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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Tribunal will determine the exact amount of compensation corresponding to the Argentina Enforcement Proceedings in Section VIII.O below.

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D. BRAZIL RECOGNITION PROCEEDINGS

873. The Claimants seek USD 20,668,398.44 as direct damages for the legal costs and expenses incurred between January 2008 and December 2018 in the Brazil Recognition Proceedings as the natural and foreseeable result of the Respondent's Denial of Justice, Umbrella Clause and Interim Awards Breaches.[1304] In the alternative, the Claimants submit that they are entitled to recover these expenses as incidental damages.[1305]

874. The Respondent submits that the Claimants are not entitled to the amount they seek for the Brazil Recognition Proceedings on the grounds that they have failed to meet their burden of proving that the expenses they allegedly incurred in those proceedings were reasonable and necessary.[1306]

1. The Claimants' Position

875. According to the Claimants, Chevron began incurring costs in connection with the Brazil Recognition Proceedings as early as January 2008 because, as already stated, they were aware since 2007 that the LAPs would likely target Chevron's assets in foreign jurisdictions, including Brazil.[1307] In the Claimants' view, the Respondent's specific efforts to support the enforcement of the Lago Agrio Judgment in Brazil, including reaching out to Brazilian government officials relating to this matter, "only heightened the foreseeability" that Chevron would incur costs in resisting the enforcement of the Judgment in that jurisdiction.[1308]

876. While the Claimants reject the Respondent's temporal "date of breach" argument[1309] on the basis that "any global corporation would and should prepare a legal strategy well in

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1304 Reply, para. 919, Updated Appendix 2, pp. 626-700; **C-3462**, Indices of Claimed Invoices by Damage Category ("Brazil Enforcement" tab).

1305 Reply, para. 931.

1306 Counter-Memorial, para. 852; Rejoinder, para. 1404.

1307 Reply, paras. 925-926.

1308 Memorial, para. 387.

1309 Reply, para. 924.

advance when facing a multi-billion-dollar threat", they note that the pre-litigation fees they incurred before June 2012 only represent 5% of the total fees they claim.[1310]

877. According to the Claimants, retaining non-Brazilian law firms for the Brazil Recognition Proceedings was necessary both to coordinate their legal representation in these domestic proceedings with actions in numerous other jurisdictions, as well as to provide "significant legal value to critical strategic decision making."[1311] As to retaining Mattos Engelberg Advogados, which the Claimants explain is one of the most well-regarded law firms in Brazil, the Claimants take the view that their fees were "more than reasonable" and "proportional" given the stakes involved.[1312]

878. The Claimants posit that they consistently took steps to end the Brazil Recognition Proceedings as quickly and efficiently as possible.[1313] Such work included filing supplemental petitions to provide new evidence relating, *inter alia*, to the RICO Litigation and settlement agreements with co-conspirators.[1314] Even during the allegedly "dormant" phases of the proceedings, the Claimants posit that substantial preparatory work went into ongoing work streams for upcoming filings, as well as coordination with ongoing actions in other jurisdictions.[1315]

879. Rejecting the Respondent's contention that Chevron advanced several legal arguments that were not reasonable or necessary – including, in particular, a fraud defence – because it prevailed on jurisdictional grounds, the Claimants underscore that under Brazilian civil procedure it was necessary for Chevron to present all of its defences, including evidence on fraud, at once.[1316] In this respect, the Claimants note that "the fraud defense was a powerful tool that Chevron used to put the recognition action in proper context", which

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1310 Reply, para. 925.

1311 Reply, para. 932.

1312 Reply, para. 933.

1313 Memorial, para. 389.

1314 Memorial, para. 389.

1315 Reply, para. 934.

1316 Reply, para. 935; **RE-37**, First Godoy Expert Report, **LUC-3**, Brazilian Code of Civil Procedure, Arts. 336, 341.

ultimately led to the Brazilian Superior Court of Justice (*Superior Tribunal de Justiça*) (the "**STJ**") unanimous decision to dismiss the LAPs' recognition action.[1317]

880. As to the Respondent's contention that Chevron should have recovered legal fees in ancillary proceedings, the Claimants consider this argument to evidence "a real disconnect": the LAPs sought to litigate in Brazil in *forma pauperis* to allow them to litigate without paying court costs on the grounds that they lacked sufficient funds to prosecute their case.[1318]

881. The Claimants further clarify that the *sucumbência* fee awarded by the Brazilian courts under Brazilian law is not intended to compensate a party for its paid legal fees; rather, it is designed as a disincentive to frivolous litigation.[1319] On this point, the Claimants observe that even the Respondent's expert on Brazilian law recognizes that this court-fixed system is not meant to be a reimbursement of the fees actually expended by the litigant and its attorneys.[1320] Therefore, contrary to what the Respondent asserts, the Claimants take the view that the BRL 100,000 (approximately USD 30,000) awarded to Chevron's Brazilian counsel of record, not to Chevron itself or its local subsidiary, should not be deemed as full compensation.[1321] According to the Claimants, such position is also consistent with Article 22 of Brazil's Advocacy Statue, which contemplates *sucumbência* as just one component of the total fees that can be paid to attorneys for rendering professional services.[1322]

882. Even after the STJ issued its ruling declining to recognize the Lago Agrio Judgment in Brazil, the Claimants posit that fees were incurred because there was a small amount of legal work to prepare for additional steps that the LAPs could take in Brazil.[1323]

[1317] Reply, paras. 936-937; **C-2817**, Third Brazil Docket Sheet (referencing Filing of Petition Opinion by the MPF No. 184009/2015 (85), 11 May 2015 (added to the record on 14 May 2015)); Appendix 5 to the Memorial, paras. 20-22.

[1318] Memorial, para. 378; Reply, para. 928; **C-2815**, Second Brazil Docket Sheet (citing Order by the Presiding Justice Granting the Claim of Legal Aid and Determining Summons Waiting for Publication, 3 July 2012).

[1319] Reply, para. 929.

[1320] Reply, para. 929; **RE-37**, First Godoy Expert Report, paras. 52-55.

[1321] Reply, para. 929.

[1322] Reply, para. 929; **C-3200**, Brazil's Advocacy Statute, Art. 22.

[1323] Reply, para. 927.

883. The Claimants submit that, at the very least, they are entitled to recover USD 20,047,000 in direct damages incurred after 1 March 2012 in connection with the Brazil Recognition Proceedings.[1324]

884. In the alternative, the Claimants argue that they are entitled to recover the legal fees and expenses incurred in the Brazil Recognition Proceedings as incidental damages because their expenses were reasonable and served to mitigate the Claimants' damages substantially.[1325]

2. The Respondent's Position

885. The Respondent maintains that the Claimants are not entitled to recover legal fees and expenses incurred in connection with the Brazil Recognition Proceedings before the Treaty breaches became final on 27 June 2018.[1326] In particular, the Respondent criticizes the Claimants' attempt to recover the expenses incurred in preparing for a potential recognition action "prior to the case being filed, and even before the Lago Agrio Judgment was rendered",[1327] as well as after 15 June 2018, when the STJ certified that its decision denying recognition of the Lago Agrio Judgment was final and binding.[1328]

886. Relying on Mr Godoy's expert opinion that the attorneys' bills claimed by the Claimants for the Brazil Recognition Proceedings are "surreal" and "surprisingly high", the Respondent challenges the Claimants' submission that the activities for which the fees were incurred were reasonable and necessary to defend Chevron in those proceedings.[1329] In this respect, the Respondent notes that a recognition proceeding in Brazil generally "is much simpler and faster than almost any other proceeding", normally lasting no more than 18 months.[1330]

1324 Reply, para. 930.

1325 Reply, para. 931.

1326 Counter-Memorial, para. 864.

1327 Rejoinder, paras. 1404-1408.

1328 Counter-Memorial, para. 871.

1329 Counter-Memorial, paras. 852, 855, 867-868; Rejoinder, paras. 1405-1406; **RE-37**, First Godoy Expert Report, paras. 74, 114.

1330 Counter-Memorial, para. 856; **RE-37**, First Godoy Expert Report, paras. 39, 44.

887. Furthermore, the Respondent stresses that the amount of *sucumbência* that the STJ actually ordered the LAPs to pay to Chevron's attorneys at the conclusion of the proceedings (*i.e.*, BRL 100,000) illustrates the extreme unreasonableness of the fees the Claimants seek as damages.[1331] Since Chevron's Brazilian attorneys have already been awarded fair compensation for the services they rendered to achieve an outcome in the Claimants' favour, the Respondent argues that the Claimants are precluded from recovering any of the fees they expended in connection with the Brazil Recognition Proceedings.[1332]

888. Even if the Tribunal were inclined to award the Claimants an amount beyond BRL 100,000, the Respondent submits that the legal fees and expenses claimed by the Claimants are a result of excessive, unreasonable, and unnecessary legal work.[1333]

889. First, of the USD 20,688,398.44 that the Claimants seek to recover under this heading, the Respondent points out that at least USD 1,153,219.32 of their claimed legal fees and expenses were incurred before the LAPs' recognition action was filed on 1 June 2012.[1334] In the Respondent's view, these pre-litigation fees were *per se* not "incurred in" the Brazil Recognition Proceedings, nor were they "charged to Chevron from the inception" of the proceedings.[1335] Yet, as the Claimants inaccurately described a significant portion of the fees as those "incurred" in the Brazil Recognition Proceedings, the Respondent, with reference to *PSEG Global Inc. v. Turkey*, argues that the Tribunal should exclude this portion of the fees claim altogether.[1336]

890. Moreover, the Respondent rejects the Claimants' assertion that there was a sound basis to conduct early preparatory work, arguing that the Claimants have failed to justify how the pre-June 2012 drafting and related activities indeed enabled them to draft the actual submission more efficiently than they would have otherwise been able to, especially when

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[1331] Counter-Memorial, para. 869.

[1332] Counter-Memorial, paras. 853, 869.

[1333] Counter-Memorial, para. 854.

[1334] Counter-Memorial, para. 871; Rejoinder, para. 1401.

[1335] Counter-Memorial, para. 866.

[1336] Rejoinder, paras. 1401-1403; **CLA-226**, *PSEG Global Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 328.

the Claimants had over eight months to prepare their defence after the recognition action was filed.[1337]

891. Second, the Respondent argues that Chevron's litigation strategy in the Brazil Recognition Proceedings featured inadmissible and unsuccessful arguments: in its view, it should not be required to bear the costs incurred for crafting those arguments.[1338] In particular, the Respondent asserts that the Claimants' unsuccessful fraud defence demonstrates that it was not reasonable for Chevron's attorneys to devote extraordinary efforts to prepare and advance this argument.[1339] For the Respondent, whether the fraud defence was persuasive or influential on the STJ is irrelevant as the STJ ultimately did not accept the argument in reaching its decision.[1340]

892. The Respondent further criticizes the Claimants' "pointless" efforts in objecting – successfully – to the LAPs' *in forma pauperis* status, with the involvement of U.S. firms who charged higher rates than their Brazilian colleagues, noting that "the revocation of the LAPs' *in forma pauperis* status had no apparent effect on the LAPs' dogged prosecution of the case or its outcome."[1341]

893. Third, the Respondent posits that the Claimants have failed to demonstrate that they should be awarded fees for services rendered by Brazilian law firms other than Pinheiro Neto. In particular, regarding the fees for services rendered by Advogacia Velloso, the Respondent asserts that the invoices submitted by the Claimants (i) do not sufficiently identify the nature of work carried out in support of Chevron's defence, making it impossible to ascertain whether the work this firm performed could not have been carried out by Pinheiro Neto (Chevron's first counsel of record); and (ii) do not contain detailed time entries in accordance with Chevron's Guidelines.[1342]

[1337] Rejoinder, paras. 1405-1408.

[1338] Counter-Memorial, paras. 857-862, 879-881; Rejoinder, paras. 1409, 1413-1417.

[1339] Counter-Memorial, para. 882; Rejoinder, para. 1419.

[1340] Rejoinder, para. 1419.

[1341] Counter-Memorial, para. 883; Rejoinder, paras. 1410-1411; **RE-37**, Godoy Expert Report, paras. 136-145; **RE-51**, Trunko Expert Report, **SM N-3**.

[1342] Rejoinder, paras. 1420-1421.

894. In regard to services rendered by Mattos Engelberg Advogados, which did not serve as counsel of record for Chevron in the Brazil Recognition Proceedings, the Respondent relies on Mr Godoy's conclusion that his review of the litigation record did not reveal any "evidence that Mattos Muriel Kestener Advogados [and its successor Mattos Engelberg Advogados] . . . produced any work in connection with the [Brazil Recognition Proceedings]" and that "it is not possible to identify how [the] Mattos [firms] provided independent value to the legal work that was already being done by Pinheiro Neto."[1343]

895. For the Respondent, even if Mattos Engelberg Advogados represented Chevron Brasil Petróleo Ltda ("**Chevron Brazil**") as Mr Veiga asserts, the Claimants cannot seek to recover the firm's fees because Chevron Brazil never intervened in the Brazil Recognition Proceedings and is not itself a party to this Arbitration.[1344]

896. Fourth, the Respondent maintains that the fees incurred by non-Brazilian counsel in connection with apprising Brazilian counsel of developments in this Arbitration are excessive and unreasonable.[1345] According to the Respondent, the Claimants have not provided any evidence to suggest that the purported coordination work performed by non-Brazilian attorneys cost even a significant portion of the over USD 7.2 million in fees they allegedly incurred.[1346] Furthermore, out of the many U.S. law firms retained by Chevron, none were counsel of record and only Gibson, Dunn & Crutcher LLP and Jones Day have offices in Brazil.[1347]

897. To the extent that foreign law firms did coordinate Chevron's defence in the Brazil Recognition Proceedings with Chevron's global strategy and made some contribution to strategic decision-making, the Respondent points out that these non-Brazilian attorneys engaged in activities beyond their self-defined roles, including *inter alia* researching Brazilian court precedent, analysing Brazilian law expert opinions, and assisting with

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1343 Counter-Memorial, para. 875; Rejoinder, paras. 1422-1423, 1425 (brackets in original); **RE-37**, First Godoy Expert Report, paras. 89(ii), 90(ii); **RE-54**, Second Godoy Expert Report, para. 35.

1344 Rejoinder, para. 1424.

1345 Counter-Memorial, para. 874.

1346 Rejoinder, para. 1452.

1347 Counter-Memorial, para. 873.

preparing counter-rebuttals.[1348] Therefore, the Respondent considers that it should not be responsible for paying fees generated by U.S. lawyers to engage in tasks that exceed the scope of what the Claimants say they did.[1349]

898. Fifth, the Respondent argues that Chevron's attorneys frequently billed excessive amounts of time and fees for "very simple and straight-forward" tasks and even when "nothing was happening in the Brazilian proceedings."[1350]

899. Lastly, the Respondent denies that the Claimants are entitled to fees related to activities that were not directed to the preparation to Chevron's defence in the Brazil Recognition Proceedings.[1351] These include:

(i) At least USD 1,350,468.38 for public relations and at least USD 215,935.85 for governmental affairs which, according to the Respondent, are by definition not fees "incurred in" the Brazil Recognition Proceedings;[1352]

(ii) Fees associated with the work performed by Chevron's lawyers in deciding whether to bring civil and/or criminal actions in Brazil against the LAPs, their funders, and their Brazilian counsel;[1353]

(iii) Fees associated with research assignments on topics that had little, if anything, to do with Chevron's defence in the Brazil Recognition Proceedings;[1354] and

(iv) Fees spent on administrative and clerical tasks by Chevron's counsel, as well as translations as a result of Chevron's choice to engage U.S. attorneys who did not read Portuguese.[1355]

1348 Rejoinder, para. 1447.

1349 Rejoinder, para. 1448,

1350 Counter-Memorial, paras. 876-877; **RE-37**, First Godoy Expert Report, paras. 119, 122.

1351 Rejoinder, para. 1428.

1352 Rejoinder, paras. 1429-14; **RE-51**, Trunko Expert Report, **SM N-4**, **N-5**.

1353 Rejoinder, para. 1435.

1354 Rejoinder, paras. 1436-1441.

1355 Rejoinder, para. 1449-1451.

3. The Tribunal's Analysis

(a) Introduction

900. On 27 June 2012, the LAPs filed a recognition action against Chevron before the STJ seeking the recognition of the Lago Agrio Judgment in Brazil.[1356] They also requested *in forma pauperis* status,[1357] which the Claimants describe as a "'legal aid benefit' to allow them to litigate without paying court costs . . . on the grounds that they lacked sufficient funds to prosecute their case."[1358]

901. While the LAPs' recognition motion mentioned Chevron as the sole defendant, service was attempted unsuccessfully at the offices of Chevron Brazil and later at the personal residence of Chevron Brazil's then-president.[1359] Following an order from the STJ that Chevron be served via Letters Rogatory at its headquarters in California, U.S., service was accomplished on 24 January 2013.[1360]

902. Subsequent to two motions filed by Chevron in March 2013 opposing both the recognition and the LAPs' request to proceed *in forma pauperis*,[1361] the STJ bifurcated the proceedings to hear the two issues separately.[1362]

903. The Brazil Recognition Proceedings continued for several years.[1363] On 19 September 2017, the day before a judgment session,[1364] the LAPs filed a *denúncia* on their recognition action, requesting that the STJ allow them to dismiss the action without

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1356 **C-2347**, Filing in the Superior Court of Justice of Brazil, 27 June 2012.

1357 **C-2815**, Supreme Court of Justice of Brazil Second Docket Sheet, 27 June 2012, p. 10 ("Lawsuit remitted to the Presidency with claim of legal aid", 28 June 2012).

1358 Memorial, Appendix 5, para. 1.

1359 Memorial, Appendix 5, paras. 2-3.

1360 Memorial, Appendix 5, para. 4.

1361 Memorial, Appendix 5, paras. 5-6; **C-2815**, Supreme Court of Justice of Brazil Second Docket Sheet, 27 June 2012, pp. 5-6.

1362 Memorial, Appendix 5, para. 7; **C-2815**, Supreme Court of Justice of Brazil Second Docket Sheet, 27 June 2012; **C-2814**, Superior Court of Justice of Brazil First Docket Sheet, 15 March 2013.

1363 Memorial, Appendix 5, paras. 8-15.

1364 The Claimants clarify that a judgment session is a public hearing of the court in which the justices discuss cases and present their votes. Memorial, Appendix 5, paras. 8-16.

prejudice.[1365] Following Chevron's opposition to the *denúncia*, a majority of the Justices voted to reject the *denúncia* during a judgment session on 4 October 2017; however, consideration of the judgement was again postponed.[1366] Two months thereafter, on 29 November 2017, the STJ unanimously denied the recognition of the Lago Agrio Judgment on jurisdictional grounds as well as the LAPs' request to proceed *in forma pauperis*.[1367]

904. The LAPs subsequently filed a motion requesting that the STJ clarify that it had dismissed the recognition action without considering the merits of the case (the implication being, according to the Claimants, that the decision was without prejudice).[1368] The STJ rejected the LAPs' request, ruling that "the merit[s] of the action [were] analyzed."[1369] On 15 June 2018, the STJ certified that the decision denying recognition of the Lago Agrio Judgment in Brazil was final and binding between the Parties.[1370]

905. Before beginning its analysis of the Claimants' damages claim in respect of the Brazil Recognition 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.[1371] 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

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[1365] Memorial, Appendix 5, para. 17; **C-2817**, Superior Court of Justice, Third Brazil Docket Sheet, 22 March 2013, p. 12.

[1366] Memorial, Appendix 5, paras. 18-19; **C-2817**, Superior Court of Justice, Third Brazil Docket Sheet, 22 March 2013, pp. 9-11.

[1367] **C-2546**, STJ SEC 8542, Decision, 15 March 2018; **C-2814**, Superior Court of Justice of Brazil First Docket Sheet, 15 March 2013, p. 2; **C-2817**, Superior Court of Justice, Third Brazil Docket Sheet, 22 March 2013, p. 7. *See* Memorial, Appendix 5, pp. 7-8.

[1368] Memorial, Appendix 5, para. 24; **Exhibit C-2817**, Superior Court of Justice, Third Brazil Docket Sheet, 22 March 2013, p. 7.

[1369] **C-2817**, Superior Court of Justice, Third Brazil Docket Sheet, 22 March 2013, p. 6.

[1370] **C-2817**, Superior Court of Justice, Third Brazil Docket Sheet, 22 March 2013, p. 4.

[1371] Reply, para. 860.

account of any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[1372]

906. 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 Brazil Recognition Proceedings must be granted for the reasons and to the extent set out below.

(b) First Step: Analysis of Incidental Damages "Category"

907. As a first step of its analysis, the Tribunal must determine whether the Brazil Recognition Proceedings category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

908. 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.

909. 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*

[1372] *See* para. 317 above.

undertaken by the Claimants, not of the *amounts* they spent, which will be examined in a subsequent step of the analysis.[1373]

910. As already explained, the LAPs' motion for recognition of the Lago Agrio Judgment in Brazil was not directed specifically against any of Chevron's Brazilian subsidiaries: Chevron was the only named defendant.[1374] However, in its 11 March 2013 opposition to the LAPs' motion for recognition, after noting that it had no assets in Brazil[1375] Chevron argued that the "action for ratification filed should also be terminated with no resolution of the merits" because "any intention by the [LAPs] to appropriate the assets of other companies of the Chevron Group in Brazil to satisfy an improbable enforcement of the Ecuadorian judgment is unacceptable", as the LAPs' motion did not comply with the requirements for piercing the corporate veil under Brazilian law.[1376] The Tribunal understands that Chevron's statements alluded specifically to Chevron Brazil, upon whom the LAPs first attempted to serve the motion for recognition[1377] and which was also identified in the 15 October 2012 Order of the Lago Agrio Court as an "asset[] owned by Chevron Corporation" against which the Lago Agrio Judgment was to be executed.[1378] These circumstances point clearly to Chevron Brazil's assets being the ultimate target of the LAPs' efforts to obtain recognition of the Lago Agrio Judgment in Brazil.[1379]

911. As such, by challenging the LAPs' motion for recognition, Chevron displayed direct efforts to prevent the Lago Agrio Judgment from becoming enforceable in Brazil 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 by seeking to protect the ultimate target of the motion for

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[1373] *See* para. 556 above.

[1374] *See* para. 901 above.

[1375] **RE-37**, First Godoy Expert Report, **LUC-18**, Chevron's defense in the Domestication Proceeding, 11 March 2013, para. 1.

[1376] **RE-37**, First Godoy Expert Report, **LUC-18**, Chevron's defense in the Domestication Proceeding, 11 March 2013, paras. 70-71.

[1377] **RE-37**, First Godoy Expert Report, **LUC-18**, Chevron's defense in the Domestication Proceeding, 11 March 2013, para. 57.

[1378] *See* para. 431 above.

[1379] *See also* para. 441 above.

recognition – Chevron Brazil – in the event that the Lago Agrio Judgment was eventually recognized and the LAPs sought its enforcement in Brazil.

912. Accordingly, because all of the efforts described in the preceding paragraphs 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 Brazil Recognition Proceedings.

913. In reaching this conclusion, the Tribunal remains mindful that Chevron made substantial filings to challenge the LAPs' request for *in forma pauperis* status in the Brazil Recognition Proceedings together with its primary opposition to the LAPs' motion for recognition.[1380] While these filings might not have had the direct and immediate objective of mitigating the 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' recognition motion. Accordingly, these supplemental submissions do not affect the Tribunal's conclusion that the participation of Chevron in the Brazil Recognition 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 filings as part of its analysis of the components of the present category of damages.

(c) Second Step: Analysis of Incidental Damages "Components"

914. As a second step of its analysis, the Tribunal must determine, within the Brazil Recognition 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.[1381]

[1380] **C-2815**, Supreme Court of Justice of Brazil Second Docket Sheet, 27 June 2012, p. 4 (referencing "Petition No. 65262/2013 (PETITION) filed as PET 9815 (2013/0072640-8)", 15 March 2013).

[1381] *See* paras. 559-565 above.

915. The Parties have identified nine components involving the legal fees and expenses incurred by the Claimants in Brazil, 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)[1382]

916. The Parties disagree on whether the Claimants may recover the costs associated with their early preparation works advanced in Brazil from January 2008 until the Invictus Memorandum became known to the Claimants in January 2011. To justify their 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".[1383] The Respondent maintains that the Claimants are not entitled to recover damages incurred before 27 June 2018.[1384]

917. 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 Brazil was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[1385]

918. Accordingly, the Tribunal finds that the Claimants are not entitled to claim compensation for legal fees and expenses incurred before the Invictus Memorandum became known to

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[1382] For an explanation of the names assigned to components *see* para. 568 above.

[1383] Reply, para. 889.

[1384] Counter-Memorial, para. 864.

[1385] *See* paras. 362, 371, 397 above.

them in January 2011 and before the issuance of the Lago Agrio Judgment on 14 February 2011.

2. (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

919. The Claimants challenged the LAPs' request for *in forma pauperis* status in the Brazil Recognition Proceedings, under which the LAPs would not have been required to pay court fees.[1386] According to the Respondent, in addition to Brazilian lawyers, the Claimants' U.S. lawyers were significantly involved in proceedings relating to the *in forma pauperis* request.[1387] The Respondent highlights that "it has only been able to identify seven time entries of Brazilian attorneys clearly related to the *in forma pauperis* proceeding, but it has identified at least 71 time entries by attorneys from American firms."[1388] The Respondent also emphasizes that the Claimants have failed to "justify having lawyers from American firms – who charged higher rates than their Brazilian colleagues – do the legwork to prepare, finalize, and file Chevron's objection to the LAPs' *in forma pauperis* status."[1389]

920. As already noted, the STJ bifurcated the Brazil Recognition Proceedings to address the LAPs' recognition action and the LAPs' request to proceed *in forma pauperis* separately.[1390] While, as already addressed, Chevron's opposition to the recognition 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 necessarily extend to Chevron's challenge to the LAPs' *in forma pauperis* status in the ancillary action within the larger recognition proceedings.[1391] Chevron filed numerous supplemental submissions relating to the revocation of the LAPs' *in forma pauperis* status with the support from multiple counsel teams from Brazil and the United

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1386 Memorial, Appendix 5, para. 1.

1387 Rejoinder, paras. 1411-1412.

1388 Rejoinder, para. 1412.

1389 Rejoinder, para. 1412.

1390 *See* para 902 above.

1391 *See* para. 913 above.

States.[1392] 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.

921. In this regard, the Tribunal observes that the Claimants have not addressed distinctly how challenging the LAPs' *in forma pauperis* status before the STJ 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.[1393]

922. Indeed, it is unclear to the Tribunal what the ultimate goal of Chevron's pursuit of this challenge was. According to the Respondent's Brazilian law expert, Mr Godoy, "[u]nder normal circumstances, the defendant has an interest to oppose the granting of gratuity to claimant; it is a strategy to apply pressure on claimant with the risk of being forced to pay court fees that can be significant when the claim's value is also significant, and Court-Mandated Fees as well."[1394] He also explains, however, that this was not the case of the Brazil Recognition Proceedings, as the "court fee for a domestication [*i.e.*, recognition] proceeding is fixed", meaning that the revocation of the LAPs' *in forma pauperis* status would have only required the LAPs to pay a *de minimis* amount of BRL 124.59 in the context of the overall litigation.[1395]

923. The Claimants have thus not convincingly explained how opposing the LAPs' *in forma pauperis* request affected Chevron's chance of success in the Brazil Recognition

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1392 Rejoinder, Annex H-9, entries 1-6, 12-21, 25-92.

1393 *See* Reply, paras. 516, 895, 928.

1394 **RE-37**, First Godoy Expert Report, para. 140.

1395 **RE-37**, First Godoy Expert Report, paras. 141-142: "According to regulation nº 2/2017, established by the Brazilian Superior Court of Justice, (LUC 28), the court fee for a domestication proceeding in Brazil is fixed, and presently costs [BRL] 194,12 (one hundred, ninety-four Brazilian reais and twelve cents). In 2012, the costs were even lower: [BRL] 124,59 (one hundred, twenty-four Brazilian reais and fifty-nine cents). The claim's value here is irrelevant." *See also* **RE-37**, First Godoy Expert Report, **LUC-28**, Brazilian Superior Court of Justice's rules on court fees, Table A, XXIII – Ratification of Foreign Decision.

Proceedings, nor how it served to mitigate the injury resulting from the Respondent's Treaty breaches.

924. 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.

3. Media and public relations

925. The Respondent takes issue with alleged 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. The Respondent has identified these activities to include, *inter alia*, providing "analysis of the media coverage of the visit of Pope Francis to countries in the Amazon region,"[1396] analysing "Twitter strategies" or reviewing tweets,[1397] conducting "[o]utreach research re: key opportunities to advance anti-corruption, human rights, and rule of law message globally",[1398] and strategizing the Claimants' publicity campaign in preparing "High Impact videos" and publishing them on YouTube.[1399]

926. Given that this issue impacts multiple damages categories, the question of whether fees related to media and public relations 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.

4. Government relations

927. Turning to government relations work, the Respondent likewise emphasizes the Claimants' failure to demonstrate how this work conducted by the Claimants' lawyers

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1396 Rejoinder, para. 1431; **C-3405**, CVX-Track III-20011124, p. 2.

1397 Rejoinder, para. 1431; Annex H-22, entries 3-5.

1398 Rejoinder, para. 1431; Annex H-24, row 33.

1399 Rejoinder, para. 1433.

was reasonable or necessary in connection with Chevron's defence in the Brazil Recognition Proceedings. According to the Respondent, the activities falling under this component include monitoring activity in the Brazilian legislature for evidence of whether a legislative development might "have an impact on [Chevron's] interest" or present "risks to [the] client",[1400] preparing a memorandum about the political context in Brazil "that may affect the LA case",[1401] and participating in a hearing regarding the "Brazilian Public Program for Control of Oil Polluting Incidents on National Waters".[1402]

928. Given that this issue impacts multiple damages categories, the Tribunal will address the question of whether fees related to government relations are generally recoverable in this Arbitration as part of its analysis of cross-cutting "elements" in Section VIII.N below.

5. Amounts billed by the Mattos Firms under the matters "Ecuador Decision-PGPA [Policy, Government, and Public Affairs]" and "Relações Governamentais [Governmental Relations]"

929. The Respondent requests that the Tribunal deny compensation for the legal fees and expenses corresponding to 47 invoices rendered by Mattos Muriel Kestener between August 2012 and April 2016 under the matter "Ecuador Decision-PGPA [Policy, Government, and Public Affairs]," and seven invoices rendered by Mattos Engelberg Advogados between May 2016 and January 2017 under the matter "Relações Governamentais [Governmental Relations]," for which the Claimants seek USD 234,331.96.[1403]

930. The Tribunal declines to exclude from compensation the legal fees and expenses charged by the Mattos firms as a whole, for the reasons set out in Section VIII.D.3(c)9 below. To the extent this specific component relates to activities involving government relations, the Tribunal will address the question of whether fees billed under such activities are recoverable in this Arbitration as part of its analysis of cross-cutting "elements" in Section VIII.N below.

1400 Rejoinder, para. 1434 (brackets in original); Annex H-3, entries 1, 2, 28.

1401 Rejoinder, para. 1434; Annex H-3, entries 109-111.

1402 Rejoinder, para 1439; Annex H-24, row 28.

1403 Rejoinder, para. 1430; **RE-51**, Trunko Expert Report, **SM-N-2**.

6. Fees and costs incurred before the date the Brazilian proceeding was filed

931. The Parties disagree on whether the Claimants are entitled to compensation for fees incurred before the commencement of the Brazil Recognition Proceedings on 27 June 2012. This necessarily encompasses the fees and costs associated with the Claimants' early preparation works in Brazil as early as January 2008 until the Invictus Memorandum became known to the Claimants in January 2011, as addressed in Section VIII.D.3(c)1 above.

932. For the reasons stated in paragraph 917 above, the Tribunal finds that the Claimants are not entitled to claim compensation for any expenses associated with the advance preparations for the Brazil Recognition 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 in this Section.

7. Costs of Portuguese/English translations between May 2013 and July 2015

933. The Respondent takes issue with the amount of time spent by U.S. lawyers to engage in translation-related activities and the expenses they incurred in hiring outside vendors to prepare English into Portuguese translations (approaching USD 900,000) between May 2013 and July 2015.[1404]

934. The Tribunal notes that incurring translation costs is not uncommon in cases where the enforcement of a judgment is pursued across multiple jurisdictions. The Tribunal also recognizes the complexity of producing accurate and reliable 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.

935. In the present case, the LAPs initiated recognition and enforcement actions in Ecuador, Argentina, Canada, and Brazil in three different languages: Spanish, English, and Portuguese. Alongside these enforcement proceedings, the RICO Litigation, Section 1782 Proceedings and Gibraltar Proceedings were 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

[1404] Rejoinder, para. 1444; Annex H-24, entries 21-27, 29-32, 34-39, 44, 47-64, 66, 68.

translating documents for use in various jurisdictions.[1405] The process involved not only the initial translation by outside vendors but also verification by bilingual attorneys and staff at Jones Day.[1406]

936. From May 2013, the Claimants filed supplemental submissions in the course of the Brazil Recognition Proceedings, providing new evidence to the STJ as evidence became available in other proceedings, including in the RICO Litigation. All submissions were required to include legalized copies and formal translations under Brazilian law.[1407] In this respect, it is worth mentioning that the STJ in its judgment of 29 November 2017 makes reference to a decision issued in the RICO Litigation stating that the Lago Agrio Judgment "was obtained through corrupt means".[1408] According to the Claimants, the opinion issued by the Brazilian Federal Prosecutor's Office on 11 May 2015 (though non-binding) also relied on the court's decision in the RICO Litigation in reaching its conclusion on the unenforceability of the Lago Agrio Judgment, implying that the submissions of the Claimants regarding the RICO Litigation were indeed considered.[1409]

937. 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.[1410] 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 Brazil Recognition Proceedings.[1411] The Tribunal is sufficiently persuaded that preparing translations from English into Portuguese was reasonable and necessary for Chevron to resist the recognition of the Lago Agrio Judgment in Brazil.

1405 Mittelstaedt Witness Statement, paras. 31, 86-87.

1406 Mittelstaedt Witness Statement, para. 38.

1407 Memorial, Appendix 5, para. 14.

1408 **C-2546**, STJ SEC 8542, Decision, 29 November 2017, p. 28.

1409 Memorial, Appendix 5, para. 11; **C-2817**, Superior Court of Justice, Third Brazil Docket Sheet, 22 March 2013) (referencing Filing of Petition of Petition Opinion by the MPF No. 184009/2015(85), 11 May 2015 (added to the record on 14 May 2015)); *see also* **C-3062**, *Opinion Of Brazilian Assistant Attorney General On Chevron Worries Assembly*, Press Release, 2 June 2015.

1410 *See* para. 341 above.

1411 Mittelstaedt Witness Statement, para. 38.

938. Accordingly, the Tribunal rejects the Respondent's request to exclude the costs of Portuguese/English translations in the Brazilian Enforcement Proceedings from being compensated as incidental damages.

8. Costs of English/Spanish translations

939. The Respondent also considers "inexplicable", and thereby challenges, the Claimants' attempt to recover the costs of English into Spanish and Spanish into English translations incurred in the Brazil Recognition Proceedings, which, according to the Respondent, amounts to over USD 500,000.[1412]

940. The Tribunal reiterates that preparing translations in a scenario involving multiple jurisdictions (Argentina, Brazil, Canada, Ecuador, Gibraltar, U.S.), with different working languages (Spanish, English, Portuguese) is inherently complex. By way of example, documents produced in the Lago Agrio Litigation might be translated from Spanish into English for the U.S. lawyers actively participating in coordinating the overall defence strategy – as well as Chevron's management and in-house counsel in the United States – and then from English into Portuguese for implementing that strategy in the submissions in Brazil. Translating some documents back into Spanish might also become necessary for coherence when liaising with teams in Spanish-speaking jurisdictions or for direct comparison with documents produced in the Lago Agrio Litigation. Given the international nature of the case, the Tribunal infers that there were strategic reasons for maintaining coherence across multiple jurisdictions and ensuring that all international legal teams have access to documents in a comprehensible language.

941. As with the costs of Portuguese/English translations, 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.[1413] The Tribunal can reasonably infer that that the preparation of English/Spanish translations played a role in the coordination strategy among multiple global firms aimed at supporting Chevron's defence in the Brazil Recognition Proceedings.

[1412] Rejoinder, para. 1444; Annex H-24, entries 9– 12, 14, 17– 20, 65, 67, 69–73.

[1413] *See* para. 341 above.

942. Accordingly, the Tribunal rejects the Respondent's request to exclude from compensation the costs of English/Spanish translations in the Brazil Recognition Proceedings.

