be addressed in paragraphs 669-674 below.

1045 *See* Reply, Updated Appendix 2, pp. 271-320.

1046 *See* Reply, Updated Appendix 2, pp. 271-320.

1047 *See* Reply, Updated Appendix 2, pp. 271-320.

1048 *See* Reply, Updated Appendix 2, pp. 271-320.

1049 *See* paras. 622, 644 above.

1050 This is the case, for instance, with the two highest-billing vendors (AMEC Geomatrix and CH2M Hill), which are the subject of criticism by the Respondent. *See* Reply, Updated Appendix 2, pp. 299-317; Rejoinder, paras. 1137-1145. A similar pattern may be observed with regard to other high-billing experts and vendors, such as GSI Environmental Inc., Cardno Entrix or URS Corporation. *See generally* Reply, Updated Appendix 2, pp. 271-320.

1051 This concerns the following experts and vendors: GSI Environmental Inc.; AMEC Geomatrix; CH2M Hill; Cardno Entrix; URS Corporation; Newfields Companies LLC; Ellis GeoSpatial; Exponent, Inc.; Gus R Lesnevich Inc; RICOH USA Inc/Formerly IKON; Autonomy – Introspect; Integrated Science & Technology, Inc.; Harris Corp Government Communication System; Di Paolo Consulting; Fernando Morales; Hargis + Associates, Inc.; Jan Paulsson (billed through Freshfields); Adrian Briggs; Audio Forensic Center; Aninat Schwencke y Cia, Ltda; Pedro J. Alvarez; and Guthrie T. Abbott. The Tribunal notes that the last claim of costs for two of these experts in the Lago Agrio Litigation (Newfields Companies LLC and Hargis + Associates, Inc.) apparently took place in February 2011. For purposes of determining whether these costs fall under the scope of compensable injury the Tribunal will determine whether the date range limitations for the compensation of incidental damages is based on the date on which the underlying services were performed, the date of invoice, or the date of payment in Section VIII.N.2(b) below). In any event, the Tribunal confirms that whether this portion of the Claimants' claim is considered to have been incurred before or after 14 February 2011 does not affect the Tribunal's analysis that follows regarding this component.

of services, including scientific, environmental, economic, forensic and legal advice; as well as information technology, technical, secretarial and other kind of litigation support.[1052] Considering the complexity and subject matter of the Lago Agrio Litigation (which involved issues of environmental law and evidence and forensic queries regarding the LAPs' alleged fraud, among other matters, in the context of a very voluminous case record), the Tribunal considers that these services contributed to Chevron's attempts to overturn the Lago Agrio Judgment in Ecuador.

670. However, the Tribunal notes that while Chevron submitted multiple expert reports over the course of the Lago Agrio Litigation, including by some of the experts included under this component,[1053] the Claimants have otherwise not detailed the specific role of these experts and vendors, particularly during the period following the issuance of the Lago Agrio Judgment.[1054] In this connection, the Tribunal recalls that the required causal link must be established clearly and in an itemized fashion for each mitigation measure to warrant reparation.[1055] While the Tribunal is persuaded that some of these services formed part of Chevron's mitigation efforts in the Lago Agrio Litigation, it agrees with the Respondent that the invoices provided often lack sufficient information to determine precisely the content of the work performed by each expert and vendor. In examining the relevant experts' and vendors' billing documentation during the relevant time period (from February 2011 onwards) the Tribunal has noted that it generally lacks detailed written accounts or itemization of the activities carried out specifically in relation to the Lago Agrio Litigation. Indeed, many invoices contain no detailed breakdowns, or enclose

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1052 *See e.g.* **C-3245**, CVX-Track III-20000752; **C-3375**, CVX-Track III-20003953; **C-3358**, CVX-Track III-20001119; **C-3367**, CVX-Track III-20002511; **C-3379**, CVX-Track III-20004304; **C-3387**, CVX-Track III-20005840; **C-3388**, CVX-Track III-20005982; **C-3423**, CVX-Track III-20016199.

1053 *See* **C-1412**, Chevron's Appellate *Alegato*, submitted to the Substitute Judges of the Provincial Court of Sucumbios, 5 May 2011, p. D5 (referring to an annexed Declaration of Mr Gus Lesnevich); **R-1738**, Chevron's motion of 25 July 2011 at 3:10 pm (Lago Agrio Record, Appellate Procedure, cuerpo 119, fojas 11886-11890), 25 July 2011 at 3:10 pm, p. 2 (announcing the upcoming submission of another expert report by Mr Lesnevich). *See also* Rejoinder, para. 970; **C-2551**, Constitutional Court Case No. 0105-14-EP, 27 June 2018, p. 110 (referring to "the large number of expert reports provided" in the Lago Agrio Litigation).

1054 When listing the "components" and "elements" identified by the Parties pursuant to Procedural Order No. 83, the Claimants simply referred to Appendix 3 to their Memorial in relation to the present component. However, the said Appendix does not expressly refer to the work undertaken by any of these experts and vendors, other than listing certain expert reports submitted by "F. Morales" (presumably referring to Fernando Morales) between 2005 and 2007. *See* Memorial, Appendix 3, Annex A, pp. 3-6.

1055 *See* para. 330 above.

timesheets with no, or very limited, descriptions of the work performed, making it difficult to assess whether a connection exists between the underlying costs and the specific measures adopted by Chevron in the Lago Agrio Litigation.[1056]

671. While the evidence on record suffices for the Tribunal to infer that the services provided by at least some of these experts and vendors formed part of the Claimants' reasonable measures to mitigate the injury flowing from the recognition and enforcement of the Lago Agrio Judgment, the Tribunal has not been presented with sufficient elements to ascertain the reasonableness of the *amounts* spent in the services of these experts and vendors. Moreover, the circumstances described in the preceding paragraph, coupled with the very significant sum claimed by the Claimants for these expert and vendor services (USD 47,115,197.79)[1057] when compared to the amount claimed for the services of the Ecuador Legal Team (USD 47,697,340.66)[1058] or other law firms (USD 66,712,623.44)[1059] in these proceedings, raise significant questions about the reasonableness of the amounts claimed for the experts and vendors.

672. At this juncture, the Tribunal must recall, having consulted the Parties' damages models, that the majority of these expert and vendor costs (over 85%) were incurred prior to the issuance of the Lago Agrio Judgment on 14 February 2011.[1060] In other words, the amount of costs incurred by experts and vendors is not that disproportionate when compared to the law firm fees and costs incurred by Chevron in the stage following the issuance of the Lago Agrio Judgment. Be that as it may, the remaining amount of expert and vendor costs (approximately USD 6 million in total) is still quite significant considering the very limited information provided by the Claimants regarding the role played by these experts and vendors.

1056 *See for instance* **C-3354**, CVX-Track III-20000344 (AMEC Geomatrix); **C-3366**, CVX-Track III-20002154 (Cardno Entrix); **C-3367**, CVX-Track III-20002515 (CH2M Hill); **C-3375**, CVX-Track III-20003957 (Di Paolo Consulting); **C-3387**, CVX-Track III-20005869 (GSI Environmental Inc.); **C-3389**, CVX-Track III-20006044 (Harris Corp Government Communication System); **C-3423**, CVX-Track III-20016194 (RICOH USA Inc/Formerly IKON); **C-3434**, CVX-Track III-20017901 (URS Corporation).

1057 Creative Response Concepts and Benjamin Ortiz Brennan, which have been covered under the previous component, account for USD 676,331.13 of this amount. **RE-51**, Trunko Expert Report, **SM L-3**.

1058 **RE-51**, Trunko Expert Report, **SM L-1**.

1059 **RE-51**, Trunko Expert Report, **SM L-2**.

1060 *See also* Reply, Updated Appendix 2, pp. 271-320.

673. For the avoidance of doubt, the Tribunal clarifies that this reasoning applies to both the fees and the expenses incurred by the experts and vendors at issue.[1061] To the extent that the services provided by a given expert or vendor can be reasonably linked with Chevron's mitigation measures in the Lago Agrio Litigation, the Tribunal believes that it was reasonable for those experts or vendors to incur certain expenses (*e.g.*, travel costs or secretarial services). Nonetheless, the Tribunal again has not been presented with sufficient information to determine the purpose (and hence, the reasonableness) of many of these expenses.

674. In view of the uncertainty surrounding the reasonableness of the amounts spent by the Claimants on the services of experts and vendors in the Lago Agrio Litigation as a way of mitigating the injury flowing from the recognition and enforcement of the Lago Agrio Judgment, and having considered the particular circumstances of this case, the Tribunal assesses that 50% of the fees and expenses charged by all relevant experts and vendors after 14 February 2011 (GSI Environmental Inc.; AMEC Geomatrix; CH2M Hill; Cardno Entrix; URS Corporation; Newfields Companies LLC; Ellis GeoSpatial; Exponent, Inc.; Gus R Lesnevich Inc; RICOH USA Inc/Formerly IKON; Autonomy – Introspect; Integrated Science & Technology, Inc.; Harris Corp Government Communication System; Di Paolo Consulting; Fernando Morales; Hargis + Associates, Inc.; Jan Paulsson (billed through Freshfields); Adrian Briggs; Audio Forensic Center; Aninat Schwencke y Cia, Ltda; Pedro J. Alvarez; and Guthrie T. Abbott) should be excluded from compensation.

3. Lago Agrio WestLaw/Lexis charges

675. The Respondent takes issue with the legal research time entries of the U.S. law firms involved in the Lago Agrio Litigation, given that they contain nothing but the name of the database used and sometimes the timekeeper, and thus fail to provide the information required by Chevron's Guidelines.[1062]

[1061] The Respondent also disputes de recoverability of the expenses invoiced by some vendors. *See* Rejoinder, paras. 1146-1148.

[1062] Rejoinder, paras. 1096-1098; **C-3233**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017065—CVX-Track III-00017119), 2010, Section 8.3.

676. These charges, which amount to USD 914,307.67, were incurred between November 2008 and May 2018 by three U.S. law firms: Boies Schiller & Flexner LLP, Gibson, Dunn & Crutcher LLP, and Jones Day.[1063] While the relevant entry descriptions do not contain much detail, the Tribunal infers from the available information that the underlying activities included, at least, research, printing, and payment of fees for the use of the WestLaw and Lexis databases.[1064]

677. As explained in the context of its analysis at the category level, in order for this component to meet the causation requirement for the compensation of incidental damages under international law, the Tribunal must determine whether these charges were incurred in the preparation of submissions or other work that supported the First Instance Appeal, the Cassation Appeal, or the Constitutional Action.[1065]

678. The Claimants have not presented sufficient information for the Tribunal to determine the precise content of the work that generated these costs. While the Tribunal understands that databases such as WestLaw and Lexis can be used to access resources on Ecuadorian law (namely, the law applicable to the Lago Agrio Litigation), it is reluctant to infer that this was the primary use of these databases by the U.S. law firms involved in the Lago Agrio Litigation, particularly considering the large team of Ecuadorian lawyers retained by Chevron and the limited background provided by the Claimants regarding these costs.

679. However, and given the nature of these databases, the costs pertaining to this component could also be connected to Chevron's efforts to overturn the Lago Agrio Judgment to the extent that foreign law (and, presumably, U.S. law) was relevant to prepare Chevron's submissions before the Appellate, Cassation and Constitutional Courts. In particular, the Tribunal can highlight at least two instances of the Lago Agrio Litigation (following the

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1063 *See generally* **RE-51**, Trunko Expert Report, **SM L-5**.

1064 *See for instance* **RE-51**, Trunko Expert Report, **SM L-5**, pp. 1-2 (containing entries described as "COMPUTER RESEARCH - WESTLAW"), 52 (containing entries described as "LEXIS RESEARCH" or "WESTLAW RESEARCH AND PRINTING CHARGES"), 95 (containing entries described as "WESTLAW SEARCH FEES", "LEXIS SEARCH FEES" or "IMAGING SERVICES - REED ELSEVIER INC . . . MRC STORAGE AND HOSTING"). The Tribunal has also identified a number of entries described as "LEXIS LIBRARY UK", and an additional entry described as "WESTLAW ESPANA". *See* **RE-51**, Trunko Expert Report, **SM L-5**, pp. 50-56.

1065 *See* paras. 653-655 above.

issuance of the Lago Agrio Judgment) in which research on U.S. law was in all likelihood required.

680. First, Chevron addressed certain issues related to U.S. law in its request for clarification and expansion of the Lago Agrio Judgment, such as the application of Ecuadorian corporate law to the merger between Chevron and Texaco (which had allegedly taken place pursuant to U.S. law), a possible reference in the Judgment to merger notions under U.S. law, and further application of U.S. case law and legislation by the Lago Agrio Court.[1066] Chevron also made discrete references to U.S case law in its First Instance Appeal.[1067]

681. Second, a significant part of Chevron's efforts to overturn the Lago Agrio Judgment in Ecuador relied on the submission of evidence of the alleged fraud committed by the LAPs that was obtained through ongoing discovery proceedings in the United States.[1068] During the proceedings related to the Cassation Appeal, the LAPs reportedly argued that this evidence should not be admitted, claiming that the underlying discovery proceedings violated their human rights. Chevron later defended the validity of this evidence and the legality of the discovery proceedings, explaining the legal framework of this type of mechanism in the United States.[1069]

682. To the extent that the WestLaw and Lexis charges at issue were related to the preparation of submissions that addressed issues of non-Ecuadorian law, such as those described above, the Tribunal believes that the costs incurred by the Claimants would also be reasonable. As mentioned earlier, given that the First Instance Appeal, the Cassation Appeal and the Constitutional Action sought directly to leave the Lago Agrio Judgment

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1066 **C-970**, Chevron's Motion to clarify and amplify, 17 February 2011 at 8:00 a.m., pp. 3-4, 19-20.

1067 *See* **C-1178**, Chevron's Appeal of the Lago Agrio Judgment, 9 March 2011 at 4:05 p.m., pp. 21-22. *See also* **C-2409**, *Maria Aguinda, et al. v. Chevron Corp.*, Constitutional Court, Case No. 0105-14-EP, Chevron's Extraordinary Action for Protection, 23 December 2013, p. 40 (responding to the Cassation Judgment's reference to other foreign jurisdictions where there was precedent for the application of strict liability).

1068 *See* Seley Witness Statement, para. 63; Mittelstaedt Witness Statement, paras. 54-55, 60.

1069 *See* **C-2956**, Chevron's Cassation *Alegato*, 30 May 2013 at 1:39 p.m.; **C-2436**, Cassation *Alegato* on fraud, 3 September 2013 at 9:22 a.m., pp. 4-8.

without effect, the Tribunal is prepared to grant a certain level of deference to efforts undertaken by Chevron to maximize the success of these actions.[1070]

683. That said, non-Ecuadorian law could only be marginally relevant to Chevron's submissions in the Lago Agrio Litigation. Given the limited information provided by the Claimants regarding the work underlying the WestLaw and Lexis charges, the Tribunal has not been presented with sufficient elements to determine the extent to which all of these costs actually contributed to Chevron's attempts to reverse the Lago Agrio Judgment. The Tribunal is also sceptical that it was reasonable or efficient to involve three different U.S. law firms in this kind of research activities, given the limited scope of this type of work in the Lago Agrio Litigation, particularly in light of the high sum involved.

684. In sum, while the Tribunal is persuaded that Chevron might have needed, at times, to conduct research regarding U.S. or other foreign law for the preparation of its submissions in the Lago Agrio Litigation (following the issuance of the Lago Agrio Judgment), it has not been presented with sufficient information to establish confidently whether all of the costs pertaining to this component were indeed devoted to any such efforts. In view of this uncertainty, and having considered the particular circumstances of this case, the Tribunal assesses that 60% of the WestLaw and Lexis charges incurred in the Lago Agrio Litigation must be excluded from compensation.

4. (CLA) Lago Agrio fees and costs allegedly relating to administrative and clerical activities / (RES) Lago Agrio fees and costs relating to administrative and clerical activities

685. The Respondent disputes the recoverability of several kinds of overhead expenses incurred by the U.S. law firms involved in the Lago Agrio Litigation, stressing that these expenses are not reimbursable under Chevron's Guidelines.[1071] In particular, the Respondent criticizes that the Claimants seek to recover legal fees and expenses for, *inter alia*, "[m]anaging data/files and filing documents", "[s]etting up/building databases",

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1070 *See* paras. 341, 647, 649, 651 above.

1071 Rejoinder, paras. 1081, 1083; **C-3240**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017738—CVX-Track III-00017800), 2017, Section 9.1.

"[o]rganizing electronic files", "[p]roviding technical support" and "[p]rinting".[1072] The Respondent's expert, Mr Trunko, estimates that the fees and costs relating to these administrative and clerical activities in the Lago Agrio Litigation amount to USD 800,075.34.[1073]

686. Given that this issue impacts multiple damages categories, the Tribunal will address the question of whether fees and costs relating to administrative and clerical activities are generally recoverable in this Arbitration as part of its analysis of cross-cutting "elements" in Section VIII.N below.