9. (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)

943. The Respondent maintains that the Claimants cannot recover USD 2,892,703.61 in fees for services rendered by Mattos Muriel Kestener Advogados and its successor, Mattos Engelberg Advogados, which, according to the testimony of Mr Veiga, represented Chevron Brazil – not Chevron Corporation – in connection with the Brazil Recognition Proceedings.[1414] In this connection, the Respondent stresses that (i) Chevron Brazil was not a defendant in the Brazil Recognition Proceedings, meaning it had no need to defend itself; (ii) Chevron Brazil is not a claimant in this Arbitration and as such any fees incurred in its defence would be unrecoverable; (iii) the fees charged by the Mattos firms include non-legal services related to public relations and governmental affairs; and (iv) to the extent their fees refer to legal services, they were duplicative of the work of Chevron's Brazilian counsel of record, Pinheiro Neto.[1415]

944. The Tribunal accepts as plausible Mr Veiga's testimony that the Mattos firms represented Chevron Brazil, as opposed to Chevron.[1416] The ensuing question for the Tribunal is whether Chevron should receive compensation for the efforts displayed by one of its subsidiaries (not Chevron) in connection with the Brazil Recognition 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 Brazil, the Lago Agrio Court order expressly provided for the execution of the

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[1414] Rejoinder, para. 1424; Fourth Veiga Witness Statement, para. 124.

[1415] Rejoinder, paras. 1422-1425.

[1416] Fourth Veiga Witness Statement, para. 124.

Lago Agrio Judgment against Chevron Brazil, which was deemed to be "assets owned by Chevron Corporation."[1417]

945. In the Tribunal's view, the preceding determination is not affected by the fact that Chevron Brazil, unlike Chevron, was not a named defendant in the Brazil Recognition Proceedings. In paragraph 910 above, the Tribunal has determined that Chevron Brazil's assets were the ultimate target of the LAPs' efforts to obtain recognition of the Lago Agrio Judgment in Brazil. Whether a named defendant in the recognition action in Brazil or not, it was reasonable for Chevron Brazil to retain its own counsel to prepare for a potential intervention as a defendant in the recognition proceedings, the potential future enforcement of the Lago Agrio Judgment, and to coordinate its strategy with its parent company and named defendant in the Brazil Recognition Proceedings. The invoices of the Mattos firms, including those to which the Respondent objects, correspond broadly with these activities and, in the Tribunal's assessment, are not indicative of duplicative efforts as between the Brazilian firms that were engaged by Chevron and Chevron Brazil.[1418]

946. For these reasons, the Tribunal declines to exclude from compensation the legal fees and expenses corresponding to services rendered by Mattos Muriel Kestener Advogados and its successor, Mattos Engelberg Advogados, subject to the below.

947. The Tribunal has also taken note of the Respondent's argument that many of the activities performed by the Mattos firms concerned public relations and governmental affairs. As already noted above in paragraph 930 above, all of these questions will be addressed by the Tribunal as part of its analysis of cross-cutting "elements" in Section VIII.N below.

10. Other issues

948. In this section, the Tribunal will address other issues raised by the Parties in connection with the Brazil Recognition Proceedings that have not been specifically identified by the Parties as a component. These include (i) the Respondent's argument that the Claimants should not be awarded fees for services rendered after 15 June 2018; (ii) the participation

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1417 *See* para. 431 above.

1418 Rejoinder, Annexes H-12, H-13. *See also* **C-3405**.

of the Brazilian law firm Advocacia Velloso as second counsel of record for Chevron, as well as 8 non-Brazilian law firms; (iii) the Respondent's criticism of the Claimants' litigation strategy featuring "inadmissible and unsuccessful arguments"; (iv) the Respondent's argument that the fees incurred by the Claimants' attorneys during the "dormant" phases of the proceedings and for "simple tasks" were "excessive"; (v) the *sucumbência* fee awarded by the STJ to Chevron's attorneys; and (vi) the fees incurred in connection with the "offensive actions" planned against the LAPs, their funders, and their Brazilian counsel.

949. *The Respondent's argument that the Claimants should not be awarded fees for services rendered after 15 June 2018*. The Respondent argues that the Claimants have not "articulated any rationale" for claiming at least USD 33,900.63 in fees for services rendered after 15 June 2018, when the STJ certified that its decision denying recognition of the Lago Agrio Judgment was final and binding.[1419] According to the Claimants, these fees correspond to a "small amount of legal work to prepare for additional steps that the LAPs might have taken in Brazil" which, in their submission, would not have been necessary "if Ecuador had complied with the Tribunal's Interim Orders and Awards."[1420]

950. The Tribunal observes that the invoices filed by the Claimants corresponding to services performed between July and December 2018 include activities such as "Review of documents and the results of the researches on possible new filings by the LAPs. Email to the client in that regard. (.8) [R&E: Brazil];"[1421] or "Provide update on Brazil recognition action for status report. (.1) [R&E: Brazil]; Further review of analysis of Constitutional Court decision (Ecuador) regarding potential re-file in Brazil. (.8) [R&E: Brazil]".[1422] As gleaned from these narratives, the Claimants undertook efforts after June 2018 to prepare for a potential re-filing of a recognition action in Brazil. Since the Lago Agrio Judgment had not been rendered unenforceable in Ecuador by then[1423] – and, to the Tribunal's knowledge, remains enforceable to this day – the Tribunal considers that the

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[1419] Counter-Memorial, para. 871.

[1420] Reply, para. 927.

[1421] **C-3332.011**, Pinheiro Neto Advogados (Member) – 2018.xlsx, Invoice Number 000530295,row 9.

[1422] **C-3287.010**, Gibson, Dunn & Crutcher LLP (Member) – 2018.xlsx, Invoice Number 2018080303, row 10.

[1423] *See* Track II Award, para. 9.15.

Claimants' decision to perform a limited assessment of a potential re-filing of a recognition action in Brazil amounted to a reasonable mitigation measure in the circumstances.

951. *The participation of the Brazilian law firm Advocacia Velloso as second counsel of record for Chevron, as well as 8 non-Brazilian law firms*. The Respondent is critical of the Claimants' engagement of "a hodgepodge of foreign law firms" from the United States and Chile in connection with the Brazil Recognition Proceedings.[1424] These include seven U.S. law firms (Gibson, Dunn & Crutcher LLP; Boies Schiller & Flexner LLP; Jones Day; Holland & Knight; King & Spalding; Stern Kilcullen & Rufolo LLC; and Covington & Burling LLP) and a Chilean law firm (Asesorias Bofill Escobar).[1425] In particular, the Respondent challenges "over US$ 7.2 million in fees" billed by these firms despite "[t]heir geographic focus and areas of specialization [] so far removed from the question of recognition of an Ecuadorian judgment in Brazil" that concern only issues of Brazilian law.[1426] In response, the Claimants assert that "[t]hese law firms were involved both to coordinate the legal representation in Brazil with the actions in numerous other jurisdictions and because they provided significant legal value to critical strategic decision making".[1427]

952. 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.[1428] While the Tribunal accepts that the engagement of foreign law firms for local recognition proceedings may be useful for the conduct of those proceedings, it nonetheless has difficulty understanding how the participation of 8 non-Brazilian law firms could have reasonably assisted the Claimants in resisting the recognition of an Ecuadorian judgment in Brazil – a quintessential question of Brazilian law and procedure

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1424 Counter-Memorial, para. 872.

1425 Counter-Memorial, paras. 872-873.

1426 Counter-Memorial, paras. 872-874; Rejoinder, para. 1445.

1427 Reply, para. 932.

1428 *See* para. 341 above.

that would normally be reserved to local lawyers, including in particular those already regularly retained by Chevron in respect of its Brazilian operations and subsidiary.

953. 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.[1429] To the extent that the goal of resisting recognition in Brazil might have required one foreign law firm to act as a liaison between the Claimants' headquarters in the United States and the law firms representing the Claimants before the Brazilian courts – as well as their local subsidiary – or in a coordinating capacity with teams operating in other jurisdictions, the Tribunal is prepared to grant compensation for the legal fees and expenses charged by the first foreign firm to participate in the Brazil Recognition Proceedings (Gibson, Dunn & Crutcher LLP).[1430] The Tribunal is also prepared to grant compensation for the fees and charged by Jones Day on account of its coordination and translation work explained above in the context of the "Costs of Portuguese/English translations between May 2013 and July 2015" component.[1431] 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 (Boies Schiller & Flexner LLP; King & Spalding; Asesorias Bofill Escobar; Holland & Knight; Stern Kilcullen & Rufolo LLC; and Covington & Burling LLP).

954. Turning to the Brazilian firms retained by Chevron, the Respondent challenges the fees incurred by Advocacia Velloso, the second Brazilian law firm that served as Chevron's counsel of record in the Brazil Recognition Proceedings in addition to Pinheiro Neto. In essence, the Respondent requests that the Tribunal deny compensation for the fees charged by Advocacia Velloso on the grounds that the invoices from this firm, which

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[1429] *See* para. 642 above.

[1430] Reply, Updated Appendix 2, p. 631.

[1431] *See* paras 933-938 above. The Tribunal notes that Gibson Dunn and Jones Day were also the two non-Brazilian firms with the highest billing in connection with this damages category (USD 6,943,231 and USD 2,279,900, 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 F107 and F173.

provide for a flat-fee arrangement, "lack detailed time entries in violation of Chevron's Guidelines".[1432]

955. The Tribunal observes that Advocacia Velloso "work[ed] under a fixed fee arrangement based on milestones" in the litigation referenced "Maria Aguinda Salazar et al. x Chevron Corporation" before the STJ.[1433] These milestones include "Signing of the Engagement Letter", "Filing of CVXs' Response to the Exequatur on 03.11.2013"[1434] and "oral argument before the Superior Court of Justice".[1435] A flat-fee arrangement, with payments made based on specific milestones reached in the proceeding, is not uncommon in legal practice. Under this arrangement, invoices may not detail the specific nature of the work performed at each stage, but could instead reflect the agreed-upon milestone payments, streamlining the billing process and focusing on the overall progress of the case rather than itemizing individual tasks.

956. Additionally, the billing records of the Claimants' other lawyers provide further context regarding the nature of the work carried out by Advocacia Velloso. By way of example, Pinheiro Neto Advogados analysed "comments on the draft submissions prepared by Mr. Carlos Velloso"; Mattos Muriel Kestener Advogados reviewed "analysis of Velloso's comments on the draft memo about the arguments that plaintiffs may raise to pierce the corporate veil"; and Gibson, Dunn & Crutcher LLP followed up with "Pinheiro Neto and Velloso firms regarding expert issues." and discussed with "Advocacia Velloso teams to strategize regarding new filing from the LAPs", among others.[1436] The Respondent precisely acknowledges that "Advocacia Velloso lawyers frequently commented on drafts in progress and provided information about developments at the STJ".[1437] Accordingly, the Tribunal considers that the evidence on the record sufficiently establishes that Advocacia Velloso undertook activities as counsel of record in the Brazil

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[1432] Rejoinder, para. 1420, *referring to* **C-3353,** CVX-Track III-20000128; CVX-Track III-200000129; CVX-Track III-20000134.

[1433] **C-3353**, CVX-Track III-20000134.

[1434] **C-3353**, CVX-Track III-200000129.

[1435] **C-3353**, CVX-Track III-200000134.

[1436] Rejoinder, Annex H-10, entries 10, 19, 214, 220.

[1437] Rejoinder, para. 1421.

Recognition Proceedings to mitigate the injury resulting from the recognition and enforcement of the Lago Agrio Judgment in Brazil.

957. Having reached this conclusion, the Tribunal believes it is unnecessary to analyse further the reasonableness of the Claimants' decision to retain more than one Brazilian law firm in connection with the Brazil Recognition Proceedings. The number of local law firms used by the Claimants *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 Brazil. As such, the Tribunal declines to exclude from compensation the legal fees and expenses corresponding to services rendered by Advocacia Velloso.

958. *The Respondent's criticism of the Claimants' litigation strategy featuring "inadmissible and unsuccessful arguments"*. The Respondent takes issue with the legal fees and expenses incurred in developing and advancing "inadmissible and unsuccessful" arguments.[1438] These include five of the grounds invoked by Chevron to defend against recognition of the Lago Agrio Judgment,[1439] which accounted for "20% of the entire primary defensive pleading",[1440] as well as the argument, on which the STJ did not rely, that the Lago Agrio Judgment was procured by fraud.[1441] For the Respondent, the Claimants are not entitled to recover costs which they "overspent on an argument that did not prevail".[1442]

[1438] Counter-Memorial, para. 879.

[1439] According to the Respondent: "Mr. Godoy explains five of the grounds invoked by Chevron in its defense—that the judgment conflicted with Brazilian public policy on the grounds that (i) it was a product of political persecution, (ii) it violated the principle of *res judicata*, (iii) it violated the principles of reasonableness and proportionality, (iv) it was an *extra petita* judgment, and (v) it violated the principle of equity by not also holding Chevron's alleged joint tortfeasors liable—were "not admissible according to Brazilian law, given that they were intended to ultimately discuss the merits of the Lago Agrio Judgment." Counter-Memorial, para. 880; **RE-37**, First Godoy Expert Report, paras. 145-151 (referencing **LUC-18**, Chevron's defense in the Domestication Proceeding, 11 March 2013.

[1440] Counter-Memorial, para. 991; **RE-37**, First Godoy Expert Report, para. 156.

[1441] Counter-Memorial, para. 882; **RE-37**, First Godoy Expert Report, paras 102, 152; **C-2546**, STJ SEC 8542, Decision, 15 March 2018. The Respondent also argues that Claimants' unsuccessful challenge to the LAPs' *in forma pauperis* status was excessive and was thus unreasonable. Counter-Memorial, para. 883. The fees incurred in connection with the challenge to the LAPs' *in forma pauperis* status was identified as a "component" and thus has been addressed by the Tribunal in paras. 919-924 above.

[1442] Rejoinder, para. 1418.

959. Having already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the Brazil Recognition Proceedings category of damages,[1443] the Tribunal does not need 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 Brazil Recognition Proceedings.[1444] In any event, the Tribunal observes that the success or failure of any legal defences is subject to various factors, including judicial discretion, and does not inherently reflect on the reasonableness or legitimacy of the defences themselves. Therefore, the mere fact that these defences did not succeed does not automatically render them unreasonable or unjustifiable.

960. *The Respondent's argument that the fees incurred by the Claimants' attorneys during the "dormant" phases of the proceedings and for "simple tasks" were "excessive".* The Respondent criticizes the Claimants' attempt to recover fees incurred by their lawyers "when nothing was happening in the Brazilian proceedings" between July 2013 and February 2014.[1445] It is also critical of the fees generated by the Claimants' attorneys conducting "research assignments on topics that had little, if anything, to do with the defense of the Brazil recognition proceedings",[1446] such as the oil spill in the Frade Field for which Chevron settled claims brought by the Brazilian government, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, and unrelated proceedings in Brazil similar to the Brazil Recognition Proceedings "insofar as the respondents in both proceedings resisted recognition on the basis of Brazilian public policy".[1447] The Respondent also criticizes the Claimants' attorneys for "spen[ding] a significant amount of time checking court records in Brazil."[1448]

[1443] *See* para. 912 above.

[1444] *See* para. 340 above.

[1445] Counter-Memorial, para. 877.

[1446] Rejoinder, para. 1436.

[1447] Rejoinder, paras. 1437-1441.

[1448] Rejoinder, para. 1443.

961. The Tribunal reiterates that it is not appropriate for it to apply hindsight to the legal strategies employed in the course of the Brazil Recognition Proceedings.[1449] Thus, it will not second-guess the precise impact that the activities described in the preceding paragraph had on the Claimants' strategy in the Brazil Recognition Proceedings or their coordination efforts with lawyers operating in other jurisdictions. The Tribunal also recalls that a significant portion of the legal fees and expenses charged in connection with these activities has been excluded from compensation as a result of the Tribunal's decision to deny compensation for the fees charged by several non-Brazilian law firms.[1450] Having examined the remaining invoices underlying the activities described in the preceding paragraph, the Tribunal has been persuaded sufficiently that such activities formed part of the Claimants' reasonable efforts to resist the recognition of the Lago Agrio Judgment in Brazil and, on that basis, declines to exclude from compensation the legal fees and expenses incurred in connection with them.

962. *The sucumbência fee awarded by the STJ to Chevron's attorneys*. The Respondent maintains that "Chevron's Brazilian attorneys have already been awarded [BRL] 100,000 (approximately US$ 30,000) by the STJ" as a *sucumbência*.[1451] According to the Respondent, this fee "represents what the court that heard the case determined was fair compensation for the services rendered and the Tribunal may not second-guess the determination of the court before which the proceeding unfolded, located where the services were rendered, as to what is and what is not reasonable for the prevailing party or its attorneys to recover."[1452]

963. Similarly, the Respondent states that the "Claimants cannot recover fees that could have been recovered in an ancillary proceeding".[1453] In the Respondent's view, "[i]t is irrelevant that the award was made to Chevon's attorneys, and not Chevron, because

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[1449] *See* para. 340 above.

[1450] *See* para. 705 above.

[1451] Counter-Memorial, para. 853. *See* **C-2546**, STJ SEC 8542, Decision, 15 March 2018, p. 29.

[1452] Counter-Memorial, para. 853.

[1453] Counter-Memorial, para. 853.

Chevron's arrangement with its attorneys must have accounted for the possibility of the fee award".[1454]

964. At the outset, the Tribunal observes that the *sucumbência* fee in Brazil can be distinguished from cost awards in other jurisdictions because it is paid directly to the prevailing party's lawyers, rather than to the prevailing party itself.[1455] According to the Respondent's Brazilian law expert, Mr Godoy, the fee awarded to Chevron's lawyers "represents what the Brazilian Superior Court considered fair for Chevron's attorneys to receive as compensation for the services provided, given Chevron's attorneys actual work in the [Brazil Recognition] Proceeding".[1456] The Claimants dispute this characterization of the *sucumbência* fee: they assert that it is "a rule of civil procedure designed to disincentivize frivolous litigation . . . not intended to compensate a party for legal fees that they pay their counsel, and . . . does not account for contracted fees and is not meant to be a reimbursement of the fees actually expended by the litigant and its attorneys".[1457]

965. The Tribunal considers that the precise nature of a *sucumbência* fee under Brazilian law is immaterial for the Tribunal's damages assessment under the Treaty and international law. As already explained in paragraph 482 above, the Tribunal is generally not bound by cost determinations made by local courts in domestic proceedings, as these determinations pertain to a different subject matter. It has also been explained in paragraph 483 above that, even when domestic cost-shifting standards incorporate an assessment of reasonableness, the determinations made by local courts in application of those standards will be of limited relevance for the Tribunal's present analysis, which will examine the question applying the prescribed standard under international law, *i.e.*, not the reasonableness of the legal fees and expenses according to the approaches applied by courts in 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

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[1454] Counter-Memorial, fn 1705.

[1455] **RE-37**, First Godoy Expert Report, para. 52.

[1456] **RE-37**, First Godoy Expert Report, para. 55.

[1457] Reply, para. 929 (emphasis removed).

distinct, and fixating on any overlap in these evaluations is more likely to be misleading than helpful.

966. Furthermore, as explained in paragraph 496 above, 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 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.

967. Thus, the question the Tribunal must address as regards the *sucumbência* fee is whether the Claimants (not their attorneys) effectively collected this fee in the Brazil Recognition Proceedings.

968. In their Reply, the Claimants imply that neither Chevron nor their local counsel *collected* the *sucumbência* fee for the Brazil Recognition Proceedings: "The fee is owed to counsel of record (i.e., the Brazilian law firms representing Chevron in Brazil), not to Chevron itself or its local subsidiaries. This fee is not intended to compensate a party for legal fees that they pay their counsel, *and even if paid*, *that fee* (in any amount) *would not have been paid to Chevron* nor would it have reduced the damages it incurred in successfully resisting recognition and enforcement in Brazil."[1458]

969. In the Tribunal's view, it is immaterial whether Chevron or their local counsel collected the *sucumbência* fee for the Brazil Recognition Proceedings. The Tribunal accepts that even if paid, that fee would not have been paid to Chevron, but to its attorneys. In this connection, the Respondent raises the possibility of Chevron making arrangements with its attorneys to offset any such *sucumbência* fee from the amount it agreed to pay for the legal services.[1459] However, the Respondent's own Brazilian law expert, Mr Godoy, notes

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1458 Reply, para. 929 (emphasis by the Tribunal).

1459 Counter-Memorial, fn 1705.

that Brazilian lawyers are normally entitled to receive a *sucumbência* fee *in addition to the fees* agreed upon with their client,[1460] meaning that such fees are not normally offset from the amount clients agree to pay their lawyers.

970. For these reasons, the Tribunal declines to make any adjustments to the compensation amount owed to the Claimants in connection with the Brazil Recognition Proceedings on account of the award of a *sucumbência* fee in those proceedings.

971. *The fees incurred in connection with the "offensive actions" planned against the LAPs, their funders, and their Brazilian counsel*. The Respondent is critical of the fees incurred by "Chevron's army of lawyers spend[ing] time researching discussing, and considering whether to bring civil and/or criminal actions in Brazil against the LAPs, their funders, and their Brazilian counsel".[1461]

972. The Tribunal has carefully reviewed the time entries identified by the Respondent in connection with such activities.[1462] As evinced from those entries, Chevron's counsel explored the possibility of bringing civil and criminal actions against the LAPs, their funders, and their Brazilian counsel at multiple stages of the Brazil Recognition Proceedings (particularly after the issuance of the RICO Judgment)[1463] and for multiple

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[1460] **RE-37**, First Godoy Expert Report, para. 53: "The Court-Mandated Fees are not a reimbursement of Contract Fees. On the contrary, the attorney is entitled to receive the Contract Fees arranged by private agreement with his own client, and, *in addition to that,* the Court-Mandated Fee established by the court, if his client wins the case." (emphasis by the Tribunal). *See also* **C-3200**, Brazil's Advocacy Statute, Art. 22 "The act of rendering professional services ensures to those registered with the Brazilian Bar Association (OAB) the right to receive agreed-upon fees, fees fixed by the court, and loss-of-suit fees."

[1461] Rejoinder, para. 1435.

[1462] Rejoinder, Annex H-1.

[1463] Rejoinder, Annex H-1, Entries 40 ("Follow-up on use of RICO ruling in Brazil"), 53 ("Follow-up on issues related to filing RICO Supplemental with the Brazil team"), 69 ("Review and analyze memorandum from Team Brazil and related communications from Civil Law Team regarding use of RICO decision in Brazil"), 70 ("Review Brazil memorandum on use of RICO judgment") and 75 ("INTERNAL DISCUSSION WITH MM REGARDING NEXT STEPS OF THE CASE AND DRAFT OF LETTER TO BE SENT TO MR. BERMUDES PUTTING HIM ON NOTICE OF THE RICO DECISION"). For an explanation on the RICO Judgment *see* paras. 1256-1258 below.

reasons, including the potential existence of "fraud"[1464] and misrepresentations by the LAPs' counsel about legal aid.[1465]

973. While the Tribunal only has partial insight into the nature of these activities, it is sufficiently persuaded that the possible existence of fraud or misrepresentations warranted an inquiry into whether civil or criminal liability arose on the part of the LAPs, their funders and their counsel, particularly to the extent that the alleged "fraud" referred to the circumstances surrounding the 'ghostwriting' of the Lago Agrio Judgment and any actions undertaken in furtherance of its corrupt objectives. The Tribunal is further convinced that, if such liability had been established, it would have conferred upon Chevron a discernible advantage in the Brazil Recognition Proceedings. Even if no civil or criminal proceedings were ultimately brought, the Tribunal considers, on balance, that the activities falling under the present heading formed part of the Claimants' reasonable efforts to resist the recognition of the Lago Agrio Judgment in Brazil and, on that basis, declines to exclude from compensation the legal fees and expenses incurred in connection with them.

4. Conclusion on Brazil Recognition Proceedings

974. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Brazil Recognition 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 Brazil Recognition Proceedings corresponding to services rendered before 14 February 2011;

[1464] Rejoinder, Annex H-1, Entries 16 ("Follow-up on crime-fraud pleadings") and 41 ("review fraud presentation").

[1465] Rejoinder, Annex H-1, Entry 78 ("EXCHANGE OF MESSAGES WITH FFP AND NAP ABOUT STJ PRECEDENT ON LACK OF CRIMINAL IMPLICATIONS IN A MISREPRESENTATION ABOUT LEGAL AID").

(iii) Defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "Media and public relations" to its analysis of cross-cutting elements set out in Section VIII.N below;

(iv) Defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "Government relations" to its analysis of cross-cutting elements set out in Section VIII.N below;

(v) Defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "Amounts billed by the Mattos Firms under the matters 'Ecuador Decision-PGPA [Policy, Government, and Public Affairs]' and 'Relações Governamentais [Governmental Relations]'" to its analysis of cross-cutting elements set out in Section VIII.N below;

(vi) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Brazil Recognition Proceedings corresponding to services provided by the firms Boies Schiller & Flexner LLP; King & Spalding; Asesorias Bofill Escobar; Holland & Knight; Stern Kilcullen & Rufolo LLC; and Covington & Burling LLP;

(vii) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Brazil Recognition Proceedings, to the extent not already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[1466] and

(viii) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Brazil Recognition Proceedings. The Tribunal will determine the exact amount of compensation corresponding to the Brazil Recognition Proceedings in Section VIII.O below.

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[1466] *See* paras. 569-573 above.

E. CANADA ENFORCEMENT PROCEEDINGS

975. The Claimants seek USD 39,798,158.90 as direct damages for the legal fees and expenses incurred between November 2009 and February 2019 in the Canada Enforcement Proceedings as the natural and foreseeable result of the Denial of Justice, Umbrella Clause and Interim Awards Breaches.[1467] In the alternative, the Claimants submit that they are entitled to recover these expenses as incidental damages.[1468]

976. The Respondent submits that the Claimants failed to prove that they are entitled to the legal fees and expenses arising from the Canada Enforcement Proceedings, arguing that the claimed fees are excessive, duplicative, and encompass non-legal work that was neither reasonable nor necessary for the Claimants' defence.[1469]

1. The Claimants' Position

977. The Claimants submit that Chevron's outside counsel began preparing for the defence in the Canada Enforcement Proceedings in November 2009 because, by then, it was clear from the LAPs' public proclamations that they planned to enforce the Lago Agrio Judgment worldwide.[1470] Consequently, in the Claimants' view, Chevron was justified in conducting preparatory work before the LAPs filed their enforcement action in Canada on 30 May 2012 in order to prevent or mitigate the foreseeable harm.[1471]

978. The Claimants reject the Respondent's argument that their claim for legal fees and expenses in the Canada Enforcement Proceedings is already *res judicata* because the Canadian courts have already assessed and awarded legal fees that were reasonably incurred by Chevron and its Canadian subsidiaries in the Canada Enforcement Proceedings.[1472] This is because, as observed in *Helnan v. Egypt*, "there is no effect of *res judicata* from the decision of a municipal court so far as an international jurisdiction

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[1467] Reply, para. 906; Updated Appendix 2; **C-3462**, Index of Claimed Invoices by Damage Category ("Canada Enforcement" tab).

[1468] Reply, para. 906.

[1469] Counter-Memorial, para. 828; Rejoinder, para. 1450.

[1470] Memorial, para. 375; Reply, paras. 909-910.

[1471] Reply, paras. 909-910.

[1472] Reply, paras. 911-912.

is concerned."[1473] Even assuming *arguendo* that the decisions of the Canadian courts and this Tribunal concern the same legal order, the Claimants contend that the doctrine of *res judicata* would still not apply because the Respondent was not a party in the Canada Enforcement Proceedings.[1474]

979. The Claimants submit that, at the very least, they are entitled to recover USD 39,525,000 as direct damages, corresponding to the expenses incurred in the Canada Enforcement Proceedings after 1 March 2012.[1475]

980. In the alternative, the Claimants contend that they are entitled to recover these expenses as incidental damages because they were reasonable.[1476] In this respect, the Claimants reiterate that both the text of the Treaty and investment jurisprudence support the conclusion that the legal fees and expenses incurred by Chevron's subsidiaries (*i.e.*, Chevron Canada Limited ("**Chevron Canada**") and Chevron Canada Finance Limited ("**Chevron Finance**")) are properly claimable as damages to Chevron.[1477] Moreover, the Claimants note that the reasonableness of Chevron's expenses relating to the Canada Enforcement Proceedings is further corroborated by expert evidence, as well as "by the fact that Chevron had no guarantee that it would ever recover its legal expenses."[1478]

2. The Respondent's Position

981. The Respondent reiterates that the Claimants improperly claim fees for services rendered prior to the Respondent's Treaty breaches, as well as fees accrued before the initiation of the Canada Enforcement Proceedings.[1479] In the Respondent's view, the Claimants have no legitimate basis to claim costs arising as early as 2009 in connection with enforcement proceedings that were initiated only on 30 May 2012 and which concerned a judgment

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1473 Reply, para. 912; **CLA-568**, *Helnan International Hotels A/S v. Egypt*, ICSID Case No. 05/19, 3 July 2008, para. 124.

1474 Reply, para. 913.

1475 Reply, para. 915.

1476 Reply, para. 916.

1477 Memorial, paras. 202-208, 359; Reply, para. 916.

1478 Reply, para. 916.

1479 Counter-Memorial, paras. 829, 831.

that was not issued until 14 February 2011.[1480] As such, the Respondent argues that the Claimants are not entitled to recover at least those USD 662,272.51 in fees alone spent preparing for an action that did not yet exist, nor their costs for this period.[1481]

982. The Respondent further takes issue with the Claimants' lack of explanation for the alleged fees incurred by two U.S. law firms for Canada-related activities between November 2009 and July 2011, by which time their Canada-based attorneys started to incur fees.[1482]

983. Even if the Claimants were entitled to recover fees prior to the date of the Treaty breach, the Respondent argues that the Claimants have failed to justify that their claimed legal fees and expenses were reasonable or necessary.[1483] In this respect, the Respondent notes that the Canadian courts, which were most familiar with the efforts required for the proceedings, already considered and awarded Chevron "fair and reasonable" costs incurred for the major stages of the litigation in the amount of CAD 375,000 based on the Claimants' detailed cost applications in accordance with Ontario law.[1484] Yet, the Respondent emphasizes that the "Claimants now demand over 140 times this amount . . . for the same Canadian Enforcement Proceedings."[1485]

984. The Respondent contends that, as observed by Professor Knutsen, the Claimants' claim for the legal fees allegedly incurred in the Canada Enforcement Proceedings in this Arbitration "bears no relationship" to Chevron's own submission, as well as the Canadian courts' determination, of their "fair and reasonable" costs:[1486]

(i) While Chevron was awarded costs for major stages of the proceedings relating to its motion for summary judgement (and corresponding appeal) and its defence of the motion to amend the claim, the Claimants in this Arbitration seek costs incurred

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1480 Counter-Memorial, para. 832.

1481 Rejoinder, para. 1451.

1482 Counter-Memorial, para. 833.

1483 Counter-Memorial, para. 834.

1484 Counter-Memorial, paras. 835-836, 843-846; Rejoinder, paras. 1454-1469.

1485 Rejoinder, para. 1454.

1486 Counter-Memorial, para. 850; Rejoinder, para. 1470; **RE-39**, First Knutsen Expert Report, p. 22; **RE-57**, Second Knutsen Expert Report, pp. 17-18;.

for all stages of the litigation, including those stages in which Chevron was unsuccessful and those for which the LAPs were awarded costs;[1487]

(ii) The Claimants' request for legal fees in this Arbitration falls "far short" of an "acceptable summary of legal costs under Ontario law as it lacks 'the most basic directional information to assess reasonableness'";[1488]

(iii) The Claimants' claim in this Arbitration for the legal fees allegedly incurred in the Canada Enforcement Proceedings includes new figures with respect to hours billed, including by attorneys who were not counsel of record and whose fees were not previously sought;[1489]

(iv) In their costs submission to the Canadian courts, the Claimants excluded entirely work done by U.S.-based law firms and did not seek fees of all its Canadian counsel;[1490] and

(v) For the same activities related to the motion to stay and the summary judgment motion, the Claimants now seek an award that is over nine times the amount Chevron represented to the Canadian courts as their actual and reasonable costs.[1491]

985. According to the Respondent, the Claimants' request in this Arbitration is also inconsistent with their submissions to other courts, including its representations regarding the Canada Enforcement Proceedings to the U.S. District Court for the Southern District of New York in the RICO Litigation.[1492]

1487 Rejoinder, paras. 1464-1468.

1488 Counter-Memorial, paras. 837-841; **RE-39**, First Knutsen Expert Report, p. 30.

1489 Rejoinder, para. 1470; Reply, Updated Appendix 2, pp. 329-337; **R-2081**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Superior Court of Justice, Ontario Case No. CV-12-980800CL, Cost Submissions of Chevron Corporation, 17 May 2013; **RE-57**, Second Knutsen Expert Report, p. 16.

1490 Rejoinder, paras. 1471, 1476.

1491 Rejoinder, paras. 1472-1475; **R-2081**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Superior Court of Justice, Ontario Case No. CV-12-980800CL, Cost Submissions of Chevron Corporation, 17 May 2013; **RE-51**, Trunko Expert Report, **SM M-4**, **SM M-5**; **RE-57**, Second Knutsen Expert Report, pp. 10, 12, 15-16.

1492 Rejoinder, paras. 1477-1479.

986. In addition to the discrepancy between the Claimants' demand in this Arbitration and prior Canadian determinations, the Respondent contends that the invoices underlying the legal fees claimed in this category are grossly excessive.[1493] Examples of excessive litigation identified by the Respondent include "a disproportionate preoccupation with the LAPs' counsel and litigation funding";[1494] Chevron's fixation on public relations;[1495] overstaffing resulting in duplication; inefficiency and excessive billing;[1496] and over-representation at hearings.[1497] The Respondent adds that many categories of expenses sought by the Claimants were wholly unrelated to the Canada Enforcement Proceedings.[1498]

987. The Respondent concludes that the Claimants were fully heard on the matter of costs in the Canada Enforcement Proceedings by the Canadian courts, which determined the reasonableness of the fees incurred in those proceedings.[1499] Therefore, in the Respondent's view, the Claimants are estopped from claiming these legal fees in this Arbitration; in its view, granting the Claimants the opportunity to re-litigate these claims would be contrary to the principle of *res judicata*.[1500]

3. The Tribunal's Analysis

(a) Introduction

988. On 30 May 2012, the LAPs initiated proceedings before the Superior Court of Justice in Ontario seeking the recognition and enforcement of the Lago Agrio Judgment in Canada. This action was commenced against Chevron as well as two of its wholly-owned local subsidiaries, Chevron Canada and Chevron Finance.[1501] After the exchange of initial

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1493 Counter-Memorial, para. 849; Rejoinder, para. 1481.

1494 Rejoinder, paras. 1481, 1483.

1495 Rejoinder, para. 1482.

1496 Rejoinder, paras. 1485-1491, 1493.

1497 Rejoinder, paras. 1494, 1496.

1498 Rejoinder, para. 1497.

1499 Counter-Memorial, para. 848.

1500 Counter-Memorial, para. 848.

1501 **C-1380**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Statement of Claim, Superior Court of Justice, Ontario, Canada, 30 May 2012.

evidentiary affidavits,[1502] on 24 August 2012 the LAPs discontinued their action against Chevron Finance, but maintained their action against Chevron and Chevron Canada.[1503]

989. The Commercial Court, a specialized subdivision of the Superior Court of Justice, initially stayed the recognition and enforcement action on 1 May 2013 on the grounds that Chevron did not have assets in Canada.[1504] On appeal, the Ontario Court of Appeal reversed the first-instance decision of the Commercial Court and ruled that the LAPs could proceed to seek recognition and enforcement of the Lago Agrio Judgment in Ontario.[1505] Following an appeal by Chevron and Chevron Canada, on 4 September 2015 the Supreme Court of Canada rendered a judgment dismissing the appeals and holding that the Ontario courts had jurisdiction to hear the LAPs' recognition and enforcement action.[1506]

990. After the Supreme Court's 2015 judgment, the matter was remanded to the Commercial Court for submissions on the merits of the LAPs' recognition and enforcement claim. Thereafter, on 20 January 2017, the Commercial Court granted a motion for summary judgment finding that Chevron Canada is a separate entity from Chevron, not a party to the Ecuadorian lawsuit, and not a debtor to the Lago Agrio Judgment and, therefore, dismissed the action against Chevron Canada.[1507] The Commercial Court also dismissed the LAPs' motion for summary judgment.[1508] The judgment of the Commercial Court was upheld on 23 May 2018 by the Ontario Court of Appeal.[1509] On 4 April 2019, the

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[1502] Memorial, para. 365.

[1503] **C-2820**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd.,* and *Chevron Canada Finance Ltd*., Court File No. CV-12-9808-00CL, Notice of Discontinuance, 24 August 2012.

[1504] **C-2821**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd.,* and *Chevron Canada Finance Ltd*., Court File No. CV-12-980800CL, Reasons for Decision, 1 May 2013, paras. 110, 112.

[1505] **C-1977**, *Yaiguaje v. Chevron Corporation*, Court of Appeal of Ontario, 17 December 2013.

[1506] **C-2524**, *Chevron Corporation v. Yaiguaje*, 2015 SCC 42, Supreme Court of Canada, 4 September 2015.

[1507] **C-2833**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Judgment and Order, 20 January 2017.

[1508] **C-2833**, Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd., Judgment and Order, 20 January 2017.

[1509] **C-2856**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Appeal Decision of the Court of Appeal of Ontario (corrected), 23 May 2018.

Supreme Court of Canada rejected the LAPs' application for leave to appeal, bringing an end to the Canada Enforcement Proceedings.[1510]

991. Before beginning its analysis of the Claimants' damages claim in respect of the Canada 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.[1511] 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.[1512]

992. 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 legal fees and expenses incurred in connection with the Canada Enforcement Proceedings shall be granted for the reasons and to the extent set out below.

(b) First Step: Analysis of Incidental Damages "Category"

993. As a first step of its analysis, the Tribunal must determine whether the Canada Enforcement Proceedings category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

994. 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

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[1510] **C-2888**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Decision of the Supreme Court of Canada, 4 April 2019.

[1511] Reply, para. 906.

[1512] *See* para. 317 above.

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.

995. 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.[1513]

996. At the outset, the Tribunal recalls that the named defendants in the LAPs' motion for recognition and enforcement of the Lago Agrio Judgment in Canada were Chevron, Chevron Canada and Chevron Finance.[1514] The motion refers to the assets of Chevron's subsidiaries as the ultimate targets of the action: "Chevron no longer has assets in Ecuador. In Canada, Chevron has two wholly-owned subsidiaries: Chevron Canada Limited and Chevron Canada Financial Limited . . . The assets of Chevron Canada are significant and are located in many provinces and territories throughout Canada. The assets are beneficially-owned by Chevron and, through it, by the shareholders of Chevron."[1515]

997. After the motion was filed, Chevron, Chevron Canada and Chevron Finance appeared in the recognition proceedings as defendants, where they were represented by different law firms: (i) Chevron was represented by Norton Rose OR LLP and Osler, Hoskin & Harcourt LLP; (ii) Chevron Canada was represented by Goodmans LLP; and (iii) Chevron Canada Finance Limited was represented by Lax O'Sullivan Scott Lisus

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1513 *See* para. 556 above.

1514 **C-1380**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Statement of Claim, Superior Court of Justice, Ontario, Canada, 30 May 2012, p. 2.

1515 **C-1380**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Statement of Claim, Superior Court of Justice, Ontario, Canada, 30 May 2012, paras. 14-15.

LLP.[1516] As already noted in paragraph 988 above, on 24 August 2012 the LAPs discontinued their action against Chevron Finance, but maintained their action against Chevron and Chevron Canada.[1517]

998. Against this background, the immediate question before the Tribunal is whether Chevron should receive compensation for the efforts displayed by its subsidiaries (not Chevron) in the Canada Enforcement 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 Canada, the Lago Agrio Court order expressly provided for the enforcement of the Lago Agrio Judgment against Chevron Canada and Chevron Finance, which were deemed to be "assets owned by Chevron Corporation."[1518]

999. Accordingly, by challenging the LAPs' motion for recognition and enforcement of the Lago Agrio Judgment, Chevron, Chevron Canada and Chevron Finance displayed direct efforts to prevent the Lago Agrio Judgment from becoming enforceable in Canada as described in item (i) in paragraph 642 above.

1000. Chevron's efforts, as well as those of its Canadian subsidiaries, also sought to minimize the loss arising directly from the enforcement of the Judgment as described in item (iii) of paragraph 642. As already explained, the LAPs' motion for recognition and enforcement expressly identified Chevron's shares in Chevron Canada and Chevron Canada Finance Limited, as well as the assets of those subsidiaries, as the ultimate targets of the motion.[1519] As such, the efforts displayed by Chevron, Chevron Canada and Chevron Finance in the Canada Enforcement Proceedings ultimately sought to protect the

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1516 **C-2820**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd.,* and *Chevron Canada Finance Ltd*., Court File No. CV-12-9808-00CL, Notice of Discontinuance, 24 August 2012, pp. 3-4; Fourth Veiga Witness Statement, para. 122.

1517 **C-2820**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd.,* and *Chevron Canada Finance Ltd*., Court File No. CV-12-9808-00CL, Notice of Discontinuance, 24 August 2012.

1518 *See* para. 431 above.

1519 **C-1380**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Statement of Claim, Superior Court of Justice, Ontario, Canada, 30 May 2012, para. 1.

assets of these three companies against the enforcement of the Lago Agrio Judgment in Canada.[1520]

1001. Accordingly, because all of the efforts described in the preceding paragraphs were a direct and reasonable way of mitigating the injury flowing from the Respondent's Treaty breaches, the requirements of causation and reasonableness are met as regards the Canada Enforcement Proceedings.

(c) Second Step: Analysis of Incidental Damages "Components"

1002. As a second step of its analysis, the Tribunal must determine, within the Canada Enforcement Proceedings category, whether the Claimants have established the requirements 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.[1521]

1003. The Parties have identified seven components involving the legal fees and expenses incurred by the Claimants and their local subsidiaries in Canada, 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)[1522]

1004. The Parties disagree on whether the Claimants may recover the costs associated with their early preparation works advanced in Canada from November 2009 until the Invictus Memorandum became known to the Claimants in January 2011. To justify their compensation claim, the Claimants argue that the LAPs' strategy to enforce the Lago

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[1520] **C-1380**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Statement of Claim, Superior Court of Justice, Ontario, Canada, 30 May 2012, para. 1.

[1521] *See* paras. 559-565 above.

[1522] For an explanation of the names assigned to components *see* para. 568 above.

Agrio Judgment outside of Ecuador was already publicly known by 2009.[1523] The Respondent maintains that the Claimants are not entitled to recover damages incurred before 27 June 2018.[1524]

1005. 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 Canada was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[1525]

1006. Accordingly, the Tribunal finds that the Claimants are not entitled to claim compensation for 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. (CLA) Amount awarded by the Canadian courts, allegedly adjusted for full indemnity / (RES) Amount awarded by the Canadian courts, adjusted for full indemnity

1007. According to the Respondent's Ontario law expert, Professor Knutsen, Chevron and Chevron Canada were awarded costs at different stages of the Canada Enforcement Proceedings, totalling CAD 375,000.[1526] In the Respondent's view "[h]aving sought and

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1523 Reply, para. 909.

1524 Rejoinder, para. 1450.

1525 *See* paras. 362, 371, 397 above.

1526 **RE-39**, First Knutsen Expert Report, p. 24. *See also* **C-2834**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Order, 10 February 2017, para. 2; **C-2856**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd*., Decision of the Court of Appeal of Ontario (corrected), 23 May 2018, paras. 89, 91.

received their costs, the Claimants should not be able to seek an award for the same fees from this Tribunal."[1527]

1008. At the outset, the Tribunal observes that while the Claimants do not deny that they were awarded CAD 375,000 in the Canada Enforcement Proceedings, they do not explain whether they actually *collected* those costs or, to the extent that they failed to do so, why they failed to do so.[1528] According to the Claimants, "[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."[1529] Yet no such deduction is accounted for in the Memorial, the Reply, the Updated Appendix 2 filed with the Reply,[1530] or the Claimants' Damages Model.[1531]

1009. Against this background, on the basis of the record before it, the Tribunal concludes the Claimants either (i) collected the costs they were awarded in the Canada Enforcement Proceedings and failed to deduct them from the amounts claimed in this Arbitration, or (ii) failed to collect those costs for reasons they have not shared with this Tribunal. For the reasons that follow, the Tribunal must deduct CAD 375,000 from the final amount of compensation owed to the Claimants in either of these scenarios.

1010. To the extent the Claimants effectively collected CAD 375,000 in costs in the Canada Enforcement Proceedings, for the reasons stated in Section VII.E.2 and paragraph 505(i) above, the Tribunal must deduct those costs from the final amount of compensation owed to the Claimants.

1011. The same conclusion must be reached to the extent the Claimants failed to collect the costs they were awarded in the Canada Enforcement Proceedings. In Section VII.E.3 above, the Tribunal has 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

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[1527] Counter-Memorial, para. 342.

[1528] *See* Reply, paras. 911-914.

[1529] Reply, para. 515.

[1530] Reply, Updated Appendix 2, pp. 324-401.

[1531] Letter from the Claimants to the Tribunal, 2 November 2022.

courts. As noted in paragraph 505(ii) above, 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.

1012. Notwithstanding the general principle that the burden of proof regarding the Claimants' failure to mitigate lies with the Respondent, the Tribunal cannot obviate the fact that the Claimants have failed to explain why they did not collect costs. This precludes even a *prima facie* determination that the Claimants' presumptive decision not to collect costs was reasonable. Accordingly, the Tribunal concludes that the Claimants are precluded from recovering as damages any legal costs awarded, but not collected, in the Canada Enforcement Proceedings.

1013. Lastly, the Tribunal takes note that the Respondent requests the Tribunal to exclude from compensation the costs awarded to the Claimants in the Canada Enforcement Proceedings, adjusted for full indemnity. This is because, according to the Respondent, "Ontario courts' default approach is to award successful litigants' 'reasonable costs' on a partial indemnity scale, which is about 60% of the actual reasonable legal fees, and only after an in-depth examination of the successful litigant's legal fees and costs applying a prescribed set of factors."[1532]

1014. The Tribunal declines to make any such adjustment: as explained in paragraph 481 above, 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 compensation in respect of legal costs. These claims must still be assessed through the lens of the usual standards for damages applicable under

[1532] Counter-Memorial, para. 835.

international law, which do not foresee the indemnity adjustment the Respondent says applies in Canadian proceedings.

1015. For these reasons, the Tribunal excludes from compensation the amount awarded by Canadian courts, excluding any adjustments (*i.e.*, CAD 375,000).[1533]

1016. For the avoidance of doubt, the Tribunal recalls that its determination of the legal fees and expenses the Claimants may recover as incidental damages under international law goes beyond an analysis of the fees they collected or were awarded in other proceedings. As set out in paragraph 496 above, 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 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 set out in the present sub-section.

3. (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

1017. According to the Respondent, "the difference between the claim advanced before the Canadian courts and Claimants' demand to this Tribunal is not attributable to some quirk in the way the Canadian courts applied the 'fair and reasonable' standard."[1534] The Respondent refers to several inconsistencies between the Claimants' costs claim before Canadian courts and their damages claim in this Arbitration:

> For example, Chevron submitted a detailed cost application for its work on the motion to stay, representing its own appraisal of the 'significant amount of work required [with] respect to' that motion. In that fee submission, Chevron represented that the actual, reasonable fees for that stage of the litigation were $683,156.00 CAD . . . Before this Tribunal, however, Claimants' representation of its fair and reasonable costs for the same

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[1533] In Section VIII.O below, fn 3666 the Tribunal addresses the conversion of this amount from CAD to USD.

[1534] Rejoinder, para. 1471.

work is much inflated. Based on the underlying invoices, Claimants appear to request US$ 4,485,549.24 in fees alone for the same activities.[1535]

1018. Taking account of these purported inconsistencies, the Respondent takes the view that the Tribunal should follow the Canadian courts' determination of the "fair and reasonable" fees that the Claimants should recover for their participation in the Canada Enforcement Proceedings and thereby "massively discount Claimants' bloated damages demand."[1536]

1019. The Tribunal reiterates, as already explained in paragraph 483 above, that even when domestic cost-shifting standards incorporate an assessment of reasonableness, the determinations made by local courts in application of those standards will be of limited relevance for the Tribunal's present analysis, which will examine the question applying the prescribed standard under international law, *i.e.*, not the reasonableness of the legal fees and expenses according to the approaches applied by courts in 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.

1020. For these reasons, the Tribunal determines that any representations made by Chevron, Chevron Canada or Chevron Finance in the Canada Enforcement Proceedings regarding the reasonableness of the legal fees and expenses they incurred in the context of those proceedings addressed a different subject matter and, therefore, are irrelevant for the Tribunal's present analysis of the damages suffered by the Claimants as a result of the Respondent's Treaty breaches. In the same vein, the Tribunal confirms that none those representations, and none of the costs decisions made by Canadian courts on the basis of such representations, are capable of giving rise to any form of *res judicata* or estoppel in this Arbitration, particularly in view of the fact that the Respondent was not a party to the Canada Enforcement Proceedings.

1021. Accordingly, the Tribunal rejects the Respondent's argument under the present heading.

[1535] Rejoinder, paras. 1471-1472. *See also* Rejoinder, paras. 1473-1476; **RE-57**, Second Knutsen Expert Report, pp. 5-16.

[1536] Rejoinder, para. 1480.

4. Pre-filing fees

1022. The Parties disagree on whether the Claimants are entitled to compensation for fees incurred before the commencement of the Canada Enforcement Proceedings on 30 May 2012.[1537] This necessarily encompasses the fees and costs associated with the Claimants' early preparation works in Canada starting from November 2009 until the Invictus Memorandum became known to the Claimants in January 2011, as addressed in Section 1 above.

1023. For the reasons stated in paragraph 1005 above, the Tribunal finds that the Claimants are not entitled to claim compensation for any expenses associated with the advance preparation work for the Canada Enforcement Proceedings that was 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 other determinations on this category of damages.

5. 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

1024. The Respondent is critical of the Claimants' engagement of six non-Canadian law firms in connection with the Canada Enforcement Proceedings (Gibson, Dunn & Crutcher LLP; Stern Kilcullen & Rufolo LLC; Jones Day; Boies Schiller & Flexner LLP; Gardere Wynne Sewell LLP; and Covington & Burling LLP).[1538] In particular, the Respondent challenges the extensive fees billed by these U.S. firms, arguing that the attorneys at these firms "would *prima facie* have been of little value in litigating corporate separateness in those proceedings, given that [they] lacked qualifications to practice law in Canada."[1539]

1025. 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.[1540] While the Tribunal accepts that the engagement of foreign law firms for local

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[1537] *See* para. 994 above.

[1538] *See* Reply, Updated Appendix 2, p. 324.

[1539] Rejoinder, para. 1485.

[1540] *See* para. 341 above.

enforcement proceedings may be useful for the conduct of those proceedings, the Tribunal has nonetheless difficulty understanding how the participation of six non-Canadian law firms could have reasonably assisted the Claimants in resisting the enforcement of an Ecuadorian judgment in Canada over assets located in that same jurisdiction – a quintessential question of Canadian law and procedure that would normally be reserved to local lawyers, including in particular those already regularly retained by Chevron in respect of its Canadian subsidiaries and operations.

1026. 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.[1541] To the extent that the goal of resisting enforcement in Canada might have required *one* foreign law firm to act as a liaison between the Claimants' headquarters in the United States and the law firms representing the Claimants and their local subsidiaries before the Canadian 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 Canada Enforcement Proceedings (Gibson, Dunn & Crutcher LLP).[1542] 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 (Stern Kilcullen & Rufolo LLC; Jones Day; Boies Schiller & Flexner LLP; Gardere Wynne Sewell LLP; Covington & Burling LLP).

6. Alleged coordination of moots / (RES) Coordination of moots

1027. The Respondent alleges that the Claimants' attorneys spent over USD 1 million to coordinate and attend moot sessions in Houston, Texas and also claim compensation for the fees and airfare it spent to have its Canadian counsel travel to these sessions.[1543]

[1541] *See* paras. 642-643 above.

[1542] Reply, Updated Appendix 2, p. 324. The Tribunal notes that Gibson Dunn was also the non-Canadian firm with the highest billing in connection with this damages category (USD 5,716,409) 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 F108.

[1543] Rejoinder, para. 1496; **RE-51**, Trunko Expert Report, **SM M-6**.

According to the Respondent, "[s]uch fees would not be compensable in Canada, or the United States for that matter, and should not be compensable here."[1544]

1028. The Tribunal considers that preparing for oral argument before a court is an integral part of litigation. Indeed, in numerous instances in this Award, the Tribunal has awarded damages to the Claimants for preparation work undertaken in various domestic proceedings to the extent that such efforts sought reasonably to mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment.[1545] Because mock oral arguments are one of many tools available to lawyers to prepare for actual oral arguments, the question before the Tribunal is whether, in the circumstances of this case, coordinating moots to prepare for oral argument in the Canada Enforcement Proceedings amounted to a reasonable mitigation measure.

1029. In the Tribunal's view, mock oral arguments are not a universal practice and go beyond what is normally required to prepare for oral arguments. Moots also entail additional preparation costs, which will often be significant in view of the need to bring together a team of several lawyers, who will need to prepare and later run the mock scenario. As such, expensive, in-depth preparations of this sort are often only justified in particularly sensitive cases or bet-the-company litigations.

1030. Yet this was precisely the case of the Canada Enforcement Proceedings, where the Claimants and their local subsidiaries faced a claim, *inter alia*, for "the Canadian equivalent of USD $18,256,718,000.00".[1546] Faced with such staggering liability, the Tribunal is unpersuaded that the Claimants were somehow overzealous in conducting moots to prepare for oral argument before the Canadian courts.

1031. Therefore, in view of the risks attached to the recognition and enforcement of the multi-billion Lago Agrio Judgment in Canada, the Tribunal considers that coordinating mock arguments to prepare for oral argument before the Canadian courts hearing the LAPs'

[1544] Rejoinder, para. 1496.

[1545] *See* para. 642 above.

[1546] **C-1380**, *Yaiguaje et al. v. Chevron Corp., Chevron Canada Ltd., and Chevron Canada Finance Ltd.*, Statement of Claim, Superior Court of Justice, Ontario, Canada, 30 May 2012, para. 1(a).

recognition and enforcement action was a reasonable and proportionate mitigation measure in the circumstances.

1032. Accordingly, the Tribunal rejects the Respondent's request to exclude from compensation the legal fees and expenses claimed by the Claimants in connection with the coordination of moots in the Canada Enforcement Proceedings.

7. (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)

1033. The Respondent seeks to preclude the recovery by Chevron of the losses suffered by its Canadian subsidiaries, including the legal fees and expenses incurred by the law firms representing these subsidiaries in the Canada Enforcement Proceedings. In the Respondent's view, it should not bear responsibility for the Claimants' choice to assume other companies' alleged losses.[1547]

1034. As already explained in paragraph 998 above, 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 2012 Order of the Lago Agrio Court caused by the recognition and enforcement of the Lago Agrio Judgment. As regards Canada, the Lago Agrio Court order expressly required the enforcement of the Lago Agrio Judgment against Chevron Canada and Chevron Finance, which were deemed to be "assets owned by Chevron Corporation."[1548] As such, Chevron is entitled to recover the legal fees and expenses incurred by the law firms representing those local subsidiaries in resisting the recognition and enforcement of the unremedied Lago Agrio Judgment in Canada.

1035. For these reasons, the Tribunal rejects the Respondent's request to exclude from compensation the legal fees and expenses incurred by the law firms that represented Chevron Canada and Chevron Canada Finance Limited in the Canada Enforcement Proceedings (Goodmans LLP and Lax O'Sullivan Scott Lisus LLP).

1547 Rejoinder, paras. 508-513.

1548 *See* para. 431 above.

8. Other issues

1036. In this Section, the Tribunal will address other issues raised by the Parties in connection with the Canada Enforcement Proceedings that have not been specifically identified by the Parties as individual components.

1037. First, the Respondent asserts that the Claimants' claim for damages corresponding to the Canada Enforcement Proceedings is inconsistent with their submissions before other courts.[1549] These include (i) the Claimants' alleged representation to this Tribunal that their attorneys' fees and costs for the Canada, Brazil, Argentina and Ecuador Enforcement Proceedings collectively were estimated not to exceed USD 14 million;[1550] (ii) Mr Veiga's October 2013 witness statement in the RICO Litigation attesting that "Chevron Corporation has spent no less than USD 1 million defending itself in Canada" as of 2 October 2013;[1551] Mr Joseph Ryan's expert report in the RICO Litigation opining on the reasonableness of USD 1 million for the Canadian proceedings;[1552] and (iii) Mr Daniel Cooperman's expert testimony in the RICO Litigation opining that USD 1,012,864.00 was the reasonable amount for responding to the Canada Enforcement Proceedings.[1553]

1038. In the Tribunal's view, none of these alleged representations can affect the determination of the compensation owed to the Claimants as a result of the Respondent's internationally wrongful acts. Apart from being made years before the Canada Enforcement Proceedings concluded, none of these representations addresses the distinct question whether the legal fees and expenses incurred by the Claimants in the Canada Enforcement Proceedings served reasonably to mitigate the injury flowing from the Respondent's Treaty breaches. Similarly to what the Tribunal has found in paragraph 1020 above regarding the Claimants' representations before Canadian courts, the purported representations listed

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[1549] Counter-Memorial, para. 849; Rejoinder, paras. 1476-1480.

[1550] Counter-Memorial, para. 849; Claimants' Show Cause Pleading, 6 May 2013, para. 3.

[1551] Rejoinder, para. 1477; **R-2092**, *Chevron Corp. v. Steven Donziger*, No. 1:11-cv-00691-LAK-RWL, D.E. 1553-1 Chevron Corporation's Notice of Filing of Witness Statement of Ricardo Reis Veiga (SDNY) 15 October 2013, para. 132.

[1552] Rejoinder, para. 1478; **JR-3**, *Chevron Corp. v. Donziger*, No 11-0691 (LAK), Expert Report of Joseph Ryan (SDNY) 1 March 2013, para. 46.

[1553] Rejoinder, para. 1478; **R-2087**, Supplemental Expert Report of Daniel Cooperman, 30 August 2013, paras. 7, 9.

in the preceding paragraph addressed an entirely different subject matter and – with the exception of this Arbitration – were made in proceedings to which the Respondent was not a party. For either of these reasons, the abovementioned representations cannot give rise to any form of *res judicata* or estoppel in these proceedings.

1039. The remaining issues under the present heading include the Respondent's arguments that the Claimants' damages claim includes costs (i) unrelated to the Canada Enforcement Proceedings;[1554] (ii) related to public and media relations;[1555] (iii) "unnecessary" activities, such as "efforts to strike at the LAPs' counsel and at litigation funders";[1556] and (iv) "excessive" and "duplicative" activities.[1557] Since all of these issues have been identified by the Parties as cross-cutting elements impacting multiple categories, the Tribunal will address them together with other elements in Section VIII.N below.[1558]

4. Conclusion on Canada Enforcement Proceedings

1040. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Canada 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 Canada Enforcement Proceedings corresponding to services rendered before 14 February 2011;

(iii) Excludes from compensation the amount awarded by Canadian courts, excluding any adjustments (*i.e.*, CAD 375,000);

(iv) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Canada Enforcement Proceedings corresponding to services provided by the firms Stern Kilcullen & Rufolo LLC; Jones Day; Boies

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1554 Counter-Memorial, para. 850; Rejoinder, para. 1497.

1555 Rejoinder, paras. 1481-1482.

1556 Rejoinder, para. 1483.

1557 Rejoinder, paras. 1484-1497.

1558 See para. 569 above.

Schiller & Flexner LLP; Gardere Wynne Sewell LLP; and Covington & Burling LLP;

(v) Defers its determination regarding the compensation of the legal fees and expenses identified in paragraph 1039 above to its analysis of cross-cutting elements set out in Section VIII.N below;

(vi) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Canada 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;[1559] and

(vii) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Canada Enforcement Proceedings. The Tribunal will determine the exact amount of compensation corresponding to the Canada Enforcement Proceedings in Section VIII.O below.

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[1559] *See* paras. 569-573 above.

F. COSTS OF PLANNING AGAINST POTENTIAL ENFORCEMENT IN OTHER JURISDICTIONS

1041. The Claimants seek USD 26,166,897.09[1560] as direct damages for the legal fees and expenses they allegedly incurred between October 2007 and October 2018 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".[1561] In the alternative, the Claimants submit that they are entitled to the reimbursement of these legal fees and expenses as incidental damages.[1562]

1042. The Respondent argues that the Claimants are not entitled to any of the legal fees and expenses they claim under the present heading because, in its view, the Claimants have not shown "how the global risk assessment and planning activities allegedly undertaken in jurisdictions where no recognition and enforcement actions were filed were caused by a Treaty breach or were 'reasonable and prudent action[s] commensurate to an extraordinary threat'."[1563]

1. The Claimants' Position

1043. In light of the LAPs' "public[] boasting" as early as July 2007 that they would attempt to enforce the Lago Agrio Judgment in "whatever country" Chevron has assets, the Claimants submit that it was necessary for Chevron to work with U.S. and foreign counsel to assess the global risks of the potential recognition and enforcement of the Judgment, as well as to develop a strategy to defend Chevron and its affiliates from the LAPs' anticipated enforcement scheme.[1564] In particular, noting the existence of regional treaties facilitating the recognition, enforcement, and attachment of assets, the Claimants assert that in civil law, Latin American jurisdictions, Chevron and its local counsel had to

[1560] Reply, para. 939; Updated Appendix 2, pp. 403-532.

[1561] Memorial, para. 392; Reply, para. 939; Updated Appendix 2, pp. 403, 531; **C-3462**, Indices 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.

[1562] Reply, para. 939.

[1563] Rejoinder, para. 1337; Reply, para. 349.

[1564] Memorial, para. 392; Reply, paras. 941, 948.

prepare in advance to resist any attachment requests that could endanger Chevron's subsidiaries and their assets.[1565]

1044. In fact, the Claimants posit that the Invictus Memorandum, which outlines the LAPs' enforcement strategy, identifies the specific jurisdictions where Chevron prepared itself for "enforcement battles", including Australia, Colombia, Nigeria, Panama, the Philippines, Singapore, the United States, and Venezuela.[1566] In this context, the Claimants highlight that the Invictus Memorandum confirmed what the Claimants already suspected from the LAPs' public statements and activities.[1567] On this basis, the Claimants reject the Respondent's attempt to impose an additional temporal limitation to their claim under this heading, *i.e.*, the date on which the Claimants obtained the Invictus Memorandum as the starting date to incur fees and costs associated with this category.[1568]

1045. Accordingly, the Claimants reject the Respondent's argument that their pre-emptive legal preparations were the result of mere exaggeration or overcautiousness;[1569] rather, they stemmed from a factual basis.[1570] To the extent that the LAPs' "ambitious" enforcement actions were foreseeable, the Claimants emphasize that Chevron's preparation in other countries was "a reasonable and prudent action commensurate to an extraordinary threat".[1571]

1046. According to the Claimants, the billing records and invoices on which they base their damages claim show that Chevron has spent considerable time, effort, and expense in preparing and implementing its defensive strategy to resist the LAPs' anticipated enforcement efforts in multiple jurisdictions around the world.[1572] Therefore, the Claimants deny the existence of a "veil of secrecy" surrounding the Claimants' defence

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1565 Reply, para. 941; Fourth Veiga Witness Statement, para. 76; Seley Witness Statement, para. 65.

1566 Memorial, para. 391; Reply, para. 942; **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51].

1567 Reply, para. 948.

1568 Reply, para. 948.

1569 Reply, para. 948.

1570 Memorial, para. 394; Reply, para. 944.

1571 Reply, para. 949.

1572 Reply, para. 946.

activities.[1573] For the Claimants, the billing records and invoices they provided also show that there is no overlap between this damages category and the General Defence category.[1574]

1047. In view of the above, the Claimants submit that – at the very least – they are entitled to recover USD 17,540,000 in direct damages incurred after 1 March 2012 in planning and preparing to defend against enforcement actions in other jurisdictions.[1575]

1048. In the alternative, the Claimants argue that they are entitled to recover the legal fees and expenses under this heading as incidental damages: in their view, these expenses were reasonable.[1576]

2. The Respondent's Position

1049. For the Respondent, the Claimants voluntarily incurred the costs claimed in this damages category in anticipation of potential enforcement activity by the LAPs, rather than as a reaction to a Treaty violation.[1577] Consequently, the Respondent asserts that the Claimants have failed to prove that Chevron would not have undertaken similar preparations in the absence of a Treaty breach, even more so given that Chevron would have faced a serious risk of liability in a Treaty-compliant but-for scenario.[1578] In any event, the Respondent argues that any costs Chevron incurred before the date Chevron obtained a copy of the Invictus Memorandum, let alone the date on which the Lago Agrio Judgment was issued or the date of the Constitutional Court Judgment, are not compensable, as they would be either unreasonable, unnecessary, or unrelated to any Treaty breach.[1579]

1050. Even assuming that the preparatory work in jurisdictions where no recognition or enforcement action was filed was caused by a Treaty breach, the Respondent maintains that the Claimants have failed to show that preparing draft submissions for use in such

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[1573] Reply, para. 947.

[1574] Reply, para. 947.

[1575] Reply, para. 950.

[1576] Reply, para. 951.

[1577] Counter-Memorial, para. 888; Rejoinder, para. 1337.

[1578] Rejoinder, para. 1339.

[1579] Counter-Memorial, para. 888.

jurisdictions was reasonable and necessary.[1580] In this respect, the Respondent points out that the Claimants have failed to identify any regional treaties in civil law, Latin American jurisdictions concerning the recognition of foreign attachment orders that could have placed Chevron in substantial danger.[1581]

1051. In addition, the Respondent considers that preparing costly draft submissions well ahead of when they might be needed in these jurisdictions was unreasonable and unnecessary because, *inter alia*, (i) Chevron could have sought extensions for deadlines to respond to a recognition action; (ii) in any event, the LAPs would not have been able to prove that there was a risk of immediate or irreparable harm to obtain attachment; and (iii) even if a court in Colombia or the Philippines had attached assets belonging to Chevron or its subsidiaries, that attachment could have been lifted upon the posting of a bond.[1582]

1052. Insofar as the legal fees and expenses claimed by the Claimants were allegedly incurred to guard against the risk of attachment of assets in non-civil law, non-Latin American jurisdictions, the Respondent argues that Chevron and its subsidiaries could not have faced a "true" risk of prejudice or being subject to attachment, as it was unlikely that any hypothetical enforcement action filed by the LAPs would have satisfied the substantive and procedural requirements for obtaining attachment in those jurisdictions.[1583]

1053. Even if the Claimants' fears of expedited attachment and recognition had justified preparatory work, the Respondent contends that Chevron's strategy of drafting stock submissions was highly inefficient, as it required Chevron's lawyers to "predict the unpredictable", continuously revise the drafts to account for evolving facts, translate unnecessary materials, and "check court dockets compulsively, sometimes on a daily basis."[1584]

1054. The Respondent adds that the invoices and billing records reveal that Chevron's lawyers engaged in activities unrelated to what the Claimants purport to have done in connection

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1580 Rejoinder, para. 1344.

1581 Rejoinder, para. 1349.

1582 Rejoinder, paras. 1350-1352.

1583 Rejoinder, para. 1346.

1584 Rejoinder, paras. 1354-1359.

with the present category.[1585] In the Respondent's view, any fees associated with such activities, including developing offensive strategies against the LAPs, seeking to retaliate against the Respondent, advising Chevron regarding U.S. securities law compliance, and managing their own businesses, are not compensable, given that none of them were caused by a Treaty breach or were related to risk assessment or preparing defences against potential recognition and enforcement actions.[1586]

3. The Tribunal's Analysis

(a) Introduction

1055. The USD 26,166,897.09 claimed under this damages category concern the legal fees and expenses allegedly incurred by the Claimants, from October 2007 through October 2018, from 25 law firms and vendors Chevron engaged to defend itself in potential enforcement actions in multiple jurisdictions, including Australia, Colombia, Indonesia, Nigeria, Singapore, the Philippines, Panama, the United States, and Venezuela.[1587] While enforcement was ultimately not pursued in these countries, the Claimants argue that these costs were nevertheless reasonably incurred since the LAPs, as early as July 2007, had indicated that they would seek enforcement in "whatever country" Chevron has assets.[1588] It was necessary and prudent for Chevron, the Claimants submit, to work with multiple teams of U.S. and local counsel to assess the global risks of potential recognition and enforcement, as well as to develop a strategy to defend Chevron and its affiliates from the LAPs' anticipated enforcement scheme.[1589]

1056. The Respondent rejects the existence of a causal link between Chevron's pre-emptive legal preparations and the Treaty breaches. According to the Respondent, Chevron would have undertaken similar preparations even in the absence of Treaty breaches, given that Chevron faced a serious risk of liability in a Treaty-compliant but-for scenario.[1590] In any

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[1585] Rejoinder, para. 1361.

[1586] Rejoinder, paras. 1362-1366.

[1587] Reply, para. 939; Updated Appendix 2, pp. 403, 532; **RE-51**, Trunko Expert Report, **SM-J-4**.

[1588] Memorial, para. 392; Reply, para. 948; **C-295**, Amazon Watch Press Release, *Chevron Launches "Dirty War" on Ecuador Court*, 4 July 2007.

[1589] Memorial, para. 392; Reply, para. 941.

[1590] Rejoinder, para. 1342.

event, according to the Respondent, any costs incurred before January 2011 – when Chevron obtained a copy of the Invictus Memorandum and thus became aware of the LAPs' enforcement strategy – are not compensable.[1591] Assuming that such risk assessment and preparatory work are compensable, the Respondent submits that the Claimants have failed to prove that it was necessary and reasonable to undertake such measures, and that the activities themselves were reasonable and necessary for Chevron's defence.[1592]

1057. Before beginning its analysis of the Claimants' damages claim in respect of Costs of Planning Against Potential Enforcement in Other Jurisdictions, 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.[1593] 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 to mitigate any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[1594]

1058. Following the methodology laid out in Section VII.G.5 for the assessment of incidental damages, the Tribunal finds that the Claimants' claim for compensation in respect of Costs of Planning Against Potential Enforcement in Other Jurisdictions must be granted for the reasons and to the extent set out below.

(b) First Step: Analysis of Incidental Damages "Category"

1059. As a first step of its analysis, the Tribunal must determine whether this category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

1591 Counter-Memorial, para. 888.

1592 Rejoinder, para. 1337.

1593 Reply, para. 860.

1594 *See* para. 317 above.

1060. 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.

1061. 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.[1595]

1062. At the outset, the Tribunal must recall once again from its findings in its Track II Award 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.
>
> 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

[1595] *See* para. 556 above.

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.[1596]

1063. The transnational scope of the potential recognition and enforcement of the uncorrected Lago Agrio Judgment required the Claimants to deploy mitigation measures in multiple jurisdictions, for which they now seek compensation in Track III.

1064. Elsewhere in this Award, the Tribunal has partially granted the Claimants' claims in respect of the legal fees and expenses they incurred in defending against recognition and enforcement actions filed by the LAPs in Argentina,[1597] Brazil,[1598] Canada,[1599] and Ecuador.[1600] As there noted by the Tribunal, defending against recognition and enforcement actions in those jurisdictions was a direct and reasonable way of mitigating the injury flowing from the Respondent's Treaty breaches.[1601] Similarly, as there also determined, the fact that those recognition and enforcement actions may have affected assets owned by Chevron's international subsidiaries (as opposed to Chevron) does not

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1596 Track II Award, paras. 7.24-7.27.

1597 *See* Section VIII.C above.

1598 *See* Section VIII.D above.

1599 *See* Section VIII.Eabove.

1600 *See* Section VIII.B above.

1601 *See* paras. 762 (Ecuador Enforcement Proceedings); 808, 810 (Argentina Enforcement Proceedings); 912 (Brazil Recognition Proceedings); 1001 (Canada Enforcement Proceedings) above.

bar Chevron from seeking compensation for the ensuing damages in Track III: 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, by which it ordered the execution of the Lago Agrio Judgment.[1602]

1065. The present damages category, comprising Costs of Planning Against Potential Enforcement in Other Jurisdictions, stands apart from the Argentina, Canada, and Ecuador Enforcement Proceedings and the Brazil Recognition Proceedings categories in that it does not concern legal fees and expenses incurred in connection with recognition or enforcement actions that were *actually* filed by the LAPs, but rather to plan for recognition and enforcement actions that were ultimately *never* filed. This raises the question whether such preventative activities, taken by themselves, amount to reasonable mitigation measures in this case.

1066. This question must be answered by reference to the situation prevailing as of the date of issuance of the Lago Agrio Judgment (14 February 2011), which, as already explained, is 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 – and may thus warrant compensation.[1603] As from that date, the risks attached to the enforcement of the Lago Agrio Judgment 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 and made the risks real and immediate. Thus, any efforts the Claimants undertook from that moment onwards to prevent the Lago Agrio Judgment from becoming enforceable in multiple jurisdictions worldwide, including preventative efforts deployed prior to the filing of any enforcement actions, would fulfil the requirement of causation for the compensation of incidental damages under international

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[1602] *See* para. 438 above. *See also* paras 808, 998 above.