5. Lago Agrio charges relating to translation

687. The Respondent is also critical of Chevron's spending in translation services during the Lago Agrio Litigation, observing that Chevron's U.S. counsel purportedly spent over USD 12,000,000 on external translation services, in addition to having a dedicated translation team for which the Claimants also seek to recover fees.[1074] The Respondent submits that the relevant time entries (i) fail to provide sufficient information with regard to the translation work that was performed; (ii) sometimes pertain to matters other than the Lago Agrio Litigation; and (iii) sometimes raise double-billing concerns.[1075]

688. In addition to the amounts spent on external translation services, Mr Trunko estimates that the additional law firms retained by Chevron (including U.S. firms Boies Schiller & Flexner LLP; Covington & Burling LLP; Gardere Wynne Sewell LLP; Gibson, Dunn & Crutcher LLP; Holland & Knight; Jones Day; Rivero Mestre LLP; Stern Kilcullen & Rufolo LLC; and the Ecuadorian firm Larreategui Meythaler & Zambrano) charged USD 2,549,641.11 in fees for translation-related work in the Lago Agrio Litigation

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1072 *See* Rejoinder, para. 1082; **C-3303.002**, Jones Day (Member) - 2009.xlsx; **C-3303.003**, Jones Day (Member) - 2010.

1073 *See* **RE-51**, Trunko Expert Report, **SM L-6**, pp. 4-5, 343-344.

1074 Rejoinder, paras. 1024-1025, Annex A-2.

1075 Rejoinder, paras. 1026-1030; **C-3303.009**, Jones Day (Member) - 2016.xlsx; **C-3303.005**, Jones Day (Member) - 2012.

between April 2008 and August 2018.[1076] The Tribunal notes that the vast majority of these fees (USD 2,214,623.25) were charged by Jones Day.[1077]

689. The Tribunal notes that incurring translation costs is not uncommon in large-scale disputes involving litigation proceedings across multiple jurisdictions. The Tribunal also recognizes the complexity of producing accurate, reliable, and timely translations. The need for precise translations in diverse linguistic contexts is crucial to ensure that submissions and documentary evidence are accurately conveyed in each legal system.

690. In the present case, Chevron initiated the RICO Litigation and the Section 1782 Proceedings in the United States, which were conducted in English. Alongside these proceedings, the LAPs initiated recognition and enforcement actions in Ecuador, Argentina, Canada, and Brazil in three different languages: Spanish, English, and Portuguese. The Gibraltar Proceedings were also conducted in English. Jones Day, acting as "the central hub among all counsel and the in-house team for translations, apostilles, [and] document management" took the lead on maintaining an up-to-date case record and translating documents for use in various jurisdictions.[1078] The process involved not only the initial translation by outside vendors but also verification by bilingual attorneys and staff at Jones Day.[1079]

691. Over the course of the proceedings of the Lago Agrio Litigation following the issuance of the Lago Agrio Judgment, Chevron submitted abundant evidence related to the LAPs' alleged fraud that was being obtained in parallel discovery proceedings in the United States. According to the Claimants' witness, Mr Mittelstaedt, Jones Day "took the lead on translating and preparing the supporting evidence" for Chevron's submissions in furtherance of the First Instance Appeal, and also "managed translating, organizing, and preparing the evidence" (working with Gibson Dunn) for Chevron's filings in the cassation proceedings.[1080] The Tribunal is thus satisfied that Chevron required extensive

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1076 *See* **RE-51**, Trunko Expert Report, **SM L-7**.

1077 *See* **RE-51**, Trunko Expert Report, **SM L-7**, pp. 1-7.

1078 Mittelstaedt Witness Statement, paras. 31, 86-87, 89-90.

1079 Mittelstaedt Witness Statement, para. 38.

1080 Mittelstaedt Witness Statement, paras. 55, 60. *See also* Track III Hearing Transcript, Day 3 (22 August 2022), pp. 548-549 (Vega).

translation support in order to furnish its submissions challenging the Lago Agrio Judgment before the Ecuadorian courts.

692. In addition to the preparation of materials to be submitted to the Ecuadorian courts, the Tribunal is satisfied that translation services were also necessary to keep Chevron's management and Chevron's lawyers in the Lago Agrio Litigation, respectively, apprised of the ongoing developments in the Lago Agrio Litigation and in the remaining proceedings in other jurisdictions, with a view to coordinating the company's overall litigation strategy. Consequently, and to the extent that the charges relating to translation contributed to Chevron's attempts to prevent the Lago Agrio Judgment from becoming enforceable or to render it unenforceable, the Tribunal concludes that such costs fulfil the requirement of causation for the compensation of incidental damages.

693. In the Tribunal's view, the translation charges incurred by Chevron were also reasonable. As already noted, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific mitigation measures to undertake in real time, particularly in the context of their attempts to overturn the Lago Agrio Judgment in Ecuador.[1081] Considering the above, the Tribunal does not seek to second-guess Jones Day's decision to work with its "preferred vendors" for translation work in the Lago Agrio Litigation.[1082] While some time entries may lack detail, the Tribunal is sufficiently persuaded that preparing translations to and from English and Spanish was reasonable and necessary for Chevron properly to challenge the Lago Agrio Judgment in Ecuador.

694. In this vein, the Tribunal has taken note that the amount of costs incurred by the U.S. law firms (and mainly by Jones Day) in retaining external translation services over the course of the Lago Agrio Litigation, which according to the Respondent exceeds USD 12,000,000,[1083] is exceptional. The Tribunal has reviewed the list of entries compiled by the Respondent and, while they do not always contain a description of the specific translation work performed, many entries do refer to documents, materials and

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1081 *See* paras. 341, 654 above.

1082 Mittelstaedt Witness Statement, para. 38.

1083 *See* Rejoinder, para. 1024, Annex A-2.

issues that were likely relevant to the Lago Agrio Litigation.[1084] Even if the connection between certain issues reflected in the entries and the Lago Agrio Litigation might be less clear than others, the Tribunal is reluctant to second-guess the relevance of the underlying work, particularly in the context of a high-stakes, multilingual, multijurisdictional legal battle involving dozens of lawyers from various firms and countries, the epicentre of which was, quite precisely, the Lago Agrio Litigation. Although the amounts incurred by Chevron in external translation services were indeed extraordinary, so were the circumstances that the company was facing. For that reason, the Tribunal considers that it was reasonable for Chevron to engage in extensive translation efforts to ensure that all potentially relevant materials were available to the company's lawyers and executives in an appropriate language.

695. The Tribunal otherwise notes that the issues raised by the Respondent with respect to these translation charges (namely, the existence of incomplete time entries, claims pertaining to matters other than the Lago Agrio Litigation and double-billing concerns) have also been identified by the Parties as cross-cutting elements impacting multiple categories, whether as vague billing, nondefense-related activities or double-billing entries.[1085] Accordingly, the Tribunal will further address the reasonableness of these amounts in light of those issues together with other elements in Section VIII.N below.

696. The Tribunal further understands that the translations prepared by external vendors would often have to be reviewed by Chevron's lawyers, and that these lawyers themselves might have also been required to prepare certain translations directly. Therefore, and bearing in mind the extraordinary circumstances mentioned earlier, the Tribunal is also persuaded

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[1084] *See for instance* Rejoinder, Annex A-2, nos. 307 (referring to "RECURSO DE APELACION"), 312 (referring to "CASES FOR ALEGATO;DEPOSITION EXCERPT"), 324 (referring to "PROTESTA Y REVOCACION"), 348 (referring to "RESPONSE MOTION RE:FRAUD IN JUDGMENT"), 379 (referring to "ECUADOR FACT SHEET;ESCRITO OPOSICION A ESCRITO DE FAJARDO"), 384 (referring to "THIRD INTERIM AWARD"), 390 (referring to "ACCION EXTRADORDINARIA DE PROTECCION"), 415 (referring to "CORONEL DRAFT EXPERT REPORT"), 423 (referring to "CASSATION ALEGATO DOCUMENTS"), 612 (referring to "PRESS RELEASE-CHEVRON SE ESCONDE NUEVAMENTE"), 616 (referring to "STJ PET 9815 LEGAL AID FULL DECISION").

[1085] *See* paras. 570-571 above.

that the fees incurred in translation-related work by the law firms retained by Chevron are reasonable.[1086]

697. The Tribunal is likewise reluctant to judge the efficiency of the translation work conducted by Chevron's lawyers with the benefit of hindsight. In any case, the fact that over 95% of the costs of this translation-related work was incurred by one law firm, Jones Day,[1087] which was also heavily involved in the Lago Agrio Litigation in other capacities, suggests that this activity was rather centralized, potentially reducing the risk of duplicative work and other inefficiencies.[1088]

698. Accordingly, the Tribunal rejects the Respondent's request to exclude from compensation the "Lago Agrio charges relating to translation".

6. Other issues

699. In this section, the Tribunal will address other issues raised by the Parties in connection with the Lago Agrio Litigation that have not been specifically identified by the Parties as a component. These include (i) the reliability of the "cash calls" provided in support of the claim for the Ecuador Legal Team; (ii) the involvement of eight U.S. law firms for the Claimants' representation in Ecuador in addition to the Ecuador Legal Team; (iii) the Respondent's criticism of abusive, excessive and unreasonable litigation practices allegedly adopted by Chevron's lawyers; (iv) the work of Chevron's counsel on various matters allegedly unrelated to the Lago Agrio Litigation; (v) the legal fees and expenses incurred for work allegedly related to criminal proceedings unrelated to the Treaty breaches; (vi) the alleged involvement of Chevron's counsel in the unauthorized practice of law in Ecuador and other activities prohibited by Ecuadorian law; (vii) the U.S. law firms' alleged lack of compliance with Chevron's Guidelines; and (viii) the sufficiency

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1086 The Tribunal understands that these are the fees amounting to USD 2,549,641.11, as calculated by Mr Trunko. *See* **RE-51**, Trunko Expert Report, **SM L-7**.

1087 In particular, Jones Day's timekeepers account for over 86% of the translation-related fees incurred by lawyers in the Lago Agrio Litigation. Jones Day was also responsible for retaining the entirety of the external translation services (except for three discrete and rather minor instances). *See generally* **RE-51**, Trunko Expert Report, **SM L-7**, pp. 1-5; Rejoinder, Annex A-2.

1088 *See* Mittelstaedt Witness Statement, paras. 30-31, 38.

of the billing information provided in support of the claim for additional Ecuadorian and foreign firms retained by Chevron.

700. *The reliability of the "cash calls" provided in support of the claim for the Ecuador Legal Team*. The Respondent contends that the "cash calls" submitted by the Claimants in support of their claim for the costs incurred by the Ecuador Legal Team do not provide sufficient information to determine the cause, reasonableness, or necessity of the work performed by these lawyers, such that the Claimants have failed to carry their burden of proof.[1089]

701. Given that this issue impacts multiple damages categories, the Tribunal will address the question of whether fees and costs claimed on the basis of "cash calls" are generally recoverable in this Arbitration as part of its analysis of cross-cutting "elements" in Section VIII.N below.

702. *The involvement of eight U.S. law firms for the Claimants' representation in Ecuador in addition to the Ecuador Legal Team*. The Respondent challenges "the dubious necessity of retaining eight U.S. law firms for Claimants' representation before Ecuadorian courts, in addition to the Ecuador Legal Team that served as counsel of record in the proceeding".[1090] These U.S. law firms include Jones Day, Gibson, Dunn & Crutcher; Rivero Mestre LLP; Gardere Wynne Sewell LLP; Holland & Knight; Boies Schiller & Flexner, Covington & Burling; and Stern Kilcullen & Rufolo.[1091]

703. In particular, the Respondent challenges the claim of "US$ 60,563,756.70 in damages for legal fees and expenses" allegedly incurred by these U.S. firms, contending that several of the firms "do not have offices in Ecuador" and that the Claimants have not explained how they "could have performed necessary tasks for a domestic 'complex environmental matter litigated . . . through every level of the Ecuadorian judicial system'."[1092]

1089 *See* paras. 598-600 above.

1090 Rejoinder, para. 977; Counter-Memorial, para. 584.

1091 *See* Reply, Updated Appendix 2, p. 145; **RE-51**, Trunko Expert Report, **SM L-1**.

1092 Counter-Memorial, para. 584 (brackets in original); Rejoinder, para. 977.

704. In response, the Claimants' witness, Mr Veiga, explains that Chevron retained additional counsel as the Lago Agrio Litigation progressed, noting that the company "sometimes retained more than one firm for a particular matter because it needed to ensure fully vetted advice given the range and complexity of the legal issues at play, the incredibly high litigation stakes, and the potentially disruptive outcome", and that Chevron's "belief and policy was that well and strategically informed advice resulted from the collaborative efforts of the best lawyers", such that they "established a culture of collaboration across firms".[1093]

705. As already noted, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific mitigation measures to undertake in real time.[1094] While the Tribunal accepts that the engagement of U.S. law firms for the Lago Agrio Litigation could be regarded as necessary to defend a U.S.-based company in a foreign jurisdiction, it nonetheless has difficulty understanding how the participation of eight U.S. law firms could have reasonably assisted the Claimants in attempting to reverse an Ecuadorian judgment in Ecuador – a quintessential question of Ecuadorian law and procedure that would normally be reserved to, and was indeed primarily handled by, local lawyers (*i.e.*, the Ecuador Legal Team).[1095] As explained above, unless the Claimants sought to minimize the possible losses arising directly from the recognition and enforcement of the Lago Agrio Judgment by retaining these U.S. law firms, they cannot claim compensation in these proceedings for the legal fees and expenses charged by those firms.[1096]

706. In this connection, the Tribunal bears in mind that Chevron's attempts to overturn the Lago Agrio Judgment in Ecuador relied significantly on extensive efforts to convey to the courts in Ecuador the evidence obtained through discovery proceedings in the United States, and also required addressing discrete issues of U.S. and other foreign law.[1097]

1093 Fourth Veiga Witness Statement, paras. 102-115.

1094 *See* para. 341 above.

1095 *See* Fourth Veiga Witness Statement, paras. 103-105 (explaining that "Callejas & Asociados was counsel of record to Chevron for the entirety of the Lago Agrio Litigation").

1096 *See* paras. 642-643 above.

1097 *See* paras. 678-681 above.

707. In view of the above, the Tribunal is prepared to grant compensation for the legal fees and expenses charged by Jones Day, which was the first foreign law firm to participate in the Lago Agrio Litigation (since 2008) and "took a lead role in supporting Callejas & Asociados from the United States", in addition to its responsibility for "the strategic integration of the Lago Agrio Litigation into Chevron's overall defensive strategy" and its coordination and translation work explained above in the context of the "Lago Agrio charges relating to translation" component.[1098] The Tribunal is also prepared to grant compensation for the legal fees and expenses charged by Gibson, Dunn & Crutcher LLP, which became involved in the Lago Agrio Litigation shortly thereafter (in September 2009) to work with Jones Day "on the environmental response", and also contributed to the review of the Lago Agrio docket and the presentation of evidence obtained in U.S. proceedings.[1099] Otherwise, the Tribunal denies compensation under this heading for the legal fees and expenses charged by all other U.S. law firms involved in the Lago Agrio Litigation (Rivero Mestre LLP; Gardere Wynne Sewell LLP; Holland & Knight; Boies Schiller & Flexner; Covington & Burling; and Stern Kilcullen & Rufolo).

708. *The Respondent's criticism of abusive, excessive and unreasonable litigation practices allegedly adopted by Chevron's lawyers*. The Respondent submits that it is not required to compensate the Claimants for the costs generated by various "excessive", "abusive", and "unreasonable" litigation tactics in which Chevron's lawyers engaged, presumably "to slow down the proceedings and overburden the Lago Agrio Court".[1100] The Claimants deny having engaged in any such tactics, and assert that the Respondent "cherry-picks examples from the Lago Agrio record" and that "Chevron's attorneys in Ecuador did their best to zealously represent Chevron amidst open hostility against the company".[1101]

709. The Tribunal observes that many of the practices criticised by the Respondent appear to have taken place primarily or entirely prior to the issuance of the Lago Agrio Judgment,

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[1098] Reply, Updated Appendix 2, p. 150; Fourth Veiga Witness Statement, paras. 105, 108-109, 112; Mittelstaedt Witness Statement, para. 31; para. 690 above.

[1099] Reply, Updated Appendix 2, p. 156; Fourth Veiga Witness Statement, para. 111; Mittelstaedt Witness Statement, paras. 50, 60.

[1100] *See generally* Rejoinder, para. 955-976, 1037-1052, 1124-1125.

[1101] Reply, paras. 725-738.

including (i) the "[e]xcessive and [d]uplicative [m]otions";[1102] (ii) the "requests for extensions";[1103] (iii) the "[m]otions [c]orrecting [c]lerical [m]istakes of [c]ourt [o]rders";[1104] (iv) the submission of a "fraudulent military report";[1105] (v) the "[f]utile [a]ttempts to [a]nnul [p]roceedings";[1106] (vi) the filing of essential error petitions;[1107] and (vi) the requests for the LAPs' experts to render "judicial confessions".[1108] To the extent that these activities were indeed undertaken before 14 February 2011, the associated costs are not compensable in this Arbitration.[1109]

710. The Respondent has also identified a limited number of these purportedly inappropriate "litigation tactics" as taking place after the issuance of the Lago Agrio Judgment. The Tribunal is not persuaded that any of these "tactics" was manifestly improper or deliberately abusive.[1110] Having reached this conclusion, the Tribunal does not consider it necessary to address this matter any further: as already stated, it is not appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the Lago Agrio Litigation.[1111]

711. Accordingly, the Tribunal declines to exclude from compensation the disputed fees or costs on the basis of the allegedly "excessive", "abusive" and "unreasonable" litigation

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1102 *See* Rejoinder, fns. 1796-1799, 1802.