[1603] *See* paras. 362, 373, 397 above.

law as described in item (i) in paragraph 1060 above. This proposition applies with equal force even where no enforcement action was ultimately filed.[1604]

1067. However, while 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,[1605] not every preventative effort deployed by the Claimants in respect of every jurisdiction where they held assets would qualify for compensation. The notion of reasonableness applied to the assessment of incidental damages required the Claimants to have a particular reason to anticipate that the LAPs would seek the recognition and enforcement of the Lago Agrio Judgment in each specific jurisdiction. Reasonableness also required the Claimants to adjust the scale of any preventative measures they deployed to the level of the risk that the LAPs would actually file a recognition or enforcement action in a given jurisdiction: the higher the risk, the more reasonable it would have been for the Claimants to undertake intensive preparations.

1068. Critically as regards this reasonableness assessment, by 14 February 2011 the Claimants had obtained the "Invictus Memorandum", which, as already explained, sets out (among other things) a legal strategy for seizing Chevron's assets outside Ecuador in multiple jurisdictions, including the arrest of Chevron's vessels.[1606]

1069. In this connection, the Invictus Memorandum includes a "non-exhaustive list" of "International Forums of Particular Note"[1607] where the enforcement of the Lago Agrio Judgment might be attempted for various reasons, including the Philippines, Singapore, Australia, Argentina, Brazil, Colombia, Venezuela, Angola, Canada, Chad, China, Kazakhstan, Kuwait, Nigeria, Saudi Arabia, South Africa, South Korea, Belgium, Indonesia, the Netherlands, New Zealand, Russia, Trinidad and Tobago, and the United

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[1604] *See* para. 362 above.

[1605] *See* para. 341 above.

[1606] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51]; Fourth Veiga Witness Statement, para. 33: "At this point, there can be no doubt—not that there had ever been any—that the Plaintiffs were planning for aggressive enforcement efforts and that the risk was both real and imminent. Indeed, the Lago Agrio Plaintiffs had already implemented various steps envisioned in the Invictus memorandum by the time we obtained it in January 2011"; Track II Award, para. 4.390.

[1607] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], p. 19.

Kingdom.[1608] Of these jurisdictions, Argentina, Brazil, Colombia, and Venezuela were considered to be of note because "all four countries have ratified the *Organization of American States' Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*, a fact which should have the effect of significantly streamlining the enforcement process in these nations."[1609]

1070. As already noted by the Tribunal, it would be possible to add many more jurisdictions to this list.[1610] Indeed, the Invictus Memorandum also foresaw the targeting of accounts and assets potentially subject to attachment in many jurisdictions beyond those identified as "International Forums of Particular Note" in the preceding paragraph:

> Identifying Chevron's assets worldwide will be a critical step to be taken at the outset of Plaintiffs' judgment enforcement efforts. As Chevron acknowledges on its website "[w]e conduct business all around the globe." On the same webpage, Chevron lists 27 sovereign countries in which its "work is more extensive." In addition to the United States, where it is headquartered in San Ramon, California, these nations with purportedly "extensive operations" include Angola, Argentina, Australia, Azerbaijan, Bangladesh, Belgium, Brazil, Cambodia, Canada, Chad, China, Columbia [*sic*: Colombia], Indonesia, Kazakhstan, Kuwait, the Netherlands, New Zealand, Nigeria, the Philippines, Russia, Saudi Arabia, Singapore, South Africa, South Korea, Thailand, Trinidad and Tobago, the United Kingdom, and Venezuela. Based on Chevron's own admissions, it is clear that the company conducts business and maintains holdings in many more countries not included in that list. Furthermore, it could be expected that Chevron might strategically choose to withhold from public view information about the location of property that it believes may be at-risk in any judgment enforcement action. Concomitantly, those nations where Chevron maintains the best relations and feels least threatened by judgment enforcement action may have intentionally been counted among its more "extensive" places of operation.[1611]

1071. In addition to the jurisdictions that have already been described, the Invictus Memorandum refers specifically to the existence of assets owned by Chevron and potentially subject to enforcement in, *inter alia*, Norway, Denmark (including Greenland), Turkey, Vietnam, Cameroon, the Democratic Republic of Congo, Poland, Myanmar, the Republic of the Congo, Ireland, Greece, France (including Martinique),

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[1608] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], pp. 19-20.

[1609] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], p. 20.

[1610] Track II Award, para. 7.26.

[1611] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], p. 21.

Pakistan, Kenya, Côte d'Ivoire, Georgia, Equatorial Guinea, Qatar, Japan, India, and Mexico.[1612]

1072. The Invictus Memorandum thus provided critical and reasonably detailed information to the Claimants on the LAPs' worldwide enforcement strategy. In the Tribunal's view, reasonableness required the Claimants to take close guidance from the Invictus Memorandum when deciding where and how intensively to prepare for potential enforcement actions. Key factors guiding such assessment include, among others, (i) whether a specific jurisdiction or asset was expressly identified as a potential target in the Memorandum; and (ii) whether Chevron owned assets in a State party to the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, where the LAPs' counsel expected to be able to "streamline" enforcement.[1613]

1073. The Invictus Memorandum, however, did not describe the LAPs' enforcement strategy in a fully exhaustive manner. It would have therefore been reasonable for the Claimants to undertake a limited risk assessment vis-à-vis jurisdictions going beyond the scope of the strategy laid out in the Memorandum and thereafter deploy additional measures in those jurisdictions to the extent such assessment revealed significant risks of enforcement activity.

1074. The Tribunal also recalls that the 15 October 2012 Order of the Lago Agrio Court providing for the execution of the Lago Agrio Judgment identified many of Chevron's subsidiaries around the world as "assets of Chevron" against whom the Judgment should be executed.[1614] The order also required that the Judgment be executed against certain assets owned by those subsidiaries that were identified expressly in the order.[1615] This order, therefore, confirmed the scope of the LAPs' enforcement plans and should have also provided valuable guidance to Chevron as to where and how intensively to prepare for potential enforcement activity from October 2012 onwards.

[1612] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], pp. 21-23.

[1613] *See* para. 1068 above.

[1614] *See* para. 431 above.

[1615] *See* para. 432 above.

1075. Against this background, the Tribunal shall now address the two specific types of activities identified by the Claimants falling under the present damages category: (i) assessing the global risks of the potential recognition and enforcement of the Lago Agrio Judgment in multiple jurisdictions;[1616] and (ii) subsequent preparatory work in those jurisdictions where Chevron believed the LAPs were most likely to attempt enforcement.[1617] Each type of activity requires a differentiated analysis for the present purposes.

1076. First, the Claimants outline global risk assessment, which encompasses activities such as: (i) identifying countries where Chevron and/or its subsidiaries possess assets and operations vulnerable to the LAPs' enforcement scheme; (ii) evaluating the LAPs' public statements for clues as to where they would seek recognition; and (iii) analysing local laws, judiciaries, enforcement procedures, and overall political climates in each jurisdiction.[1618]

1077. Reduced to their essence, the activities described in the preceding paragraph sought to determine whether any risk of enforcement activity existed in each of the multiple jurisdictions and, if so, whether additional preparatory efforts were necessary. As such, to the extent Chevron performed these global risk assessment activities after the critical date of 14 February 2011, the Tribunal is satisfied that they were ultimately geared towards preventing the Lago Agrio Judgment from becoming enforceable as described in item (i) in paragraph 1060 above, thereby fulfilling the requirement of causation for the compensation of incidental damages.

1078. The Tribunal has also concluded that it was reasonable for the Claimants generally to undertake preparatory work in connection with jurisdictions identified in the Invictus Memorandum, as well as to perform a limited risk assessment of jurisdictions outside those identified expressly therein.[1619] In view of Chevron's extensive knowledge of the operations of its own corporate group and its worldwide distribution of assets, the

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[1616] Reply, para. 941.

[1617] Reply, para. 942.

[1618] Reply, para. 941.

[1619] *See* paras. 1072-1073 above.

Tribunal considers it would be generally inappropriate for it to apply hindsight to the decisions the Claimants took as to the territorial and material scope of these risk assessment activities. Thus, the Tribunal does not dismiss activities such as a global comparative law study on recognition and enforcement in 33 different jurisdictions[1620] as inherently unreasonable – indeed, as gleaned from above, the Invictus Memorandum identifies, in a non-exhaustive manner, no less than 50 jurisdictions where enforcement should be considered.[1621]

1079. Second, the Claimants refer to additional preparation work: "[a]fter the global risk assessment was completed, Chevron began preparing to defend against potential enforcement actions in jurisdictions where it believed the LAPs were most likely to attempt to enforce a judgment, including Australia, Colombia, Nigeria, Panama, the Philippines, Singapore and Venezuela", as well as Indonesia and the United States.[1622] Mr Robert A. Mittelstaedt, a partner at Jones Day and witness for the Claimants, describes this work as follows:

> This work included preparing briefs, affidavits, and other expected elements of an enforcement briefing "package" in a way that they readily could be accommodated to the legal requirements of a wide range of possible jurisdictions yet still present the same key facts and central arguments.
>
> The initial stages of this work focused on legal research and drafting, and marshaling facts regarding the Lago Agrio Litigation. Jones Day worked closely with local counsel at Perez Bustamante & Ponce on Ecuador law issues and with local counsel for a short list of the most likely countries for enforcement.
>
> Preparing to oppose anticipated recognition and enforcement efforts in multiple jurisdictions around the globe was necessary and prudent given the potential amount of an adverse judgment, the often short deadlines provided under local law for responding to an exequatur action, and the need to analyze local law, prepare legal arguments, amass supporting evidence, and provide certified translations and other legalized documents in support of the submission. This work could not simply await the filing of an action at some unspecified time in some remote jurisdiction.
>
> Gibson Dunn had developed a core list of documents from the RICO trial and certain 1782s for local counsel in enforcement countries to consider using in their anti-enforcement proceedings. Beyond obtaining certified translations of those documents into several languages, our team worked with Gibson Dunn to obtain certified copies of the English originals whenever possible and have those apostilled by the appropriate authorities. This

1620 *See* Rejoinder, para. 1341.

1621 *See* paras. 1069-1071 above.

1622 Reply, para. 942; Updated Appendix 2, p. 403. *See also* Rejoinder, para. 1342.

project was ongoing from late 2011 and well into 2013 and involved multiple trips to at least six Latin American countries.[1623]

1080. As already noted, the Tribunal considers it was reasonable for the Claimants to undertake more intensive preparation work – that is, work going beyond a mere risk assessment – in jurisdictions that were specifically identified in the Invictus Memorandum as potential targets for the LAPs' recognition and enforcement actions.[1624] Such is the case of Australia, Colombia, Indonesia, Nigeria, the Philippines, Singapore, the United States, and Venezuela.[1625]

1081. However, the remaining jurisdiction where Chevron undertook additional preparation work – Panama – is not specifically mentioned in the Invictus Memorandum. Panama has also not ratified the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards[1626] – which, as already explained, the LAPs' counsel considered to be "a fact which should have the effect of significantly streamlining the enforcement process" in that jurisdiction.[1627] Furthermore, no Panamanian assets or subsidiaries appear listed in the 15 October 2012 Order of the Lago Agrio Court – by which it ordered the execution of the Lago Agrio Judgment against Chevron's worldwide assets – or the Court's subsequent order of 25 October 2012 extending the execution order to additional assets (the "**25 October 2012 Order**").[1628]

1082. Notwithstanding this, the Tribunal notes that the focus of the work of the Panamanian counsel retained by Chevron was "the possible commencement of exequatur proceedings and *arrest proceedings of vessels* by Lago Agrio Plaintiffs against Chevron Corp. and related companies in relation to the enforcement of the Lago Agrio Judgment before Panamanian courts."[1629] The arrest of vessels, the Tribunal recalls, formed part of the

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1623 Mittelstaedt Witness Statement, paras. 87-90.

1624 *See* para. 1072 above.

1625 **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], pp. 19-20.

1626 **RE-54**, Second Godoy Expert Report, **LUC2-7**.

1627 *See* para. 1069 above.

1628 *See* paras. 431-432 above; **C-1541**, Amplification of Execution Order Issued by the Provincial Court of Sucumbíos, 25 October 2012.

1629 **C-3373**, De Castro & Robles, p. 1 (emphasis by the Tribunal).

enforcement strategy laid out in the Invictus Memorandum.[1630] Outside the Memorandum, the LAPs' counsel also made public their intentions to target Chevron's passing vessels in Panama:

> The legal team representing Ecuadorean plaintiffs who won an $18 billion (11.3 billion pounds) landmark case against oil giant Chevron . . . for polluting the Amazon jungle will target the company's assets in Panama and Venezuela in a bid to collect the award.
>
> Pablo Fajardo, the plaintiffs lead lawyer, told Reuters on Friday that they would first need countries outside Ecuador to recognize the validity of the sentence, and then could try to enforce the ruling there "Chevron has investments in more than 50 countries, but two have caught our eye . . . Panama because oil ships go through the Panama Canal and in Venezuela because they have important assets there," Fajardo said.
>
> When asked if they will try to confiscate Chevron assets in those two countries the lawyer said his team has not yet decided how they will proceed.[1631]

1083. Flowing from the above, the Tribunal is persuaded that the Claimants had a basis for considering there to be a significant risk of enforcement in Panama in view of the passage of vessels owned by Chevron and its worldwide subsidiaries through the Panama Canal – a central conduit for international maritime trade. In the circumstances, the Tribunal considers it was reasonable for Chevron to undertake additional preparatory work in a jurisdiction where its passing vessels were vulnerable to arrest.

1084. Having reached this conclusion, the Tribunal does not consider it necessary to analyse further whether the Claimants should have also taken into consideration a multiplicity of specifics of local procedural law when deciding where and how intensively to undertake additional preparation work, including (i) the applicable requirements in each of those jurisdictions to obtain attachment, as well as the existing procedural safeguards to protect

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[1630] *See* **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], p. 16: "There may, however, be a potential argument to be made for Rule B attachment with respect to U.S. territories, whereby docked Chevron vessels could be targeted for attachment. At a minimum, this type of aggressive action would lend momentum to the Plaintiffs' enforcement efforts, and would force Chevron to take such efforts seriously"; p. 21: "In addition, Chevron 'downstream' operations—including refining, marketing, and *transportation*—exist in many more foreign states" (emphasis by the Tribunal). *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)."

[1631] **C-1117**, Eduardo Garcia, *Ecuador Plaintiffs Eye Chevron Assets in Panama, Venezuela*, Reuters, 2 March 2012.

defendants from the prejudicial effects of asset attachment;[1632] (ii) whether attachment proceedings in each of those jurisdictions are expedited or fast-tracked;[1633] or (iii) the time available for Chevron to present a response after the filing of a recognition action in each of those jurisdictions.[1634] The Tribunal cannot conduct such an analysis without unduly applying hindsight to the legal strategies deployed by the Claimants to plan for the potential filing of recognition and enforcement actions, which – as explained earlier – is not appropriate, particularly with regard to jurisdictions where the risk of enforcement was significant.[1635]

1085. For these reasons, the Tribunal finds that the requirements of causation and reasonableness for the compensation of incidental damages under international law are met as regards the Costs of Planning Against Potential Enforcement category of damages.

1086. In reaching this conclusion, the Tribunal is mindful of the Respondent's argument that this category as a whole is not causally connected to the Respondent's Treaty breaches because a major multinational company like Chevron, embroiled in a significant litigation in Ecuador, where it has no assets, would have undertaken similar risk assessment and preparations against enforcement actions even in a Treaty-compliant but-for scenario.[1636] The Tribunal will address this argument in paragraphs 1103 to 1106 below.

(c) Second Step: Analysis of Incidental Damages "Components"

1087. As a second step of its analysis, the Tribunal must determine, within the Costs of Planning Against Potential Enforcement in Other Jurisdictions 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

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1632 Rejoinder, para. 1346.

1633 Rejoinder, para. 1347.

1634 Rejoinder, paras. 1350-1352.

1635 *See* para. 340 above.

1636 Rejoinder, para. 1339.

whether any other portion of the legal fees and expenses claimed should be excluded from the final amount of compensation.[1637]

1088. The Parties have identified three components involving the Costs of Planning Against Potential Enforcement in Other Jurisdictions category, 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)[1638]

1089. The Parties disagree on whether the Claimants may recover the legal fees and expenses Chevron incurred before the LAPs' enforcement strategy became known to them. The Claimants argue that the LAPs' strategy to enforce the Lago Agrio Judgment outside of Ecuador was already publicly known as early as 2007.[1639] Thus, Chevron began preparing its defence against future enforcement proceedings in 2008, on the belief that it would not receive a fair trial in Ecuador and because of the significant risks posed by global enforcement of a multi-billion dollar judgment against Chevron and its subsidiaries.[1640] The Respondent, on the other hand, argues that the relevant commencement date should be around January 2011, when Chevron received certain documents in the Donziger 1782, including the Invictus Memorandum detailing the LAPs' enforcement strategy.[1641]

1090. The Tribunal reiterates 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 attached 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

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[1637] *See* paras. 559-565 above.

[1638] For an explanation of the names assigned to components *see* para. 568 above.

[1639] Reply, para. 870; **C-295**, Amazon Watch Press Release, *Chevron Launches "Dirty War" on Ecuador Court*, 4 July 2007.

[1640] Fourth Veiga Witness Statement, para. 76; Track III Hearing Transcript, Day 3 (22 August 2022), 457-459 (Veiga); Track III Hearing Transcript, Day 4 (23 August 2022), 914-915 (Mittelstaedt).

[1641] Fourth Veiga Witness Statement, paras. 29-30.

Respondent's internationally wrongful acts. Whatever harm the Claimants may have suffered by undertaking work before 14 February 2011 in preparation for potential enforcement proceedings outside of Argentina, Brazil, Canada, and Ecuador was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[1642]

1091. Accordingly, the Tribunal finds that the Claimants are not entitled to claim compensation for Costs of Planning Against Potential Enforcement in Other Jurisdictions incurred 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.

2. (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

1092. The Respondent opposes the Claimants' attempt to recover fees for monitoring dockets in jurisdictions where no recognition or enforcement action was ever filed. Relying on its extracts of time billings for Australia,[1643] Panama,[1644] the Philippines,[1645] and Venezuela,[1646] the Respondent argues that Chevron's lawyers took an unprincipled approach to monitoring dockets, compulsively checking the same despite the fact that Chevron or its subsidiaries would have to be served with process if they were ever summoned to defend a recognition or enforcement action.[1647] As such, recovery should be barred on the ground of unreasonableness, in the Respondent's view.[1648] The Claimants, on the other hand, defend the reasonableness of these measures, pointing to the multi-jurisdictional plan for pre-judgment attachment in the Invictus Memorandum

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1642 *See* paras. 362, 371, 397 above.

1643 Rejoinder, Annex I-16.

1644 Rejoinder, Annex I-17.

1645 Rejoinder, Annex I-18.

1646 Rejoinder, Annex I-19.

1647 Rejoinder, para. 1359.

1648 Rejoinder, para. 1360.

and citing *Iran v. United States*,[1649] where the Iran-US Claims Tribunal held that "monitoring activities" such as monitoring docket sheets are compensable.[1650]

1093. In the Tribunal's view, tasking lawyers to monitor court dockets periodically for filings against Chevron and its subsidiaries served the reasonable objective of (i) ensuring that Chevron was properly apprised of the existence of any enforcement action against it; and (ii) mitigating a possible disruption of business operations caused by an *ex parte* pre-judgment attachment of Chevron's or its subsidiaries' assets.[1651] The Tribunal is cognizant of instances when service of process does not necessarily guarantee adequate notice to a litigant, *e.g.*, in case of substituted, or sometimes even improper, service. As such, it is not uncommon for litigants to monitor court dockets proactively, especially when anticipating an adverse enforcement action.

1094. The Tribunal again notes that Australia, the Philippines, and Venezuela are identified as "International Forums of Particular Note" in the Invictus Memorandum, thus reinforcing the conclusion that it was reasonable for Chevron to deploy efforts going beyond a mere risk assessment in these countries at that time – such as monitoring court dockets proactively.[1652] A similar conclusion can be reached in respect of Panama, where, for the reasons explained in paragraphs 1081 to 1082 above, there was a significant risk that the LAPs might attempt to arrest Chevron's vessels.

1095. Accordingly, the Tribunal declines to exclude from compensation the legal fees and expenses incurred by the Claimants for monitoring dockets in jurisdictions where no action was ever filed.

[1649] **RLA-722**, *The Islamic Republic of Iran v. The United States of America*, Cases Nos. A15 (IV) and A24-FT, Award No. 590- A15(IV)/A24-FT, 28 December 1998.

[1650] Track III Hearing Transcript, Day 15 (7 September 2022), p. 3459 (Silbert).

[1651] 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)."

[1652] *See* paras. 1072, 1080 above.

3. (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

1096. The Parties also disagree on whether the Claimants should be allowed to recover fees incurred for drafting pleadings in jurisdictions where no actions were ever filed. The Respondent extracts the time spent developing various pleadings that were never used in Australia,[1653] Colombia,[1654] Nigeria,[1655] Panama,[1656] the Philippines,[1657] Singapore,[1658] and the United States,[1659] and criticizes Chevron's "expense generating" strategy where its lawyers researched and drafted "stock" submissions that would then be continuously revised and polished to account for evolving facts,[1660] even in jurisdictions such as Australia, Nigeria, Singapore, Panama, and the United States, where there were "no realistic chance[s] of pre-judgment attachment of Chevron's assets".[1661]

1097. The Claimants, on the other hand, argue that such preparatory work was justified by a substantial risk of pre-judgement attachment and expeditious enforcement in Latin America – owing to regional treaties that facilitate enforcement – and in civil law jurisdictions, where Chevron has shorter periods to respond to a recognition action.[1662] The Claimants assert that the reasonableness of such work cannot be judged in hindsight since, at that time, Chevron had no way of knowing which country the LAPs would choose for enforcement. In the Claimants' view, it is immaterial that no enforcement actions were ultimately filed, as Chevron needed to prepare all the same.[1663] Furthermore, the Claimants state that in a complex, multi-venue litigation, it is not surprising or unusual that actions or motions are voluntarily dismissed or abandoned from time to time on

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1653 Rejoinder, Annex I-3.

1654 Rejoinder, Annex I-4.

1655 Rejoinder, Annex I-5.

1656 Rejoinder, Annex I-6.

1657 Rejoinder, Annex I-7.

1658 Rejoinder, Annex I-8.

1659 Rejoinder, Annex I-9.

1660 Rejoinder, para. 1355; Track III Hearing Transcript, Day 2 (19 August 2022), p. 358 (Renzler).

1661 Rejoinder, paras. 1345-1346, 1349; Track III Hearing Transcript, Day 2 (19 August 2022), p. 357 (Renzler).

1662 Reply, para. 941.

1663 Track III Hearing Transcript, Day 4 (23 August 2022), pp. 914-918 (Mittelstaedt).

account of evolving facts, mootness, declining rates of success, or accomplishment of a litigation objective through other means.[1664]

1098. The Tribunal notes that, from 2011 to 2018, Chevron incurred over USD 4 million in legal fees and expenses in connection with drafting and revising pleadings and motions anticipating various potential enforcement scenarios. The lion's share of this component comes from drafting activities undertaken by Chevron's U.S. lawyers.[1665] As already explained, the Claimants state that their U.S. counsel, Jones Day, took the lead in drafting a set of master pleadings that presented the same key facts and central arguments but could be tailored for use in different jurisdictions.[1666] The time extracts provided by the Respondent show that Chevron's counsel in Australia, Nigeria, Panama, the Philippines, and Singapore[1667] spent an average of 192 hours in drafting activities over the course of eight years, while Chevron's U.S. counsel spent upwards of 6,680 hours.[1668]

1099. As already explained in paragraphs 1079 to 1082 above, the Tribunal considers that it was reasonable for the Claimants to undertake more substantive preparatory work – that is, efforts going beyond a mere risk assessment – in certain jurisdictions with a heightened risk of enforcement. These include Australia, Colombia, Indonesia, Nigeria, Panama, the Philippines, Singapore, the United States, and Venezuela. In the Tribunal's view, the anticipatory drafting of responsive pleadings and motions was a generally reasonable response in view of the risk that the LAPs might attempt enforcement in those specific jurisdictions.

1100. Otherwise, it is unnecessary for the Tribunal to second-guess the litigation value of a particular pleading or motion at the time it was drafted. As already explained, it is not appropriate for the Tribunal to apply hindsight to the legal strategies deployed by the

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1664 Lea Expert Report, para. 50.

1665 *See* Rejoinder, Annex I-9.

1666 Track III Hearing Transcript, Day 4 (23 August 2022), pp. 914-915 (Mittelstaedt). *See also* para. 1079 above.

1667 Colombia is excluded as the drafting activities in Rejoinder, Annex I-4 all took place before 14 February 2011.

1668 *See* Rejoinder, Annexes I-3 to I-9.

Claimants to plan for the potential filing of recognition and enforcement actions, particularly in jurisdictions where the risk of enforcement attempts was significant.[1669]

1101. Accordingly, the Tribunal declines to exclude from compensation the legal fees and expenses incurred by the Claimants in connection with drafting pleadings in jurisdictions where no action was ever filed.

4. Other issues

1102. In this Section, the Tribunal will address other issues raised by the Parties in connection with this category that have not been specifically identified by the Parties as a component. These include: (i) the Respondent's argument that the Claimants would have also engaged in preparatory work in a Treaty-compliant *but-for* scenario;[1670] (ii) the participation of 25 law firms and vendors in defending Chevron across eight jurisdictions;[1671] (iii) the Claimants' alleged profligate spending in preparing for a potential recognition action in the United States;[1672] (iv) the compensation of fees and costs relating to identifying experts and preparing draft expert reports for hypothetical recognition actions;[1673] (v) the compensation of costs of having documents translated in Colombia for annexing to pleadings;[1674] and (vi) the Respondent's argument that the Claimants have failed to demonstrate that they should be awarded fees and expenses for activities unrelated to risk assessment or preparatory work.[1675]

1103. *The Respondent's argument that the Claimants would have engaged in preparatory work in a Treaty-compliant but-for scenario*. The Respondent submits that the Claimants would have also performed risk assessment activities "in the absence of a Treaty breach, even more so given that Chevron would have faced a serious risk of liability in a Treaty-compliant but-for scenario. The fees allegedly incurred in connection with risk assessment activities are thus simply a result of Chevron being a defendant in the Lago

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[1669] *See* paras. 340, 1084 above.

[1670] Rejoinder, para. 1339.

[1671] Rejoinder, para. 1336.

[1672] Rejoinder, para. 1356; Rejoinder, Annexes I-10 to I-13.

[1673] Rejoinder, para. 1359; Rejoinder, Annex I-14.

[1674] Rejoinder, para. 1359; Rejoinder, Annex I-15.

[1675] Rejoinder, paras. 1361-1365.

Agrio Litigation, which was not, on its own, a Treaty breach."[1676] Similarly, the Respondent argues that "just as with the fees Chevron's counsel generated through risk-assessment activities, the fees they generated through preparatory activities are voluntarily incurred expenses not caused by any Treaty breach."[1677]

1104. The Tribunal has already addressed, in paragraphs 378 to 395 above, its consideration of the Parties' arguments regarding a but-for scenario. As discussed in paragraph 390, the applicable but-for scenario must be premised on a hypothetical Lago Agrio Judgment that dismisses the LAPs' diffuse claims and at best ignores their individual claims – that is, a Lago Agrio Judgment finding no liability on Chevron.

1105. As also found by the Tribunal, it is unclear 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 potential enforcement proceedings would have been much more limited in terms of scope and stakes than the real-world Lago Agrio Litigation.[1678]

1106. Against this background, the Tribunal is unpersuaded that the Claimants, faced with more limited stakes in the but-for world, would in all probability have continued to pursue the same global risk assessment and worldwide pre-emptive preparations they undertook when faced with the real-world Lago Agrio Judgment. Critically, in view of the Tribunal's finding that a but-for scenario should depart from a trial-phase Lago Agrio Judgment finding no liability on Chevron, it is uncertain whether the Claimants would have conducted *any* further risk assessment or preparatory work whatsoever after the issuance of such judgment on 14 February 2011. As already explained, this date is both the starting date for the assessment of incidental damages in this Arbitration[1679] and the departing point of the but-for counterfactual.[1680]

1676 Rejoinder, para. 1339.

1677 Rejoinder, para. 1342.

1678 *See* para. 391 above.

1679 *See* para. 1066 above.

1680 *See* para. 390 above.

1107. Accordingly, the Tribunal rejects the Respondent's argument that the Claimants would in all probability have engaged in preparatory work in a Treaty-compliant but-for scenario.

1108. *The participation of 25 law firms and vendors in defending Chevron across eight jurisdictions*. The Respondent is critical of the Claimants' engagement of 25 law firms and vendors in connection with this damages category.[1681]

1109. The Tribunal notes that, of these 25 vendors, ten are law firms that appear to have been engaged for work in a particular jurisdiction (King & Wood Mallesons in Australia; Philippi Prietocarrizosa Ferrero DU & Uria SAS and Medellin Martinez & Duran Abogados SAS in Colombia; Lubis Santosa & Maulana in Indonesia; Miannaya Aja Essien & Associates The Principles Law Partnership in Nigeria; Morgan & Morgan Group and De Castro & Robles in Panama; Angara Abello Concepcion Regala & Cruz in the Philippines; Wong Partnership LLP in Singapore; Despacho de Abogados Miembros de Norton Rose Fulbright SC and Macleod Dixon SC in Venezuela);[1682] nine are U.S. law firms (Gibson, Dunn & Crutcher LLP; Jones Day; Boies Schiller & Flexner LLP; Gardere Wynne Sewell LLP; Rivero Mestre LLP; King & Spalding; Covington & Burling LLP; Three Crowns LLP; and Holland & Knight);[1683] and another five vendors were engaged as experts (Prof Adrian Briggs KC, Mr Marco Cabra, Lord Lawrence Collins, Mr Cesar Coronel Jones, and Ms Linda Silberman).[1684]

1110. While, 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,[1685] the Tribunal has difficulty understanding how the participation of 25 law firms and vendors could reasonably be supposed to be required to assist the Claimants in preparing for potential recognition and enforcement actions in jurisdictions where no such actions were ultimately filed.

[1681] Rejoinder, para. 1336.

[1682] Rejoinder, Annexes I-3 to I-8, I-16 to I-19; **RE-51**, Trunko Expert Report, **SM J-4**.

[1683] Reply, Updated Appendix 2, pp. 403-504; **RE-51**, Trunko Expert Report, **SM J-4**.

[1684] Reply, Updated Appendix 2, pp. 531-532; **RE-51**, Trunko Expert Report, **SM J-4**.

[1685] *See* para. 341 above.

1111. This is particularly true in respect of the United States, where Chevron decided to take affirmative action against potential enforcement attempts by bringing the RICO Litigation, rather than passively wait for an enforcement action to be filed. As more fully explained in Section VIII.G below, by bringing the RICO Litigation Chevron sought to ensure that any enforcement action filed in any U.S. State other than New York would be treated as a compulsory counterclaim of the RICO Litigation and be transferred to the SDNY, thus concentrating all enforcement issues into one specific forum.[1686] As such, preparing for potential recognition and enforcement actions in the United States sought principally to mitigate the risk that the strategy underlying the RICO Litigation would not succeed. In view of the heightened risk of enforcement in the United States, where Chevron has its headquarters and numerous assets,[1687] the Tribunal does not believe that it was unreasonable for the Claimants to display two parallel mitigation strategies – *i.e.*, the RICO Litigation and preparing for potential enforcement attempts – in that jurisdiction. However, in the circumstances, engaging nine U.S. law firms to perform preventive activities would appear to be excessive. Having regard to these factors, the Tribunal is prepared to grant compensation for the legal fees and expenses charged by the first two U.S. law firms that were engaged to prepare for potential enforcement and recognition actions (Jones Day and Gibson, Dunn & Crutcher LLP).[1688] The Tribunal otherwise denies compensation under this heading for the legal fees and expenses charged by all other U.S. law firms engaged by the Claimants (Boies Schiller & Flexner LLP; Gardere Wynne Sewell LLP; Rivero Mestre LLP; King & Spalding; Covington & Burling LLP; Three Crowns LLP; and Holland & Knight).

[1686] *See* paras. 1290-1292 below.

[1687] **C-903,** "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], pp. 13-14: "We note that Chevron, by way of public disclosure on its corproate website, has notable attachable assets located in a number of these jurisdictions, including Alabama, California, Southern Louisiana, Mississippi, Nevada, and New Mexico. Dependent upon the peculiarities of the foreign judgment recognition law in these jurisdictions, among other considerations, the aforementioned states may prove to be especially attractive for enforcement. . ."

[1688] Reply, Updated Appendix 2, pp. 405, 410. The Tribunal notes that Gibson Dunn and Jones Day were also the two U.S. firms with the highest billing in connection with this damages category (USD 12,853,813 and USD 4,853,223, 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 F109 and F175.

1112. As to the remaining jurisdictions with a heightened risk of enforcement (Australia, Colombia, Indonesia, Nigeria, Panama, the Philippines, Singapore, and Venezuela),[1689] to the extent that the goal of preventing the Lago Agrio Judgment from becoming enforceable in those jurisdictions might have required *one* local law firm to undertake such preparatory efforts, or to act 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 local firm that billed the most in each of those jurisdictions, which, with one exception, was also the first local firm to be engaged by Chevron: (i) King & Wood Mallesons (Australia);[1690] (ii) Philippi Prietocarrizosa Ferrero DU & Uria SAS (Colombia);[1691] (iii) Lubis Santosa & Maulana (Indonesia);[1692] (iv) Miannaya Aja Essien & Associates The Principles Law Partnership (Nigeria);[1693] (v) Morgan & Morgan Group (Panama);[1694] (vi) Angara Abello Concepcion Regala & Cruz (the Philippines);[1695] (vii) Wong Partnership LLP (Singapore);[1696] and (viii) Despacho de Abogados Miembros de Norton Rose Fulbright SC (Venezuela).[1697] Otherwise, the Tribunal denies compensation under this heading for the legal fees and expenses charged by all other local firms engaged by Chevron in these jurisdictions (Medellin Martinez & Duran Abogados SAS in Colombia; De Castro & Robles in Panama; and Macleod Dixon SC in Venezuela).

1689 *See* paras. 1080-1082 above.

1690 Reply, Updated Appendix 2, p. 428.

1691 Reply, Updated Appendix 2, p. 413.

1692 Reply, Updated Appendix 2, p. 509.

1693 Reply, Updated Appendix 2, p. 509.

1694 Reply, Updated Appendix 2, p. 430.

1695 Reply, Updated Appendix 2, p. 431.

1696 Reply, Updated Appendix 2, p. 431.

1697 Reply, Updated Appendix 2, p. 426. The Tribunal notes that Macleod Dixon SC was the first firm that was engaged by the Claimants in Venezuela (*see* Reply, Updated Appendix 2, p. 404). Macleod Dixon SC billed USD 252,887 in connection with this damages category (*see* Letter from the Claimants to the Tribunal dated 2 November 2022, Claimants' Damages Model, Vendor Switches, cell F227). By contrast, Despacho de Abogados Miembros de Norton Rose Fulbright SC – the second firm engaged by the Claimants in Venezuela – billed a total of USD 1,159,629 (*see id*, cell F84). Based on these figures, the Tribunal infers that this latter law firm had a much more prominent role than Macleod Dixon SC when undertaking general recognition and enforcement work in Venezuela.

1113. The Tribunal's analysis regarding the engagement of five vendors as experts (Prof Adrian Briggs KC, Mr Marco Cabra, Lord Lawrence Collins, Mr Cesar Coronel Jones, and Ms Linda Silberman)[1698] is addressed separately in paragraphs 1117 to 1118 below.

1114. *The Claimants' alleged profligate spending in preparing for a potential recognition action in the United States*. The Respondent is critical of Chevron's efforts to prepare for a potential recognition action in the United States. According to the Respondent, the Invictus Memorandum showed that the LAPs did not intend to attempt enforcement in the United States unless and until the Lago Agrio Judgment was enforced elsewhere.[1699] As such, the Respondent asserts that it is unreasonable for Chevron to claim USD 18,448,054.37[1700] in legal fees incurred by counsel "imagining and preparing for all permutations of a U.S. recognition action".[1701]

1115. Further, the Respondent notes that Chevron's lawyers gathered evidence inefficiently despite their familiarity with the case records of the RICO and Lago Agrio Litigations, generating at least USD 230,000 in additional fees solely for reviewing the Lago Agrio case.[1702] Additionally, Chevron's U.S. and Venezuelan counsel dedicated at least 214 hours to monitoring cases that would be inconsequential vis-à-vis a U.S. recognition action, despite the fact that lawyers from Jones Day and Gibson, Dunn & Crutcher – Chevron's legal team – handled the defendants' representation in these miscellaneous judgment proceedings.[1703]

1116. The Tribunal recalls that it has already excluded from compensation the legal fees and expenses charged by seven U.S. law firms in connection with this damages category.[1704] Having reached that conclusion, the Tribunal does not consider it necessary to opine further on the substance or magnitude of the Claimants' efforts to prepare for a potential

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[1698] Reply, Updated Appendix 2, pp. 531-532; **RE-51**, Trunko Expert Report, **SM J-4**.

[1699] **C-903**, Patton Boggs, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement," undated [DONZ00032520-51], p. 17; Respondent's Track III Closing Presentation, 7 September 2022, Slide 97.

[1700] **RE-51**, Trunko Expert Report, **SM J-4**.

[1701] Rejoinder, para. 1356.

[1702] Rejoinder, para. 1357; Annex I-10.

[1703] Rejoinder, para. 1358; Annexes I-11 to I-13.

[1704] *See* para. 1111 above.

enforcement action. As already noted, it is not appropriate for the Tribunal to apply hindsight to the legal strategies deployed by the Claimants to plan for the potential filing of recognition and enforcement actions, particularly in jurisdictions where the risk of enforcement was significant.[1705]

1117. *The compensation of fees and costs relating to identifying experts and preparing draft expert reports for hypothetical recognition actions*. The Respondent rejects the Claimants' attempt to obtain reimbursement of legal fees and expenses incurred for time spent identifying experts and preparing draft expert submissions for hypothetical recognition actions.[1706]

1118. Having already ascertained that the requirements of causation and reasonableness for the compensation of incidental damages are met as regards Costs of Planning Against Potential Enforcement in Other Jurisdictions as a category, the Tribunal does not consider it necessary to opine further on the substance or magnitude of the Claimants' efforts to prepare for a potential enforcement action, including the preparation of expert evidence. As already noted, it is not appropriate for the Tribunal to apply hindsight to the legal strategies deployed by the Claimants to plan for the potential filing of recognition and enforcement actions, particularly in jurisdictions where the risk of enforcement was significant.[1707]

1119. *The compensation of costs of having documents translated in Colombia for annexing to pleadings*. The Respondent rejects the Claimants' attempt to obtain reimbursement of legal fees and expenses incurred for time spent by Chevron's Colombian lawyers attending to the translation of over 700 documents that were never used.[1708]

1120. As already noted, Mr Robert A. Mittelstaedt, a partner at Jones Day and witness for the Claimants, explained that preparing to oppose anticipated recognition and enforcement proceedings in multiple jurisdictions around the globe required, among other things, "certified translations and other legalized documents in support of the submission. This

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[1705] *See* paras. 340, 1084 above.

[1706] Rejoinder, para. 1359; Annex I-14.

[1707] *See* paras. 341, 1084 above.

[1708] Rejoinder, para. 1359; Annex I-15.

work could not simply await the filing of an action at some unspecified time in some remote jurisdiction."[1709] Such work concerned, in particular, the following documents:

> Gibson Dunn had developed a core list of documents from the RICO trial and certain 1782s for local counsel in enforcement countries to consider using in their anti-enforcement proceedings. Beyond obtaining certified translations of those documents into several languages, our team worked with Gibson Dunn to obtain certified copies of the English originals whenever possible and have those apostilled by the appropriate authorities. This project was ongoing from late 2011 and well into 2013 and involved multiple trips to at least six Latin American countries.[1710]

1121. Against this background, the Tribunal is convinced that preparing certified Spanish translations of certain key documents for use in Colombia was necessary for the Claimants properly to prepare for the potential filing of a recognition and enforcement action in that country. As already explained, it is immaterial whether those translations were ultimately used or not: the relevant inquiry is whether there was a heightened risk of enforcement activity in Colombia that would have justified more intensive preparations for potential enforcement activity. The Tribunal has already concluded that there was,[1711] particularly in view of the fact that Colombia has ratified the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards[1712] – which, as already explained, the LAPs' counsel considered to be "a fact which should have the effect of significantly streamlining the enforcement process" in that jurisdiction.[1713] Adding to this risk, the 15 October 2012 Order of the Lago Agrio Court provided for the execution of the Lago Agrio Judgment against specific assets owned by one of Chevron's local subsidiaries, citing to the Inter-American Convention on the Enforcement of Preventive Measures.[1714]

[1709] Mittelstaedt Witness Statement, para. 89.

[1710] Mittelstaedt Witness Statement, para. 90.

[1711] *See* para. 1080 above.

[1712] *See* para. 1069 above; **RE-54**, Second Godoy Expert Report, **LUC2-7**.

[1713] *See* para. 1069 above.

[1714] **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, p. 6: "In relation to the assets that the petitioner has identified in the Republic of Colombia, the request is for a 'seizure order and a prohibition against transfer,' likewise, over a series of assets that are under the control and total ownership of the debtor under execution in this proceeding, through a series of subsidiaries and a Colombian branch, Chevron Petroleum Company – Colombia Branch. Thus, under the same argument, the claim is granted, and as a result, the court orders 'the freezing of all credits, present and future, of those that Chevron Corp., through its controlled

1122. *The Respondent's argument that Claimants have failed to demonstrate that they should be awarded fees and expenses for activities unrelated to risk assessment or preparatory work*. The Respondent argues that the Claimants have failed to demonstrate that they should be awarded fees and expenses for activities of counsel unelated to risk assessment or preparatory work. According to the Respondent, the invoice data shows that Chevron's lawyers routinely billed for activities such as (i) developing offensive strategies against the LAPs; (ii) retaliating against Ecuador; (iii) advising Chevron regarding U.S. securities law compliance; and (iv) administrative work relating to firm management.[1715]

1123. In particular, the Respondent refers to activities of Chevron's attorneys in Colombia, the Philippines, the United States, and Venezuela in researching "offensive strategies", *i.e.*, possible affirmative actions against the LAPs, their attorneys, and their funders.[1716] The Respondent also points to time entries concerning Chevron's petition to the U.S. Trade Representative to deny Ecuador trade preferences as non-compensable retaliatory activities.[1717] Further, the Respondent highlights time charges for work relating to U.S. securities law compliance,[1718] as well as fees charged by Chevron's lawyers for administrative tasks including running internal conflict checks, preparing budgets,[1719] and handling "billing issues".[1720] According to the Respondent, these fees, amounting to approximately USD 185,519.09 for this component, were neither causally connected to a Treaty breach nor reasonable or necessary in preparing to defend Chevron in potential recognition and enforcement actions, and hence should be excluded from compensation.[1721]

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company, Chevron Petroleum Company Colombian branch, identified with the tax identification number 860.005.223-9 is a creditor, and whose debtor is any of the following companies . . . Likewise, the order is given to 'prohibit the transfer of all the commercial establishments that has registered the Colombian branch of Chevron Petroleum Company,' however, the official letters indicated by the petitioner shall be ordered and processed by the Colombian authority, together with any other requisite that is required for the application of the provisions in the [Inter-American Convention on the Enforcement of Preventive Measures]."

1715 Rejoinder, para. 1361.

1716 Rejoinder, para. 1362; Annex I-27, entries 23-37.

1717 Rejoinder, para. 1363; Annex I-27, entries 1-3.

1718 Rejoinder, para. 1364; Annex I-24, row 4.

1719 Rejoinder, para. 1365; Annex I-25.

1720 Rejoinder, para. 1365; Annex I-26.

1721 *See* Rejoinder, Annex I-24 to I-27, excluding entries prior to 14 February 2011.

1124. Since the Parties have already identified (i) allegedly non-defence related activities, (ii) activities allegedly relating to Government Relations, including USTR, and (iii) alleged administrative and clerical activities as cross-cutting elements impacting multiple categories,[1722] the Tribunal will address these issues together with other elements in Section VIII.N below.

4. Conclusion on Costs of Planning Against Potential Enforcement in Other Jurisdictions

1125. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Costs of Planning Against Potential Enforcement in Other Jurisdictions category of damages as a whole;

(ii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants under this category corresponding to services rendered before 14 February 2011;

(iii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants under this category corresponding to services provided by the firms Boies Schiller & Flexner LLP; Gardere Wynne Sewell LLP; Rivero Mestre LLP; King & Spalding; Covington & Burling LLP; Three Crowns LLP; Holland & Knight; Medellin Martinez & Duran Abogados SAS; De Castro & Robles; and Macleod Dixon SC;

(iv) Defers its determination regarding the compensation of the legal fees and expenses identified in paragraphs 1122 to 1124 above 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 Costs of Planning Against Potential Enforcement in Other Jurisdictions category of damages, to the extent not already addressed in

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1722 *See* para. 571 above.

this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[1723] and

(vi) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Costs of Planning Against Potential Enforcement in Other Jurisdictions category of damages. The Tribunal will determine the exact amount of compensation corresponding to the Costs of Planning Against Potential Enforcement in Other Jurisdictions category in Section VIII.O below.

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[1723] *See* paras. 564-566 above.

G. RICO LITIGATION

1126. The Claimants seek USD 323,180,099.51 as direct damages for the legal fees and expenses they allege to have incurred between January 2009 and December 2018 in the RICO Litigation initiated by Chevron. According to the Claimants, these damages are a "natural and foreseeable result of Ecuador's breach of the Umbrella Clause, its denial of justice, and its breach of the Tribunal's Interim Orders and Awards."[1724] In the alternative, the Claimants submit that they are entitled to recover these expenses as incidental damages.[1725]

1127. The Claimants assert that this sum represents "574,335.5 hours expended by ten different law firms, experts, and other vendors over a time period spanning nearly a decade",[1726] in the litigation commenced by Chevron on 1 February 2011 before the U.S. District Court for the Southern District of New York (defined earlier as the "SDNY") under, *inter alia*, 18 U.S.C. Section 1962, the Racketeer Influenced and Corrupt Organizations Act ("**RICO**"), leading to the RICO Judgment of 4 March 2014 (the "**RICO Judgment**"),[1727] which was affirmed by the U.S. Court of Appeals for the Second Circuit (the "**Second Circuit**") in its judgment of 8 August 2016[1728] and by the U.S. Supreme Court's denial of the appellants' petition for *certiorari* on 19 June 2017.[1729]

1128. The Respondent argues that the Claimants are not entitled to any of the legal fees and expenses they claim for the RICO Litigation, principally on two grounds: (i) a reasonable observer could not have foreseen that Chevron would bring a RICO action; and (ii) the fees and costs incurred by Chevron from the RICO Litigation were patently and objectively unreasonable. Consequently, the Respondent considers that this entire

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1724 Reply, para. 794.

1725 Reply, para. 794.

1726 Reply, para. 794.

1727 **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014.

1728 **C-2865**, *Chevron Corp. v. Donziger*, 833 F.3d 74, 122 (2d Cir. 2016) Case (WL 2019).

1729 **C-2542**, U.S. Court of Appeals for the Second Circuit, denying the petition for a writ of certiorari in *Steven Donziger, et al. v. Chevron Corporation*, Case No. 16-1178, 19 June 2017.

category of damages is non-compensable.[1730] The Respondent also contests the compensability of a number of identified components under this damages category.[1731]

1. The Claimants' Position

(a) Description of the Proceedings[1732]

1129. The Claimants recall that Chevron initiated the RICO Litigation before the SDNY against Mr Steven Donziger, the Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC (collectively, the "**Donziger Defendants**"); Stratus Consulting and two of its employees, Ms Ann Maest and Mr Douglas Beltman (collectively, the "**Stratus Defendants**"); Messrs Pablo Fajardo and Luis Yanza, the Ecuadorian representatives of the LAPs; and the alleged "front" organizations ADF and Selva Viva (the Donziger Defendants, the Stratus Defendants, Messrs Fajardo and Yanza, and ADF and Selva Viva are collectively referred to as the "**RICO Defendants**").[1733] Chevron also impleaded the individual LAPs in relation to other causes of action pursued in the RICO Litigation.[1734] Chevron accused the defendants of engaging in "a wide-ranging scheme to defraud and extort Chevron" by, among others, unlawfully procuring and ghostwriting the Lago Agrio Judgment.[1735] Chevron successfully obtained injunctive relief in the RICO Litigation preventing the Donziger Defendants and the LAPs from taking any steps to recognize and enforce the Lago Agrio Judgment in the United States. As of the date of the Claimants' Memorial dated 31 May 2019, Chevron remained involved in the RICO Litigation due to

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[1730] Rejoinder, para. 1208-1209.

[1731] *See* Letter from the Respondent dated 21 October 2022.

[1732] For a detailed description of the chronology of these proceedings, *see generally* Appendix 9 to the Claimants' Memorial.

[1733] The Tribunal notes that Chevron, in its Amended Complaint in the RICO Litigation, used the term "RICO Defendants" to refer to a specific subset of defendants charged under Counts 1 and 2 (for violation of RICO and conspiracy to violate RICO), which include the Donziger Defendants, the Stratus Defendants, Messrs. Fajardo and Yanza, ADF, and Selva Viva. For the avoidance of doubt, the Tribunal adopts the same terminology in this Award and shall accordingly use the term "RICO Defendants" to refer to this particular subset of defendants under Counts 1 and 2 of the RICO Litigation. On the other hand, where the Tribunal uses the non-capitalized term "defendants", *i.e.*, "RICO defendants", it does so in reference to all defendants in the RICO Litigation, including those not charged under Counts 1 and 2.

[1734] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, paras. 7-21.

[1735] Memorial, paras. 282-284. Specifically, Chevron alleged violations under the RICO and several common law torts under New York law. *See* **C-2865**, *Chevron Corp. v. Donziger*, 833 F.3d 74, 122 (2d Cir. 2016) Case (WL 2019).

various outstanding motions regarding, for example, Mr Donziger's alleged violations of the injunction.[1736]

1130. The Claimants argue that the defendants, who were represented by prominent counsel and raised almost USD 30 million to support their activities, pursued "a strategy of obstruction", including through discovery obstruction, meritless appeals and petitions, and even challenging Judge Lewis A. Kaplan of the SDNY.[1737]

1131. The Claimants explain that in March 2011, the SDNY granted Chevron's request for a global preliminary injunction to prevent any enforcement activity pending resolution of the RICO Litigation. The SDNY subsequently granted the company's motion to bifurcate its request for a declaratory judgment that the Lago Agrio Judgment was non-recognizable and unenforceable.[1738] However, in September 2011, the Second Circuit reversed the preliminary injunction and dismissed the bifurcated request, following which Chevron pursued numerous motions before the SDNY to mitigate the risk of enforcement activity.[1739] The Claimants also note that Chevron was forced to litigate many complex discovery-related issues, including "frivolous and dilatory" tactics of the defendants that required significant resources to challenge and address.[1740]

1132. According to the Claimants, following a trial held from 15 October through 26 November 2013, the SDNY issued an opinion on 4 March 2014 finding that some of the defendants had violated the RICO statute and enjoining them from seeking to enforce the Lago Agrio Judgment in the United States.[1741] The Second Circuit appellate court later rejected the

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[1736] Memorial, paras. 285-286.

[1737] Memorial, paras. 288-289.

[1738] The Claimants indicate that work began in January 2009. Memorial, paras. 290-291; **C-972**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691, United States District Court for the Southern District of New York, Opinion, 7 March 2011; **C-975**, *Chevron Corp. v. Steven Donziger*, No. 11CV691(LAK) SDNY, 15 April 2011 (Scheduling Order to Count Nine).

[1739] Memorial, paras. 292-293; **C-3039**, *Chevron Corp. v. Pablo Fajardo Mendoza*., Docket for Case No. 11-1150 (2d Cir.), referencing Order, 12 May 2011.

[1740] Memorial, para. 294.

[1741] Memorial, para. 295; **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014; **C-2865**, *Chevron Corp. v. Donziger*, 833 F.3d 74, 122 (2d Cir. 2016) Case (WL 2019).

defendants' appeal and affirmed the SDNY's decision, and the U.S. Supreme Court ultimately denied Mr Donziger's petition for *certiorari* in June 2017.[1742]

(b) Costs Incurred

1133. Observing that the RICO statute requires proving that defendants violated multiple federal criminal laws over time and in connection with the operation of an enterprise, the Claimants argue that prosecuting this lawsuit required a substantial amount of attorney time due to the inherent complexity of the action, as well as Mr Donziger's obstructive efforts.[1743] In particular, the Claimants break down Chevron's "significant" expenses into seven general sub-categories, which they describe below:

(i) preparing and filing the complaint and an amended complaint in 2011, which involved additional expenses in connection with their service to the defendants residing in Ecuador;[1744]

(ii) extensive discovery, investigation, and related activity through which Chevron sought and obtained "devastating" evidence, including documents, testimony and written discovery from the defendants, their former counsel, and various vendors and other related entities, as well as time devoted to responding to the defendants' discovery requests and overall obstructive behaviour;[1745]

(iii) rebutting the defendants' assertions that Ecuadorian law applied to various issues in the case, which required retaining Ecuadorian legal experts, analysing Ecuadorian and U.S. sources, and deposing the defendants' Ecuadorian legal experts;[1746]

1742 Memorial, para. 296.

1743 Memorial, para. 297.

1744 Memorial, para. 298.

1745 Memorial, paras. 299-307.

1746 Memorial, para. 308.

(iv) proving that Mr Donziger had engaged in several RICO-predicate financial crimes, which was central to several aspects of the case and required the services of not only attorneys, but also financial and accounting professionals;[1747]

(v) motion practice and hearings, including those related to the bifurcated proceedings, the Second Circuit appeals, and the *certiorari* petition;[1748]

(vi) expenses incurred during the seven-week trial on the merits, which involved 31 witnesses testifying in person and 37 depositions offered into evidence, and was also affected by Mr Donziger's "obstructive conduct" during the pre-trial proceedings and through trial;[1749] and

(vii) post-judgment expenses, including in connection with Mr Donziger and the LAPs' refusal to pay the fees of the "Special Masters" responsible for supervising the depositions of key witnesses.[1750]

1134. The Claimants insist that the RICO Litigation was crucial to prove the fraud in the Lago Agrio Litigation and uncover important evidence used in this Arbitration, as well as to prevent the enforcement of the Lago Agrio Judgment.[1751]

1135. The Claimants further assert that there is no risk of double recovery on these fees and expenses, explaining that the SDNY has not yet ruled on Chevron's 2014 motion for a small portion of its attorney's fees, except for a judgment related to the Special Masters' costs, which remains on appeal and "largely unsatisfied".[1752] Even if the SDNY were to award the entirety of the requested fees, the Claimants opine that there is minimal chance of recovering them, and confirm in any event that Chevron will not seek or accept any double recovery of any amounts actually collected.[1753]

1747 Memorial, para. 309.

1748 Memorial, para. 310.

1749 Memorial, para. 311.

1750 Memorial, para. 312.

1751 Memorial, para. 313.

1752 Memorial, para. 319.

1753 Memorial, para. 319.

(c) Request for Full Reparation of Direct Damages

1136. The Claimants submit that the Respondent must make full reparation for Chevron's RICO Litigation costs as direct damages, to the extent that they are the natural, foreseeable, and proximate result of Ecuador's Treaty breaches.[1754]

1137. In the Claimants' view, it is natural and foreseeable that Chevron would take all reasonable steps to (i) bring the fraud to light while resisting enforcement of the Lago Agrio Judgment; and (ii) hold the fraudsters responsible for their wrongful conduct under applicable U.S. laws, including RICO, especially considering that, during the pendency of the RICO Litigation, Ecuador continued to support the LAPs' efforts to enforce the Judgment.[1755] The Claimants highlight that Ecuador had repeatedly ignored the mounting evidence of fraud provided by Chevron, while the latter was especially concerned about the risk of a potential enforcement action in the United States, where Chevron has substantial assets.[1756]

1138. Similarly, the Claimants assert that the Respondent's Treaty breaches proximately caused Chevron's fees and costs in the RICO Litigation, since the cause of the Claimants' harm resulting from the denial of justice was (i) Judge Zambrano's acceptance of a bribe in return for permitting the LAPs' representatives to ghostwrite the judgment; and (ii) that the judgment ghostwriting scheme included the preparation of the fraudulent Cabrera Reports.[1757] In the Claimants' view, whether the RICO Litigation involved claims against non-State actors is irrelevant, since, under international law, the Respondent may not invoke concurrent causes, such as the LAPs or their counsel, to allege a break in the causal chain excusing the State's liability for its wrongful acts.[1758]

1139. According to the Claimants, several factual considerations illustrate how the RICO Litigation "naturally flowed" from Ecuador's breaches and the surrounding circumstances, including that (i) the fraud was beginning to come to light in 2009 and

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[1754] Memorial, para. 315; Reply, para. 794.

[1755] Memorial, para. 316; Reply, paras. 797-798.

[1756] Reply, para. 796; Fourth Veiga Witness Statement, paras. 67, 71.

[1757] Reply, para. 798; Track II Award, paras. 5.230, 5.247.

[1758] Memorial, para. 317.

2010; (ii) Ecuador demonstrated that "it would turn a blind eye" to allegations of fraud and corruption; (iii) U.S. courts were willing to entertain these allegations; (iv) the LAPs planned enforcement actions in the United States; (v) the Lago Agrio Judgment was potentially massive and anticipated in early 2011; and (vi) Ecuador failed to comply with the Tribunal's Interim Orders and Awards.[1759]

1140. The Claimants assert that it was foreseeable that Chevron would seek to prevent enforcement of the Lago Agrio Judgment in the United States, its home jurisdiction, and hold those responsible for the fraud "accountable under the law."[1760] It was equally foreseeable, according to the Claimants, that the first jurisdiction of the LAPs' intended enforcement actions would be the United States, where (i) Chevron is headquartered and incorporated and has assets; (ii) much of the ghostwriting took place; and (iii) courts allow broad discovery and are "respected" in such way that they could give "credibility" to the enforcement initiative or to a declaration of fraud, as the case may be.[1761]

1141. The Claimants further underscore that the RICO Litigation served to resist enforcement of the Lago Agrio Judgment in the United States and generated evidence of the fraud that was "instrumental" in Chevron's efforts to oppose enforcement actions in other jurisdictions, which treated the RICO Judgment "as persuasive authority".[1762] The Claimants reject the suggestion that Chevron should or could have pursued a common law fraud claim, noting in any event that it is not up to the Respondent to self-servingly dictate, in hindsight, the best legal strategy for Chevron.[1763]

1142. Finally, even if the Tribunal were to find that the RICO Litigation was not foreseeable, the Claimants posit that the expenses arising from this litigation would still constitute

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1759 Reply, paras. 799, 803; Track II Award, paras. 1.16, 4.199, 4.272-4.275, 4.277, 4.324-4.327, 4.385, 5.235, 7.169, 8.33-8.34, 8.76; Lea Expert Report, para. 63.

1760 Reply, para. 798.

1761 Reply, paras. 800-802.

1762 Reply, paras. 804-805; Fourth Veiga Witness Statement, para. 73; Seley Witness Statement, para. 87; Litvack Expert Report, para. 111; Lea Expert Report, para. 67.

1763 Reply, paras. 806-807. *See* **C-3198**, *Pasternack v. Lab'y Corp. of Am. Holdings*, 27 N.Y.3d 817, 59 N.E.3d 485 (2016).

proximate or direct damages arising from Ecuador's Treaty breaches, because both Ecuador and the LAPs intended to inflict this type of harm on Chevron.[1764]

(d) Request for Full Reparation of Incidental Damages

1143. In the alternative, the Claimants submit that they are entitled to recover the legal fees and expenses incurred in the RICO Litigation as incidental expenses geared towards mitigating the harm arising from the Respondent's international delicts, as well as providing crucial evidence for this Arbitration.[1765]

1144. First, the Claimants contend that the RICO Litigation was a reasonable and calculated mitigation measure that prevented the enforceability of the Lago Agrio Judgment in the United States. The RICO Litigation was expected and proved to be successful, and the expense incurred was proportionate to the imminent threat of great harm.[1766] Indeed, until the issuance of the Track II Award, the March 2014 RICO judgment and the April 2018 default judgment "provided the principal bulwark protecting Chevron's assets against attachment or seizure" in the United States. The RICO Judgment thus provided important protection that the Claimants would not have required had the Respondent prevented the Lago Agrio Judgment from becoming enforceable as directed by the Tribunal.[1767]

1145. According to the Claimants, the filing of the RICO Litigation before the issuance of the Lago Agrio Judgment does not change the analysis because incidental damages can be incurred "pre-emptively" to avert the harm threatened. In fact, filing the RICO Litigation before the SDNY, after some of the evidence was coming to light but before the Lago Agrio Judgment was issued, helped mitigate the harm to the Claimants by effectively concentrating all enforcement issues into one specific forum, thus limiting the LAPs'

[1764] Reply, para. 808.

[1765] Reply, paras. 794, 809.

[1766] Reply, paras. 810-811, 822. The Claimants also suggest comparing these costs with the price and effectiveness of the bond which the Tribunal found the Claimants were not required to pay in the Lago Agrio Litigation. *See id.* at 812.

[1767] Reply, para. 813.

options about when and where they could commence their U.S. enforcement campaign.[1768]

1146. The Claimants further reject the opinion of the Respondent's U.S. law expert, Dr Stacie Strong, that the RICO Litigation was not a necessary or efficient means of preventing enforcement. The Claimants argue that (i) a passive strategy of waiting and resisting enforcement actions "would have been irresponsible" and "devoid of business and legal sense" given the substantial and imminent risk that Chevron faced at the time; (ii) Dr Strong fails to explain how a reasonable claimant stood to gain by adopting an inferior litigation strategy; (iii) Chevron needed to be proactive, since a "sit and wait" approach would have likely led to a disruption of the company's operations if the LAPs had been able to file multiple enforcement actions in various states of the United States; (iv) Dr Strong's analysis of the complexity of the RICO Litigation bolsters Chevron's claim that the legal fees and expenses it paid were reasonable; and (v) pursuing a "more robust" RICO action entailed a higher bar, but provided a means to prosecute this type of criminal enterprise in a civil action, while the evidence gleaned could be valuable for other proceedings.[1769]

1147. *Second*, the Claimants stress that the RICO Litigation provided valuable evidence that the Tribunal used in finding the Respondent's breaches of international law in the Track II Award. According to the Claimants, many of the witness testimonies and documents proffered in the RICO Litigation had a direct bearing on the questions involved in this Arbitration regarding Ecuador's responsibility for the ghostwriting and extortion scheme surrounding the Lago Agrio Judgment.[1770] In particular, the Claimants highlight the following pieces of evidence:

(i) Judge Zambrano's testimony, which was given "great importance", proved to have "mitigated" the effects of otherwise unavailable evidence and assisted the Tribunal

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[1768] Reply, paras. 814-815; **RLA-738**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 306; Lea Expert Report, para. 66.

[1769] Reply, paras. 816-822; Fourth Veiga Witness Statement, para. 75; Lea Expert Report, paras. 63-64, 66 (emphasis omitted); First Silver Expert Report, paras. 128, 131, 177.

[1770] Reply, paras. 823-825; Track II Award, paras. 1.40, 4.25, 4.28.

in determining that the LAPs ghostwrote the Lago Agrio Judgment, even if it rejected the truthfulness of Judge Zambrano's sworn assertions;[1771]

(ii) Mr Donziger's testimony and personal notebook, which the Tribunal used to support its findings about the LAPs' representatives' "malign conduct towards the Respondent's legal system", the ghostwriting of the Cabrera Report by Stratus Consulting, and the ghostwriting of the Lago Agrio Judgment;[1772] and

(iii) Judge Guerra's testimony and physical evidence (such as his personal computer and bank records) which corroborated the other evidence of ghostwriting and his later testimony at the Track II Hearing.[1773]

1148. Third, the Claimants reiterate that it was reasonable and proportionate for Chevron to bring the RICO Litigation in order to prevent the enforcement of a "correctly anticipated" fraudulent, multi-billion dollar judgment. The proceedings in the Lago Agrio Litigation at that time, as well as discovery actions in the United States, provided evidence of the LAPs' fraud that implicated Ecuador as well as their intent to immediately enforce the fraudulent judgment. It would have been "foolish" for Chevron to sit idly by and not mitigate a foreseeable harm.[1774]

1149. As for the reasonableness of Chevron's expenses, the Claimants assert that this is supported by the fact that Chevron incurred them even without any guarantee of recovery.[1775] The Claimants further argue that:

(i) The fact that the global preliminary injunction ordered by the SDNY in 2011 was subsequently vacated by the Second Circuit does not mean that Chevron's RICO

[1771] Reply, paras. 826-833; Track II Award, paras. 4.8-4.25; 5.17, 5.135-5.150, 5.17, 5.150, 5.228; Transcript of Procedural Hearing, 20-21 January 2014, Day 2, p. 267.

[1772] Reply, paras. 834-839; Track II Award, paras. 4.27-4.29, 4.224-4.225, 4.232, 4.235, 4.237, 4.241, 4.253, 4.259, 4.263, 4.267, 4.270, 4.288, 4.302-4.303, 4.310, 4.318, 4.344-4.345, 4.473, 5.161-5.164, 5.229, 5.231.

[1773] Reply, paras. 840-842; Track II Award, paras. 4.37-4.38, 4.352, 4.356, 4.359, 4.362, 4.364, 4.365, 4.366, 4.371, 4.372, 4.373, 4.375, 4.405, 5.157.

[1774] Reply, paras. 843-845.

[1775] Reply, paras. 846-848; Lea Expert Report, para. 43; Litvack Expert Report, para. 41; Miller Expert Report, para. 57.

strategy was unsuccessful or otherwise unreasonable, considering that it resulted in a permanent injunction against any enforcement in the United States;[1776]

(ii) While Chevron did not prevail on all of its claims, none of those claims were vexatious or patently unmeritorious, and Chevron was "the clear winner in the RICO litigation", since the critical factor is "the degree of success obtained";[1777]

(iii) Chevron's basis for claiming costs incurred in the RICO Litigation is not U.S. federal law but international law, to the extent that Ecuador's breaches were the natural and foreseeable cause of the RICO Litigation and the Claimants' damages in this category;[1778]

(iv) It is irrelevant if certain law firms did not formally appear in the RICO Litigation, since Ecuador's breach of its international law obligations entitles Chevron to full reparation including all of the fees it incurred in connection with the RICO Litigation;[1779]

(v) Chevron undertakes in good faith not to seek or accept double recovery of any amounts actually collected in other proceedings;[1780]

(vi) Ecuador's concerns about double-billing have been addressed by Chevron's production of the underlying invoices supporting the claimed fees and costs;[1781] and

(vii) Seeking to hold Mr Donziger and others accountable for fraud and corruption and to prevent them from continuing to enforce a fraudulent judgment "is hardly a vendetta", while the post-judgment filings identified by the Respondent are lawful and legitimate remedies available to Chevron.[1782]

[1776] Reply, paras. 849-852.

[1777] Reply, para. 853.

[1778] Reply, para. 854.

[1779] Reply, para. 855.

[1780] Reply, para. 856.

[1781] Reply, para. 857.

[1782] Reply, para. 858.

2. The Respondent's Position

1150. The Respondent rejects the Claimants' submission that they are entitled to the legal fees and expenses from the RICO Litigation on two grounds: (i) a reasonable observer could not have foreseen that the Claimants would bring a RICO action; and (ii) the fees and costs incurred by Chevron from the RICO Litigation were unreasonable.[1783]

(a) Unforeseeable and Unintended Consequences

1151. The Respondent argues that a reasonable observer could not have foreseen that the Claimants would bring a RICO action – designed to combat organized crime groups, with its attendant complicated, onerous burdens of proof – to forestall the enforcement of the Lago Agrio Judgment before it was even entered or became enforceable.[1784] Consequently, the Respondent submits that the alleged fees and expenses from the RICO Litigation are not compensable as direct damages.[1785]

1152. In particular, the Respondent maintains that the RICO Litigation was not a predictable response to the Treaty breaches in the context where Texaco assured the SDNY that it would contest an Ecuadorian judgment "only in the limited circumstances permitted by New York's Recognition of Foreign Country Money Judgment Act."[1786] As such, it was not foreseeable that Chevron would deviate from its predecessor's explicit commitment and instead launch a novel offensive under the complex federal RICO statute.[1787]

1153. In support of its contention, the Respondent refers both to the Second Circuit and the opinion of the Claimants' experts, all of which agree with the Respondent that the Claimants' resort to a RICO action was "unorthodox", "innovative," and a "masterstroke".[1788]

[1783] Rejoinder, para. 1208.

[1784] Rejoinder, paras. 1211-1213.

[1785] Rejoinder, para. 1211.

[1786] Rejoinder, para. 1214; **R-4**, Texaco Inc.'s Reply Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, *Aguinda v. Texaco, Inc.*, Case No. 93-Civ-7527 (SDNY), 25 January 1999, p. 21.

[1787] Rejoinder, para. 1214.

[1788] Rejoinder, paras. 1215-1216; **R-1563**, *Chevron Corp. v. Donziger*, 533 F.3d 74 (2d Cir. 2016), 8 August 2016, p. 137; Silver Expert Report, para. 177; Lea Expert Report, para. 63.

1154. For the Respondent, it was also not foreseeable that the Claimants would try to use a single expensive action in the United States to prevent pre-emptively the global enforcement of the Lago Agrio Judgment.[1789] In this respect, the Respondent emphasizes that the preliminary injunction entered by the SDNY was vacated by the Second Circuit on the grounds that such a global injunction against the enforcement of a foreign judgment was "radical" and would cause "grave[]" comity concerns.[1790]

1155. Furthermore, the Respondent rejects the Claimants' contention that the Respondent intended to inflict harm on the Claimants or that it intended the Claimants to pursue the RICO Litigation.[1791] Nor did the Respondent intend for the Claimants to bring a complicated and expensive pre-emptive lawsuit in the United States in response to the Treaty breaches.[1792] The Respondent criticizes the Claimants' reliance on the Invictus Memorandum to argue otherwise, asserting that Ecuador "had absolutely nothing to do with the Invictus Memo."[1793] The Respondent underscores that, as found by the Tribunal, Ecuador is separate and apart from Mr Donziger and the LAPs and that the conduct of the LAPs and their representatives is "not attributable to the Respondent under international law."[1794]

(b) Unreasonableness of the Fees

1156. Second, the Respondent submits that the Claimants are not entitled to recover fees and expenses from the RICO Litigation – regardless of whether they are characterized as direct or indirect damages – because the Claimants' expenditures were simply unreasonable.[1795] Specifically, the Respondent avers that it has no duty to finance "a bloated action", which was "neither necessary nor the most economical or efficient means

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[1789] Rejoinder, para. 1217.

[1790] Rejoinder, para. 1218; **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012, p. 244.

[1791] Rejoinder, paras. 1220, 1223.

[1792] Rejoinder, para. 1221.

[1793] Rejoinder, para. 1222.

[1794] Rejoinder, para. 1222; Track II Award, para. 5.229.

[1795] Rejoinder, para. 1225.

of preventing the enforcement of the Lago Agrio Judgment" in the United States or elsewhere in the world.[1796]

1157. Considering that only one out of the nine separate claims in the RICO Litigation – Count 3, for common law fraud – provided the basis for preventing the LAPs from enforcing the Lago Agrio Judgment in the United States, the Respondent argues that the Claimants could have pursued other less expensive means to achieve the same result.[1797] The Respondent further highlights that Chevron asserted only the common law fraud claim against all of the RICO Defendants, whereas it asserted the RICO counts against a subset that did not even include the LAPs.[1798] Even Chevron, according to the Respondent, conceded that its RICO claim was superfluous and immaterial and that, as opined by Prof Silver, the complexity of the RICO claim is what drove Chevron's legal fees and expenses.[1799]

1158. Accordingly, it is the Respondent's submission that a "cheaper" fraud claim could have prevented enforcement of the Lago Agrio Judgment in the United States, in particular, when bringing a RICO claim to prevent enforcement of a foreign judgment was unprecedented, uncertain, and risky.[1800]

1159. Furthermore, to the extent that the Claimants argue that the RICO Litigation was reasonable because it facilitated the Claimants' goal to preclude enforcement of the Judgment on a global scale, the Respondent points out that the Second Circuit vacated the preliminary injunction and dismissed Count 9, holding that neither the New York Recognition Act nor the Declaratory Judgment Act could be used "to declare the []enforceability of a foreign judgment before the putative judgment-creditor could seek"

[1796] Counter-Memorial, para. 741; Rejoinder, para. 1227; **RE-44**, First Strong Report, para. 7.

[1797] Counter-Memorial, para. 756; Rejoinder, para. 1228; **R-1563**, *Chevron Corp. v. Donziger*, 533 F.3d 74 (2d Cir. 2016), 8 August 2016, p. 140.

[1798] Counter-Memorial, para. 757; Rejoinder, paras. 1229-1230; **R-1819**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, paras. 388-395.

[1799] Rejoinder, paras. 1229, 1231; Silver Expert Report, para. 177; **R-2106**, *Steven Donziger et al v. Chevron Corporation*, 137 S. Ct. 2268, No. 16-1178, Brief in Opposition in Petition for a Writ of Certiorari, 5 May 2017, pp. 3, 26; Memorial, Appendix 9, para. 8.