1103 *See* Rejoinder, fns. 1807-1809.

1104 *See* Counter-Memorial, fns. 1215-1223, 1249-1258; Rejoinder, fn 1813.

1105 *See* Rejoinder, fns. 1813-1816.

1106 *See* Rejoinder, fns. 1823-1829.

1107 *See* Counter-Memorial, fns. 1163-1164, 1166-1174, 1177; Rejoinder, fns. 1938-1946, 1949.

1108 *See* Counter-Memorial, fn 1177.

1109 *See* paras. 622, 644-645 above.

1110 One of the very few examples of purportedly abusive litigation practices identified by the Respondent in the period after the issuance of the Judgment concerns two requests for the annulment of the proceedings, submitted before the Appellate Court, in which Chevron argued, *inter alia*, that some of the LAPs' signatures had been forged. *See* Rejoinder, fns. 1824, 1948; **R-1736**, Chevron's motion in the appellate procedure, (Lago Agrio Record, Appellate Procedure, cuerpo 118, fojas 11719-11722), 13 June 2011 at 10:05 a.m.; **R-1738**, Chevron's motion (Lago Agrio Record, Appellate Procedure, cuerpo 119, fojas 11886-11890), 25 July 2011 at 3:10 .p.m; **C-3303.004**, Jones Day (Member) - 2011. However, the Tribunal is not persuaded that these motions were unreasonable. Even accepting, for the sake of argument, the Respondent's view that Chevron sought to "to slow down the proceedings", the Tribunal has difficulty understanding why Chevron would have engaged in dilatory tactics after the issuance of the Lago Agrio Judgment.

1111 *See* paras. 340, 655 above.

tactics adopted by Chevron's lawyers in the Lago Agrio Litigation after 14 February 2011.

712. *The work of Chevron's counsel on various matters allegedly unrelated to the Lago Agrio Litigation*. The Respondent argues that the Claimants' lawyers undertook work unrelated to the Lago Agrio Litigation that is not compensable. Among other examples, the Respondent refers to work and charges regarding "procedures or concepts foreign to the Ecuadorian legal system", "a repository used by the U.S. federal courts to locate filings and decisions in U.S. federal court cases", "[a]dvising a client on Ecuador's telecom law", an "Anti-Terrorism Act filing", "meetings with a Brazilian electric utility company", "a contentious administrative proceeding", and "enforcement efforts in countries where enforcements actions were never filed".[1112] The Respondent also insists that it cannot be made to compensate the Claimants for the legal fees and expenses they incurred in connection with work on "offensive steps" in response to the Lago Agrio Litigation, such as "a potential defamation lawsuit".[1113]

713. Since the existence of allegedly non-defence related activities has been identified by the Parties as a cross-cutting element impacting multiple categories,[1114] the Tribunal will address it together with other elements in Section VIII.N below.

714. *The legal fees and expenses incurred for work allegedly related to criminal proceedings unrelated to the Treaty breaches*. The Respondent states that the invoices of some of the law firms retained by Chevron in the Lago Agrio Litigation refer to work in relation to the criminal cases against Mr Pérez and Mr Veiga and the "Nuñez tapes" investigations, which, in the Respondent's view, are not related to any Treaty breaches.[1115] The Respondent contends that Chevron's U.S. attorneys also incurred fees for time spent searching for potential legal actions against the prosecutor who brought one of these criminal proceedings.[1116]

1112 *See generally* Rejoinder, paras. 982-989, 1005-1006, 1112-1115, 1120.

1113 Rejoinder, paras. 993-998.

1114 *See* paras. 570-571 above.

1115 Rejoinder, paras. 1116-1119.

1116 Rejoinder, paras. 999-1001.

715. The work related to the Criminal Proceedings against Mr Veiga and Mr Pérez will be addressed by the Tribunal in the context of that damages category in Section VIII.K below.

716. To the extent that the activities questioned by the Respondent concern other criminal proceedings, they will be addressed as part of the analysis regarding non-defence related activities in Section VIII.N below, concerning cross-cutting elements.

717. *The alleged involvement of Chevron's counsel in the unauthorized practice of law in Ecuador and other activities prohibited by Ecuadorian law*. The Respondent refers to unlawful practices on the part of Chevron's counsel in the Lago Agrio Litigation. On the one hand, it contends that the U.S. law firms, as well as Chilean law firm Asesorias Bofill Escobar, "were doing work sufficiently central in the Lago Agrio Litigation as to amount to the unauthorized practice of law in a foreign jurisdiction".[1117] On the other hand, the Respondent asserts that the Claimants' counsel engaged in activities prohibited by Ecuadorian law, such as having multiple meetings with Ecuadorian judges.[1118]

718. The proper question before this Tribunal is whether the Claimants have satisfied their burden under international law, rather than domestic law, to prove their claims for the reimbursement of legal fees and expenses as incidental damages. From this viewpoint, the Tribunal is not tasked with assessing the compliance of Claimants' counsel's activities with Ecuadorian law, but must rather assess the sufficiency of the evidence on record, on the basis of its discretion under the UNCITRAL Arbitration Rules, to establish the requirements for the underlying costs to qualify as incidental damages (*i.e.*, causation and reasonableness).

719. Accordingly, the Tribunal rejects the Respondent's argument that it should deny compensation for the fees corresponding to the activities described in paragraph 717 above for the reason that they were prohibited under Ecuadorian law.

1117 Rejoinder, paras. 1031-1036, 1128-1129; **RE-58**, Sixth Andrade Expert Report, paras. 13(a), 73-80.

1118 Rejoinder, paras. 1126-1127.

720. Notwithstanding this conclusion, the Tribunal considers that the nature of those activities is relevant in determining whether they amounted to reasonable mitigation measures under international law.

721. In this respect, the Tribunal observes that preventing the Lago Agrio Judgment from becoming enforceable, or seeking to render it unenforceable, might have required the Claimants to retain additional law firms, including one or two U.S. law firms, to assist their local lawyers in their efforts to overturn the Judgment before the Ecuadorian courts. The Tribunal believes that the decision to retain those additional firms and to involve them substantively in the Lago Agrio Litigation can be considered a reasonable mitigation measure in the specific circumstances of this case[1119] (which, as previously discussed, required conveying evidence obtained in U.S. discovery proceedings to the Ecuadorian courts, while coordinating the company's defence and strategy across various parallel proceedings in other jurisdictions).[1120] In any event, the Tribunal notes that "Callejas & Asociados was counsel of record to Chevron for the entirety of the Lago Agrio Litigation", and there is no indication of any malicious or objectionable intent in the involvement of foreign firms in these proceedings.[1121]

722. In contrast, the Tribunal considers that *ex parte* meetings with judges are outside the boundaries of what could be considered a reasonable mitigation measure in the circumstances of this case, regardless of whether they are considered to be legal, illegal or part of regular domestic practice. The Tribunal understands that attaining the reversal of the Lago Agrio Judgment might have required the Claimants as a matter of proper litigation to sway the decision of an Ecuadorian court in their favour. As a general proposition, however, even though *ex parte* contact with a judge may be practised in a local litigation context, the only proper way in which courts should be swayed is through

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1119 At least with respect to Jones Day and Gibson, Dunn & Crutcher LLP, as determined in paragraphs 702-707 above.

1120 *See* paras. 681, 690-692, 705-707 above.

1121 According to Mr Veiga, "[a]s the case progressed, and with Chevron's approval, Dr. Callejas expanded his team to meet the growing needs of the case", and, beginning in 2008, Jones Day "took a lead role in supporting Callejas & Asociados from the United States". Fourth Veiga Witness Statement, paras. 104-105.

written and oral argument, whether on the record or in analogous circumstances in which due process, equality of arms, and other essential procedural guarantees are respected.

723. The Respondent has identified one invoice referring to *ex parte* meetings between the Claimants' counsel and Ecuadorian judges. It is an invoice covering the services of Dr Santiago Andrade Ubidia, one of Chevron's local counsel in Ecuador, between July and November 2012.[1122] The invoice refers to multiple meetings with judges, which would represent approximately USD 8,697.07 in fees.[1123] For the reasons explained in the preceding paragraph, these fees cannot be compensated as incidental damages under international law. Since the Respondent has not identified any other instances of this kind of practice by Chevron's counsel, the Tribunal has no basis to infer that any of the Claimants' lawyers, whose fees are claimed under this damages category, may have engaged in any such practices on a regular basis or otherwise.

724. In sum, the Tribunal assesses that it would be appropriate to exclude from compensation USD 8,697.07 of the fees incurred by Dr Santiago Andrade Ubidia, and declines to apply any further reductions on to the damages claimed under the present heading on the basis of any allegedly unlawful practices in which Chevron's counsel may have engaged in the Lago Agrio Litigation.

725. *The U.S. law firms' alleged lack of compliance with Chevron's Guidelines*. The Respondent avers that the time entries of the U.S. law firms that worked in the Lago Agrio Litigation do not permit a review of the type of work they performed or its relationship with the Lago Agrio Litigation, claiming that these deviations from Chevron's Guidelines "go to the essence of Chevron's lack of oversight and the free-wheeling nature of Chevron's U.S. counsel's involvement in the Lago Agrio Litigation".[1124] The Respondent provides a number of examples of such "vague time entries", including with regard to work by temporary employees and travel expenses; and also casts doubts on instances of services performable at a lower level of seniority and billing rate, "excessive amount of

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1122 *See* Rejoinder, para. 1126; **C-3245**, CVX-Track III-20008956.

1123 The invoices indicate that the fee amounts are based on a Retainer Agreement concluded in August 2010. As such, the Tribunal has arrived at this figure by weighing the total fees paid in these invoices on the basis of the number of hours devoted to meetings with judges.

1124 *See* Rejoinder, paras. 1053-1099.

time on certain activities", "large block entries", and "fees incurred for the recruitment and training of . . . contract attorneys".[1125]

726. Since the issue of vague billing entries has been identified by the Parties as a cross-cutting element impacting multiple categories,[1126] the Tribunal will address it together with other elements in Section VIII.N below. To the extent that the practices questioned by the Respondent concern other issues such as non-defence-related activities, alleged blocked billing, fees allegedly related to "Getting Up to Speed and Training", excessively long billing days and excessive time, or double-billing entries, they will likewise be addressed in Section VIII.N below.

727. *The sufficiency of the billing information provided in support of the claim for the additional Ecuadorian and foreign firms retained by Chevron*. The Respondent is also critical of the billing information provided with regard to the additional Ecuadorian and foreign firms retained by Chevron in the Lago Agrio Litigation. It contends that (i) the Claimants have often not produced proper invoices, but rather documents which do not meet the necessary requirements to establish an expense in Ecuador (such as "*proformas*"); (ii) many invoices are "incomplete" and do not permit a determination on how the charges described are related to the Lago Agrio Litigation; and (iii) many invoices contain "ambiguous descriptions" or lack basic information, showing that Chevron's Guidelines were not enforced.[1127]

728. In line with the reasoning set out in paragraphs 718-719 above, the question referred to in item (i) of the previous paragraph, whether the billing records of any of these law firms comply with Ecuadorian law, is *per se* not dispositive of the Claimants' claim for the reimbursement of the legal fees and expenses charged by these firms. Again, the proper question before this Tribunal is whether the Claimants have satisfied their burden under international law, rather than domestic law, to prove their claims for the reimbursement of legal fees and expenses as incidental damages. From this viewpoint, the Tribunal is not tasked with assessing the compliance of the Ecuadorian firms' billing records with

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1125 *See generally* Rejoinder, paras. 1068-1080, 1084-1095.

1126 *See* paras. 570-571 above.

1127 *See generally* Rejoinder, paras. 1103-1111, 1130-1133.

Ecuadorian law, but must rather assess the sufficiency of the evidence on record to establish the requirements for the underlying charges to qualify as incidental damages under international law (*i.e.*, causation and reasonableness).

729. Accordingly, the Tribunal rejects the Respondent's argument that it should deny compensation for the fees for services rendered by any of the additional Ecuadorian firms involved in the Lago Agrio Litigation (Perez, Bustamante & Ponce; Larreategui Meythaler y Zambrano; Donoso & Donoso Asociados; Ricardo Andrade Vaca & Asociados; and Santiago Andrade Ubidia & Juan Carlos Andrade Dávila) for the reason that some of the invoices produced to support this claim do not suffice as proof of expenditures under Ecuadorian law.

730. As for the Respondent's remaining arguments, referred to in paragraph 727(ii) and (iii) above, since the issue of vague billing entries has been identified by the Parties as a cross-cutting element impacting multiple categories,[1128] the Tribunal will address them together with other elements in Section VIII.N below.

7. Implications of the but-for scenario

731. Lastly, the Tribunal turns to the implications of its conclusions on the Respondent's but-for argument, as set out in Section VII.A.5 above, on the assessment of the damages to be awarded under the Lago Agrio Litigation category.

732. The Tribunal has determined that the applicable but-for scenario should take as its point of departure a hypothetical Lago Agrio Judgment that dismisses the diffuse claims and at best ignores the individual claims.[1129] This but-for scenario does not necessarily presume no appeal of the hypothetical Lago Agrio Judgment by the LAPs. However, it remains an open question what appellate level would have been reached in the counterfactual and whether any remaining individual claims would have ultimately been adjudicated by the upper courts (even presuming they were not abandoned at the trial court stage). What is clear, however, is that any appellate proceedings would have been much more limited in

1128 *See* paras. 570-571 above.

1129 *See* para. 390 above.

terms of scope and stakes than the real-world Lago Agrio Litigation:[1130] the Claimants would in all likelihood not have needed to deploy as many resources to oppose the LAPs' appeal of a hypothetical Lago Agrio Judgment finding no liability on Chevron, particularly when compared to the costs they actually incurred to appeal the real-world Lago Agrio Judgment. Among other things, the Tribunal anticipates that the parties' submissions would have involved a comparable level of legal and environmental arguments, but would not have required the discussion of the LAPs' alleged fraud (or at least not to the same degree).

733. As mentioned in paragraph 392 above, it is improbable that the Claimants would have continued to involve several international firms in the Lago Agrio Litigation. Faced with more limited stakes, the legal fees and expenses of any local and international counsel would have likely been only a portion of those that were effectively generated by the actual Ecuadorian team representing the Claimants in the real-world Lago Agrio Litigation.[1131]

734. The Tribunal considers that a single team of local Ecuadorian lawyers would have in all likelihood satisfied Chevron's litigation needs at the appellate stage. Unlike the real-world Ecuador Legal Team, this team would not need to be "able to devote all of its time to Chevron's defenses",[1132] meaning that its legal fees and expenses would be comparatively lower. Accordingly, the Tribunal determines that Chevron's local Ecuadorian counsel would in all probability have incurred no more than 60% of the total costs incurred by the real-world Ecuador Legal Team during the period following the issuance of the Lago Agrio Judgment.

735. Further, it is likely that any international law firms would have been involved to a much less significant degree and in all probability in a strict supervisory capacity, or serving as liaison with the Claimants' headquarters in the United States. The Tribunal considers it likely that a single U.S. law firm would have been sufficient to perform this role. Moreover, such firm would in all probability not have been required to undertake a great

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1130 *See* para. 391 above.

1131 *See* para. 393 above.

1132 Fourth Veiga Witness Statement, para. 105.

portion of the tasks that Jones Day – the main international law firm supporting Chevron in the Lago Agrio Litigation – was tasked with in the real world, such as performing "a more active role advising Chevron and coordinating with the Ecuadorian legal team", working "on the environmental response in the Lago Agrio Litigation", overviewing the "strategic integration of the Lago Agrio Litigation into Chevron's overall defensive strategy", "reviewing [the Ecuadorian] lawyers' and law firms' invoices", extensively reviewing the Lago Agrio Litigation record, coordinating translation issues, "travel[ing] to Ecuador to work in person with the Ecuador Legal Team to finalize the [First Instance Appeal] brief", working on "an appellate *alegato*, Chevron's rebuttal to the LAPs' appellate *alegato* and related motion practice", "preparing . . . supporting evidence", "build[ing] a cassation strategy and outlin[ing] the cassation arguments and briefing", "prepar[ing] five *alegatos* addressing torts, fraud, *res judicata*, due process, and punitive damages", management of "translating, organizing, and preparing the evidence [of the LAPs' alleged fraud] for filing in Ecuador" or preparing for the hearings before the Constitutional Court.[1133] Consequently, the Tribunal determines that, for purposes of the services provided by an international law firm in the but-for Lago Agrio Litigation proceedings following the Judgment, the Claimants would in all probability have incurred no more than 15% of the legal fees and expenses charged by Jones Day in the real-world proceedings during the period following the issuance of the Lago Agrio Judgment.