[1800] Counter-Memorial, para. 752; Rejoinder, para. 1233.

enforcement.[1801] Thus, the Respondent emphasizes that the Claimants did not get the global injunction that they insist justifies their expenditures.[1802]

1160. Similarly, as opined by Dr Strong, the Respondent posits that the constructive trust that the SDNY ultimately ordered in the RICO Litigation is unlikely to be enforceable outside the United States because it is a uniquely American doctrine that has no civil law counterpart.[1803]

1161. Contrary to what the Claimants suggest, the Respondent contends that there was no urgency in defending against the Lago Agrio Judgment such that it was necessary for Chevron to incur the costs of the RICO Litigation.[1804] Further, there was no basis to believe that the LAPs would have tried to enforce in multiple U.S. jurisdictions simultaneously.[1805] Rather, the Invictus Memorandum, the Respondent notes, advised the LAPs not to seek enforcement in the United States without first obtaining favourable rulings in other jurisdictions.[1806] As demonstrated in their media statements, it was likewise "clear" to the Claimants' attorneys at the time that they did not anticipate the LAPs bringing an enforcement action in the United States.[1807]

1162. In fact, the Respondent submits that a reasonable litigant would have waited for the LAPs to attempt to enforce the Lago Agrio Judgment because it would have been far more economical, and more effective, for Chevron to defend against a U.S. recognition action.[1808] This is because, as explained by Professor Strong, recognition actions are

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1801 Counter-Memorial, para.742; Rejoinder, para. 1241; **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012, pp. 245-246.

1802 Rejoinder, para. 1234.

1803 Counter-Memorial, para. 743; Rejoinder, para. 1235; **RE-44**, First Strong Report, para. 88.

1804 Rejoinder, para. 1238.

1805 Counter-Memorial, para. 753.

1806 Rejoinder, para. 1238; **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], p. 17.

1807 Rejoinder, para. 1239; **R-2071**, Randy Mastro on The $8 Billion Lawyer Joke, *Wall St. J. Opinion Journal*, *available at* https://www.wsj.com/video/opinion-the-8-billion-lawyer-joke/43F54BBB-9A9C-48F8-A1A1-C6E214FD08B2.html, 7 February 2012.

1808 Counter-Memorial, para. 749.

relatively straightforward and faster than a RICO action.[1809] Dr Strong adds that if Chevron defeats a U.S. enforcement action, that defeat would have precluded subsequent enforcement actions in other U.S. courts pursuant to the U.S. Constitution's Full Faith and Credit Clause and the doctrine of collateral estoppel.[1810]

1163. In the Respondent's view, the Claimants' rush to New York to pursue the RICO Litigation may have been counter-productive, considering that New York is widely considered an enforcement-friendly jurisdiction and that the court could have found the RICO Litigation to be an improper anticipatory suit, which, in turn, would not have precluded the LAPs from bringing an enforcement action in the United States.[1811]

1164. While the Respondent believes it is "improper" to bring a proceeding in the United States for the purpose of obtaining discovery for use in another proceeding, it also avers that the Claimants have, in any event, failed to identify evidence gathered solely from the RICO Litigation that was integral to this Arbitration or to any enforcement proceedings.[1812]

1165. According to the Respondent, the Claimants have conceded in their earlier filings that they obtained much of the evidence presented in the RICO Litigation elsewhere and made "extensive use" of its Section 1782 evidence in the RICO Litigation.[1813] The Respondent further points out that the majority of the evidence on which the Tribunal allegedly relied is trial testimony, not the product of discovery.[1814] Even assuming that crucial evidence was obtained in the RICO Litigation, the Respondent maintains that the cost-benefit analysis does not justify spending a purported USD 330 million in the RICO Litigation when lower-cost proceedings could have yielded the same evidence.[1815] In this respect, the Respondent, relying on Dr Strong's opinion, argues that Chevron would have been

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1809 Counter-Memorial, paras. 750-751; Rejoinder, para. 1240; **RE-44**, First Strong Report, paras. 50-56; **RE-62**, Second Strong Expert Report, paras. 63-72.

1810 Counter-Memorial, para. 749; **RE-44**, First Strong Report, paras. 39, 45.

1811 Rejoinder, paras. 1242, 1245; **RE-62**, Second Strong Expert Report, paras. 59-60.

1812 Counter-Memorial, para. 740; Rejoinder, para. 1253; **RE-62**, Second Strong Expert Report, para. 75.

1813 Counter-Memorial, para. 732; Rejoinder, para. 1256; Memorial, para. 250; Fourth Veiga Witness Statement, para. 114.

1814 Rejoinder, para. 1255.

1815 Rejoinder, paras. 1257, 1271.

permitted to conduct discovery in a U.S. enforcement proceeding had the LAPs brought one.[1816]

1166. Contrary to the Claimants' contentions, the Respondent clarifies that the Tribunal explicitly disclaimed any "rel[iance] upon the judgments of the New York Courts in the RICO Litigation."[1817] According to the Respondent, the Tribunal made limited use of the evidence that the Claimants obtained through the RICO Litigation:[1818]

(i) *Judge Zambrano's testimony*: The Tribunal rejected Judge Zambrano's testimony in full and thus did not rely on the testimony in any respect. Therefore, in the Respondent's view, the only value that Judge Zambrano's testimony could have had was that it was unreliable.[1819]

(ii) *Mr Donziger's testimony*: The Tribunal referred to Mr Donziger's both oral and written testimony just four times. By contrast, the Tribunal cited Mr Donziger's deposition testimony in Section 1782 Proceedings at least 17 times. Accordingly, the Tribunal's "extensive use" of Mr Donziger's testimony in issuing Track II Award was primarily referring to Donziger's testimony from his deposition in Chevron's Section 1782 action.[1820]

(iii) *Mr Donziger's diary entries*: The diary entries are not an evidentiary product of the RICO Litigation because, as repeatedly asserted by the Claimants, the diary entries are proof of the success of the Section 1782 Proceedings.[1821]

(iv) *Judge Guerra's testimony*: Judge Guerra's testimony in the RICO Litigation was not the source of any unique evidence because the Tribunal received his testimony at the Track II hearing.[1822] According to the Respondent, the Claimants omit to mention the Tribunal's concerns about corroborating his testimony because

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1816 Rejoinder, paras. 1271-1273; **RE-44**, First Strong Report, para. 68.

1817 Counter-Memorial, para. 738; Rejoinder, para. 1258; Track II Award, para. 4.6.

1818 Counter-Memorial, paras. 734-735; Rejoinder, para. 1268; Track II Award, para. 5.150.

1819 Rejoinder, para. 1270.

1820 Counter-Memorial, para. 737; Rejoinder, paras. 1260-1261; Track II Award, para. 4.28.

1821 Rejoinder, paras. 1263-1264.

1822 Rejoinder, para. 1266.

"Dr Guerra could colour his testimony to favour the Claimants as his benefactors during his exile from Ecuador."[1823]

1167. The Respondent further contests the Claimants' argument that the RICO Litigation and the evidence obtained therein were used as persuasive authority in foreign enforcement proceedings.[1824] According to the Respondent, Chevron and its subsidiaries prevailed in the enforcement proceedings in Canada, Argentina, and Brazil on the basis that the subsidiaries had distinct legal personalities from Chevron and/or that the court lacked jurisdiction over Chevron.[1825] In fact, the Canadian appellate court explicitly disclaimed any reliance on the RICO Litigation by stating that the "court is not purporting to adopt the findings of the United States courts."[1826]

1168. In addition, the Respondent submits that the amount the Claimants allegedly spent on the RICO Litigation was patently unreasonable.[1827]

1169. The Respondent criticizes the Claimants' ends-justify-the-means approach to determine the reasonableness of the RICO Litigation fees, arguing that the proper test should instead be to consider whether the RICO Litigation offered the most favourable success-to-cost ratio when compared to other feasible alternatives.[1828] Simply put, the Respondent asserts that a reasonableness inquiry should focus on whether the Claimants could have achieved the same outcome at a fraction of the cost they claim to have incurred.[1829] In this respect, the Respondent stresses the need to take account of the intermediate decisions the Claimants made between initiating and concluding the RICO Litigation that had a huge impact on the reasonableness of a fee expenditure, including their decision to incur fees

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[1823] Rejoinder, para. 1277; Track II Award, paras. 4.37.

[1824] Counter-Memorial, para. 739; Rejoinder, para. 1274.

[1825] Counter-Memorial, para. 739; Rejoinder, paras. 1275, 1277, 1279; **RE-38**, First García Pullés Expert Report, pp. 51-52; **C-2546**, STJ SEC 8542 Decision, 15 March 2018, p. 10.

[1826] Rejoinder, para. 1278; **C-2856**, *Yaiguaje et al. v. Chevron Corp.*, *Chevron Canada Ltd., and Chevron Canada Finance Ltd.,* Decision of the Court of Appeal of Ontario (corrected), 23 May 2018, p. 36, fn 5.

[1827] Rejoinder, para. 1280.

[1828] Rejoinder, paras. 1282-1283.

[1829] Rejoinder, para. 1283.

of USD 731,205.09 to pursue a valueless unjust enrichment claim in the amount of USD 358.92.[1830]

1170. According to the Respondent, the business judgment rule that shields certain corporate decisions from review is inapplicable in this context because "litigation strategy is not a business judgment".[1831]

1171. Turning to the legal fees and expenses allegedly incurred in the RICO Litigation, the Respondent faults the Claimants for the "little scrutiny" applied to the alleged invoices to derive a conclusion that the expenditures were reasonable.[1832] In the Respondent's view, Mr Veiga's "self-serving" statement that the RICO Litigation was "ultimately successful" is untenable, given that Chevron failed to obtain a global injunction even though the RICO Litigation was purportedly commenced "to preclude enforcement of the fraudulent judgment anywhere in the world as quickly as possible".[1833]

1172. As regards the Claimants' experts, the Respondent avers that none of them considered the possibility of any alternatives to Chevron's chosen course of action that offered cost savings and a higher or comparable chance of success.[1834] Further, the Respondent faults the Claimants' experts for reviewing only 5% of the invoices and then concluding that only "few" instances of overbilling were found, without mentioning how "few" of these instances were spotted. Claimants' experts also assumed that "because the ethical rules prohibit overbilling, and because lawyers behave ethically, then the fees must be reasonable."[1835] In the Respondent's view, the reliance on such assumption does not constitute a professional analysis because, as opined by Professor Brad Wendel, "compliance with any ethical duty is an issue that must be determined in a dispute, not something that can be taken for granted."[1836]

[1830] Counter-Memorial, paras. 770-771; Rejoinder, paras. 1285-1286.

[1831] Rejoinder, para. 1287; **RE-66**, Wendel Expert Report, para. 76.

[1832] Rejoinder, para. 1309.

[1833] Rejoinder, paras. 1299-1300; Fourth Veiga Witness Statement, para. 130; Silver Expert Report, para. 146.

[1834] Rejoinder, para. 1301.

[1835] Rejoinder, paras. 1303-1305, 1307; Lea Expert Report, paras. 12(l), 47-48; Ryan Expert Report, paras. 83-85, 97; Parsons Miller Expert Report, paras. 21, 33-34.

[1836] Rejoinder, para. 1307; **RE-66**, Wendel Expert Report, para. 38.

1173. Conversely, a careful review of the claimed invoices, the Respondent posits, shows that considerable time and money were spent by Chevron's attorneys pursuing unnecessary and unreasonable activities, including filing (i) motions and subpoenas that the RICO court considered to be harassing, improper, and unnecessary, including oppositions to *pro hac* vice motions;[1837] and (ii) motions for summary judgments despite the RICO court's warning that Chevron was likely "wasting [its] time" in so doing.[1838]

1174. The Respondent points out that the following fees and expenses sought by the Claimants are unrelated to the claims or defences in the RICO Litigation or are unnecessarily costly:

(i) legal work that was done prior to bringing the RICO Litigation, in particular, that undertaken on behalf of Chevron employees, Mr Veiga and Dr Pérez, neither of whom are a party to the RICO Litigation or this Arbitration;[1839]

(ii) a "series of false starts," none of which are attributed to the RICO complaint that Chevron ultimately filed in the SDNY;[1840]

(iii) overstaffing of Chevron's counsel team in hearings as acknowledged by Judge Kaplan, and rental fees of facilities for an unspecified number of attorneys without justification;[1841]

(iv) work related to Count 9 – through which Chevron sought a pre-emptive declaratory judgment that the Lago Agrio Judgment was unenforceable worldwide – that was dismissed by the Second Circuit on appeal;[1842]

[1837] Counter-Memorial, paras. 490, 784-785; **R-1837**, *Chevron Corp v. Maria Salazar and Steven Donziger*, S.D.N.Y. Case 1:11-cv-03718-LAK-JCF, D.E. 360 Memorandum and Order, 20 September 2011, p. 3; **R-1585**, *Chevron Corp. v. Maria Salazar*, D. OR. Case 6:11-mc-07003-TC, D.E. 36 Granting ELAW's Petition for $32,945.20 in Fees, 30 November 2011 (Order entered in Chevron Corp. v. Steven Donziger, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL), p. 6.

[1838] Counter-Memorial, paras. 522-523. 772; **R-1613**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1318 Transcript of Proceedings, 26 July 2013, p. 14.

[1839] Counter-Memorial, para. 764; Rejoinder, para. 1291-1293, 1311.

[1840] Rejoinder, paras. 1294-1295.

[1841] Counter-Memorial, paras. 780-781; **R-1614**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1798 Transcript of Proceedings, 10 December 2013, p. 838.

[1842] Counter-Memorial, paras. 766-768; Rejoinder, paras. 1296-1297; **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012, p. 247.

(v) preparation of unnecessary witnesses who were never called at trial and compilation of unnecessary exhibits;[1843]

(vi) three other counts (Count 4 for tortious interference with contract, Count 5 for trespass to chattels, and Count 6 for unjust enrichment) that were dismissed in their entirety;[1844] and

(vii) work related to Chevron's internal shareholder relations.[1845]

1175. The Respondent further contends that Chevron accepted invoices from attorneys that provided wholly inadequate descriptions of the work performed, or billed twice for the same work, or referring to activities that were billed by two different attorneys performing precisely the same task on the same day.[1846] Equally concerning, the Respondent notes, is the Claimants' approval of invoices that included charges for timekeepers not working and those that did not even include the names of the timekeepers.[1847]

1176. In view of the above, the Respondent takes the view that the legal fees and expenses incurred by Chevron in connection with the RICO Litigation were not necessary, reasonable, or related to the Treaty violations.[1848] The Claimants could have simply waited to defend an enforcement action in the United States if the LAPs ultimately brought such an action.[1849] Instead, the RICO Litigation was pursued as part of Chevron's vendetta against Mr Donziger for which Chevron was willing to spend an extraordinary sum.[1850] Since Chevron pursued the RICO Litigation as part of its vendetta, the Respondent should not be asked to subsidize Chevron for its crusade to inflict maximum pain on Mr Donziger.[1851]

1843 Counter-Memorial, para. 782.

1844 Counter-Memorial, para. 769.

1845 Rejoinder, para. 1312.

1846 Counter-Memorial, paras. 774-777; Rejoinder, paras. 1310, 1313-1316.

1847 Rejoinder, paras. 1318-1319.

1848 Counter-Memorial, para. 791.

1849 Counter-Memorial, para. 755; Rejoinder, para. 128.

1850 Counter-Memorial, paras. 787, 791; Rejoinder, para. 1246.

1851 Rejoinder, para. 1252.

1177. The Respondent also highlights that Chevron obtained a money judgment from Mr Donziger in the amount of USD 813,602.71 in litigation costs, pursued post-judgment discovery on his wife, and filed motions to hold Mr Donziger in civil contempt of court.[1852] In addition, the Respondent points out that certain Chevron attorneys testified against Mr Donziger at the criminal contempt proceedings initiated by the SDNY and facilitated the proceedings to disbar Mr Donziger in New York, the fees of which have been claimed as damages in this Arbitration under the RICO Litigation category.[1853]

1178. In the alternative, if the Tribunal determines that the fees for the RICO Litigation are compensable, the Respondent argues that the Claimants should not be permitted to recover more than USD 32 million, the sum they requested before the SDNY for Chevron's fees and costs in the RICO Litigation.[1854] This is because, according to the Respondent, the Claimants are seeking to recover fees for precisely the same activities that Chevron sought to recover in the RICO Litigation as "the cost of the suit, including a reasonable attorneys' fee" pursuant to the RICO Act.[1855] Furthermore, any compensation awarded by the Tribunal in connection with the RICO Litigation, the Respondent submits, should be offset by any award that the Claimants could recover directly from the RICO Litigation in the SDNY, where the matter of Chevron's USD 32 million fees and costs remains pending.[1856]

3. The Tribunal's Analysis

(a) Introduction

1179. The Claimants claim by way of direct or, in the alternative, incidental damages the amount of USD 323,180,099.51 for legal fees and expenses incurred between January 2009 and December 2018 in the RICO Litigation initiated by Chevron.[1857] The Respondent contests the recoverability of this amount, principally on two grounds: (i) a

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[1852] Counter-Memorial, para. 789-790; Rejoinder, pars. 1247-1248.

[1853] Rejoinder, paras. 1249-1251.

[1854] Rejoinder, paras. 1321-1322.

[1855] Rejoinder, paras. 1321, 1323-1324; **R-1603**, *Chevron Corp. v. Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1890 Memorandum of Law ISO Application for Attorneys' Fees, 18 March 2014, p. 2.

[1856] Rejoinder, para. 1325.

[1857] Reply, para. 794, Updated Appendix 2, pp. 2-143.

reasonable observer could not have foreseen that the Claimants would bring a RICO action; and (ii) the fees and costs incurred by Chevron in connection with the RICO Litigation were unreasonable.

1180. The Tribunal observes that this is the largest category of damages claimed in these proceedings. According to the Claimants, the more than USD 323 million in legal fees and expenses they claim is justified by the sheer complexity of the RICO Litigation, which has a docket sheet that is "almost 500 pages long and lists more than 2,200 separate entries". The Claimants recount that the parties in the RICO Litigation filed more than 195 separate motions, with the RICO Defendants initiating 11 separate appeals, two petitions for mandamus, approximately 52 motions in the Second Circuit, and a petition for *certiorari* before the U.S. Supreme Court.[1858]

1181. Due to its complexity and the significant amount of fees and costs claimed under this category, a more detailed account of what transpired in the RICO Litigation is in order.[1859] The Tribunal will thus structure its analysis by providing first a concise background of RICO, followed by a summary of the RICO Litigation proceedings, before setting out its analysis of the category as a whole. The category-level analysis will be followed by the Tribunal's analysis of individual components and other issues identified by the Parties.

(b) Background of RICO

1182. RICO is a U.S. federal statute that provides for enhanced criminal penalties as well as civil remedies against individuals involved in activities conducted as part of a continuing criminal organization. Enacted in 1970 as Title IX of the broader Organized Crime Control Act, and codified at 18 U.S.C. §§ 1961-1968, RICO is intended primarily to combat the corrupt influence of organized crime.[1860] It was enacted in response to the growing influence of organized crime syndicates, particularly mafia families, who in the

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[1858] Memorial, Appendix 9, para. 3.

[1859] For a detailed description of the procedural history of these proceedings, *see generally* Memorial, Appendix 9.

[1860] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 340 ("RICO was drafted as a weapon to fight against organized crime.")

1960s and 1970s had become "highly sophisticated, diversified, and widespread", draining "billions of dollars from America's economy".[1861]

1183. In its statement of finding and purpose, the U.S. Congress noted that the purpose of RICO is, among others, "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[1862] RICO provides for civil and criminal penalties for persons who engage in a "pattern of racketeering activity", drawn from a long list of predicate crimes, and who have a specified relationship to an "enterprise".[1863] An "enterprise", in turn, includes "any union or group of individuals associated in fact although not a legal entity" "associated together for a common purpose of engaging in a course of conduct".[1864] While originally aimed at organized crime syndicates, RICO applies to "'any person' who violates its provisions", and is intended "to be read broadly" in accordance with its "expansive language and overall approach."[1865] Thus, over time, the application of RICO broadened to include cases involving a broad array of perpetrators operating in many different ways.[1866]

1184. It is common ground between the Parties that pursuing a RICO action is both complex and costly. The Claimants recognize that "litigating a RICO case is an inherently costly endeavor . . . which requires a plaintiff to prove that the defendants violated multiple federal criminal laws over time and in connection with the operation of an enterprise."[1867] Thus, Chevron had to "amass and present an extensive evidentiary record through documents, videos, fact witnesses, and experts".[1868] Chevron retained 36 experts in a

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[1861] **RLA-703**, Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 922 (1970).

[1862] **RLA-703**, Organized Crime Control Act of 1970, Pub. L. 91–452, 84 Stat. 923 (1970).

[1863] *See, generally*, 18 U.S.C. §§ 1963-1964.

[1864] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 354.

[1865] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 340.

[1866] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 340.

[1867] Memorial, Appendix 9, para. 8.

[1868] Memorial, Appendix 9, para. 8.

range of technical and legal subjects,[1869] prepared over 38 fact and expert witnesses for trial, and presented almost 3000 affirmative exhibits.[1870] The RICO defendants, on the other hand, introduced about 1,000 exhibits, submitted seven witness statements, and called six witnesses at trial.[1871] The parties collectively produced more than 875,000 documents following contentious discovery proceedings.[1872]

(c) Summary of the RICO Litigation

1185. At the outset, the Tribunal clarifies that the summary of the RICO Litigation that follows is primarily drawn from Appendix 9 to the Claimants' Memorial, which is largely uncontested by the Respondent as regards the underlying facts, albeit not as regards its implications for the Tribunal's current analysis. The Tribunal has also consulted extensively the case docket sheet for the RICO Litigation[1873] and numerous documents pertaining to those proceedings that have been filed by the Parties in this Arbitration, which encompass only a portion of a larger RICO Litigation case record.

1186. The Tribunal does not purport for this summary of the RICO Litigation to be exhaustive or to recount those proceedings in every detail. It is only meant to place in context its decisions regarding the compensation of the legal fees and expenses allegedly incurred in connection with those proceedings.

1. The RICO Complaint and Amended Complaint

1187. On 1 February 2011, Chevron filed a Complaint against Steven Donziger and his law office, the Stratus Defendants, Messrs Fajardo and Yanza, the organizations ADF and Selva Viva, as well as the named plaintiffs in the Lago Agrio Litigation (the LAPs).[1874] The action was filed before the SDNY and assigned to Judge Lewis A. Kaplan.[1875] Chevron pleaded nine (9) different claims for relief, including under 18 U.S.C. § 1962

[1869] Memorial, Appendix 9, para. 96.

[1870] Memorial, Appendix 9, para. 139.

[1871] Memorial, Appendix 9, para. 139.

[1872] Memorial, Appendix 9, para. 69.

[1873] **C-3037**, RICO Docket.

[1874] **R-1811**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691 (SDNY), Complaint, 1 February 2011, paras. 8-19.

[1875] Memorial, Appendix 9, para. 1; **C-3037**, RICO Docket, ECF No. 1 (1 February 2011).

and New York state law,[1876] and prayed for, *inter alia*, equitable relief as appropriate, including a temporary restraining order, a preliminary injunction, and a permanent injunction against the enforcement of the Lago Agrio Judgment.[1877]Gibson, Dunn & Crutcher LLP represented Chevron as counsel of record in the RICO Litigation.[1878]

1188. On 20 April 2011, following the issuance of the Lago Agrio Judgment, Chevron amended its Complaint (the "**Amended Complaint**").[1879] The Amended Complaint (i) reiterated the nine claims for relief previously pleaded in Chevron's original Complaint; (ii) included an additional defendant (Donziger & Associates, PLLC) and alleged additional "non-party co-conspirators"; (iii) clarified Chevron's claims and the RICO Defendants' alleged involvement in fraudulent activity; and (iv) specified that Count 9 (requesting declaratory and injunctive relief) was directed to the LAPs and Donziger's organization (the ADF) only.[1880]

1189. As pleaded in both the original Complaint and the Amended Complaint, Chevron's nine claims for relief in the RICO Litigation, and the different subsets of defendants for each claim, are as follows:

(i) Count 1 (against the RICO Defendants): Violations of the RICO statute, including a pattern of racketeering activity, witness tampering, and money laundering;

(ii) Count 2 (against the RICO Defendants): Conspiracy to violate RICO;

(iii) Count 3 (against all defendants): Fraud, including that the defendants "and their agents have knowingly misrepresented, omitted, and/or concealed material facts in their pleadings and representations before U.S. courts and before the Lago Agrio court";

[1876] **R-1811**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691 (SDNY), Complaint, 1 February 2011, para. 21, p. 11.

[1877] **R-1811**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691 (SDNY), Complaint, 1 February 2011, pp. 146-147.

[1878] Memorial, Appendix 9, para. 1.

[1879] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011.

[1880] Memorial, Appendix 9, para. 12.

(iv) Count 4 (against all defendants): Tortious interference with contract, namely that "Defendants have intentionally caused and continued to cause the Republic of Ecuador to repeatedly breach the 1995 Settlement Agreement and the 1998 Final Release";

(v) Count 5 (against all defendants): Trespass to chattels, or that the defendants "have engaged in a pattern of extortion, collusion, wrongdoing and deceit with an intent to interfere with Chevron's property";

(vi) Count 6 (against all defendants): Unjust enrichment, or that the defendants "seek to obtain billions of dollars from Chevron through a fraudulent judgment . . . Defendants have been and will continue to be unjustly enriched by the benefits obtained due to the judgment itself";

(vii) Count 7 (against all defendants): Civil conspiracy, or that the defendants "agreed to participate in a common scheme against Chevron" and "intentionally participated in the furtherance of a plan or purpose to obtain property from Chevron";

(viii) Count 8 (against the Donziger Defendants): Violations of New York Judiciary law § 487, which provides that any attorney who "is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor";

(ix) Count 9 (against ADF and the LAPs[1881]): Request for declaratory judgment that the Lago Agrio Judgment against Chevron is unenforceable and non-recognizable worldwide. As described in greater detail below, Count 9 (Declaratory Judgment) was bifurcated from the remaining claims and proceeded apace independently of Counts 1-8.[1882]

1190. As will be shown in the narration that follows, these claims for relief had different objectives and outcomes, as summarized below:

[1881] Count 9 was directed against all defendants in the original Complaint, and was later circumscribed to the ADF and the LAPs in the Amended Complaint.

[1882] Memorial, Appendix 9, para. 13; **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

Claim	Targets	Relief prayed for	Outcome
Count 1 *(Violations of the RICO statute)*	RICO Defendants	1. General damages, trebled according to 18 U.S.C. § 1964(c); 2. Pre-judgment interest according to statute; 3. Reasonable attorneys' fees and costs according to 18 U.S.C. § 1964(c); 4. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars defendants from any attempt to recognize or enforce the Lago Agrio Judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad.[1883]	Survived to trial; equitable relief awarded (constructive trust on property traceable to the Lago Agrio Judgment and permanent injunction against enforcement in the United States)[1884]
Count 2 *(Conspiracy to violate RICO)*	RICO Defendants	1. General damages, trebled according to 18 U.S.C. § 1964(c); 2. Pre-judgment interest according to statute; 3. Reasonable attorneys' fees and costs according to 18 U.S.C. § 1964(c); 4. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars	Survived to trial; equitable relief awarded (constructive trust on property traceable to the Lago

[1883] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1884] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, pp. 299, 475-479.

Claim	Targets	Relief prayed for	Outcome
		defendants from any attempt to recognize or enforce the Lago Agrio Judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad.[1885]	Agrio Judgment and permanent injunction against enforcement in the United States)[1886]
Count 3 *(Fraud)*	All defendants	1. General damages according to proof at trial; 2. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars defendants from any attempt to recognize or enforce the Lago Agrio Judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad; 3. Punitive damages in an amount to be proven at trial.[1887]	Partly dismissed,[1888] partly survived to trial; equitable relief awarded (constructive trust on property traceable to the Lago Agrio Judgment and permanent injunction

[1885] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1886] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, pp. 299, 475-479.

[1887] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1888] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 53.

Claim	Targets	Relief prayed for	Outcome
			against enforcement in the United States)[1889]
Count 4 *(Tortious interference with contract)*	All defendants	1. General damages according to proof at trial; 2. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars defendants from any attempt to recognize or enforce the Lago Agrio Judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad; 3. Punitive damages in an amount to be proven at trial.[1890]	Dismissed before trial for being time-barred[1891]
Count 5 *(Trespass to chattels)*	All defendants	1. General damages according to proof at trial; 2. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars	Dismissed before trial for failure to plead a cause of action[1893]

1889 **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, pp. 299, 339, 475-479.

1890 **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

1891 **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 53.

1893 **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 53.

Claim	Targets	Relief prayed for	Outcome
		defendants from any attempt to recognize or enforce the Lago Agrio Judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad; 3. Punitive damages in an amount to be proven at trial.[1892]	
Count 6 *(Unjust enrichment)*	All defendants	1. General damages according to proof at trial; 2. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars defendants from any attempt to recognize or enforce the Lago Agrio Judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad.[1894]	Thrice dismissed before trial for being premature[1895]
Count 7 *(Civil conspiracy)*	All defendants	1. General damages according to proof at trial; 2. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars	Survived to trial; cause of action recognized but not distinctively

[1892] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1894] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1895] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 53; **R-1593**, Memorandum Endorsement, 12 March 2013, p. 2; **C-3037**, RICO Docket, ECF No. 1662 (1 November 2013).

Claim	Targets	Relief prayed for	Outcome
		defendants from any attempt to recognize or enforce the Lago Agrio Judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad; 3. Punitive damages in an amount to be proven at trial.[1896]	addressed in respect of the equitable relief that was ultimately granted[1897]
Count 8 *(Violations of New York Judiciary Law)*	Donziger Defendants	1. General damages trebled according to Judiciary Law § 487; 2. Reasonable attorneys' fees and costs according to Judiciary Law § 487.[1898]	Survived to trial; no relief awarded[1899]
Count 9 *(Declaratory Judgment)*	ADF and LAPs	1. Declaration that the Lago Agrio Judgment is non-recognizable and unenforceable; 2. Equitable relief, including but not limited to a temporary restraining order, a preliminary injunction and a permanent injunction that bars the ADF and the LAPs from any attempt to recognize or enforce the	Global preliminary injunction issued;[1901] claim bifurcated and later dismissed at

[1896] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1897] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 299.

[1898] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1899] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 409.

[1901] **C-972**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691, United States District Court for the Southern District of New York, Opinion, 7 March 2011, p. 125.

Claim	Targets	Relief prayed for	Outcome
		Lago Agrio Judgement in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad.[1900]	discovery stage[1902]

2. Temporary Restraining Order and Preliminary Injunction

1191. Meanwhile, on 3 February 2011, the SDNY issued an Order, on the basis of Chevron's original Complaint, asking the defendants to show cause why a temporary restraining order and preliminary injunction should not be issued.[1903] On 8 February 2011, Messrs Hugo Gerardo Camacho Naranjo and Mr Javier Piaguaje Payaguaje, two of the LAPs impleaded in the Complaint, filed a memorandum of law in opposition to Chevron's application for a temporary restraining order.[1904] Messrs Camacho and Piaguaje (hereafter the "**LAP Representatives**") are the only two individual LAPs who appeared and defended the lawsuit.

1192. On 9 February 2011, the SDNY granted the temporary restraining order requested by Chevron, preventing Mr Donziger and the LAPs from "funding, commencing, prosecuting, advancing in any way, or receiving benefit from, directly or indirectly, any action or proceeding for recognition or enforcement of any judgment entered against Chevron" in the then-pending Lago Agrio Litigation.[1905] The SDNY scheduled an oral argument on 18 February 2011 for Chevron's application for a preliminary injunction.[1906] The temporary restraining order, originally lasting to noon of 22 February 2011, was subsequently extended until 8 March 2011 "in order to facilitate careful consideration of

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[1900] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 163-165.

[1902] **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012, p. 2.

[1903] **C-3037**, RICO Docket, ECF No. 4 (3 February 2011).

[1904] **C-3037**, RICO Docket, ECF No. 61 (8 February 2011).

[1905] Memorial, Appendix 9, para. 14; **C-963**, *Chevron Corporation v. Steven Donziger, et al.*, No. 11CV691(LAK), Order on Plaintiff's Motion for a Temporary Restraining Order, 8 February 2011, p. 2.

[1906] **C-3037**, RICO Docket, ECF No. 79 (9 February 2011).

[Chevron's] motion for preliminary injunction" against the enforcement of the Lago Agrio Judgment.[1907]

1193. On 7 March 2011, following exchange of briefings and an oral argument on the motion, the SDNY issued a 131-page Order granting in part and denying in part Chevron's request for a preliminary injunction. All the defendants, save for the Stratus Defendants, were:

> 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.[1908]

1194. In the same Order, the SDNY noted the "parties' interest in having the enforceability and recognizability of the [Lago Agrio Judgment] outside of Ecuador determined without unnecessary delay" and thus advised that "[t]he parties therefore may move promptly to sever Count 9 of the complaint, the declaratory judgment claim, and to establish and appropriate schedule for its prompt resolution."[1909]

1195. The parties, as directed by the SDNY, met-and-conferred on several occasions to seek an agreement on the scope of the preliminary injunction. These meetings proved unsuccessful, and on 13 April 2011, Chevron filed a supplemental statement reporting that the parties, despite their efforts, were unable to reach an agreement regarding the form of the preliminary injunction.[1910]

[1907] **C-964**, *Chevron Corporation v. Steven Donziger, et al.*, No. 11CV691(LAK), Order extending Chevron's temporary restraining order, 14 February 2011.

[1908] **C-972**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691, United States District Court for the Southern District of New York, Opinion, 7 March 2011, p. 125.

[1909] **C-972**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691, United States District Court for the Southern District of New York, Opinion, 7 March 2011, pp. 125-126.

[1910] Memorial, Appendix 9, para. 18.

3. Second Circuit Proceedings

1196. In the interim, on 24 March 2011, the LAP Representatives noticed an appeal to the Second Circuit, challenging the 7 March 2011 preliminary injunction.[1911] The LAP Representatives also moved to stay the proceedings before the SDNY while their Second Circuit appeal was pending.[1912] Relatedly, on 1 April 2011, the Donziger Defendants appealed the same Order to the Second Circuit, which was later consolidated with the LAP Representatives' appeal.[1913]

1197. On 12 May 2011, the Second Circuit denied the LAP Representatives' request for a stay of proceedings pending appeal of the preliminary injunction, but granted partial stay "insofar as the preliminary injunction restrains activities other than commencing, prosecuting, or receiving benefit from recognition, enforcement, or prejudgment seizure or attachment proceedings".[1914]

1198. On 2 June 2011, the LAP Representatives and the Donziger Defendants filed their merits briefs on the pending appeal before the Second Circuit.[1915] Oral argument was scheduled and held on 16 September 2011.[1916]

1199. Relatedly, on 2 June 2011, the LAP Representatives also filed a petition for mandamus requesting the Second Circuit to order Judge Kaplan to recuse himself from the case.[1917] This mandamus petition was later consolidated with the LAP Representatives' and the Donziger Defendants' pending appeal.[1918]

[1911] **C-3037**, RICO Docket, ECF No. 233 (24 March 2011).

[1912] **C-3037**, RICO Docket, ECF No. 237 (29 March 2011).

[1913] Memorial, Appendix 9, para. 41.

[1914] ; Memorial, Appendix 9, para. 20; **C-3039**, *Chevron Corp. v. Pablo Fajardo Mendoza*., Docket for Case No. 11-1150 (2d Cir.), referencing Order, 12 May 2011, ECF No. 135.

[1915] **C-3039**, *Chevron Corp. v. Pablo Fajardo Mendoza*., Docket for Case No. 11-1150 (2d Cir.), referencing Order, 12 May 2011, ECF Nos. 159, 163.

[1916] Memorial, Appendix 9, paras. 17, 41.

[1917] **C-3038**, *In re: Hugo Gerardo Camacho*, No. 11-2259 (2d Cir.), Docket, Writ of Mandamus, 6 June 2011, ECF No. 1.

[1918] **C-3038**, *In re: Hugo Gerardo Camacho*, No. 11-2259 (2d Cir.), Docket, Writ of Mandamus, 6 June 2011, ECF No. 31.