736. Similarly, the lower magnitude and scope of the Lago Agrio Litigation in the but-for world (which, crucially, would have resulted in the absence of parallel enforcement proceedings) would have obviated the need for extensive translation services and for most work regarding non-Ecuadorian law.

737. Lastly, the Tribunal accepts that Chevron might still have had to retain some environmental and technical expertise, as well as litigation support, for purposes of the appellate stage in the but-for world. Such appellate stage, however, would likely have been more straightforward from a technical and logistical point of view than in the real-world litigation, as it would have involved fewer lawyers, less voluminous submissions and no or much more limited efforts to convey any evidence of fraud. Accordingly, the

[1133] Fourth Veiga Witness Statement, paras. 108, 111-112; Mittelstaedt Witness Statement, paras. 31, 35, 37-38, 54-55, 57-62.

Tribunal determines that the costs of these services in the but-for world would in all probability have represented no more than 35% of the amounts claimed for costs of experts and vendors under this category during the period following the issuance of the Lago Agrio Judgment.

738. For these reasons, and having considered the particular circumstances of this case, in order to re-establish the situation which would, in all probability, have existed if the Respondent's Treaty breaches had not been committed, the Tribunal assesses that the global amount of compensation to be awarded to the Claimants for damages arising from the Respondent's Treaty breaches must be reduced by (i) 60% of the total costs incurred by the Ecuador Legal Team in the Lago Agrio Litigation (after 14 February 2011); (ii) 15% of the legal fees and expenses incurred by Jones Day in the Lago Agrio Litigation (after 14 February 2011); and (iii) 35% of the legal fees and expenses charged by all experts and vendors in the Lago Agrio Litigation (after 14 February 2011).

4. Conclusion on Lago Agrio Litigation

739. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Lago Agrio Litigation category of damages as a whole;

(ii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to services rendered before 14 February 2011;

(iii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to services provided by the firm Benjamin Ortiz Brennan, and otherwise defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "PR Firms (Creative Response Concepts; Benjamin Ortiz Brennan)", as well as the legal fees and expenses identified in paragraph 661 above, to its analysis of cross-cutting elements set out in Section VIII.N below;

(iv) Excludes from compensation 50% of the fees and expenses charged by all relevant experts and vendors after 14 February 2011 (GSI Environmental Inc.; AMEC Geomatrix; CH2M Hill; Cardno Entrix; URS Corporation; Newfields Companies LLC; Ellis GeoSpatial; Exponent, Inc.; Gus R Lesnevich Inc; RICOH USA Inc/Formerly IKON; Autonomy – Introspect; Integrated Science & Technology, Inc.; Harris Corp Government Communication System; Di Paolo Consulting; Fernando Morales; Hargis + Associates, Inc.; Jan Paulsson (billed through Freshfields); Adrian Briggs; Audio Forensic Center; Aninat Schwencke y Cia, Ltda; Pedro J. Alvarez; and Guthrie T. Abbott);

(v) Excludes from compensation 60% of the legal fees and expenses corresponding to the component "Lago Agrio WestLaw/Lexis charges";

(vi) Defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "(CLA) Lago Agrio fees and costs allegedly relating to administrative and clerical activities / (RES) Lago Agrio fees and costs relating to administrative and clerical activities" to its analysis of cross-cutting elements set out in Section VIII.N below;

(vii) Defers its determination regarding the compensation of the legal fees and expenses charged by the "Ecuador Legal Team" to its analysis of cross-cutting elements set out in Section VIII.N below;

(viii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to services provided by the firms Rivero Mestre LLP, Gardere Wynne Sewell LLP, Holland & Knight, Boies Schiller & Flexner, Covington & Burling, and Stern Kilcullen & Rufolo;

(ix) Defers its determination regarding the compensation of the legal fees and expenses identified in paragraphs 695, 712, 714, 725, and 727 above (except as provided in paragraphs 715 and 729 above) to its analysis of cross-cutting elements set out in Section VIII.N below;

(x) Defers its determination regarding the compensation of the legal fees and expenses identified in paragraph 715 above to its analysis of the Criminal Proceedings category of damages in Section VIII.K below;

(xi) Excludes from compensation USD 8,697.07 of the fees incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to services provided by Dr Santiago Andrade Ubidia;

(xii) On account of the Tribunal's conclusions regarding the but-for scenario, set out in paragraphs 731-738 above, deducts from the global amount of compensation to be awarded to the Claimants for damages arising from the Respondent's Treaty breaches an amount equal to (1) 60% of the total fees and expenses charged by the "Ecuador Legal Team" after 14 February 2011; (2) 15% of the legal fees and expenses incurred by the Claimants after 14 February 2011 corresponding to services provided by Jones Day; and (3) 35% of the legal fees and expenses charged, after 14 February 2011, by GSI Environmental Inc.; AMEC Geomatrix; CH2M Hill; Cardno Entrix; URS Corporation; Newfields Companies LLC; Ellis GeoSpatial; Exponent, Inc.; Gus R Lesnevich Inc; RICOH USA Inc/Formerly IKON; Autonomy – Introspect; Integrated Science & Technology, Inc.; Harris Corp Government Communication System; Di Paolo Consulting; Fernando Morales; Hargis + Associates, Inc.; Jan Paulsson (billed through Freshfields); Adrian Briggs; Audio Forensic Center; Aninat Schwencke y Cia, Ltda; Pedro J. Alvarez; and Guthrie T. Abbott;

(xiii) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Lago Agrio Litigation, to the extent not already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[1134] and

(xiv) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Lago Agrio Litigation. The Tribunal will

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1134 *See* paras. 569-573 above.

determine the exact amount of compensation corresponding to the Lago Agrio Litigation in Section VIII.O below.

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B. ECUADOR ENFORCEMENT PROCEEDINGS

740. The Claimants seek USD 3,582,889.44 as direct damages for the legal fees and expenses incurred between October 2007 and February 2019 in the Ecuador Enforcement Proceedings as the natural and foreseeable result of the Respondent's Treaty breaches.[1135] In the alternative, the Claimants submit that they are entitled to recover these expenses as incidental damages.[1136]

741. The Respondent submits that the Claimants' claims for fees and costs allegedly paid for the Ecuador Enforcement Proceedings should be denied in their entirety, arguing that the Claimants failed to carry their burden of proving that the expenses claimed were caused by the Treaty breaches and were reasonable and necessary.[1137]

1. The Claimants' Position

742. According to the Claimants, Chevron began incurring costs to prepare for enforcement proceedings in Ecuador in February 2008 because "the LAPs foreign enforcement efforts were clearly foreseeable in light of their press statements, the strategy outlined in their Invictus Memorandum (the "**Invictus Memorandum**"),[1138] and Ecuador's breach of the Tribunal's Interim Orders and Awards to facilitate the enforcement of the Judgment."[1139] As a result, the Claimants argue that they were entitled to prepare in advance of the enforcement proceedings before the LAPs filed their action in August 2012 and now are entitled to recover the expenses they incurred in doing so.[1140]

743. As to the Respondent's complaint about the Claimants engaging foreign attorneys to work on the Ecuadorian enforcement proceedings, the Claimants take the view that the business decisions regarding legal representation should be afforded ample deference and "need

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1135 Reply, para. 860, Updated Appendix 2; **C-3462**, Indices of Claimed Invoices by Damage Category ("Ecuador enforcement" tab).

1136 Reply, para. 860.

1137 Counter-Memorial, para. 792; Rejoinder, para. 1501.

1138 **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51].

1139 Memorial, paras. 320, 335; Reply, paras. 865, 870.

1140 Reply, para. 870.

not be second-guessed."[1141] As stated by the Claimants' expert, Mr Joseph Ryan, the Claimants note that Chevron's decision with respect to hiring law firms was assessed based on the "complexity and timeframe for completion of the legal work" required.[1142] To the extent the Respondent's criticism relates to the scope of work performed by foreign attorneys, the Claimants submit that they have provided underlying invoices and time entries and thus presented sufficient evidence and explanation of the work being done.[1143]

744. Regarding the expenses incurred by the "Ecuador Legal Team" comprised of Ecuadorian lawyers, the Claimants explain that the invoices underlying the claimed fees and costs refer to payments advanced by Chevron for the defence of the Lago Agrio Litigation, which were sent to the attention of three individuals over the course of the dispute: Adolfo Callejas, Rodrigo Pérez Pallares, and Eduardo Borja.[1144] According to the Claimants, the daily accounting of the times was not necessary or required by Chevron, given that Mr Callejas and several members of his team "had a long, preexisting relationship with the Company going back to the time of the Consortium. This team had the utmost confidence of, and was closely supervised by, Mr Veiga and others on a daily basis."[1145]

745. The Claimants conclude that – at the very least – they are entitled to recover USD 3,477,000 in direct damages after 1 March 2012 in the Ecuador Enforcement Proceedings.[1146] In the alternative, the Claimants take the view that they are entitled to recover these legal fees and expenses as incidental damages as a matter of international law.[1147]

2. The Respondent's Position

746. According to the Respondent, the Claimants are not entitled to recover damages incurred before the Respondent's breaches became final when the Ecuadorian Constitutional Court

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1141 Reply, para. 872.

1142 Reply, para. 872; Ryan Expert Report, paras. 26, 72, 79; Litvack Expert Report, para. 24.

1143 Reply, para. 872.

1144 Reply, para. 874.

1145 Reply, para. 875; Fourth Veiga Witness Statement, paras. 104-105.

1146 Reply, para. 880.

1147 Reply, para. 882.

upheld the decisions of the lower courts on 27 June 2018.[1148] As a result, the Respondent argues that fees incurred before this date are not recoverable and that the maximum fees and costs the Claimants can claim for the Ecuador Enforcement Proceedings is no more than USD 1,722,902.[1149]

747. In particular, the Respondent rejects the Claimants' assertion that they are entitled to recover fees in the amount of USD 213,910.41 incurred during the four-year period before the Ecuadorian enforcement proceedings commenced in August 2012.[1150] This is because, in the Respondent's view, "[l]egal fees cannot be reasonably incurred in 'defense of' a legal proceeding that has not yet been initiated."[1151] The foreseeability of the proceeding, the Respondent adds, does not provide justification for the Claimants to recover fees for work performed during a time when the complaint was not even filed, in particular, when the Claimants have not provided enough information to analyse whether the work was actually performed in connection with the Ecuadorian enforcement proceedings.[1152]

748. In addition, the Respondent argues there are multiple problems with the Claimants' evidence pertaining to this category of expenses.[1153]

749. First, the Respondent takes issue with the Claimants' engagement of non-Ecuadorian law firms to handle the enforcement proceedings even though they took place in Ecuadorian courts and required knowledge of Ecuadorian law.[1154] In fact, all of the fees sought before the "Ecuador Legal Team" enters the picture in September 2018, the Respondent asserts, are for work done by non-Ecuadorian law firms even though none of these firms have offices in Ecuador or purport to be licensed to practice in Ecuador.[1155] According to the Respondent, the Claimants have not established the reasonableness and necessity of

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1148 Counter-Memorial, para. 793.

1149 Counter-Memorial, para. 793.

1150 Counter-Memorial, para. 793; Rejoinder, paras. 1502, 1504.

1151 Rejoinder, para. 1504.

1152 Counter-Memorial, para. 795; Rejoinder, paras. 1504-1507.

1153 Rejoinder, para. 1519.

1154 Counter-Memorial, para. 797; Rejoinder, para. 1516.

1155 Counter-Memorial, para. 798; Rejoinder, para. 1516.

involving these firms, including six large U.S. law firms, before any Ecuadorian lawyers were engaged in September 2018, well into the enforcement action.[1156]

750. Second, while the Claimants have produced six "cash calls" for the "Ecuador Legal Team" from September 2018 to February 2019, the Respondent maintains that the information provided therein is wholly insufficient, as they do not specify the details of the timekeepers and their work nor are accompanied by contemporaneous supporting documentation to conduct an analysis of reasonableness or necessity.[1157] By way of example, the Respondent notes that many of the items listed relate to overhead expenses and public relations expenses not caused by the Treaty breaches.[1158] The Respondent further posits that Mr Veiga's approval of enormous expenditures month after month without requiring individualized entries, in violation of Chevron's Guidelines, is "a sufficiently egregious lapse in oversight," for which the Respondent cannot be held responsible.[1159]

751. Lastly, the Respondent contends that the invoices produced by the Claimants for work performed after the initiation of the Ecuador Enforcement Proceedings is not recoverable because many of the invoices lack the detail needed to establish a causal link with the Treaty breaches, as well as the reasonableness and necessity of the fees claimed.[1160] In this respect, the Respondent points out that the Claimants' invoices include public relations work, which is not legal by definition.[1161] The fact that Chevron deployed lawyers to perform public relations related activities, the Respondent asserts, "does not transform it into legal and necessary activity."[1162]

1156 Counter-Memorial, para. 798; Rejoinder, paras. 1518-1519.

1157 Rejoinder, paras. 1508-1509, 1512.

1158 Rejoinder, para. 1510.

1159 Rejoinder, para. 1513.

1160 Rejoinder, para. 1514.

1161 Rejoinder, para. 1515.

1162 Rejoinder, para. 1515.

3. The Tribunal's Analysis

(a) Introduction

752. The Claimants' damages claim in Track III includes three different categories concerning separate yet related chains of events taking place in parallel in Ecuador. Under the present heading, the Tribunal will address only the Claimants' claim for reimbursement of the legal fees and expenses disbursed in connection with the Ecuador Enforcement Proceedings. The Claimants' damages claim for the reimbursement of the legal fees and expenses disbursed in connection with the Lago Agrio Litigation is addressed separately in Section VIII.A above, while the Claimants' claim concerning the embargo of Chevron's trademarks in Ecuador will be addressed separately in Section IX.B below.

753. On 3 August 2012, the Lago Agrio Court issued an order of enforcement ordering Chevron to pay the sum of USD 19,041,414,529 per the Lago Agrio Judgment – or to turn over assets of equivalent value free of any encumbrances – within 24 hours.[1163] The Lago Agrio Court issued the writ of execution in response to an application by the LAPs to execute on the Claimants' assets.[1164]

754. Shortly after the LAPs' petition, on 15 October 2012, the Lago Agrio Court ordered that the Lago Agrio Judgment's execution "be applicable to the entirety of the assets of [Chevron], until such time as the entire obligation has been satisfied."[1165] Assets subject to the order included Chevron's intellectual property assets in Ecuador, all of Chevron and its affiliates' bank accounts in Ecuador or transfers through the Ecuadorian banking system, and Chevron's US $96 million award against Ecuador from the *Chevron v. Ecuador I* arbitration.[1166] In addition, as already noted, the order named Chevron subsidiaries in other countries, and purported to freeze their assets in those countries.[1167]

1163 *See* Track II Award, para. 4.467; **C-1404**, Providencia, Provincial Court of Justice of Sucumbíos, 3 August 2012 at 3:00 p.m.

1164 **C-1404**, Providencia, Provincial Court of Justice of Sucumbíos, 3 August 2012 at 3:00 p.m.

1165 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:54 p.m., p. 2; *see* Track II Award, paras. 4.469, 7.129.

1166 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:54 p.m., pp. 4-5.

1167 *See* paras. 431-432 above.

755. The Lago Agrio Court's order of enforcement and the LAPs' subsequent embargo petition triggered a lengthy proceeding before the Ecuadorian courts. Attachment pursuant to the embargo order was extended to additional Chevron subsidiaries' assets, including additional trademarks and intellectual property in Ecuador.[1168]

756. Notwithstanding the Tribunal's Interim Awards on Interim Measures, the Lago Agrio Court continued to admit the LAPs' motions and denied Chevron's challenges, prompting Chevron to continue to defend against the trademark embargo.[1169]

757. Before beginning its analysis of the Claimants' damages claim in respect of the Ecuador Enforcement Proceedings, the Tribunal recalls the Claimants' position that all of their claimed legal fees and expenses incurred in connection with these proceedings constitute direct damages and are recoverable in the alternative as incidental damages.[1170] As explained in paragraph 327 above, the legal fees and expenses reasonably incurred by the Claimants in attempting to repair damage and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment are compensable only as *incidental* damages, *not* as *direct* damages. The costs incurred by the Claimants on account of any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[1171]

758. Following the methodology laid out in Section VII.G.5 for the assessment of incidental damages in this case, the Tribunal finds that the Claimants' claim for compensation in respect of the Ecuador Enforcement Proceedings must be granted for the reasons and to the extent set out below.

1168 *See* Section VIII.A above on the Lago Agrio Litigation and Section IX.B below on Intellectual Property Losses in Ecuador.

1169 *See* Section VIII.A above on the Lago Agrio Litigation.

1170 Reply, para. 860.

1171 *See* para. 317 above.

(b) First Step: Analysis of Incidental Damages "Category"

759. As a first step of its analysis, the Tribunal must determine whether the Ecuador Enforcement Proceedings category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.[1172]

760. First, as noted in paragraph 555 above, the notion of causation applied to the reimbursement of legal fees and expenses as incidental damages requires the Tribunal to determine whether the legal fees and expenses claimed under the present heading, when considered as a whole, were incurred to minimize loss and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment. To warrant compensation, as also stated in paragraph 555, the Claimants' efforts must have been geared towards one of three mitigation goals: (i) preventing the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, thereafter seeking to render the Judgment unenforceable; or (iii) minimizing the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution or howsoever otherwise.

761. Second, as noted in paragraph 556 above, incidental damages are subject to an additional requirement of reasonableness: to warrant compensation, legal fees and expenses must have been *reasonably* incurred to mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment. At this level of analysis, the Tribunal's determination concerns the reasonableness of the mitigation *measures* undertaken by the Claimants, not of the *amounts* they spent, which will be examined in a subsequent step of the analysis.[1173]

762. By participating in the Ecuador Enforcement Proceedings, the Claimants sought to resist the execution of the Lago Agrio Judgment against the Claimants' assets in the territory of Ecuador. As such, the efforts undertaken by the Claimants in connection with the Ecuador Enforcement Proceedings clearly sought to minimize the loss arising directly from the enforcement of the Lago Agrio Judgment as described in item (iii) in paragraph 760 above. These efforts sought to protect Chevron's property in the very jurisdiction

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1172 *See* paras. 553-558 above.

1173 *See* para. 556 above.

where the Lago Agrio Judgment came into existence and as such were also a direct and reasonable way of mitigating the injury. The requirements of causation and reasonableness are therefore met as regards this category of damages.

(c) Second Step: Analysis of Incidental Damages "Components"

763. As a second step of its analysis, the Tribunal must determine, within the Ecuador Enforcement Proceedings category, whether the Claimants have established the requirement for each individual costs "component" identified by the Parties to qualify as incidental damages. The Tribunal must also examine other issues raised by the Parties in connection with this particular damages category to determine whether any other portion of the legal fees and expenses claimed under the present heading should be excluded from the final amount of compensation.[1174]

764. In view of their importance within the Parties' pleadings on this category, the Tribunal will address first the broader issues raised by the Respondent affecting this category before turning to the individual component that was identified by the Parties.

1. General issues

765. First, the Tribunal notes that the costs claimed by the Claimants under this category were incurred starting in 2007, *i.e.*, five years before the Ecuador Enforcement Proceedings commenced in August 2012.[1175] The Respondent considers that the Claimants are not entitled to recover fees and expenses incurred in defence of the Ecuador Enforcement Proceedings before they were initiated.[1176]

766. The Tribunal has already determined that incidental damages are only compensable in principle in this Arbitration if they were incurred starting as of 14 February 2011, the date

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1174 *See* paras. 559-565 above.

1175 As noted in paragraph 740 above, the Claimants state in their Reply that they "seek US$ 3,582,889.44 as direct damages for the legal fees and costs incurred between October 2007 and February 2019" in connection with the Ecuador Enforcement Proceedings category of damages (Reply, para. 860) However, the first entry in the Ecuador Enforcement Proceedings category of the Claimants Updated Summary of Chevron's Fees and Costs Claimed as Damages in Track III is dated December 2008. Reply, Updated Appendix 2, p. 702. The corresponding invoice, dated 28 January 2009, is the oldest in the Claimants' Index of Claimed Invoices by Damage Category. *See* **C-3462**, Indices of Claimed Invoices by Damage Category ("Ecuador enforcement" tab). In view of the Tribunal's decision to exclude from compensation all legal fees and expenses incurred by the Claimants before 14 February 2011, these discrepancies are ultimately immaterial.

1176 *See* para. 747 above.

of issuance of the Lago Agrio Judgment. This was the date upon which the risks connected to the enforcement of the Judgment became foreseeable and was thus also the date as of which the Claimants' mitigation efforts could be said to respond to the injury arising from the recognition and enforcement of that Judgment – *i.e.*, the injury flowing from the Respondent's internationally wrongful acts. Whatever harm the Claimants may have suffered by undertaking work before 14 February 2011 in preparation for a potential enforcement proceeding in Ecuador was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[1177]

767. Accordingly, the Tribunal finds that the Claimants are not entitled to claim compensation for any expenses associated with the advance preparations for the Ecuador Enforcement Proceedings that were done before 14 February 2011. Legal fees and expenses incurred within the context of these proceedings after that date – and, in particular, legal fees and expenses for preparatory work undertaken between 14 February 2011 and the initiation of the Ecuador Enforcement Proceedings in August 2012 – are compensable in principle, subject to the Tribunal's determinations that follow.

768. Second, the Respondent is critical of the Claimants' engagement of several large non-Ecuadorian law firms in these proceedings and notes, in particular, that all fees sought for the work of Ecuadorian lawyers under this category were incurred only as of September 2018, well into the enforcement proceedings.

769. At the outset, the Tribunal observes that while Chevron was effectively represented by Ecuadorian lawyers in the Ecuador Enforcement Proceedings from their initiation in August 2012,[1178] the Claimants claim no fees under this category for the work of the so-called "Ecuador Legal Team" prior to September 2018.[1179] In the Tribunal's understanding, the reason for this discrepancy is that the "Ecuador Legal Team" participated both in the Lago Agrio Litigation and the Ecuador Enforcement Proceedings: the team was paid on the basis of a monthly retainer and therefore issued a single billing document for all services performed for Chevron each month in connection with both

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1177 *See* paras. 362, 364, 397 above.

1178 *See generally* Memorial, Appendix 8.

1179 Reply, Updated Appendix 2, pp. 702-730.

litigations.[1180] As such, the legal fees and expenses incurred in connection with the Ecuador Enforcement Proceedings before September 2018 appear to be effectively claimed under the Lago Agrio Litigation damages category, while all fees charged by the "Ecuador Legal Team" after the Lago Agrio Litigation ended in mid-2018 are claimed under the present category. Accordingly, the Tribunal's rulings in this Section should be understood to refer only to legal fees and expenses incurred by the Claimants in connection with the "Ecuador Legal Team" as from September 2018.

770. As to the fees incurred by the "Ecuador Legal Team" starting in September 2018, which are properly claimed under the present heading, the Tribunal recalls that the Respondent objects to the reimbursement of the "cash calls" prepared by this team in lieu of formal invoices on several grounds, including the lack of supporting narratives and detail and the presence of expenses related to public relations work. Given that these are issues that impact multiple damage categories, the Tribunal will address these as cross-cutting "elements" in Section VIII.N below.[1181]

771. Aside from the "Ecuador Legal Team", all remaining legal fees claimed under this category correspond to services rendered by non-Ecuadorian law firms (Jones Day; Holland & Knight; Gardere Wynne Sewell LLP; Gibson, Dunn & Crutcher LLP; Boies Schiller & Flexner LLP; Mateha Associates Corp.; Stern Kilcullen & Rufolo LLC; Asesorias Bofill Escobar).[1182]

772. As already noted, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific mitigation measures to undertake in real time.[1183] While the Tribunal accepts that the engagement of foreign law firms for local enforcement proceedings may be useful for the conduct of those proceedings, it nonetheless has difficulty understanding how the participation of 8 non-Ecuadorian law firms could have reasonably assisted the Claimants in resisting the enforcement of an Ecuadorian judgment in Ecuador over assets located in that same jurisdiction – a

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1180 *See* Reply, paras. 874-875; Fourth Veiga Witness Statement, paras. 112, 125.

1181 *See* paras. 570-572 above.

1182 Reply, Updated Appendix 2, p. 702.

1183 *See* para. 341 above.

quintessential question of Ecuadorian law and procedure that would normally be reserved to local lawyers.

773. As explained above, unless the Claimants sought to minimize the loss arising directly from the enforcement of the Lago Agrio Judgment by retaining these foreign law firms, they cannot claim compensation in these proceedings for the legal fees and expenses charged by those firms.[1184] To the extent that the goal of resisting enforcement in Ecuador might have required *one* foreign law firm to act as a liaison between the Claimants' headquarters in the United States and the "Ecuador Legal Team" acting before the Ecuadorian courts, or in a coordinating capacity with teams operating in other jurisdictions (including before this Tribunal), the Tribunal is prepared to grant compensation for the legal fees and expenses charged by the first foreign firm to participate in the Ecuador Enforcement Proceedings (Jones Day).[1185] Otherwise, the Tribunal denies compensation under this heading for the legal fees and expenses charged by all other foreign law firms involved in these proceedings (Holland & Knight; Gardere Wynne Sewell LLP; Gibson, Dunn & Crutcher LLP; Boies Schiller & Flexner LLP; Mateha Associates Corp.; Stern Kilcullen & Rufolo LLC; Asesorias Bofill Escobar).

774. Having addressed all overarching issues raised by the Parties in connection with this category of damages, the Tribunal will now assess the "components" identified by the Parties under this heading.

2. Component: (CLA) Expenses alleged to be for temporary employees / (RES) Temporary employee expenses[1186]

775. The Parties have only identified one component within the Ecuador Enforcement Proceedings Category: "(CLA) Expenses alleged to be for temporary employees / (RES) Temporary employee expenses".[1187] This component concerns USD 135,588.38 claimed

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1184 *See* para. 555 above.

1185 Reply, Updated Appendix 2, p. 702. The Tribunal notes that Jones Day was also the non-Ecuadorian firm with the highest billing in connection with this damages category (USD 898,759) and thus, presumably, had a more prominent role than other firms retained by the Claimants. *See* Letter from the Claimants to the Tribunal dated 2 November 2022, Claimants' Damages Model, Vendor Switches, cell F176.

1186 For an explanation of the names assigned to components *see* para. 568 above.

1187 *See* para. 568 above.

through 61 invoices as "Temporary Employee Expenses" paid by Jones Day.[1188] Specifically, the Respondent argues that these invoices, which lack sufficient detail, do not on their own prove the necessity of employing temporary employees on top of the multitude of law firms Chevron had already retained for the proceedings.[1189]

776. As pointed out by the Respondent, many of the invoice entries for the work engaged by the temporary employees include "enforcement document collection."[1190] In this respect, Mr Mittelstaedt's witness statement provides further guidance as to what these tasks might have entailed. According to Mr Mittelstaedt, "[t]o ensure that the document was efficient, Jones Day worked seamlessly with teams of lower cost contract attorneys at multiple locations to ensure that Chevron document production needs were met."[1191] The Jones Day team, Mr Mittlestaedt continues, "provided cost efficient support to keep the record current as the litigation progressed, carry out targeted searches, and assist with record citations when [they] were preparing filings, among other things."[1192] As a result, Jones Day "often fielded multiple requests each day, from various law firms and case teams, supplying them with essential information and documents needed to support Chevron's claims or defenses in the RICO case, 1782 proceedings, recognition and enforcement proceedings, the Gibraltar proceedings, and this arbitration before the Tribunal."[1193]

777. In light of the above, the Tribunal can reasonably infer that the work of Jones Day's temporary employees played a role in the coordination strategy among multiple global firms aimed at supporting Chevron's defence in the Ecuador Enforcement Proceedings, as described above.[1194] Accordingly, the Tribunal rejects the Respondent's request to exclude from compensation the expenses of Jones Day's temporary employees claimed under this damages category.

1188 Rejoinder, para. 1514.

1189 Rejoinder, para. 1514.

1190 Rejoinder, Annex E-2.

1191 Mittelstaedt Witness Statement, para. 38.

1192 Mittelstaedt Witness Statement, para. 38.

1193 Mittelstaedt Witness Statement, para. 111.

1194 *See* para. 773 above.

4. Conclusion on Ecuador Enforcement Proceedings

778. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Ecuador Enforcement Proceedings category of damages as a whole;

(ii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Ecuador Enforcement Proceedings corresponding to services rendered before 14 February 2011;

(iii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Ecuador Enforcement Proceedings corresponding to services provided by the firms Holland & Knight, Gardere Wynne Sewell LLP, Gibson, Dunn & Crutcher LLP, Boies Schiller & Flexner LLP, Mateha Associates Corp., Stern Kilcullen & Rufolo LLC and Asesorias Bofill Escobar;

(iv) Defers its determination regarding the compensation of the legal fees and expenses charged by the "Ecuador Legal Team" to its analysis of cross-cutting elements set out in Section VIII.N below;

(v) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Ecuador Enforcement Proceedings, to the extent not already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[1195] and

(vi) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Ecuador Enforcement Proceedings. The Tribunal will determine the exact amount of compensation corresponding to the Ecuador Enforcement Proceedings in Section VIII.O below.

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[1195] *See* paras. 569-573 above.

C. ARGENTINA ENFORCEMENT PROCEEDINGS

779. The Claimants seek USD 25,695,438.12 as direct damages for the legal fees and expenses incurred between October 2007 and December 2018 in the Argentina Enforcement Proceedings.[1196] In the alternative, the Claimants submit that they are entitled to recover these expenses as incidental damages.[1197]

780. The Respondent submits that the Claimants' claims for legal fees and expenses allegedly paid for the Argentina Enforcement Proceedings should be denied in its entirety, arguing that the Claimants failed to carry their burden of proving that the expenses claimed were caused by the Treaty breaches and were reasonable and necessary.[1198]

1. The Claimants' Position

781. According to the Claimants, the damages sought under this category consist mainly of legal fees and expenses incurred in two proceedings over a period of six and a half years: (i) the LAPs' attempt to enforce an Ecuadorian embargo order targeting the assets of Chevron's subsidiaries in Argentina (the "**Argentina Embargo Proceedings**"); and (ii) a parallel recognition (*exequatur*) proceeding seeking to enforce the Lago Agrio Judgment (the "**Argentina Recognition Proceedings**").[1199]

782. In response to the Respondent's argument that the Claimants are not entitled to recover any expenses incurred before the LAPs actually filed their enforcement action in November 2012, the Claimants posit that they had a sound basis to advance preparatory work in light of the public statements made by President Correa, as well as by LAPs' attorneys, as early as 2007, about their intent to enforce the Lago Agrio Judgment and seize Chevron's assets in jurisdictions worldwide.[1200] As Latin American jurisdictions were "high-risk jurisdictions for potential enforcement actions by the Lago Agrio

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1196 Reply, paras. 884, 1212, Appendix 2; **C-3462**, Index of Claimed Invoices by Damages Category, "Argentina Enforcement" tab.

1197 Reply, para. 884.

1198 Counter-Memorial, para. 805; Rejoinder, para. 1367.

1199 Memorial, paras. 339-354.

1200 Memorial, para. 356; Reply, paras. 887-889.

Plaintiffs," the Claimants take the view that their early preparations in Argentina thus constituted a "proportional response" to a foreseeable substantial threat.[1201]

783. In the Claimants' view, the Respondent should be estopped or precluded from advancing the argument that Chevron may not recover losses incurred by its subsidiaries, given that "it conflicts with its own judiciary's conduct", which expressly ordered the seizure of Chevron's subsidiaries' assets in Argentina.[1202] Allowing the Respondent to invoke the corporate separateness that its own judiciary ignored for the purposes of avoiding the payment of damages sustained as a result of its own breach of international law, the Claimants assert, would violate the international law principle of good faith that does not allow a party to "blow hot and cold", as well as the separate principle barring a party from benefiting from its own wrongful conduct.[1203]

784. Pointing out that the LAPs did not have any assets in Argentina to satisfy any adverse costs award, the Claimants reject the Respondent's argument that the Claimants could have recovered their fees and costs that were actually incurred in the Argentina Enforcement Proceedings under Argentine law.[1204]

785. In view of the above, the Claimants submit that that – at the very least – they are entitled to recover USD 25,462,000 in direct damages after 1 March 2012 in the Argentina Enforcement Proceedings.[1205]

786. In the alternative, the Claimants take the view that they are entitled to recover these legal fees and expenses as incidental damages because they were reasonable.[1206] In this respect, the Claimants clarify that Chevron consulted – but did not retain – 16 law firms on various matters, given the stakes and complexity of the litigation in Argentina, and that most of the legal expenses incurred in Argentina were in fact charged by Argentine

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1201 Reply, para. 889.

1202 Reply, para. 891.

1203 Reply, para. 892.

1204 Reply, paras. 893-895.

1205 Reply, para. 896.

1206 Reply, para. 897.

lawyers.[1207] The Claimants add that consulting multiple law firms was required to coordinate the advocacy in Argentina with multiple parallel actions in several other jurisdictions.[1208]

787. Lastly, the Claimants contest the Respondent's assertion that the filings in the Argentina Recognition Proceedings were excessive, unreasonable, and unnecessary.[1209] For the Claimants, "Chevron's strategy of presenting all legitimate arguments in an effort to protect its assets and business was normative in litigation and reasonable in all respects."[1210]

2. The Respondent's Position

788. Similar to its argument advanced in the context of the Ecuador Enforcement Proceedings, the Respondent maintains that the Claimants are not entitled to recover legal fees and expenses incurred in connection with the Argentina Enforcement Proceedings before the Treaty breaches became final on 27 June 2018.[1211] Consequently, the Respondent asserts that the Claimants could at most claim USD 634,908 in legal fees and expenses under this category.[1212]

789. Even if the Claimants could claim expenses incurred before 27 June 2018, the Respondent takes issue with the expenses allegedly incurred between June 2008 and November 2012, before the LAPs filed their first action in Argentina.[1213] For the Respondent, detailed preparation from more than four years before the initiation of the proceedings "was simply not necessary", considering that (i) no level of preparatory work could have prevented the Argentine court from attaching Chevron's subsidiaries' assets *ex parte*; and (ii) the grounds on which Chevron's subsidiaries succeeded in lifting the embargo order (*i.e.*, the fact that they were distinct legal entities from Chevron and were not defendants

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1207 Reply, paras. 898-899.