4. Bifurcation of Count 9 and Dismissal by Second Circuit

1200. Meanwhile, on 11 March 2011, Chevron – following the SDNY's 7 March 2011 Order – asked the SDNY to hold a bench trial and "bifurcate the Ninth Claim for Relief – the request for a declaratory judgment that the Lago Agrio judgment against Chevron is non-recognizable and enforceable – in whole or in part, from the other claims for relief," to expedite decision on this claim for relief,[1919] citing necessity on account of the Invictus Memorandum enforcement strategy.[1920] The Donziger Defendants, the Stratus Defendants, and the LAP Representatives opposed Chevron's motion to bifurcate and requested an oral argument on the issue of bifurcation.[1921]

1201. On 16 March 2011, the Donziger Defendants filed a demand for trial by jury.[1922] This was followed by similar demands from the Stratus Defendants[1923] and the LAP Representatives.[1924]

1202. On 15 April 2011, the SDNY issued an order granting Chevron's motion to bifurcate Count 9 and set an expedited schedule to ensure that Count 9 would proceed apace.[1925] Noting the defendants' objections regarding a right to trial by jury, the SDNY ruled:

> The interests of justice, convenience, the avoidance of prejudice, and the desirability of an expedited resolution of Count 9 all support conducting a separate trial on that claim. Chevron's motion to bifurcate Count 9 therefore is granted. The Court, however, retains complete flexibility to ensure that the matter is handled appropriately and that any Seventh Amendment [trial by jury] rights are preserved. It therefore will stand ready to consider changes to this order, should circumstances warrant, as the matter proceeds.[1926]

1203. On 26 April 2011, the LAP Representatives challenged Judge Kaplan's impartiality and filed an order to show cause why Judge Kaplan should not be recused, arguing that "the Court bifurcated Chevron's ninth claim of relief, maximizing the risk that the Ecuadorian

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[1919] Memorial, Appendix 9, paras. 21-22**C-3037**, RICO Docket, ECF No. 199 (11 March 2011).

[1920] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51].

[1921] Memorial, Appendix 9, para. 21; **C-3037**, RICO Docket, ECF Nos. 220, 223, 224 (21 March 2011).

[1922] **C-3037**, RICO Docket, ECF No. 212 (16 March 2011).

[1923] **C-3037**, RICO Docket, ECF No. 218 (20 March 2011).

[1924] **C-3037**, RICO Docket, ECF No. 226 (21 March 2011).

[1925] Memorial, Appendix 9, para. 23; **C-3037**, RICO Docket, ECF Nos. 278, 279 (15 April 2011).

[1926] **C-3037**, RICO Docket, ECF No. 278 (15 April 2011).

Plaintiffs and Defendant Donziger will be deprived of their Seventh Amendment [*i.e.*, trial by jury] rights, all the while taking steps to insulate its decision from meaningful appellate review."[1927]

1204. On 9 May 2011, following exchange of submissions, Judge Kaplan issued an order denying the RICO Defendants' motion for his recusal.[1928]

1205. Subsequently, Mr Donziger sought to intervene as a defendant in the Count 9 proceedings. Following an exchange of submissions, on 31 May 2011, the SDNY partially granted Mr Donziger's request and allowed for limited intervention due to the possibility of factual overlap.[1929]

1206. On 31 May 2011, the SDNY also issued an Order severing Count 9 from the Amended Complaint and allowing it to proceed as its own action[1930] with Chevron as the plaintiff, the 47 individual LAPs and ADF as the defendants, and the Donziger Defendants as intervenors.[1931] The SDNY generated a new docket pertaining only to Count 9.

1207. Following the severance of Count 9, on 2 June 2011, the LAP Representatives sought a stay of discovery in the Count 9 action pending their Second Circuit appeal regarding the 7 March 2011 preliminary injunction, including a temporary stay pending the court's decision on the stay.[1932] They advanced two main arguments: (i) Count 9 would require a lesser discovery burden, and (ii) they required all of their resources to be focused on the expedited Second Circuit appeal.[1933]

1208. After briefing, on 14 June 2011 the SDNY denied the request for stay of the Count 9 proceedings.[1934] Discovery on the Count 9 proceedings continued. Chevron continued to

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1927 Memorial, Appendix 9, para. 24.

1928 **C-3037**, RICO Docket, ECF No. 310 (9 May 2011).

1929 Memorial, Appendix 9, para. 26; **C-3037**, RICO Docket, ECF No. 327 (31 May 2011).

1930 **C-3037**, RICO Docket, ECF No. 328 (31 May 2011).

1931 **C-3037**, RICO Docket, ECF No. 328 (31 May 2011).

1932 Memorial, Appendix 9, para. 28; **C-3041**, RICO Count 9 Docket, ECF No. 4 (2 June 2011).

1933 Memorial, Appendix 9, para. 28.

1934 Memorial, Appendix 9, para. 31; **C-3041**, RICO Count 9 Docket, ECF No. 33 (14 June 2011).

seek the assistance of the court to compel discovery and depositions from the defendants.[1935]

1209. On 19 September 2011, in the midst of discovery proceedings for Count 9, the Second Circuit – acting on the earlier appeal and mandamus petition of the LAP Representatives – issued an Order which (i) denied the mandamus petition to compel Judge Kaplan to recuse himself, (ii) vacated the preliminary injunction issued by the SDNY on 7 March 2011, and (iii) stayed the proceedings on Count 9.[1936] The operative part of the 19 September 2011 Order reads:

> Upon due consideration, it is hereby ORDERED that the mandamus petition, docketed under 11-2259-op is DENIED. IT IS FURTHER ORDERED that in the appeal [from] the issuance of a preliminary injunction issued in *Chevron Corp v. Donziger*, 768 F. Supp. 2d 58a, 660 (S.D.N.Y. 2011), docketed in this Court under 11-1150-cv, the preliminary injunction issued by the District Court on Marc[h] 7, 2011 is VACATED in its entirety upon entry of this Order. IT IS FURTHER ORDERED that the motion for a stay of the District Court's proceedings on Count 9 of the Compliant, renewed by counsel at oral argument before this Court on Sep. 16, 2011 is GRANTED.[1937]

1210. With proceedings in Count 9 stayed, proceedings before the Second Circuit continued. On 26 January 2012, the Second Circuit issued an Opinion deciding the appeal, the dispositive portion of which read:

> Accordingly, for the foregoing reasons and consistent with our September 19, 2011 order, the judgment of the district court is REVERSED and the preliminary injunction VACATED. We REMAND to the district court with the instruction to DISMISS Chevron's claim for injunctive and declaratory relief under the Recognition Act in its entirety.[1938]

1211. In dismissing Count 9 in its entirety, the Second Circuit explained that New York law does not grant a putative judgment-debtor a cause of action to challenge a foreign judgment before enforcement of such judgment is sought, and judgment-debtors can only challenge a foreign judgment's validity defensively in response to an attempted

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[1935] Memorial, Appendix 9, paras. 32-40.

[1936] **C-3041**, RICO Count 9 Docket, ECF No. 361 (19 September 2011). *See also*, **C-3039**, *Chevron Corp. v. Pablo Fajardo Mendoza*., Docket for Case No. 11-1150 (2d Cir.), referencing Order, 12 May 2011, ECF No. 597; **C-3038**, *In re: Hugo Gerardo Camacho*, No. 11-2259 (2d Cir.), Docket, Writ of Mandamus, 6 June 2011, ECF No. 75.

[1937] **C-3041**, RICO Count 9 Docket, ECF No. 361 (19 September 2011).

[1938] **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012, p. 2.

enforcement.[1939] Following the Second Circuit Opinion, the case was remanded to the SDNY and Count 9 was accordingly dismissed.[1940]

1212. On 25 May 2012, Chevron filed with the U.S. Supreme Court a petition for *certiorari* seeking review of the Second Circuit's 26 January 2012 Opinion vacating the preliminary injunction and dismissing Count 9. Chevron's petition was denied by the U.S. Supreme Court with finality on 9 October 2012.[1941]

5. Defendants' Motions to Dismiss

1213. Reverting to Chevron's original Complaint of 1 February 2011, on 30 March 2011, the Donziger Defendants filed a motion to dismiss that Complaint, primarily on the grounds that (i) RICO lacked extraterritorial effect; (ii) Chevron allegedly failed to articulate sufficient "predicate" acts that would fall under the scope of RICO, and (iii) Chevron's claims for relief "fail to state a claim upon which [a] Court can grant relief."[1942]

1214. On 4 May 2011, the Donziger Defendants renewed their motion to dismiss in light of Chevron's Amended Complaint of 20 April 2011.[1943] The Stratus Defendants similarly filed a motion to dismiss the Amended Complaint on 17 May 2011.[1944] Chevron opposed both the Donziger Defendants' and Stratus Defendants' motions to dismiss.[1945]

1215. On 14 May 2012, following further briefings, the SDNY issued an Opinion partially granting and partially denying the Donziger Defendants' motion to dismiss. The SDNY disagreed with Mr Donziger regarding the RICO claims, finding that the Amended Complaint "adequately [ ] alleged at least one predicate act of extortion" and that the

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[1939] **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012, p. 2.

[1940] **C-3037**, RICO Docket, ECF No. 390 (16 February 2012).

[1941] Memorial, Appendix 9, para. 44; **C-3042**, *Chevron Corp. v. Naranjo,* Petition Denied, U.S. Supreme Court Dkt. No. 11-1428, 25 May 2012.

[1942] Memorial, Appendix 9, paras. 49-51.

[1943] **C-3037**, RICO Docket, ECF No. 302 (4 May 2011). *See* para. 1188 above.

[1944] **C-3037**, RICO Docket, ECF No. 320 (17 May 2011).

[1945] **C-3037**, RICO Docket, ECF No. 324 (18 May 2011), ECF No. 333 (3 June 2011).

asserted RICO claims were not essentially extraterritorial in focus.[1946] However, the SDNY found that:

(i) The tortious interference claim (Count 4) was time-barred;

(ii) The Amended Complaint failed to adequately plead a trespass to chattels claim (Count 5) under New York law; and

(iii) The unjust enrichment claim (Count 6) was premature, thus dismissing these counts in their entirety, without prejudice to the claim for damages under Count 6.[1947]

(iv) The SDNY also granted dismissal to the extent that so much of Count 3 was premised on detrimental reliance.[1948]

1216. On 24 May 2012, the SDNY issued an Opinion regarding the Stratus Defendants' motion to dismiss, largely identical to its Opinion dated 14 May 2012.[1949]

1217. On 12 February 2013, Chevron moved for reconsideration of the SDNY's 14 May 2012 Opinion, requesting the reinstatement of its claim under Count 6 for unjust enrichment.[1950] Following exchange of briefings, Chevron's motion was denied by the SDNY on 12 March 2013.[1951] Chevron made a second attempt to reinstate its Count 6 claim,[1952] which the LAP Representatives opposed.[1953] The SDNY summarily denied Chevron's second attempt through an Order dated 1 November 2013.[1954]

[1946] Memorial, Appendix 9, para. 52.

[1947] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, pp. 43-49, 53; Memorial, Appendix 9, para. 52.

[1948] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 53.

[1949] Memorial, Appendix 9, para. 53.

[1950] **C-3037**, RICO Docket, ECF Nos. 782-785 (12 February 2013).

[1951] **C-3037**, RICO Docket, ECF No. 889 (12 March 2013).

[1952] **C-3037**, RICO Docket, ECF Nos. 1470-1473 (30 September 2013).

[1953] **C-3037**, RICO Docket, ECF No. 1511 (8 October 2013).

[1954] **C-3037**, RICO Docket, ECF No. 1662 (1 November 2013).

1218. Chevron's motions to reinstate Count 6 having been unsuccessful, Chevron's claims for tortious interference (Count 4), trespass to chattels (Count 5) and unjust enrichment (Count 6) were ultimately dismissed.[1955]

6. Donziger and Stratus Counterclaims

1219. Meanwhile, on 7 May 2011, Mr Donziger filed his amended answer prior to the bifurcation of Count 9. With leave of court, on 28 November 2012, Mr Donziger filed another amended answer asserting counterclaims against Chevron, in particular claims of fraud and duress.

1220. On 24 December 2012, Chevron filed a motion to dismiss Mr Donziger's counterclaims. After briefing, the SDNY ultimately granted Chevron's motion, dismissing the Donziger Defendants' counter-claims on 29 July 2013.[1956]

1221. In the interim, the Stratus Defendants filed their answer to the Amended Complaint on 6 June 2012. After briefing, and with leave of court, on 1 December 2013, the Stratus Defendants filed an amended answer with a counterclaim of defamation against Chevron.[1957]

7. Stratus Settlement

1222. Subsequently, Chevron and the Stratus Defendants, including Mr Douglas Beltman and Ms Ann Maest, entered into an agreement settling the claims against the Stratus Defendants in the RICO Litigation. Thus, on 22 March 2013, Chevron and the Stratus Defendants filed a Joint Motion seeking, among others, an order dismissing Chevron's claims against the Stratus Defendants.[1958]

1223. Thereafter, the non-settling defendants (the Donziger Defendants and the LAP Representatives) moved to compel the production of the declarations of Mr Beltman and

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1955 Memorial, Appendix 9, paras. 54-55.

1956 Memorial, Appendix 9, paras. 46, 48; **C-3037**, RICO Docket, ECF No. 1321 (29 July 2013).

1957 Memorial, Appendix 9, para. 47.

1958 Memorial, Appendix 9, para. 56.

Ms Maest resulting from the settlement. This motion was ultimately denied by the SDNY on 18 March 2013.[1959]

1224. On 8 April 2013, the SDNY granted Chevron's and the Stratus Defendants' joint motion for, among others, voluntary dismissal and dismissed Chevron's action against the Stratus Defendants and the latter's related counterclaims with prejudice, without award of costs or attorneys' fees.[1960] On 11 April 2013, the Stratus Defendants and Chevron obtained a voluntary dismissal order which satisfied the conditions precedent to the settlement agreement between them and rendered that agreement binding.[1961]

8. Chevron's First Motion for Partial Summary Judgment

1225. On 1 March 2012, Chevron filed a motion for summary judgment on the RICO defendants' affirmative defences of *res judicata* and collateral estoppel, arguing that these defences should already be decided for lack of a genuine issue as to any material fact.[1962] On 31 July 2012, after briefing, the SDNY partially granted Chevron's motion, dismissing the Donziger Defendants' and the LAP Representatives' affirmative defences of *res judicata* but reserving their defences regarding the recognizability and enforceability of the Lago Agrio Judgment.[1963]

9. Discovery Issues

1226. The RICO Litigation was characterized by long, contentious, and voluminous discovery process, involving several incidents as well as the exchange of hundreds of thousands of documents well until 2013. According to Chevron, it had to "utilize many attorney resources and expend significant amounts of time and money on discovery-related tasks, such as reviewing hundreds of thousands of pages of evidence produced by the [RICO defendants], taking and defending depositions, reviewing, (where appropriate) logging

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[1959] Memorial, Appendix 9, paras. 57-58.

[1960] Memorial, Appendix 9, para. 59; **C-3037**, RICO Docket, ECF No. 988 (8 April 2013).

[1961] Memorial, Appendix 9, para. 58; **C-3037**, RICO Docket, ECF No. 1002 (11 April 2013).

[1962] Memorial, Appendix 9, para. 60; **C-3037**, RICO Docket, ECF No. 396 (1 March 2012).

[1963] Memorial, Appendix 9, para. 61; **C-3037**, RICO Docket, ECF No. 550 (31 July 2012).

communications involving Chevron and its agents, and otherwise overcoming the [d]efendants' repeated attempts to obstruct Chevron's discovery efforts."[1964]

1227. In addition to voluminous written discovery requests from both parties requiring several motions to compel, Chevron also propounded dozens of interrogatories to the defendants, as well as hundreds of requests for admission.[1965] Ultimately, the RICO Defendants produced more than 500,000 documents to Chevron.[1966] For their part, the defendants issued voluminous discovery requests to Chevron, and Chevron ultimately produced more than 375,000 documents to the RICO defendants in response to these requests, in addition to privilege logs.[1967]

1228. Apart from discovery issues involving the parties, there were also significant issues involving third-party discovery.[1968] These include subpoena requests and motions to compel non-parties Messrs Joseph Kohn, Andrew Woods, and Ms Laura Garr in the Count 9 action,[1969] Mr Aaron Marr Page,[1970] and Patton Boggs LLP, which provided legal advice and services to the LAPs since early 2010.[1971]

1229. From June 2012 to March 2013, Chevron engaged in discovery disputes with Patton Boggs, with back-and-forth briefings on the propriety and scope of subpoena as well as assertions of privilege. Patton Boggs ultimately produced the documents, but only after multiple meet-and-confer calls to discuss the search terms for their document collection.[1972]

1230. On 5 April 2013, the SDNY also ordered that non-party Mr David Russell, an environmental engineer hired by Mr Donziger for the Lago Agrio Litigation, and non-

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[1964] Memorial, Appendix 9, para. 62.

[1965] Memorial, Appendix 9, paras. 65-73.

[1966] Memorial, Appendix 9, para. 63.

[1967] Memorial, Appendix 9, para. 69.

[1968] Memorial, Appendix 9, para. 74.

[1969] Memorial, Appendix 9, paras. 75-76.

[1970] Memorial, Appendix 9, para. 77.

[1971] Memorial, Appendix 9, para. 78.

[1972] Memorial, Appendix 9, paras. 78-88.

party Mr Orin Kramer, comply with Chevron's *subpoena duces tecum*.[1973] Chevron also sought to compel production of documents from H5, a litigation support firm that assisted Mr Donziger and the LAPs.[1974]

1231. For its part, the RICO defendants sought discovery from 26 non-parties for the production of documents and other materials. Twenty of these non-parties were persons or entities who served as expert witnesses or consultants to Chevron in connection with the Lago Agrio Litigation. Following the issuance of these subpoenas, Chevron moved the court to enter a protective order striking or compelling the withdrawal of the subpoenas addressed to 20 Chevron environmental contractors, consultants, or experts, and the 23 subpoenas directed to non-parties, including 20 environmental witnesses.[1975] On 12 December 2012, the SDNY issued an order forbidding the LAP Representatives from enforcing the subpoenas listed in Chevron's motion, ruling that environmental issues are irrelevant in the RICO Litigation where "the central issue . . . is whether the LAPs procured [the Lago Agrio Judgment] by fraud or other misconduct in furtherance of the overall extortion scheme".[1976]

1232. On 18 January 2013, the LAP Representatives filed a Notice of Appeal challenging the SDNY's issuance of the protective order. On 1 May 2013, the Second Circuit granted Chevron's Motion to Dismiss for lack of appellate jurisdiction.[1977]

1233. On 13 February 2013, Chevron moved the SDNY to appoint a Special Master to oversee the numerous party and party-related depositions in the case.[1978] On 1 March 2013, the SDNY appointed Messrs Max Gitter and Theodore H. Katz as Special Masters for the purposes of assisting with discovery in the action.[1979] The Special Masters issued twenty

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[1973] Memorial, Appendix 9, para. 89.

[1974] Memorial, Appendix 9, para. 90.

[1975] Memorial, Appendix 9, para. 91.

[1976] Memorial, Appendix 9, para. 92.

[1977] Memorial, Appendix 9, para. 94.

[1978] Memorial, Appendix 9, para. 99.

[1979] Memorial, Appendix 9, para. 100.

orders throughout the case analysing and deciding questions of relevance and privilege over contentious depositions.[1980]

1234. On 5 March 2013, Judge Kaplan held a pre-trial status conference, where he issued his "Rule 16 Order" directing the parties "to confer and to report by [12 March 2013] any agreement of all parties as to the number of depositions for each side".[1981] As the parties disagreed on the location of depositions, Judge Kaplan also instructed the parties to confer and seek an agreement on a deposition protocol by 12 March 2013.[1982]

1235. On 15 March 2013, the SDNY issued an order limiting the number of fact witness depositions to 21 witnesses per side. On 26 March 2013, the SDNY allowed the deposition of certain Ecuadorian witnesses in Lima, Peru, in light of security risks in Ecuador raised by Chevron.[1983] Further, the SDNY also granted in part and denied in part Chevron's motion for discovery, ruling that, because the RICO defendants were present or represented at the Section 1782 depositions, those depositions could be used "to the same extent as if taken in [this] action."[1984]

1236. Following further incidents relating to the depositions, such as changes to Chevron's deponent list, proposed modifications to the deposition schedule, and requests to depose Chevron's senior executives, as well as requests for protective orders from both parties,[1985] the remaining depositions were held pursuant to the schedule in Special Masters Orders Nos. 12, 13, and 14.[1986] Pursuant to Special Masters Order No. 18, Mr Donziger's deposition was also taken and completed on 28 June 2013.[1987]

1237. In the interim, on 12 March 2013 Chevron filed a motion for sanctions seeking to hold the Donziger Defendants and the LAP Representatives in contempt of court for refusing

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1980 Memorial, Appendix 9, para. 102.

1981 **C-3037**, RICO Docket, ECF No. 882 (7 March 2013).

1982 Memorial, Appendix 9, paras. 105-106.

1983 **C-3037**, RICO Docket, ECF No. 941 (26 March 2013); Memorial, Appendix 9, paras. 107-108.

1984 **C-3037**, RICO Docket, ECF No. 939 (26 March 2013); Memorial, Appendix 9, para. 113.

1985 Memorial, Appendix 9, paras. 114-116.

1986 Memorial, Appendix 9, paras. 110-111.

1987 Memorial, Appendix 9, para. 112.

to produce documents from their Ecuadorian agents and lawyers. Following an exchange of briefings, on 10 April 2013 the SDNY directed a full evidentiary hearing on certain issues pertinent to the motion.[1988]

1238. Contempt hearings were held from 16 to 18 April 2013.[1989] On 10 October 2013, the SDNY issued an Opinion granting in part and denying in part Chevron's sanctions motion against the Donziger Defendants and the LAP Representatives.[1990]

10. LAP Representatives' Motion to Dismiss and Motion for Judgment on the Pleadings

1239. On 18 July 2012, the LAP Representatives filed a motion to dismiss for lack of jurisdiction. Following opposition from Chevron and a reply from the LAP Representatives, the SDNY, on 24 August 2012, denied the motion stating it would defer the question of personal jurisdiction to trial, "because discovery is just beginning in this action, and the factual issues pertinent to this motion are intertwined with the merits."[1991]

1240. On 23 October 2012, the LAP Representatives moved for judgment on the pleadings, which was opposed by Chevron on 12 November 2012.[1992]

1241. On 27 November 2012, the SDNY issued an Order granting in part and denying in part the LAP Representatives' motion for judgment on the pleadings. The SDNY granted the motion "to the extent that so much of the third claim for relief as is premised on detrimental reliance by Chevron and the fourth through the sixth claims for relief all are dismissed, provided, however, that the dismissal of the claim for damages asserted in the sixth claim is dismissed only as premature."[1993]

[1988] **C-3037**, RICO Docket, ECF No. 997 (10 April 2013).

[1989] Memorial, Appendix 9, para. 127; **C-3037**, RICO Docket, ECF No. 997 (10 April 2013).

[1990] Memorial, Appendix 9, paras. 107-108; **C-3037**, RICO Docket, ECF No. 1529 (10 October 2013).

[1991] Memorial, Appendix 9, paras. 117-118.

[1992] Memorial, Appendix 9, para. 120.

[1993] Memorial, Appendix 9, para. 121; **C-3037**, RICO Docket, ECF No. 634 (27 November 2012).

1242. On 4 December 2012, the LAP Representatives sought leave to appeal on two points, which the SDNY denied on 7 January 2013.[1994]

11. Huaorani People's Motion to Intervene

1243. Meanwhile, on 30 November 2012 members of the Huaorani people in Ecuador sought leave to intervene in the RICO Litigation on the ground that it was necessary to defend the validity of the Lago Agrio Judgment. The Huaorani people challenged Mr Donziger and ADF's purported representation of them in the Lago Agrio Litigation and asserted cross claims against Mr Donziger and ADF.[1995]

1244. On 14 January 2013, the SDNY issued an Order denying the Huaorani people's motion on the grounds of untimeliness and lack of interest, as the Huaorani people's "objective [with regard to the defending the validity of the Lago Agrio Judgment] are entirely aligned with those of the existing [RICO Defendants]".[1996]

12. LAPs' Mandamus Petition

1245. Meanwhile, on 5 March 2013, the LAPs – represented by attorneys at Patton Boggs – filed a mandamus petition before the Second Circuit seeking an order directing the SDNY to "refrain, *in any context*, from considering whether the [Lago Agrio Judgment] is entitled to recognition, unless Petitioners affirmatively seek relief under the Recognition Act" in addition to other relief, including removing Judge Kaplan from the RICO Litigation.[1997] Chevron filed its response to the mandamus petition on 15 July 2013.

1246. Following oral argument on 26 September 2013, the Second Circuit denied the mandamus petition.[1998]

1994 Memorial, Appendix 9, paras. 122-123; **C-3037**, RICO Docket, ECF No. 707 (7 January 2013).

1995 Memorial, Appendix 9, para. 124.

1996 Memorial, Appendix 9, para. 125.

1997 Memorial, Appendix 9, para. 131 (emphasis in the original).

1998 Memorial, Appendix 9, para. 134; **C-3044**, *In re Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje*, Docket for Case No. 13-772 (2d Cir.), 5 March 2013, ECF No. 182 (26 September 2013).

13. RICO Trial Phase

1247. On 25 October 2012, the SDNY issued a Trial Order, noting that it expected the RICO Litigation to be called for trial a year later, on 15 October 2013.[1999] Apart from the incidents narrated above, there were several motions filed by both parties in the lead-up to the RICO trial.[2000]

1248. Chevron filed several motions *in limine* to exclude allegedly irrelevant and prejudicial statements, as well as to preclude or allow admission of certain evidence or arguments.[2001]

1249. On 8 September 2013, Chevron filed a notice that it was waiving any right to collect money damages against the LAP Representatives.[2002] Following this, on 7 October 2013 the SDNY held that there is no right to trial by jury and declined to order a jury trial in this case.[2003]

1250. Meanwhile, Chevron again attempted to reinstate its claim for unjust enrichment (Count 6).[2004] On the other hand, the remaining RICO defendants (at this stage, the Donziger Defendants and the LAP Representatives) sought an order to dismiss Counts 1 and 2 of the RICO Litigation in light of Chevron's waiver to claim any money damages.[2005] The SDNY denied this motion, declining to address the issue on an expedited basis in the absence of a complete factual record that may inform his ultimate disposition.[2006]

1251. The Claimants allege that, by the time the trial began, Chevron had taken and defended over 50 depositions as well as identified, prepared, and introduced almost 3,000 affirmative exhibits. Chevron also prepared over 38 fact and expert witnesses for trial, including preparing statements for each witness and preparing them for their appearance

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1999 Memorial, Appendix 9, para. 135; **C-3037**, RICO Docket, ECF No. 606 (25 October 2012).

2000 *See generally* Memorial, Appendix 9, paras. 135-139.

2001 **C-3037**, RICO Docket, ECF No. 1388 *ff* (8 September 2013).

2002 **C-3037**, RICO Docket, ECF No. 1404 (8 September 2013).

2003 **C-3037**, RICO Docket, ECF No. 1500 (7 October 2013).

2004 **C-3037**, RICO Docket, ECF No. 1470 (30 September 2013).

2005 **C-3037**, RICO Docket, ECF No. 1521 (10 October 2013).

2006 **C-3037**, RICO Docket, ECF No. 1533 (10 October 2013).

in court. Chevron ultimately called 25 witnesses at trial. Further, the Claimants assert that Chevron prepared over 150 demonstratives for use during trial. The remaining RICO defendants, in turn, introduced about 1,000 exhibits, submitted seven witness statements, and called six witnesses at trial.

1252. Trial took place before Judge Kaplan from 15 October through 26 November 2013. The Court heard Chevron's RICO, fraud, and other claims against the Donziger Defendants and the LAP Representatives. In all, the SDNY heard 31 witnesses in person and considered the sworn/stipulated testimony of an additional 37 witnesses.[2007] Among the factual witnesses examined orally were Dr Zambrano, Mr Donziger, and Dr Guerra.[2008]

1253. According to the Claimants, given the "enormity and complexity" of the RICO trial, Chevron incurred significant expenses in terms of: (i) trial logistics; (ii) preparing over 23 trial briefs; (iii) preparing Chevron's witnesses and witness statements; (iv) preparing for cross-examination and other responses to defence witnesses; and (v) other trial costs excluding attorney time.[2009] Other trial costs include Chevron's expenses relating to: (i) space rentals and related costs; (ii) transcripts; (iii) courier services/delivery; (iv) travel/lodging of its counsel, paralegals, vendors, witnesses and experts; (v) catered meals; (vi) printing and photocopying costs; and (vii) interpreter fees.[2010]

1254. After the conclusion of the RICO trial, the parties had one month to prepare post-trial briefs, which the parties filed on 23 December 2013. Reply briefs were filed on 21 January 2014.[2011]

1255. The trial did not conclude the incidents before the SDNY. On 22 January 2014, the Donziger Defendants filed a second motion to dismiss for lack of jurisdiction,[2012] which

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[2007] Memorial, Appendix 9, para. 140.

[2008] Track II Award, para. 4.479.

[2009] *See generally* Memorial, Appendix 9, paras. 141-151.

[2010] *See generally* Memorial, Appendix 9, paras. 152-158.

[2011] Memorial, Appendix 9, para. 160.

[2012] **C-3037**, RICO Docket, ECF No. 1860 (22 January 2014).

the LAP Representatives later joined.[2013] Following another round of briefings, the SDNY denied the defendants' motion together with his decision on the Amended Complaint.[2014]

14. SDNY Decision

1256. On 4 March 2014, the SDNY issued its Opinion and related Orders in the RICO Litigation (previously defined as the "**RICO Judgment**"),[2015] finding that the "[Lago Agrio Judgment] was procured by fraud and that [the Donziger Defendants] conducted and conspired to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. §§ 1962(c) and 1962(d)."[2016] The RICO Judgment was entered (i) imposing a constructive trust for the benefit of Chevron on the assets of the Donziger Defendants and LAP Representatives that are traceable to the Lago Agrio Judgment; and (ii) enjoining said defendants from seeking to enforce the Lago Agrio Judgment in the United States or from undertaking any acts to monetize or profit from the Lago Agrio Judgment.[2017] Chevron was also allowed to recover the costs of the action against the defendants, jointly and severally.[2018]

1257. The Order appended to the RICO Judgment reads, in relevant part, as follows:

> 1. The Court hereby imposes a constructive trust for the benefit of Chevron on all property, whether personal or real, tangible or intangible, vested or contingent, that Donziger has received, or hereafter may receive, directly or indirectly, or to which Donziger now has, or hereafter obtains, any right, title or interest, directly or indirectly, that is traceable to the Judgment or the enforcement of the Judgment anywhere in the world including, without limitation, all rights to any contingent fee under the Retainer Agreement and all stock in Amazonia. Donziger shall transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain.
>
> 2. The Court hereby imposes a constructive trust for the benefit of Chevron on all property, whether personal or real, tangible or intangible, vested or contingent, that the LAP Representatives, and each of them, has received, or hereafter may receive, directly or indirectly, or to which the LAP Representatives, and each of them, now has, or hereafter obtains, any right, title or interest, directly or indirectly, that is

2013 **C-3037**, RICO Docket, ECF No. 1862 (28 January 2014).

2014 Memorial, Appendix 9, para. 161.

2015 Track II Award, para. 4.481.

2016 **C-3037**, RICO Docket, ECF No. 1874 (4 March 2014).

2017 **C-3037**, RICO Docket, ECF No. 1875 (4 March 2014).

2018 **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, para. 9.

traceable to the Judgment or the enforcement of the Judgment anywhere in the world. The LAP Representatives, and each of them, shall transfer and forthwith assign to Chevron all such property that he now has or hereafter may obtain.

3. Donziger shall execute in favor of Chevron a stock power transferring to Chevron all of his right, title and interest in his shares of Amazonia, and Donziger and the LAP Representatives, and each of them, shall execute such other and further documents as Chevron reasonably may request or as the Court hereafter may order to effectuate the foregoing provisions of this Judgment.

4. Donziger and the LAP Representatives, and each of them, is hereby enjoined and restrained from:

   4.1 Filing or prosecuting any action for recognition or enforcement of the Judgment or any New Judgment or seeking the seizure or attachment of assets based on the Judgment or any New Judgment, in each case in any court in the United States.

   4.2. Seeking prejudgment seizure or attachment of assets based upon the Judgment or any New Judgment, in each case in any court in the United States.[2019]

5. Donziger and the LAP Representatives, and each of them, is hereby further enjoined and restrained from undertaking any acts to monetize or profit from the Judgment, as modified or amended, or any New Judgment, including without limitation by selling, assigning, pledging, transferring or encumbering any interest therein.

6. Notwithstanding anything to the contrary in this Judgment, nothing herein enjoins, restrains or otherwise prohibits Donziger, the LAP Representatives, or any of them, from (a) filing or prosecuting any action for recognition or enforcement of the Judgment or any New Judgment, or any for prejudgment seizure or attachment of assets based in courts outside the United States; or (b) litigating this action or any appeal of any order or judgment issued in this action.

   [. . .]

8. In accordance with Federal Rule of Civil Procedure 65(d)(2), this Judgment is binding upon the parties; their officers, agents, servants, employees, and attorneys; and other persons who are in active concert and participation with any of the foregoing.

   [. . .]

9. Chevron shall recover of Donziger and the LAP Representatives, and each of them, jointly and severally, the costs of this action pursuant to Fed. R. Civ. P. 54(d)(l) and 28 U.S.C. § 1920 [. . .].[2020]

[2019] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014.

[2020] Track II Award, para. 4.481; **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, 4 March 2014.

1258. As summarized by the Claimants, the SDNY's Opinion contained several key holdings, namely: (i) the Lago Agrio Judgment was procured by fraud, and is thus unenforceable in the United States; (ii) the application of RICO was not impermissibly extraterritorial; (iii) the RICO Defendants constituted an "enterprise" under the RICO statute; (iv) the Ecuadorian litigation team violated the Hobbs Act (*i.e.*, 18 U.S.C. § 1951, interference with commerce by robbery or extortion); (v) Mr Donziger violated the Foreign Corrupt Practices Act and the Travel Act; (vi) Chevron sufficiently showed its injuries satisfied RICO's direct causation mandate; (vii) none of the related Ecuadorian decisions – including the final Lago Agrio Judgment – were entitled to recognition in the United States; (viii) Chevron was not judicially estopped from challenging the validity of the Lago Agrio Judgment; (ix) the circumstances required the imposition of a constructive trust in Chevron's favour in case any proceeds from the fraudulent Judgment were ever obtained; and that (x) it was proper to issue a permanent injunction barring enforcement of the judgment anywhere in the United States.[2021]

15. Appeal before the Second Circuit

1259. On 18 March 2014, the Donziger Defendants and the LAP Representatives each noticed their respective appeals with the Second Circuit, challenging the SDNY's RICO Judgment.[2022]

1260. With leave of court, all the parties filed briefs. The LAP Representatives and Mr Donziger their respective merits brief on 1 July and 2 July 2014.[2023]

1261. On 1 October 2014, Chevron filed a response brief. This was followed by a corrected response brief on 8 October 2014.[2024]

1262. On 3 November 2014, the LAP Representatives filed their reply brief. On 25 November 2014, Mr Donziger filed a brief, followed by a corrected reply brief on 6 January 2015.[2025]

[2021] Memorial, Appendix 9, para. 162.

[2022] **C-3037**, RICO Docket, ECF Nos. 1886, 1887 (18 March 2014).

[2023] Memorial, Appendix 9, para. 168.

[2024] Memorial, Appendix 9, para. 169.

[2025] Memorial, Appendix 9, para. 170.

1263. An oral argument was held on 20 April 2015. After argument, the parties filed supplemental briefing relating to the implications of this Arbitration, as the issue had been raised during the oral argument.[2026]

1264. Ecuador also moved to file an *amicus curiae* brief before the Second Circuit and also filed a motion for judicial notice.[2027] On 15 March 2015, Mr Donziger filed with the court a motion for judicial notice asking the court to take notice of eight documents filed in this Arbitration.

1265. On 8 August 2016, the Second Circuit affirmed the SDNY's decision.[2028]

a. *Certiorari* before the Supreme Court

1266. On 27 March 2017, Mr Donziger and one of the LAP Representatives, Mr Camacho Naranjo, filed a petition for *certiorari* before the U.S. Supreme Court, seeking review of the Second Circuit's decision affirming the SDNY's RICO Judgment.[2029]

1267. Following the submission of briefs, including an *amicus brief* filed by Ecuador in support of the petition for *certiorari*, the U.S. Supreme Court denied the petition on 19 June 2017, thus affirming with finality the Second Circuit's Decision and the SDNY's RICO Judgment.[2030]

b. Post-judgment Proceedings

1268. The RICO Judgment did not bring an end to the RICO Litigation. Chevron continued pursuing certain motions and incidents that are relevant in the determination of the damages claimed under this category, including (i) Chevron's application for attorneys' fees and costs, and (ii) post-judgment contempt proceedings against Mr Donziger.

2026 Memorial, Appendix 9, para. 171.

2027 Memorial, Appendix 9, para. 173.

2028 Track II Award, para. 4.486.

2029 Memorial, Appendix 9, para. 180.

2030 Memorial, Appendix 9, paras. 181-182; **C-2542**, U.S. Court of Appeals for the Second Circuit, denying the petition for a writ of certiorari in *Steven Donziger, et al. v. Chevron Corporation*, Case No. 16-1178, 19 June 2017.