1208 Reply, para. 899.

1209 Reply, para. 900.

1210 Reply, paras. 901-903.

1211 Counter-Memorial, para. 806.

1212 Counter-Memorial, para. 807; **RE-35**, First Leigh Expert Report, para. 125.

1213 Counter-Memorial, para. 808.

in the Lago Agrio Litigation) were straightforward and thus did not "require to prepare a mountain of materials over many months".[1214]

790. Additionally, the Respondent argues that the Claimants may not recover losses incurred by third parties, even if they are wholly-owned subsidiaries.[1215] Rejecting the Claimants' assertion that it is precluded from advancing its argument about Chevron's subsidiaries, the Respondent points out that the Claimants "succeeded in vindicating their corporate separateness in vacating the attachment" in the Argentina Embargo Proceedings.[1216] Moreover, in the absence of proof regarding who paid the claimed invoices for the Argentina Enforcement Proceedings, the Respondent contends that the Claimants have failed to prove that they suffered a potentially compensable loss.[1217]

791. Even if the Claimants had shown that they actually paid for the legal fees and expenses incurred in the Argentina Enforcement Proceedings, the Respondent maintains that the Claimants have failed to demonstrate that the services supposedly rendered by certain Argentine lawyers, namely, by Mr León Carlos Arslanian of Arslanian & Asociados and Mr Emilio Jorge Cardenas, were actually rendered, let alone reasonable, necessary, or as a result of any Treaty breach.[1218] In this respect, the Respondent explains that the fees are documented exclusively through proforma invoices, cover letters or lists of time entries, instead of formal invoices (*facturas*) issued by either Arslanian & Asociados or Mr Cardenas in accordance with Argentine law.[1219] Relying on Argentine law, which governs the provision of legal services in Argentina, the Respondent therefore is of the view that there is no basis for the Tribunal to conclude that the services were, in fact, rendered.[1220]

792. Aside from USD [redacted] in fees for services not substantiated by a *factura*, the Respondent contends that the Claimants have failed to prove that any of the USD [redacted]

1214 Rejoinder, para. 1379.

1215 Counter-Memorial, paras. 809-811; Rejoinder, para. 1370.

1216 Rejoinder, para. 1371.

1217 Counter-Memorial, para. 812; Rejoinder, para. 1369.

1218 Counter-Memorial, para. 817; Rejoinder, para. 1371.

1219 Rejoinder, para. 1372.

1220 Rejoinder, para. 1372.

[redacted] in fees allegedly charged by Arslanian & Asociados between January 2013 and October 2018 were related to the Treaty breaches.[1221] Pointing out that the flat rate arrangement with Arslanian & Asociados violated Chevron's Guidelines, the Respondent further questions the "astronomical fees" charged by Arslanian & Asociados accompanied by "paper-thin description" which, according to the Respondent, "far exceed what is normal and reasonable in the Argentine legal market".[1222]

793. As to the legal expenses charged by non-Argentine lawyers, the Respondent submits that the Claimants have not proved the reasons for retaining such lawyers, who normally charge at hourly rates much higher than Argentine counsel, nor explained their actual work, and the reasonableness thereof.[1223] In this respect, the Respondent further notes that the Claimants have failed to provide justification as to why resorting to 16 domestic and international law firms throughout the proceedings was reasonable and necessary.[1224]

794. In fact, the Respondent argues that Chevron's subsidiaries consistently submitted excessive, unreasonable, and unnecessary filings and made frivolous motions to recuse judges and to oppose the LAPs' requests to proceed *in forma pauperis* by using, *inter alia*, high-priced U.S. lawyers, even when doing so would provide no benefit to their legal defence.[1225] According to the Respondent, the invoice data also reveals that all firms engaged in activities that went beyond defending Chevron in the Argentina Enforcement Proceedings, including unrelated work on public and governmental relations, research on Argentine bankruptcy and environmental law, as well as activities that are prohibited under Argentine law, which would not be compensable under both Argentine and international law.[1226]

795. Lastly, the Respondent argues that the Claimants could have mitigated damages by requesting the Argentine courts in the Argentina Enforcement Proceedings to reimburse

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1221 Counter-Memorial, para. 819; Rejoinder, para. 1373.

1222 Rejoinder, paras. 1373-1375; **RE-55**, Second García Pullés Expert Report, para. 11.

1223 Counter-Memorial, para. 818.

1224 Counter-Memorial, paras. 818, 820; Rejoinder, para. 1385.

1225 Counter-Memorial, paras. 821-826; Rejoinder, paras. 1381-1392.

1226 Rejoinder, paras. 1393-1396.

the same expenses that the Claimants are requesting before this Tribunal.[1227] As such, the Respondent submits that the Claimants are precluded from claiming these fees in this Arbitration when their lawyers have failed to do so through the proper Argentine legal channels.[1228]

3. The Tribunal's Analysis

(a) Introduction

796. On 5 November 2012, the LAPs initiated the Argentina Enforcement Proceedings. First, the LAPs commenced an embargo proceeding, seeking to attach the assets of Chevron's Argentine and Danish subsidiaries Chevron Argentina S.R.L. ("**Chevron Argentina**"), Ingeniero Roberto Priú S.R.L., CDC ApS, and CDHC ApS, pursuant to the 15 October 2012 Order of the Lago Agrio Court.[1229]

797. Less than 24 hours after the request was made, on 6 November 2012, the LAPs were initially successful in obtaining an *ex parte* order attaching the assets of Chevron's Argentine and Danish subsidiaries (the "**Argentina Embargo Order**").[1230] After eight months, on 4 June 2013, following the rejection of a motion for reconsideration and an appeal, Chevron's subsidiaries ultimately succeeded in obtaining a judgment from the Argentine Supreme Court, which vacated the judgment of the lower appellate court ordering the enforcement of the 15 October 2012 Order of the Lago Agrio Court against the assets of Chevron's subsidiaries.[1231] Subsequently, on 28 June 2013 the Argentine courts lifted the embargo, releasing the funds that had been seized.[1232]

798. In parallel to the Argentina Embargo Proceedings, on 21 November 2012, the LAPs initiated a formal *exequatur* proceeding to recognize the Lago Agrio Judgment in Argentina against Chevron.[1233] This recognition action was accompanied by interlocutory

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1227 Counter-Memorial, paras. 813-815; **RE-38**, First García Pullés Expert Report, pp. 10-11, 19-20, 23.

1228 Counter-Memorial, para. 816.

1229 **C-2656**, *Ex Parte* Motion before Argentina's National Civil Trial Courts, 5 November 2012.

1230 **C-2349**, Order issued by the National Civil Trial Court No. 61 of Argentina in Aguinda Salazar Maria vs. Chevron Corporation on Preventive Measures, 6 November 2012.

1231 **C-1877**, Supreme Court Order listing Argentine Embargo, 4 June 2013.

1232 **C-2665**, Court Order, 28 June 2013.

1233 **C-2666**, LAPs' Complaint, 21 November 2012.

appeals, motions to recuse judges, and the *in forma pauperis* proceedings, wherein Chevron objected to the LAPs' request to litigate *in forma pauperis*.[1234] The Argentine courts ultimately dismissed the *exequatur* action on 31 October 2017 (a decision that was later confirmed by the Court of Appeals on 3 July 2018 and by the Supreme Court on 30 July 2020) and concluded that they had no jurisdiction over Chevron because it had no assets or presence in Argentina.[1235]

799. The Claimants submit that they must receive compensation from the Respondent for all of the legal fees and expenses incurred between October 2007 and December 2018 in the Argentina Enforcement Proceedings caused by the Respondent's Treaty breaches. The Respondent disagrees, arguing that the Claimants have failed to meet their burden to prove that the claimed expenses were caused by the Respondent's breaches, let alone that they are entitled to recover losses incurred by their subsidiaries.

800. Before beginning its analysis of the Claimants' damages claim in respect of the Argentina Enforcement Proceedings, the Tribunal recalls the Claimants' position that all of their claimed legal fees and expenses incurred in connection with these proceedings constitute direct damages and are recoverable in the alternative as incidental damages.[1236] As explained in paragraph 327 above, the legal fees and expenses reasonably incurred by the Claimants in attempting to repair damage and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment are compensable only as *incidental* damages. The expenses incurred by the Claimants on account of any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[1237]

801. Following the methodology laid out in Section VII.G.5 for the assessment of incidental damages in this case, the Tribunal finds that the Claimants' claim for compensation in

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1234 Memorial, Appendix 4, pp. 4-13. *See also* **C-2667**, Chevron's Motion, 27 February 2014; **C-2676**, Chevron's Motion, 6 March 2014; **C-2701**, Court Order, 24 May 2016.

1235 **C-2718**, Court Order, 31 October 2017; **C-2725**, Court Order, 3 July 2018; **R-2119**, Supreme Court Decision, 30 July 2020.

1236 Reply, para. 884.

1237 *See* para. 317 above.

respect of the Argentina Enforcement Proceedings must be granted for the reasons and to the extent set out below.

(b) First Step: Analysis of Incidental Damages "Category"

802. As a first step of its analysis, the Tribunal must determine whether the Argentina Enforcement Proceedings category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

803. First, as noted in paragraph 555 above, the notion of causation applied to the reimbursement of legal fees and expenses as incidental damages requires the Tribunal to determine whether the legal fees and expenses claimed under the present heading, when considered as a whole, were incurred to minimize loss and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment. To warrant compensation, as also stated in paragraph 555, the Claimants' efforts must have been geared towards one of three mitigation goals: (i) preventing the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, thereafter seeking to render the Judgment unenforceable; or (iii) minimizing the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution or howsoever otherwise.

804. Second, as noted in paragraph 556 above, incidental damages are subject to an additional requirement of reasonableness: to warrant compensation, legal fees and expenses must have been *reasonably* incurred to mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment. At this level of analysis, the Tribunal's determination concerns the reasonableness of the mitigation *measures* undertaken by the Claimants, not of the *amounts* they spent, which will be examined in a subsequent step of the analysis.[1238]

805. The Argentina Enforcement Proceedings comprised two parallel yet distinct proceedings, each requiring a differentiated analysis for present purposes: the Argentina Embargo Proceedings and the Argentina Recognition Proceedings.

1238 *See* para. 556 above.

806. First, the embargo action filed by the LAPs on 5 November 2012 led to the attachment of Argentine assets owned by two of Chevron's Argentinean subsidiaries (Chevron Argentina and Ingeniero Roberto Priú S.R.L.) and two of Chevron's Danish subsidiaries (CDC ApS, and CDHC ApS). The Tribunal recalls that while Chevron was the named defendant in the LAPs motion for an embargo,[1239] it was Chevron's Danish and Argentine subsidiaries who appeared in the embargo proceedings in their capacity as the owners of the embargoed property.[1240]

807. The immediate question before the Tribunal is whether Chevron should receive compensation for the efforts displayed by its subsidiaries (not Chevron) in the Argentina Embargo Proceedings. The Tribunal has already answered this question in the affirmative by ruling in paragraph 438 above that Chevron may in its own right claim compensation in this Arbitration for the injuries caused by the recognition and enforcement of the Lago Agrio Judgment to the assets of its subsidiaries listed in the 15 October 2012 Order of the Lago Agrio Court. As regards Argentina, the Lago Agrio Court order required expressly the seizure of Argentine assets belonging to Chevron's Argentinean and Danish subsidiaries.[1241]

808. Accordingly, by resisting and eventually overturning the Argentina Embargo Order, Chevron's Argentine and Danish subsidiaries clearly sought to minimize the loss arising directly from the enforcement of the Lago Agrio Judgment – as described in item (iii) in paragraph 642 above – against assets that were specifically identified in the 15 October 2012 Order of the Lago Agrio Court. Because those efforts were a direct and reasonable way of mitigating the injury flowing from the Respondent's Treaty breaches, the requirements of causality and reasonableness are met as regards the Argentina Embargo Proceedings.

809. Second, Chevron was the named defendant in the Argentina Recognition Proceedings and intervened in those proceedings in such capacity.[1242] By challenging the motion for

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1239 **C-2656**, *Ex Parte* Motion before Argentina's National Civil Trial Courts, 5 November 2012, p. 1.

1240 **C-1584**, Chevron Argentina, Request for Lifting of Preventative Measures, (Revocatoria Final), 9 November 2012; **C-2658**, Chevron's Motion, 14 November 2012.

1241 *See* paras. 431-432 above.

1242 **C-2666**, LAP's Complaint, 21 November 2012, p. 1; **C-2667**, Chevron's Motion, 27 February 2014.

recognition, Chevron displayed direct efforts to prevent the Lago Agrio Judgment from becoming enforceable in Argentina as described in item (i) in paragraph 642 above. Chevron's efforts also sought to minimize the loss arising directly from the enforcement of the Judgment as described in item (iii) of the same paragraph: the LAPs' motion for recognition noted expressly that "Defendant owns property in Argentina, and has even declared before the regulatory authorities of its country, the United States of America, that it owns 100% of Chevron Argentina S.R.L.", thus signalling Chevron's local subsidiary as the ultimate target of the recognition action.[1243]

810. As such, Chevron's efforts sought ultimately to protect the assets of one of its Argentine subsidiaries listed in the 15 October 2012 Order of the Lago Agrio Court[1244] and were thus a direct and reasonable way of mitigating the injury flowing from the recognition and enforcement of the Lago Agrio Judgment. The requirements of causation and reasonableness are therefore also met as regards the Argentina Recognition Proceedings.

811. For these reasons, the Tribunal finds that the requirements of causation and reasonableness are met as regards the Argentina Enforcement Proceedings category of damages – and, specifically, as regards the two distinct proceedings falling under this category.

812. In reaching this conclusion, the Tribunal remains mindful that Chevron made two substantial filings in the Argentina Recognition Proceedings together with its primary opposition to the LAPs' motion for recognition: an opposition to the LAPs' request to litigate *in forma pauperis*[1245] and a motion to recuse the sitting judge (Judge Elcuj).[1246] Chevron's subsidiaries also sought to recuse one of the sitting judges in the appellate court (Judge Castro) later in the Recognition Proceedings.[1247] While these motions, along with several other motions filed by Chevron in the course of the Argentina Enforcement Proceedings, might not have had the direct and immediate objective of mitigating the

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1243 **C-2666**, LAP's Complaint, 21 November 2012, p. 2.

1244 *See* para. 431 above.

1245 **C-2668**, Chevron's Motion, 27 February 2014.

1246 **C-2669**, Chevron's Motion, 27 February 2014.

1247 **C-2679**, Chevron's Motion, 11 May 2015.

injury arising from the recognition and enforcement of the Lago Agrio Judgment, they are ancillary in nature to Chevron's primary opposition to the LAPs' embargo and recognition motions. Accordingly, these supplemental motions do not affect the Tribunal's conclusion that the participation of Chevron and its subsidiaries in the Argentina Enforcement Proceedings, when considered as a whole, was a reasonable means of mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment. The Tribunal will address below Chevron's pursuit of these supplemental motions as part of its analysis of the components of the present category of damages.

(c) Second Step: Analysis of Incidental Damages "Components"

813. As a second step of its analysis, the Tribunal must determine, within the Argentina Enforcement Proceedings category, whether the Claimants have established the requirement for each individual costs "component" identified by the Parties to qualify as incidental damages. The Tribunal must also examine other issues raised by the Parties in connection with this particular damages category to determine whether any other portion of the legal fees and expenses claimed under the present heading should be excluded from the final amount of compensation.[1248]

814. The Parties have identified eight components involving the legal fees and expenses incurred by the Claimants and their subsidiaries in Argentina, which are addressed *seriatim* below. Other issues raised by the Parties in connection with this damages category but not expressly identified by them as a component are addressed immediately thereafter.

1. (CLA) Fees and costs before the LAPs' enforcement strategy became known to Claimants / (RES) Fees and costs before the Invictus Memorandum became known to Chevron (January 2011)[1249]

815. The Parties disagree on whether the Claimants may recover the costs associated with their early preparation works advanced in Argentina from June 2008 until the Invictus Memorandum became known to the Claimants in January 2011. To justify their

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[1248] *See* paras. 559-565 above.

[1249] For an explanation of the names assigned to components *see* para. 568 above.

compensation claim, the Claimants argue that the LAPs' strategy to enforce the Lago Agrio Judgment outside of Ecuador was already publicly known as early as 2007 and that Latin American jurisdictions were in this respect "high-risk jurisdictions".[1250] The Respondent maintains that the Claimants are not entitled to recover damages incurred before 27 June 2018.

816. The Tribunal has already determined that incidental damages are only compensable in principle in this Arbitration if they were incurred starting as of 14 February 2011, the date of issuance of the Lago Agrio Judgment. This was the date upon which the risks connected to the enforcement of the Judgment became foreseeable and was thus also the date as of which the Claimants' mitigation efforts could be said to respond to the injury arising from the recognition and enforcement of that Judgment – *i.e.*, the injury flowing from the Respondent's internationally wrongful acts. Whatever harm the Claimants may have suffered by undertaking work before 14 February 2011 in preparation for a potential enforcement proceeding in Argentina was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[1251]

817. Accordingly, the Tribunal finds that the Claimants are not entitled to claim compensation for any legal fees and expenses incurred before the Invictus Memorandum became known to them in January 2011 and before the issuance of the Lago Agrio Judgment on 14 February 2011.

2. Fees and costs incurred before November 5, 2012, the date the Argentine proceedings were filed

818. The Parties also disagree on whether the Claimants are entitled to compensation for fees incurred before the commencement of the Argentina Enforcement Proceedings on 5 November 2012. This necessarily encompasses the fees and costs associated with the Claimants' early preparation works in Argentina starting from June 2008 until the Invictus Memorandum became known to the Claimants in January 2011, as addressed in the previous section.

1250 Reply, para. 889.

1251 *See* paras. 362, 371, 397 above.

819. For the reasons stated in paragraph 816 above, the Tribunal finds that the Claimants are not entitled to claim compensation for any expenses associated with the advance preparations for the Argentina Enforcement Proceedings that were done before 14 February 2011. Legal fees and expenses corresponding to services provided from that date onwards are compensable in principle, subject to the Tribunal's determinations that follow.

3. Fees for services rendered by Arslanian and Asociados and Emilio Jorge Cardenas not accompanied by *facturas*

820. Relying on the report of its expert, Mr García Pullés, the Respondent argues that, under Argentine law, the informal billing documents submitted by the Argentine law firm Arslanian & Asociados and Mr Emilio Jorge Cardenas – also an Argentine lawyer – do not qualify as adequate documentary proof for the legal services they rendered unless they are accompanied, or later substantiated, by formal invoices (*facturas*).[1252]

821. In the Tribunal's view, the question whether the billing records of Arslanian & Asociados and Mr Cardenas complies with Argentine law is *per se* not dispositive of the Claimants' claim for the reimbursement of the legal fees and expenses charged by these lawyers. The proper question before this Tribunal is whether the Claimants have satisfied their burden under international law, rather than domestic law, to prove their claims for the reimbursement of legal fees and expenses as incidental damages. From this viewpoint, the Tribunal is not tasked with assessing the compliance of Arslanian & Asociados and Mr Cardenas' billing records with Argentine law, but must rather assess the sufficiency of the evidence on record to establish the requirements for this component to qualify as incidental damages (*i.e.*, causation and reasonableness). As noted in paragraph 546 above, the Tribunal enjoys ample discretion under Article 25(6) of the UNCITRAL Arbitration Rules as regards the assessment of evidence.

822. Accordingly, the Tribunal rejects the Respondent's argument that it should deny compensation for the fees for services rendered by Arslanian & Asociados and

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1252 Rejoinder, para. 1372.

Mr Cardenas identified in paragraph 1372 of the Rejoinder for the reason that they were not accompanied by *facturas*.

823. This conclusion, however, is not dispositive of the Respondent's separate but related argument that the Claimants have failed to demonstrate that the overall services provided by Arslanian & Asociados, totalling USD [redacted] in fees, were a reasonable and necessary measure. While not expressly falling under this particular component, the Tribunal will also address this argument under the present heading as it affects all of Arslanian & Asociados's fees, not just those billed through proforma invoices not accompanied by a *factura*.

824. In essence, the Respondent requests that the Tribunal deny compensation for the fees charged by Arslanian & Asociados on three different bases: (i) they include "paper-thin descriptions" of the services that he allegedly provided; (ii) they were incurred under a flat-fee arrangement in violation of Chevron's Guidelines; and (iii) they "far exceed what is normal and reasonable in the Argentine legal market".[1253] The Tribunal notes that these arguments by the Respondent are specific to Arslanian & Asociados's invoices and are not made extensive to Mr Cardenas' billing documentation.

825. The Tribunal has ascertained that Mr Arslanian (of Arslanian & Asociados) was involved in both the Argentina Embargo[1254] and Recognition Proceedings[1255] as part of the legal teams defending Chevron and its subsidiaries – albeit not as first counsel of record. The exact scope of Arslanian & Asociados's engagement is otherwise unclear to the Tribunal. In examining their billing documentation during the relevant time period (from January 2013 onwards)[1256] the Tribunal has noted that it generally lacks detailed written accounts or itemization of the activities carried out specifically in relation to the Argentina Enforcement Proceedings. The only description contained in most of these documents is "Legal Services Provided". Arslanian & Asociados also billed USD [redacted] for "Lump

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1253 Rejoinder, paras. 1373-1375.

1254 **C-2668**, Chevron's Motion, 27 February 2014, p. 1.

1255 **C-2660**, Court Order, 27 February 2013, p. 5.

1256 *See generally* **C-3356**, Arslanian & Asociados.

sum fee civil litigation up to the present" and USD [redacted] for a "sign-one [sic] fee for undertaking civil litigation split part I".[1257]

826. While the evidence on record suffices for the Tribunal to establish that the services provided by Arslanian & Asociados formed part of the Claimants' reasonable *measures*, as well as those of its subsidiaries, to mitigate the injury flowing from the recognition and enforcement of the Lago Agrio Judgment in Argentina, the Tribunal lacks the elements to ascertain the reasonableness of the elevated *amounts* spent in Arslanian & Asociados's services. Indeed, the circumstances described in the preceding paragraph, coupled with the very significant sum claimed by the Claimants for Arslanian & Asociados's services (USD [redacted]) when compared to the total amount claimed for this damages category (approximately USD 25 million)[1258] or the amount claimed for the services of other local counsel in these proceedings raise significant questions about the reasonableness of the amounts billed by Arslanian & Asociados.

827. For context, the Tribunal observes that the total fees claimed by the Claimants in respect of other local counsel acting in the Argentina Enforcement Proceedings as gleaned from the Parties' Damages Models are USD [redacted] (Emilio Jorge Cardenas) USD [redacted] (Estudio Alegria Buey Fernandez Fissore) USD [redacted] (Estudio Nissen y Asociados) USD [redacted] (Julio Cesar Rivera Abogados Srl) and USD [redacted] (Perez Alati Grondona Benites Arntsen).[1259] The fees claimed in respect of Arslanian & Asociados's services are higher than those of all other local Argentinean counsel combined. There is no basis to infer that Arslanian & Asociados was tasked with a commensurate amount of the efforts undertaken by local counsel in the Argentina Enforcement Proceedings: as already noted, Arslanian & Asociados did not act as first counsel of record in either the Argentina Embargo or Recognition Proceedings.[1260]

1257 **C-3356**, CVX-Track III-20000768, Arslanian & Asociados.

1258 Reply, para. 884.

1259 Letter from the Claimants to the Tribunal dated 2 November 2022, Claimants' Damages Model, Vendor Switches; Letter from the Respondent to the Tribunal dated 2 November 2022, Respondent's Damages Model, Vendor Reductions.

1260 *See* **C-2660**, Court Order, 27 February 2013, p. 5; **C-2668**, Chevron's Motion, 27 February 2014.

828. In view of the uncertainty surrounding the reasonableness of the amounts spent by the Claimants and their subsidiaries on Arslanian & Asociados's services as a way of mitigating the injury flowing from the recognition and enforcement of the Lago Agrio Judgment, and having considered the particular circumstances of this case, the Tribunal assesses that 95% of the fees charged by Arslanian & Asociados must be excluded from compensation.

4. (CLA) Fees solely related to media and public relations / (RES) Fees for media and public relations

829. The Respondent takes issue with the non-legal work performed by the Claimants' lawyers, in particular media and public relations work, and argues that any fees arising from such activities should not be recoverable. According to the Respondent and its experts, these activities include *inter alia* "revision of news on the case", "meet with media and PR with K. Robertson and Argentinean counsel", "review and analyze key Spanish language media for July 20", "address press conference to be held in Argentina", "R&E team e-mails on press conferences in media reports in Argentina regarding enforcement by the LAPS", and "Memo on the Implementation of Human Rights Policies".[1261]

830. Given that this issue impacts multiple damages categories, the Tribunal will address the question whether fees related to media and public relations are generally recoverable in this Arbitration as part of its analysis of cross-cutting "elements" in Section VIII.N below.

5. (CLA) Fees incurred solely for monitoring service, dockets, and service refusal activities / (RES) Fees for monitoring service, dockets, and service refusal activities

831. The Respondent opposes the Claimants' attempt to recover fees of "task[ing] associates at PAGBAM [*i.e.*, the Argentine firm Perez Alati Grondona Benites Arntsen] in May 2013 with four six-and-a-half hour shifts – amounting to 26 hours per day – directed to

[1261] Rejoinder, para. 1395; **RE-51**, Trunko Expert Report, SM O-4. *See also* **RE-55**, Second García Pullés Expert Report, Appendix GP-5.

'monitoring service refusal at Chevron Argentina's offices,'" which "generated more than US$600,000 in fees".[1262]

832. In the Tribunal's view, the monitoring activities falling under the present heading likely sought to provide an early warning to the Claimants and their subsidiaries about the filing of actions by the LAPs against them. They may have also served, in particular, to ensure the effective service of a recognition (*exequatur*) motion on Chevron – a company with its principal place of business in the United States of America – by preventing service from being performed incorrectly at Chevron Argentina's offices. Critically, these monitoring activities took place on a regular basis between February and December 2013, that is, starting several months after the LAPs filed their recognition (*exequatur*) motion in Argentina in November 2012 and ending the same month the action was served with Chevron.[1263]

833. Ultimately, however, it is unnecessary for the Tribunal to ascertain the exact purpose or the actual effectiveness of these measures: as already noted, it is not appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the Argentina Enforcement Proceedings.[1264] As a whole, the Tribunal is persuaded that these monitoring activities contributed to the Claimants' attempts to resist the recognition and enforcement of the Lago Agrio Judgment in Argentina.

834. The Tribunal nonetheless lacks the elements to confirm the *reasonableness* of the high sum charged for these services, which total more than USD 600,000 in fees.[1265] The Tribunal has confirmed that there are multiple instances of four timekeepers billing 6,5 hours in a single day for performing these services.[1266] This is strongly indicative of excessive billing. In the Tribunal's view, whatever the precise nature of these services was, they would have in all likelihood been performed effectively by one timekeeper operating during regular business hours.

1262 Rejoinder, para. 1394; **RE-51**, Trunko Expert Report, SM O-2.

1263 Memorial, Appendix 4, p. 4.

1264 *See* para. 340 above.

1265 **RE-51**, Trunko Expert Report, SM O-2.

1266 *See, e.g.*, **RE-51**, Trunko Expert Report, SM O-2, pp. 24-32.

835. In view of the uncertainty surrounding the reasonableness of the amounts spent by the Claimants and their subsidiaries on these monitoring service, dockets, and service refusal activities, and having considered the particular circumstances of this case, the Tribunal assesses that 66% of the fees incurred for monitoring service, dockets, and service refusal activities in the Argentina Enforcement Proceedings must be excluded from compensation.

6. (CLA) Fees incurred solely in connection with the challenge to the LAPs' *in forma pauperis status* / (RES) Fees incurred in connection with the challenge to the LAPs' *in forma pauperis* status

836. The Claimants challenged the LAPs' request for *in forma pauperis* status in Argentina Recognition Proceedings, under which the LAPs would not have been required to pay court fees.[1267] In addition to Argentine and Chilean lawyers, the Claimants' U.S. lawyers were significantly involved in proceedings relating to the *in forma pauperis* request.[1268] The Respondent emphasizes that it "has identified more than 250 time entries from U.S. law firms for tasks such as reviewing memoranda on the subject and commenting on and editing the various motions".[1269] The Respondent also highlights that the Claimants have failed to explain the "unnecessary, excessive use of high-priced U.S. lawyers".[1270]

837. At the outset, the Tribunal recalls that Chevron's opposition to the LAPs' request to litigate *in forma pauperis* was a supplemental motion vis-à-vis its primary opposition to the LAPs' request for recognition.[1271] While, as already addressed, Chevron's opposition to the *exequatur* of the Lago Agrio Judgment was a direct and reasonable way of mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment, the same conclusion does not extend necessarily to Chevron's challenge to the LAPs' *in forma pauperis* status simply for being an ancillary motion within the larger recognition proceedings. Chevron filed numerous briefs regarding this matter and was even granted a request for the court to open a parallel proceeding to address the LAPs'

1267 Memorial, Appendix 4, p. 4.

1268 Rejoinder, para. 1392.

1269 Rejoinder, para. 1392; **RE-55**, Second García Pullés Expert Report, Appendix GP-2. *See also* Rejoinder, Annex F-3, entries, 1, 8-14, 22-23, 31.

1270 Rejoinder, para. 1392.

1271 Memorial, Appendix 4, p. 4.

request for *in forma pauperis* status.[1272] In view of this circumstance, the Tribunal believes a separate analysis of the Claimants' actions in connection with the challenge to the LAPs' *in forma pauperis* status is warranted.

838. In this regard, the Tribunal observes that the Claimants have not addressed distinctly how challenging the LAPs' *in forma pauperis* status before the Argentine courts could have substantially furthered any of the mitigation goals warranting compensation identified in paragraph 642 above, namely: (i) preventing the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, thereafter seeking to render the Judgment unenforceable; or (iii) minimizing the loss arising directly from the enforcement of the Judgment.

839. Indeed, the ultimate goal of Chevron's pursuit of this challenge is unclear to the Tribunal. According to the Respondent's Argentine law expert, the revocation of the LAPs' *in forma pauperis* status would have only obligated the LAPs to pay a relatively minor amount of court fees in the context of the overall litigation, no higher than USD 1,000.[1273] The Tribunal considers that this unsupported figure contradicts the factual record and thus declines to draw any inferences from it: it is highly questionable that both sides in the Argentina Recognition Proceedings – not just Chevron – would have gone to such great lengths to defend and oppose respectively the LAPs' *in forma pauperis* status if USD 1,000 in court fees was all that was at stake. In any event, however, the Claimants have not convincingly explained how exactly opposing the LAPs' *in forma pauperis* request served to mitigate the injury flowing from the Respondent's Treaty breaches.

840. For these reasons, the Tribunal finds that the Claimants have failed to establish that the legal fees and expenses they incurred in connection with their challenge of the LAPs' *in forma pauperis* status were reasonably incurred to minimize loss and otherwise mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment. Accordingly, the Claimants are not entitled to claim compensation for those fees.

1272 **C-2701**, Court Order, 24 May 2016.

1273 According to the Respondent's expert, Mr García Pullés, the court fees at the time ranged from USD 14.74 to USD 972. **RE-55**, Second García Pullés Expert Report, para. 34.

7. (CLA) Fees incurred solely in connection with unsuccessful challenges of judges / (RES) Fees incurred in connection with unsuccessful challenges of judges

841. The Respondent is critical of Chevron and its subsidiaries' unsuccessful motions to recuse Judges Adrian Elcuj and Patricia Castro in the Argentina Recognition Proceedings. In the Respondent's view, the motions were "frivolous, unreasonable, and unnecessary".[1274]

842. The Tribunal recognizes that the filing of motions to recuse judges is an integral part of legal strategy, often employed to ensure impartiality and fairness in the judicial process. The success or failure of a procedural motion in court is subject to various factors and judicial discretions, and does not automatically reflect on the reasonableness or legitimacy of the motion itself.

843. Therefore, the Tribunal considers that the mere fact that the Claimants' recusal motions were unsuccessful does not inherently imply that they amounted to unreasonable mitigation measures. Furthermore, it is inappropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the Argentina Enforcement Proceedings.[1275] The question the Tribunal must address is whether in pursuing their challenges to Judges Elcuj and Castro the Claimants sought reasonably to (i) prevent the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, thereafter seek to render the Judgment unenforceable; or (iii) minimizing the loss arising directly from the enforcement of the Judgment.[1276] To the extent that ensuring the impartiality and fairness of the Argentina Recognition Proceedings was a necessary condition for Chevron to aspire to achieve any of the aforementioned mitigation goals in those proceedings, the Tribunal considers that the challenges to Judges Elcuj and Castro, even if they were ultimately unsuccessful, amount to reasonable mitigation measures in this case.

1274 Rejoinder, paras. 1387-1390.

1275 *See* para. 340 above.

1276 *See* para. 642 above.

844. Accordingly, the Tribunal declines to exclude from compensation the fees incurred in connection with unsuccessful challenges of judges in the Argentina Recognition Proceedings.

8. Fees incurred in carrying out activities alleged to be prohibited under Argentine law

845. The Respondent argues that fees associated with improper activities carried out by the Claimants in violation of Argentine law should be rejected from the Claimants' claims for compensation. These activities include Chevron's attorneys holding *ex parte* meetings with Argentine judges and prosecutors on at least ten occasions and obtaining legal advice on Argentine law from a Chilean lawyer who is not qualified to practice in Argentina.[1277]

846. The proper question before this Tribunal is whether the Claimants have satisfied their burden under international law, rather than domestic law, to prove their claims for the reimbursement of legal fees and expenses as incidental damages. From this viewpoint, the Tribunal is not tasked with assessing the compliance of Claimants' counsel's activities with Argentine law, but must rather assess the sufficiency of the evidence on record to establish the requirements for this component to qualify as incidental damages (*i.e.*, causation and reasonableness). As noted in paragraph 546 above, the Tribunal enjoys ample discretion under Article 25(6) of the UNCITRAL Arbitration Rules as regards the assessment of evidence.

847. Accordingly, the Tribunal rejects the Respondent's argument that it should deny compensation for the fees corresponding to this component for the reason that they were allegedly prohibited under Argentine law.

848. Notwithstanding this conclusion, the Tribunal considers that the nature of the activities falling under this component is relevant in determining whether they amounted to reasonable mitigation measures under international law.

849. In this respect, the Tribunal observes that preventing the recognition and enforcement of the Lago Agrio Judgment in Argentina, whether by overturning the embargo over the assets of Chevron's Argentine and Danish subsidiaries or opposing the LAPs' recognition

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[1277] Rejoinder, para. 1396.

motion, might have required the Claimants as a matter of proper litigation to sway the decision of an Argentine court in their favour. As a general proposition, however, even though *ex parte* contact with a judge may be practised in a local litigation context, the only proper way in which courts should be swayed is through written and oral argument, whether on the record or in analogous circumstances in which due process, equality of arms, and other essential procedural guarantees are respected. Whether legal or illegal, part of regular domestic practice or not, e*x parte* communications with judges or their staff are outside the boundaries of what could be considered a reasonable mitigation measure in the circumstances of this case.

850. Similarly, having determined that all of the mitigation goals warranting compensation identified in paragraph 642 above required the Claimants to convince the Argentine courts to rule in their favour, the Tribunal has difficulty understanding how the *ex parte* meetings between Chevron's local counsel and employees of the Prosecutor's Office could have reasonably assisted the Claimants in swaying the decision of a court of law. The link between these meetings and the goal of mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment is tenuous at best. Accordingly, the Tribunal excludes these fees from the final amount of compensation.

851. Lastly, regardless of any existing similarities between the Argentine and Chilean legal systems, the Tribunal considers that the Claimants' spending funds on a Chilean lawyer ([redacted]) to provide advice on Argentine law within the Argentina Enforcement Proceedings cannot amount, by definition, to a reasonable mitigation measure. In this particular context, reasonableness required the Claimants to retain only Argentine lawyers to provide advice on Argentine law. The fees charged by this Chilean attorney for providing advice on Argentine law must therefore be excluded as well from the final amount of compensation.

852. For these reasons, the Tribunal finds that the Claimants are not entitled to claim compensation for fees incurred by the Claimants in connection with activities falling under this component.

9. Other issues

853. In this section, the Tribunal will address other issues raised by the Parties in connection with the Argentina Enforcement Proceedings that have not been specifically identified by the Parties as a component. These include (i) the participation of 16 law firms in the Argentina Enforcement Proceedings, including ten non-Argentine and six Argentine law firms; (ii) the Claimants' failure to pursue the collection of legal costs before domestic courts; (iii) the Respondent's criticism of the Claimants' purported "excessive, unreasonable and unnecessary filings to litigate the merits of the LAPs' recognition claim"; (iv) the Respondent's argument that the Claimants have failed to demonstrate that they should be awarded fees and expenses for other activities of counsel; and (v) the Respondent's argument that the Claimants have not proved that they incurred or paid the legal fees and expenses they claim in connection with the Argentina Enforcement Proceedings.

854. *The participation of 16 law firms in the Argentina Enforcement Proceedings*. The Respondent is critical of the Claimants' engagement of 16 law firms in connection with the Argentina Enforcement Proceedings.[1278] The Claimants assert that "Chevron did not have 16 law firms retained to act as counsel of record, but it did consult 16 law firms, to a greater or lesser extent, on different matters, which was entirely justified given the stakes and complexity of the litigation in Argentina, as well as the need to coordinate the advocacy in Argentina with multiple parallel actions in several other jurisdictions".[1279]

855. The Tribunal will address separately the use by the Claimants and their subsidiaries of non-Argentine and Argentine law firms.

856. The Tribunal recalls in the first place that the Claimants and their subsidiaries made use of ten non-Argentine law firms in connection with the Argentina Enforcement Proceedings (Gibson, Dunn & Crutcher LLP, Jones Day, King & Spalding, Boies Schiller & Flexner LLP, Asesorias Bofill Escobar, Stern Kilcullen & Rufolo LLC, Gardere

1278 Counter-Memorial, para. 820.

1279 Reply, para. 889.

Wynne Sewell LLP, Rivero Mestre LLP, Holland & Knight, and Covington & Burling LLP).[1280]

857. As already noted, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific mitigation measures to undertake in real time.[1281] While the Tribunal accepts that the engagement of foreign law firms for local enforcement proceedings may be useful for the conduct of those proceedings, it nonetheless has difficulty understanding how the participation of ten non-Argentine law firms could have reasonably assisted the Claimants in overturning the embargo of assets located in Argentina or opposing the LAPs' recognition motion.

858. In this regard, the Tribunal has taken note that the LAPs' embargo and recognition motions were premised in part on international conventions – respectively, the Inter-American Convention on the Enforcement of Preventive Measures[1282] and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[1283] Receiving advice from foreign international law firms may have thus contributed to the Claimants' efforts in resisting the embargo and recognition motions to a certain extent. However, the participation of non-Argentine firms was by no means necessary for the Claimants and their subsidiaries to prepare their defence before Argentine Courts: the task of assisting local courts in the application of these international conventions would normally be reserved to local lawyers qualified to appear before Argentine courts and opine on the interplay between these conventions and the Argentine legal order. Other ancillary motions filed by the Claimants in the Argentina Enforcement Proceedings, such as the motions to recuse sitting judges, raise quintessential questions of Argentine law and procedure that would also be addressed in normal circumstances by Argentine lawyers alone, including in particular those already regularly retained by Chevron in respect of its Argentine subsidiaries and operations.

1280 Counter-Memorial, paras. 818, 820, fn 228; Rejoinder, para. 1385.

1281 *See* para. 341 above.

1282 **C-2656**, *Ex Parte* Motion before Argentina's National Civil Trial Courts, 5 November 2012, p. 2.

1283 **C-2666**, LAPs' Complaint, 21 November 2012, p. 3.

859. As explained above, unless the Claimants sought to minimize the loss arising directly from the recognition and enforcement of the Lago Agrio Judgment by retaining these foreign law firms, they cannot claim compensation in these proceedings for the legal fees and expenses charged by those firms.[1284] To the extent that the goal of resisting the recognition and enforcement of the Lago Agrio Judgment in Argentina might have required *one* foreign law firm to act as a liaison between the Claimants' headquarters in the United States and the firms acting before the Argentine courts, or in a coordinating capacity with teams operating in other jurisdictions (including before this Tribunal), the Tribunal is prepared to grant compensation for the legal fees and expenses charged by the first foreign firm to participate in the Argentina Enforcement Proceedings (Jones Day).[1285] The Tribunal is also prepared to grant compensation for the legal fees and expenses charged by the second foreign law firm to participate in these proceedings (Gibson & Dunn)[1286] on account of the need for Chevron and its subsidiaries (i) to receive advice on the international elements of the Argentine embargo and recognition motions, as explained in the preceding paragraph; and (ii) to coordinate the actions of a larger number of actors – Chevron, its Argentine and Danish subsidiaries and their respective teams of lawyers – in two parallel proceedings, *i.e.*, the Argentina Embargo and Recognition Proceedings. Otherwise, the Tribunal denies compensation under this heading for the legal fees and expenses charged by all other foreign law firms involved in these proceedings (King & Spalding, Boies Schiller & Flexner LLP, Asesorias Bofill Escobar, Stern Kilcullen & Rufolo LLC, Gardere Wynne Sewell LLP, Rivero Mestre LLP, Holland & Knight, and Covington & Burling LLP).

860. The Respondent also considers "unnecessary and excessive" the number of Argentine law firms that were hired by the Claimants and their subsidiaries to advise them in the Argentina Enforcement Proceedings (Emilio Jorge Cardenas, Arslanian & Asociados,

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1284 *See* paras. 642-643 above.

1285 Reply, Updated Appendix 2, p. 537.

1286 Reply, Updated Appendix 2, p. 538. The Tribunal notes that Gibson Dunn and Jones Day were also the two non-Argentine firms with the highest billing in connection with this damages category (USD 2,871,102 and USD 4,445,504, respectively) and thus, presumably, had a more prominent role than other firms retained by the Claimants. *See* Letter from the Claimants to the Tribunal dated 2 November 2022, Claimants' Damages Model, Vendor Switches, cells F106 and F172.

Estudio Alegria Buey Fernandez Fissore, Estudio Nissen y Asociados, Julio Cesar Rivera Abogados Srl and Perez Alati Grondona Benites Arntsen).[1287]

861. The Tribunal recalls that it has already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met generally as regards the Argentina Enforcement Proceedings category of damages.[1288] The Tribunal has also addressed the arguments raised by the Respondent specifically in connection with the billing documents of Mr Cardenas and Arslanian & Asociados[1289] and also in connection with several activities carried out by these firms, which were analysed as components earlier in this section.

862. Having already addressed these matters, the Tribunal considers unnecessary to analyse further the reasonableness of the Claimants' decision to retain or consult six Argentine law firms in connection with the Argentina Enforcement Proceedings. The number of local law firms used by the Claimants and their subsidiaries *per se* is not indicative of unreasonableness, particularly when compared with the risks attached to the recognition and enforcement of the multi-billion Lago Agrio Judgment in Argentina.

863. *The Claimants' failure to pursue the collection of legal costs before domestic courts*. The Respondent argues that the Claimants are precluded from recovering any legal fees and expenses claimed in connection with the Argentina Enforcement Proceedings because they failed to pursue the collection of legal costs before domestic courts. In the absence of a judicial assessment of the attorneys' fees, the Respondent maintains that it is not possible for the Claimants to show that the expenses they claim as damages in this Arbitration were reasonable and necessary.[1290]

864. In Section VII.E.3 above, the Tribunal has already addressed the issue of the recoverability of legal fees and expenses in this Arbitration in circumstances where the Claimants were awarded costs in domestic proceedings but failed to seek the collection of those costs before domestic courts. As noted in paragraph 505(ii) above, the Claimants

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1287 Counter-Memorial, para. 820, fn 228.

1288 *See* para. 811 above.

1289 *See* paras. 820-828 above.

1290 Counter-Memorial, para. 816.

are precluded from recovering as damages any legal costs awarded, but not collected, in domestic proceedings only to the extent that the Claimants unreasonably failed to pursue the collection of those costs in breach of their duty to mitigate under international law. The burden of proof regarding the Claimants' failure to mitigate lies with the Respondent. To the extent the Tribunal allows the recovery of such costs in this Award, any amounts collected by the Claimants after the issuance of this Award in local proceedings must be excluded from the final amount of compensation.

865. Against this backdrop, the Tribunal has taken note of the Claimants' explanation that while they were awarded costs in both the Argentina Embargo and Recognition Proceedings[1291] they decided not to seek to collect costs because the LAPs had no assets in Argentina, as also evidenced by the LAPs' request to proceed *in forma pauperis* in the Argentina Recognition Proceedings.[1292] The Respondent retorts that "Chevron opposed those *in forma pauperis* motions, and Claimants argue in their Reply and in supporting witness statements and expert reports that the LAPs had significant litigation resources. Claimants cannot have it both ways. If Chevron rejected the LAPs' representations of poverty with respect to requirements to pay filing fees, then it makes no sense for Chevron to defer to those same representations in deciding not to pursue fees and costs from the LAPs".[1293]

866. The dispositive question under the rationale set out in paragraph 864 above is whether the Respondent has established that the LAPs had enough funds located in Argentina to satisfy a hypothetical award on costs. Since the Respondent has failed to make this showing, this question must be answered in the negative. In this respect, while Chevron's opposition to the LAPs' motion to proceed *in forma pauperis* in the Argentina Recognition Proceedings describes the "substantial availability of funds for use by the LAPs" by means of "multiple funding agreements with different sources",[1294] there is no

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1291 **C-1877**, Supreme Court Order listing Argentine Embargo, 4 June 2013, p. 11 ("Therefore, considering the opinion of the Attorney General of Argentina, the extraordinary appeal is dismissed, with costs. . .); **C-2725**, Court Order, 3 July 2018, p. 10 ("Costs are imposed on the losing party"); **R-2119**, Supreme Court Decision, 30 July 2020 ("Therefore, the extraordinary appeal is dismissed. With costs").

1292 Reply, paras. 893-895.

1293 Rejoinder, para. 532.

1294 **C-2668**, Chevron's Motion, 27 February 2014, paras. 43-73.

indication that any those funds were deposited in Argentina. In the Tribunal's view, it would be unreasonable to require the Claimants to pursue an award on costs against the LAPs in Argentina and then, at much expense and difficulty, attempt to collect those costs overseas against the LAPs or their third-party funders, particularly when the Tribunal has not been informed of the existence of an international legal instrument that could serve as a basis for an action of this sort.

867. *The Respondent's criticism of the Claimants' purported "excessive, unreasonable and unnecessary filings to litigate the merits of the LAPs' recognition claim"*. The Respondent is critical of the Claimants' purported "excessive, unreasonable and unnecessary filings to litigate the merits of the LAPs' recognition claim"[1295]. In the Respondent's submission, "Chevron's attorneys unnecessarily prepared detailed briefs and voluminous evidence—one primary brief and nine supplemental briefs—to litigate the merits of the LAPs' recognition request, despite the fact that every Argentine court that considered such a request easily rejected it because there was no jurisdiction over Chevron".[1296]

868. Having already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the Argentina Enforcement Proceedings category of damages (and also as regards the Argentina Recognition Proceedings alone),[1297] the Tribunal declines to opine on the substance or magnitude of the Claimants' submissions in those proceedings. As already noted, it is not appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the Argentina Enforcement Proceedings.[1298]

869. *The Respondent's argument that Claimants have failed to demonstrate that they should be awarded fees and expenses for other activities of counsel*. The Respondent argues that the Claimants have failed to demonstrate that they should be awarded fees and expenses for other activities of counsel. Some of these activities have already been addressed by

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1295 Rejoinder, para. 1381-1386.

1296 Rejoinder, para. 1381.

1297 *See* paras. 810-811 above.

1298 *See* para. 340 above.

the Tribunal as components, such as those related to media and public relations, monitoring service, dockets, and service refusal activities or alleged to be prohibited under Argentine law.[1299]

870. In addition to these, the Respondent also refers to other activities that "were not reasonably calculated to advance Chevron's defense", such as the preparation of an action for a declaratory judgment or a criminal complaint that were never filed.[1300] Since the existence of allegedly non-defence related activities has been identified by the Parties as a cross-cutting element impacting multiple categories,[1301] the Tribunal will address it together with other elements in Section VIII.N below.

871. *The Respondent's argument that the Claimants have not proved that they incurred or paid the legal fees and expenses they claim in connection with the Argentina Enforcement Proceedings*. The Respondent submits that the Claimants have not proved that they – as opposed to a third party such as their subsidiaries – incurred or paid the legal fees and expenses they claim in connection with the Argentina Enforcement Proceedings. Given that this issue also impacts multiple damages categories, the Tribunal will address this question as part of its analysis of cross-cutting "elements" in Section VIII.N below.[1302]

4. Conclusion on Argentina Enforcement Proceedings

872. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Argentina Enforcement Proceedings category of damages as a whole;

(ii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Argentina Enforcement Proceedings corresponding to services rendered before 14 February 2011;

(iii) Excludes from compensation 95% of the fees charged by Arslanian & Asociados;

1299 *See* paras. 829-830, 831-835, 845-852 above.

1300 Rejoinder, para. 1394.

1301 *See* para. 571 above.

1302 *See* para. 571 above.

(iv) Defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "(CLA) Fees solely related to media and public relations / (RES) Fees for media and public relations" to its analysis of cross-cutting elements set out in Section VIII.N below; and

(v) Excludes from compensation 66% of the legal fees and expenses corresponding to the component "(CLA) Fees incurred solely for monitoring service, dockets, and service refusal activities / (RES) Fees for monitoring service, dockets, and service refusal activities";

(vi) Excludes from compensation 100% of the legal fees and expenses corresponding to the component "(CLA) Fees incurred solely in connection with the challenge to the LAPs' *in forma pauperis* status / (RES) Fees incurred in connection with the challenge to the LAPs' *in forma pauperis* status";

(vii) Excludes from compensation 100% of the legal fees and expenses corresponding to the component "Fees incurred in carrying out activities alleged to be prohibited under Argentine law";

(viii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Argentina Enforcement Proceedings corresponding to services provided by the firms King & Spalding, Boies Schiller & Flexner LLP, Asesorias Bofill Escobar, Stern Kilcullen & Rufolo LLC, Gardere Wynne Sewell LLP, Rivero Mestre LLP, Holland & Knight, and Covington & Burling LLP;

(ix) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Argentina Enforcement Proceedings, to the extent not already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[1303] and

(x) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Argentina Enforcement Proceedings. The

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1303 *See* paras. 569-573 above.

Tribunal will determine the exact amount of compensation corresponding to the Argentina Enforcement Proceedings in Section VIII.O below.

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