1269. On 18 March 2014, shortly after the issuance of the RICO Judgment, Chevron filed its motion for attorneys' fees for the amount of USD 32,334,584.[2031] The SDNY deferred the determination of the motion "pending the outcome of Donziger's appeal" before the Second Circuit.[2032] Accordingly, on 8 November 2016 after the conclusion of the Second Circuit Appeal, Chevron filed a notice reactivating its motion for attorneys' fees.[2033] However, the SDNY still declined to reactivate the motion at that time, stating that Chevron could seek to renew its application on or after 26 January 2017 or, if Mr Donziger had by then filed a petition for certiorari before the Supreme Court, Chevron could reapply to reactivate the motion after the Supreme Court proceedings.[2034]

1270. On 19 June 2017, following the conclusion of Supreme Court proceedings, Chevron again requested the SDNY to reactivate its motion for attorneys' fees.[2035] On 17 July 2017, the SDNY granted Chevron's request and gave Mr Donziger until 7 August 2017 to contest the reasonableness of Chevron's attorneys' fees rates and hours.[2036] According to the Claimants, the SDNY has not yet decided whether to award Chevron any attorneys' fees.[2037]

1271. In the same order, the SDNY also directed the clerk of court to tax costs against Mr Donziger, which included fees associated with the work of the Special Masters who oversaw discovery.[2038] Mr Donziger, through several submissions, contested the reasonableness of the Special Masters' costs, which were eventually upheld by the SDNY.[2039]

2031 **C-3037**, RICO Docket, ECF No. 1889 (18 March 2014).

2032 **C-3037**, RICO Docket, ECF No. 1902 (29 April 2014).

2033 **C-3037**, RICO Docket, ECF No. 1915 (8 November 2016).

2034 **C-3037**, RICO Docket, ECF No. 1916 (9 November 2016).

2035 **C-3037**, RICO Docket, ECF No. 1922 (19 June 2017).

2036 **C-3037**, RICO Docket, ECF No. 1923 (17 July 2017).

2037 Memorial, Appendix 9, para. 184.

2038 **C-3037**, RICO Docket, ECF No. 1923 (17 July 2017).

2039 Memorial, Appendix 9, paras. 185-186.

1272. On 8 August 2017, costs were taxed in favour of Chevron and against the Donziger Defendants in the amount of USD 944,463.85.[2040] On 28 February 2018, following a motion to review from Mr Donziger concerning the amounts taxed for the Special Masters, the costs award was reduced to USD 813,602.71.[2041]

1273. As regards post-judgment discovery and contempt proceedings, on 19 March 2018, Chevron filed a request for discovery and a preservation order as well as an application to have Mr Donziger held in contempt of court for his alleged failure to transfer his shares in Amazonia Recovery Limited ("**Amazonia**") – a Gibraltar company created by the LAPs' representatives "for receipt and distribution of any funds in consequence of the Judgment"[2042] – and his alleged attempts to monetize the Lago Agrio Judgment. After briefing by the parties and a hearing that took place on 8 May 2018, the SDNY reserved its decision on the motion.[2043]

1274. On 16 May 2018, the SDNY granted Chevron's motion with respect to discovery and added that the question of whether or not Mr Donziger could be found in contempt would be addressed at a later date. On 28 June 2018, an evidentiary hearing on the monetization contempt claims was held. The SDNY again reserved decision after this evidentiary hearing.[2044]

1275. Chevron subsequently served post-judgment subpoenas under Federal Rule of Civil Procedure 69 (*i.e.*, execution) and New York CPLR 5224 (*i.e.*, enforcement of money judgments) on Mr Donziger and other third parties alleged to be involved with his solicitation of judgment enforcement funds. Following Mr Donziger's refusal to comply, Chevron moved to compel discovery, which the SDNY granted. Mr Donziger allegedly "produced minimal responses" and was deposed on 15 June 2018, during which examination he again allegedly "refused to fully comply."[2045] Chevron also subpoenaed

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[2040] **C-3037**, RICO Docket, ECF Nos. 1928 (8 August 2017).

[2041] **C-3037**, RICO Docket, ECF Nos. 1959 (28 February 2018).

[2042] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, fn 1110.

[2043] Memorial, Appendix 9, para. 192.

[2044] Memorial, Appendix 9, para. 193.

[2045] Memorial, Appendix 9, para. 194.

documents from and deposed numerous third parties, following the SDNY's confirmation that the subpoenaed third parties were subject to post-judgment discovery.[2046]

1276. Rather than an unqualified transfer of his Amazonia shares to Chevron as previously represented, Mr Donziger later executed an allegedly non-compliant share transfer document with an "Addendum of Understandings" seeking to negate the transfer of shares.[2047] Thus, on 27 June 2018, Chevron moved to compel Mr Donziger to execute an unqualified transfer of these shares to Chevron, which the SDNY granted.[2048]

1277. According to the Claimants, post-judgment discovery showed that Mr Donziger is in repeated violation of the RICO Judgment, which prohibited him from monetizing or profiting from the Lago Agrio Judgment and which required him to transfer to Chevron all property he obtains that is traceable to the Lago Agrio Judgment. Thus, on 1 October 2018, Chevron filed another contempt motion based on these alleged violations of the RICO Judgment.[2049]

1278. On 5 October 2018, following Chevron's motion to hold him in contempt, Mr Donziger executed a document for the transfer of his Amazonia shares to Chevron.[2050] Thus, the SDNY denied Chevron's 1 October 2018 contempt motion as moot.[2051]

1279. On 5 March 2019, the SDNY directed Mr Donziger to comply with a Forensic Inspection Protocol which required him to, *inter alia*, provide a court-appointed neutral forensic expert with a list of his accounts and devices for imaging. Mr Donziger refused to comply. Thus, on 20 March 2019, Chevron filed another motion to hold him in contempt.[2052]

2046 Memorial, Appendix 9, para. 195.

2047 Memorial, Appendix 9, para. 200.

2048 Memorial, Appendix 9, para. 201.

2049 Memorial, Appendix 9, para. 204.

2050 Memorial, Appendix 9, para. 202.

2051 Memorial, Appendix 9, para. 202.

2052 Memorial, Appendix 9, para. 203; **C-3037**, RICO Docket, ECF No. 2175 (20 March 2019).

1280. On 20 March 2019, Chevron filed yet another contempt motion based on Mr Donziger allegedly pledging a portion of his interest in the Lago Agrio Judgment to pay for personal consulting services.[2053]

1281. On 23 May 2019, the SDNY granted the pending contempt motions and found Mr Donziger in contempt of the RICO Judgment and the Forensic Inspection Protocol order. Mr Donziger was ordered to complete an unqualified transfer of his interest under his 2017 retainer agreement with ADF to Chevron and to provide the lists of devices and accounts required by the Forensic Protocol Order, with daily fines if Mr Donziger still fails to comply.[2054] In the same order, the SDNY found that Mr Donziger profited in the amount of USD 666,476.34 from the sale of his interest in the Lago Agrio Judgment, and that he failed to transfer these proceeds to Chevron. The SDNY accordingly ordered a supplemental judgment in Chevron's favour in the amount of USD 666,476.34.[2055]

1282. According to the Claimants, to date, this ancillary proceeding in the RICO Litigation is still ongoing.[2056]

(d) Analysis

1283. Before beginning its analysis of the Claimants' damages claim in respect of the RICO Litigation, the Tribunal recalls the Claimants' position that all of their claimed legal fees and expenses incurred in connection with this litigation constitute direct damages and are recoverable in the alternative as incidental damages.[2057] 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 to mitigate any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[2058]

[2053] Memorial, Appendix 9, para. 205; **C-3037**, RICO Docket, ECF No. 2175 (20 March 2019).

[2054] Memorial, Appendix 9, para. 206.

[2055] Memorial, Appendix 9, para. 206.

[2056] Memorial, Appendix 9, para. 207.

[2057] Reply, para. 794.

[2058] *See* para. 317 above.

1284. Following the methodology laid out in Section VII.G.5 for the assessment of incidental damages in this case, a majority of the Tribunal finds that the Claimants' claim for compensation in respect of the RICO Litigation must be granted for the reasons and to the extent set out below. The findings set forth in Section VIII.G.3(d)1 below are subject to a dissent by Arbitrator Dr Horacio A. Grigera Naón.

1. First Step: Analysis of Incidental Damages "Category"

1285. As a first step of its analysis, the Tribunal must determine whether the RICO Litigation category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

1286. 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.

1287. 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.[2059]

[2059] *See* para. 556 above.

1288. The Tribunal is satisfied that, by initiating the RICO Litigation, the Claimants sought to prevent the Lago Agrio Judgment from becoming enforceable, particularly in the United States. Thwarting enforcement in this jurisdiction was critical: aside from hosting Chevron's headquarters and numerous assets, the Invictus Memorandum – which set out a legal strategy for seizing Chevron's assets outside Ecuador in multiple jurisdictions – noted expressly that recognition and enforcement of the Lago Agrio Judgment "in the United States is undoubtedly the most desirable outcome".[2060] In clear reaction to that strategy, the request for relief in Chevron's Amended Complaint includes (i) a request for a temporary restraining order, a preliminary injunction, and permanent injunction barring any attempt "to recognize or enforce the Lago Agrio judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad";[2061] and (ii) a request for a declaratory judgment that the Lago Agrio Judgment is unenforceable and non-recognizable.[2062] Chevron's efforts were partly successful: the relief ultimately obtained by Chevron by the time the U.S. Supreme Court denied *certiorari* in 2017 included (i) a permanent injunction against the enforcement of the Lago Agrio Judgment in the United States (albeit not abroad); and (ii) a constructive trust for Chevron's benefit on all property that Mr Donziger or the LAPs may obtain that is traceable to the enforcement of the Lago Agrio Judgment.[2063]

1289. As shown in this analysis, Chevron's pursuit of the RICO Litigation was geared towards the goal of preventing the Lago Agrio Judgment from becoming enforceable (item (i) in paragraph 642 above), thus fulfilling the requirement of causation for the compensation of incidental damages under international law. The same set of circumstances is nonetheless insufficient, on its own, to support the conclusion that the requirement of

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[2060] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], p. 12. *See also id*., pp. 13-14: "We note that Chevron, by way of public disclosure on its corporate website, has notable attachable assets located in a number of these jurisdictions, including Alabama, California, Southern Louisiana, Mississippi, Nevada, and New Mexico. Dependent upon the peculiarities of the foreign judgment recognition law in these jurisdictions, among other considerations, the aforementioned states may prove to be especially attractive for enforcement. . ."

[2061] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

[2062] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

[2063] **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, 4 March 2014, pp. 1-3.

reasonableness is also met: the fact that Chevron's pursuit of the RICO Litigation was one course of action to achieve the goal of preventing enforcement does not necessarily entail that Chevron's choice of measures was reasonable overall.[2064]

1290. The Tribunal shall now consider other relevant questions raised by the Parties to determine whether the requirement of the reasonableness of incidental damages is met as regards the RICO Litigation, *i.e.*, whether Chevron's pursuit of the RICO Litigation was a reasonable means of mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment. Without prejudice to such analysis, however, the fact that Chevron's choice of measures to prevent the enforcement of the Lago Agrio Judgment in its home jurisdiction was successful and effective in achieving this wholly legitimate result (save for Count 9 and Chevron's request for a global injunction) compels the conclusion that the RICO Litigation cannot be entirely excluded from compensation.[2065] Lending additional support to this conclusion, the RICO Litigation was the source of extensive evidence and discovery ultimately relied upon in other contexts where Chevron was defending itself against the risk of very serious harm created by the fraudulent Lago Agrio Judgment and its recognition and enforcement, including to prove the Claimants' claims before this Tribunal.[2066] Accordingly, any potential shortcomings in the reasonableness of the Claimants' choice of measures should, at most, result in a reduction of compensation for the legal fees and expenses incurred by the Claimants in connection with the RICO Litigation.

1291. The Respondent raises two main arguments touching upon the reasonableness of the Claimants' decision to pursue the RICO Litigation: (i) a reasonable litigant would have waited for the LAPs to attempt to enforce the Lago Agrio Judgment instead of bringing the RICO Litigation; and (ii) the claims in the RICO Litigation were not related to preventing enforcement; rather, they "sought to inflict maximum pain on Steven

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2064 *See* para. 342 above.

2065 *See* para. 553 *above*.

2066 *See*, *e.g.*, Track II Award, paras. 4.25, 4.28.

Donziger" and "send a message to anyone else who may deign to challenge Chevron in the future".[2067] The Tribunal will address each argument in turn.

1292. First, relying on the opinion its expert, Dr Stacie Strong, the Respondent asserts that if Chevron wished simply to prevent the enforcement of the Lago Agrio Judgment in the United States, a reasonable option would have been "to defend against an enforcement action in U.S. courts", in which case Chevron "would have saved considerable time and money".[2068] The Respondent recalls in this respect that the Second Circuit, in dismissing Chevron's pre-emptive request for a declaratory judgment that the Lago Agrio Judgment is unenforceable, similarly opined that "a far better remedy is available: Chevron can present its defense to the recognition and enforcement of the Ecuadorian judgment in New York if, as and when the LAPs seek to enforce their judgment in New York."[2069] In essence, therefore, the Respondent questions the reasonableness of the Claimants' decision to bring the RICO Litigation in circumstances where there was an alternative course of action which would have "a higher chance of succeeding [and] would be a more efficient as well as a more time- and cost-effective procedure."[2070]

1293. The Tribunal is not persuaded by this analysis, as it understates the threat faced by the Claimants in the United States and the critical procedural advantages brought about by taking affirmative action against potential enforcement attempts. The Invictus Memorandum laid out an "aggressive approach" for enforcement of the Lago Agrio Judgment in the United States, canvassing multiple jurisdictions where pre-judgment attachment may be attempted.[2071] The Tribunal thus sees merit in the Claimants' argument that "[r]ather than facing the threat of enforcement actions in unknown U.S.

2067 Rejoinder, paras. 1227-1252.

2068 **RE-44**, First Strong Report, para. 7.

2069 **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012, p. 246.

2070 **RE-44**, First Strong Report, para. 90.

2071 **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated [DONZ00032520-51], p. 14: "Consistent with their aggressive approach, Plaintiff's Team will look for ways to proceed against Chevron on a pre-judgment basis, largely as a means of attaining a favorable settlement at an early stage. Varios laws and procedures within and outside of the United States may permit the attachment of Chevron's assets prior to successful recognition of the Ecuadorian judgment. Pre-judgment attachment would undoubtedly compound the pressure already placed on Chevron vis à vis an international enforcement campaign, and force Chevron to focus its resources on the proceedings initiated by the Plaintiffs, rather than its own sideshows. Undoubtedly, the availability of pre-judgment attachment mechanisms will play a critical role in our decision to enforce the judgment in a particular U.S. jurisdiction."

jurisdictions with a myriad of potentially applicable state laws", it was reasonable to seek to concentrate all enforcement issues into one specific forum.[2072] Among other advantages arising from this approach identified by the Claimants' experts, Mr Sanford Litvack notes, crucially, that "Chevron was able to affirmatively choose the venue and timing of that proceeding, rather than having to react defensively. This control of venue and timing is a key element in any litigation strategy."[2073] The Tribunal agrees with this assessment, particularly in circumstances in which Chevron might have conceivably faced parallel enforcement actions in several U.S. jurisdictions. The RICO Litigation may not have been the most economical and efficient strategy, but that does not necessarily make it an unreasonable strategy.

1294. In this connection, the Tribunal has taken note of Dr Strong's opinion that Rule 13 of the Federal Rules of Civil Procedure would not have required an enforcement action in another U.S. State to be treated as a compulsory counterclaim of the RICO Litigation and be transferred to the SDNY, as the Claimants assert.[2074] This opinion, however, is disproven by the RICO Judgment, where the SDNY stated that there was a "substantial" chance that any enforcement action filed elsewhere would be brought before it:

> As noted, attempts to enforce the Judgment in the United States always have been part of the plan. Indeed, even when the defendants sought to defeat the preliminary injunction in this case by disclaiming any then present intention to seek enforcement in New York, they conspicuously did not disclaim any such intention elsewhere in the United States.
>
> Moreover, the reasons for their failure to seek enforcement to date in the United States are fairly obvious.
>
> As an initial matter, the defendants' repeated efforts to have this case assigned to a different judge make clear their preference for almost any other forum. Any attempt, however, to enforce the Judgment in the United States while this action remains pending would carry a substantial risk that the enforcement proceeding would be litigated here for two reasons.
>
> *First*, as long as this action remains pending, any suit in a federal court by any of the LAPs (other than the two LAP Representatives who defended this case at trial) to enforce the

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[2072] Reply, para. 814. *See also* Silver Expert Report, para. 180.

[2073] Litvack Expert Report, para. 94.

[2074] **RE-62**, Second Strong Expert Report, paras. 35-47. Rule 13(a) of the Federal Rules of Procedure, concerning compulsory counterclaims, reads: " (1) *In General*. A pleading must state as a counterclaim any claim that – at the time of its service – the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." **RE-62**, Second Strong Expert Report, **SS-89**, Fed. R. Civ. P. 13(a).

> judgment likely would be a compulsory counterclaim in this case, as the defaulting LAPs are defendants here and have not answered the complaint in this case. FED. R. CIV. P. 13(a)(1).
>
> *Second*, there in any event would be a substantial chance that any enforcement action brought in a federal court other than this one would be transferred to this Court under 28 U.S.C. § 1404(a) or 1407, as occurred with Patton Boggs' related lawsuit in the District of New Jersey. *Patton Boggs LLP v. Chevron Corp.,* No. 12 Civ. 9176 (LAK), DI 42 (filed Dec. 14, 2012). Moreover, as the LAPs all are aliens, any enforcement action brought in a state court, other than those of the two states of which Chevron is a citizen (California and Delaware), could and quite likely would be removed by Chevron to federal court and then likely transferred to this Court.[2075]

1295. Therefore, in the Tribunal's view, it was reasonable for Chevron to take affirmative action to prevent the recognition and enforcement of the Lago Agrio Judgment in the United States by initiating the RICO Litigation, rather than passively wait for an enforcement action to be filed and defend against it.

1296. Second, the Respondent asserts that the claims in the RICO Litigation were not related to preventing enforcement; rather, their goal was "to inflict maximum pain on Steven Donziger" and "send a message to anyone else who may deign to challenge Chevron in the future".[2076]

1297. The Tribunal has already determined that by initiating the RICO Litigation Chevron had the goal of preventing the Lago Agrio Judgment from becoming enforceable in the United States.[2077] Critically, however, RICO does not address the enforcement of foreign judgments in the United States: it is intended primarily to combat the corrupt influence of organized crime.[2078] In the Tribunal's view, this circumstance invites further scrutiny of the reasonableness of Chevron's choice of mitigation measures. The fact that Chevron elected to pursue claims under RICO – a course of action the Claimants' own experts characterize as "innovative"[2079] – begs the question of why it chose to do so, whether by

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[2075] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, fn 1192.

[2076] Rejoinder, paras. 1227-1252.

[2077] *See* para. 1288 above.

[2078] *See* para. 1182 above.

[2079] Lea Expert Report, para. 63.

doing so Chevron pursued other goals beyond preventing enforcement, and, in such case, whether any of those other goals informed Chevron's choice of litigation strategy.

1298. These questions cannot be answered only by reference to Chevron's ultimate success in pursuing the RICO Litigation or the evidence of fraud it gathered while the litigation unfolded: the attainment of a particular outcome does not, in itself, establish that such an outcome was Chevron's primary aim. Whether Chevron pursued other goals beyond preventing enforcement by bringing the RICO Litigation must be answered chiefly by reference to the Claimants' Amended Complaint – which was filed shortly after the issuance of the Lago Agrio Judgment – and, in particular, by reference to the specific relief requested by Chevron in such complaint.

1299. The Tribunal notes that the Amended Complaint encompassed nine different causes of action, directed towards particular subsets of defendants.[2080] For better reference, Chevron's nine claims for relief in the Amended Complaint, as well as its prayer for relief, are reproduced below:

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Violations of RICO, 18 U.S.C. § 1962(c))

(Against All RICO Defendants)

[. . .]

SECOND CLAIM FOR RELIEF

(Conspiracy to Violate RICO, Violation of 18 U.S.C. § 1962(d))

(Against All RICO Defendants)

[. . .]

THIRD CLAIM FOR RELIEF

(Fraud)

(Against All Defendants)

2080 *See* para. 1190 above.

[. . .]

FOURTH CLAIM FOR RELIEF

(Tortious Interference With Contract)

(Against All Defendants)

[. . .]

FIFTH CLAIM FOR RELIEF

(Trespass to Chattels)

(Against All Defendants)

[. . .]

SIXTH CLAIM FOR RELIEF

(Unjust Enrichment)

(Against All Defendants)

[. . .]

SEVENTH CLAIM FOR RELIEF

(Civil Conspiracy)

(Against All Defendants)

[. . .]

EIGHTH CLAIM FOR RELIEF

(Violations of New York Judiciary Law § 487)

(Against Defendants Donziger, the Law Offices of Steven R. Donziger and Donziger & Associates, PLLC)

[. . .]

NINTH CLAIM FOR RELIEF

(Request for Declaratory Judgment That the Judgment by the Lago Agrio Court Against Chevron is Unenforceable and Non-Recognizable)

(Against the [ADF] and the "Lago Agrio Plaintiffs")

[. . .]

PRAYER FOR RELIEF

On the First and Second Claims for Relief:

1. For general damages according to proof at trial, trebled according to statute, 18 U.S.C. § 1964(c);

2. For pre-judgment interest according to statute; and

3. For Chevron's reasonable attorneys' fees and costs according to statute, 18 U.S.C. § 1964(c).

On the First through Seventh Claims for Relief:

4. For general damages according to proof at trial;

5. For equitable relief as appropriate pursuant to applicable law, including but not limited to issuing a temporary restraining order, a preliminary injunction and a permanent injunction that bars Defendants, their assignees and anyone else acting in concert with them including potentially the law firms of Emery Celli, Motley Rice and Patton Boggs, and H5 and financial backers such as Burford and Russell DeLeon-from commencing, prosecuting, or advancing in any way-directly or indirectly-any attempt to recognize or enforce the Lago Agrio judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad, including any attempt to attach or seize any Chevron or Chevron subsidiary's or co-venturer's assets, whether pre-judgment or otherwise, until this Court determines the merits and enters judgment on Chevron's claims against the Defendants in this action; and

6. Only for the third, fourth, fifth, and seventh claims for relief, punitive damages in an amount to be proven at trial.

On the Eighth Claim for Relief:

7. For general damages according to proof at trial, trebled according to statute, Judiciary Law § 487; and

8. For Chevron's reasonable attorneys' fees and costs according to statute, Judiciary Law § 487.

On the Ninth Claim for Relief:

9. For a declaration that the judgment against Chevron in the Lago Agrio Litigation is non-recognizable and unenforceable for each and everyone of the reasons set forth herein; and

10. For equitable relief as appropriate pursuant to applicable law, including but not limited to issuing a temporary restraining order, a preliminary injunction and a permanent injunction that bars the Front, the Lago Agrio Plaintiffs, their assignees and anyone else acting in concert with them-including the other RICO Defendants, the law firms of Emery Celli, Motley Rice and Patton Boggs, and H5 and financial backers such as Burford and Russell De Leon from commencing, prosecuting, or advancing in any way-directly or indirectly-any attempt to recognize or enforce the Lago Agrio judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad, including any attempt to attach or seize any Chevron or Chevron subsidiary's or co-venturer's assets, whether pre-judgment or otherwise, until this Court determines the merits and enters judgment on Chevron's claims against the Defendants in this action, or until such time as this Court deems appropriate.

As to All Causes of Action:

> 11. For such other legal and equitable relief as the Court may deem Chevron is entitled to receive.[2081]

1300. As gleaned from above, the only claims for relief in the Amended Complaint that are actually based on RICO are the First and Second Claims for Relief (to which the Parties also refer as Counts 1 and 2). In particular, Chevron pleaded violations of RICO (18 U.S.C. § 1962(c)) and conspiracy to violate RICO (18 U.S.C. § 1962(d)) as against a particular subset of the defendants, *i.e.*, the Donziger Defendants, the Stratus Defendants, Messrs Fajardo and Yanza, ADF, and Selva Viva. In Chevron's submission, this group of defendants "associated together in fact for the common purpose of carrying out an ongoing criminal enterprise".[2082]

1301. Aside from the two RICO claims, the remaining claims for relief in the Amended Complaint are either non-statutory claims for equitable relief (*i.e.*, common law claims) or claims based on New York law:[2083]

(i) Count 3 (Fraud) is principally based on the premise that the RICO defendants "and their agents have knowingly misrepresented, omitted, and/or concealed material facts in their pleadings and representations before U.S. courts and before the Lago Agrio court, in their communications to federal and state government agencies and officials, and in their communications to Chevron, Chevron's shareholders, investors, analysts, and the media". According to Chevron, "[a]s a direct, proximate, and foreseeable result of Defendants' fraud, Chevron has been harmed, including significant pecuniary, reputational, and other damages. These injuries include significant damage to Chevron's reputation and goodwill, and the attorneys' fees and costs to defend itself in objectively baseless, improperly motivated sham litigation in Ecuador and in related litigation in the U.S., including the attorneys'

2081 **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

2082 **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 342.

2083 Track III Hearing Transcript, Day 1 (18 August 2022), p. 67 (Coriell).

fees and costs associated with exposing the Defendants' pervasive fraud in the Section 1782 proceedings".[2084]

(ii) Count 4 (Tortious Interference with Contract) is founded on the assertion that that "Defendants have intentionally caused and continued to cause the Republic of Ecuador to repeatedly breach the 1995 Settlement Agreement and the 1998 Final Release. Defendants have, through improper influence and the fabricated Cabrera Report, persuaded the Republic of Ecuador to refuse to defend Chevron's rights and those of its subsidiaries under the contracts, to improperly dictate to the judiciary that Chevron be held liable in the Lago Agrio Litigation, and to bring criminal charges against Chevron's employees".[2085]

(iii) Count 5 (Trespass to Chattels) proceeds on the basis that the same subset of defendants against whom Counts 1 and 2 were brought "have engaged in a pattern of extortion, collusion, wrongdoing, and deceit with an intent to interfere with Chevron's property, and the Lago Agrio Plaintiffs have benefited and will continue to benefit from the RICO Defendants' criminal scheme through a fraudulent judgment. Through these actions, and by prosecuting a fraudulent lawsuit, manufacturing false evidence, tampering with testimony, disseminating misleading statements to courts, the public, and U.S. government officials, and otherwise engaging in the pressure campaign described in the foregoing paragraphs of this Amended Complaint, Defendants have intentionally, and without justification or consent, interfered and intermeddled with Chevron's use and enjoyment of its funds that were intended for Chevron's business purposes and of its business reputation and goodwill".[2086]

(iv) Count 6 (Unjust Enrichment) was argued as follows: "Principles of equity and good conscience mandate that this Court prevent Defendants from reaping a multi-billion

[2084] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, paras. 388-395.

[2085] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 398.

[2086] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 404.

dollar windfall and any benefits arising out of the fraudulent litigation by, among other things, issuing a preliminary and permanent injunction against Defendants that enjoins Defendants, their assignees, and anyone else acting in concert with them".[2087]

(v) Count 7 (Civil Conspiracy) departs from the premise that the RICO defendants "have committed torts against Chevron, including acts of racketeering giving rise to violations of RICO, fraud, tortious interference with contract, trespass to chattels, and unjust enrichment".[2088] Against this background, Chevron asserted that "Defendants agreed to participate in a common scheme against Chevron. Defendants intentionally participated in the furtherance of a plan or purpose to obtain property from Chevron. In furtherance of this plan or purpose, Defendants committed overt and unlawful acts, including acts of racketeering as alleged herein."[2089]

(vi) Count 8 (Violations of New York Judiciary Law § 487) is based on New York Judiciary Law § 487, which, as reproduced in the Amended Complaint, reads in relevant part: "An attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."[2090] According to Chevron, the Donziger Defendants "engaged in an intentional pattern of collusion, wrongdoing, and deceit with the intent to deceive both Chevron and multiple federal courts, including the

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[2087] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 413.

[2088] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 415.

[2089] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 416.

[2090] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 421.

United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit."[2091]

(vii) Count 9 (Request for Declaratory Judgment That the Judgment by the Lago Agrio Court Against Chevron is Unenforceable and Non-Recognizable) is a prayer for relief pursuant to the Declaratory Judgment Act, 28 USC § 2201(a)[2092] for a "declaratory judgment that the Lago Agrio judgment is unenforceable and non-recognizable, including but not limited to under the United States Constitution, federal common law, New York common law principles of comity, and/or New York's Recognition of Foreign Country Money Judgments Act (New York C.P.L.R. 5301, *et seq*.)".[2093]

1302. From among Counts 3-9, Count 8 merits a separate analysis. As gleaned from above, all of Counts 3-7 and 9 concern relief seeking to prevent the enforcement of the Lago Agrio Judgment.[2094] In contrast, Count 8 concerns only a request "for general damages according to proof at trial, trebled according to statute" and "for Chevron's reasonable attorneys' fees and costs according to statute" under Judiciary Law § 487.[2095] This raises questions regarding the extent to which Count 8 fulfils the requirement of causation for the compensation of incidental damages under international law. In view of the limited scope of Count 8, the Tribunal deems it preferable to address it individually in the following section.[2096] The Tribunal's further analysis will proceed only in respect of Counts 1-7 and 9.

1303. As mentioned before, from among the nine claims for relief set out in the Amended Complaint, Counts 1 and 2 stand apart for being based on RICO, a statute which is

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[2091] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 422.

[2092] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 428.

[2093] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 430.

[2094] *See also* para. 1190 above.

[2095] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

[2096] *See* paras. 1456-1461 below.

intended primarily to combat the corrupt influence of organized crime[2097] and does not address the enforcement of foreign judgments in the United States. At the same time, the two RICO claims and the remaining claims for relief in the Amended Complaint share the same factual matrix,[2098] while all counts except for Count 8 concern the same equitable relief seeking to prevent the enforcement of the Lago Agrio Judgment. This raises the question of whether it was necessary[2099] for Chevron to bring Counts 1 and 2 to prevent the recognition and enforcement of the Lago Agrio Judgment in the United States, instead of bringing an action based only on Counts 3-7 and 9. In the Tribunal's view, Counts 1 and 2, being based on RICO, are clearly separable from all other Counts and must be justified independently.

1304. The Claimants reject the suggestion that Chevron could have brought an action based only on Counts 3-7 and 9 on the basis that a common law claim would not have supported a request for equitable relief, as "there is no cause of action for common law fraud in New York where a plaintiff pleads detrimental reliance by a third party".[2100] However, the Tribunal does not believe this is germane to the question at hand. The equitable relief ultimately granted to Chevron in the RICO Litigation, which was identified in paragraph 1288 above, was based on liability under RICO and also under "non-statutory grounds" (*i.e.*, common law fraud under Count 3).[2101] As rightly noted by the Respondent, the

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[2097] *See* para. 1182 above.

[2098] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 23: "This Court has subject matter jurisdiction over Chevron's claims under 28 U.S.C. §§ 1331 and 1332, and under 18 U.S.C. § 1964(c). Chevron's first claim for relief arises under 18 U.S.C. § 1961 *et seq.*, as hereinafter more fully appears. There is also complete diversity of citizenship between the parties, and the amount in controversy exceeds $75,000, exclusive of interest and costs. *Chevron's state law claims arise out of the same case or controversy as its federal law claims, as all claims in this action arise out of a common nucleus of operative facts*. Thus, this Court also has supplemental jurisdiction over Chevron's state law claims under 28 U.S.C. § 1367." (emphasis by the Tribunal).

[2099] The Tribunal recalls that necessity is a component of reasonableness in the context of the assessment of incidental damages (*see* para. 336 above).

[2100] Reply, para. 807.

[2101] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, pp. 306 ("Chevron's principal remaining claims seek equitable relief with respect to the Judgment both on non-statutory grounds and under RICO. These two claims are entirely independent of each other although, of course, they rely to a great but not complete extent on the same facts. Chevron asserts in addition certain other claims."); 318 ("*The Non-Statutory Claims for Equitable Relief With Respect to the Judgment* - Chevron asserts that the Judgment was procured by bribery and coercion of Ecuadorian judges and, even if that were not so, that it nevertheless was procured by fraud in other respects. It nevertheless

Claimants' contrary proposition is disproven by the Second Circuit's opinion, which makes clear that the SDNY did, in fact, award equitable relief on principles of common law:

> Chevron did not assert RICO claims against the LAPs, and the district court based its grant of equitable relief against the LAP Representatives—for procurement of the Judgment by means of fraud—on principles of common law. The court also based the relief it granted against Donziger on that common-law theory as well as on RICO.[2102]

1305. Chevron also acknowledged as much when opposing a petition for *certiorari* questioning the availability of private injunctive relief in a RICO action:

> [Petitioners] fail to mention that the equitable relief ordered by the district court is independently supported under New York common law, and thus the question of RICO's remedial scope would not meaningfully affect the outcome of this appeal.
>
> [. . .]
>
> [The] district court's grant of equitable relief is also supported by a second, independent cause of action. As the Second Circuit noted, the district court "based the relief it granted against Donziger" on both the New York "common law theory as well as RICO." App. 125a. Thus, even if this Court were to grant certiorari and reverse the Second Circuit's holding regarding the availability of equitable relief under RICO, the relief ordered by the district court would remain in place.[2103]

1306. In sum, there was no distinct need for Chevron to bring claims under RICO to prevent the recognition and enforcement of the Lago Agrio Judgment in the United States, as the equitable relief it ultimately obtained could be independently supported in common law. In view of this circumstance, what precise goal did Chevron seek to attain by bringing two RICO claims (*i.e.*, Counts 1 and 2) in the RICO Litigation?

1307. At the heart of this question lies a fact of critical significance: before the RICO Litigation there was no clear precedent supporting the use of RICO to prevent the enforcement of a foreign judgment in the United States, much less to support a worldwide injunction. In

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does not seek to set aside the Judgment in the Ecuadorian court – an institution of a sovereign nation – or even to enjoin its enforcement outside the United States. Rather, it seeks equitable relief 'that will strip Defendants of any profits they are able to procure as a result of their corrupt judgment' and to enjoin enforcement of the Judgment in the United States.") 339 ("All of the elements required for equitable relief from the Judgment as against all defendants have been satisfied in this case. . .").

2102 **R-1563**, *Chevron Corp. v. Donziger*, 533 F.3d 74 (2d Cir. 2016), 8 August 2016, p. 167.

2103 **R-2106**, *Steven Donziger et al v. Chevron Corporation*, 137 S. Ct. 2268, No. 16-1178, Brief in Opposition in Petition for a Writ of Certiorari, 5 May 2017, pp. 3, 25-26.

the words of the Second Circuit, prior to its decision on appeal: "Neither the Supreme Court nor this Court has decided the question of whether RICO authorizes a court to award equitable relief to a private plaintiff."[2104] The Tribunal thus sees merit in the Respondent's argument that, at the time it initiated the action, Chevron "could not even be sure that the relief it was seeking through RICO *existed*. It therefore made little sense, objectively, for Chevron to turn to RICO to prevent enforcement, particularly when other means were available and were well within the bounds of existing precedent".[2105] In other words, there is a disconnect between the filing of Chevron's two RICO claims and the goal of preventing the enforcement of the Lago Agrio Judgment.

1308. Such disconnect becomes all the more apparent in light of the fact that, by the Claimants' own admission, "[l]itigating a RICO case is an inherently costly endeavor. RICO is a complex statute which requires a prevailing plaintiff to prove that defendants violated multiple federal criminal laws over time and in connection with the operation of an enterprise."[2106] In particular, to establish civil liability under RICO, a party must prove several elements, *i.e.*, "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[2107] Chevron also needed to prove the commission of predicate acts that took place on two continents, spanning nearly 50 years, and involving more than 50 defendants, including foreign individuals.[2108] As such, to prove its RICO claims, Chevron had to "process, amass[ ] and present[ ] a voluminous evidentiary record through documents, videos, fact witnesses, and experts" that "naturally required a substantial amount of attorney time".[2109] Among other examples, the Claimants note that Chevron incurred "significant expenses" in a complex "follow the money" strategy to develop evidence proving that Mr Donziger had engaged in several RICO-predicate financial crimes, such as money laundering, Travel Act/Foreign Corrupt Practices Act violations, and wire fraud.[2110] When compared to other claims raised by Chevron in the Amended

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[2104] **R-1563**, *Chevron Corp. v. Donziger*, 533 F.3d 74 (2d Cir. 2016), 8 August 2016, p. 137.

[2105] Rejoinder, para. 1233 (emphasis in the original).

[2106] Memorial, para. 297.

[2107] **RE-44**, First Strong Report, para. 58.

[2108] **RE-44**, First Strong Report, para. 59.

[2109] Memorial, para. 297.

[2110] Memorial, para. 309.

Complaint, such as Count 3, the Claimants themselves state that "[p]roving a RICO violation was a higher bar, with more elements to satisfy than a fraud claim".[2111]

1309. Thus, the complexity of the two RICO claims included in the Amended Complaint was in all likelihood a key driver (if not *the* key driver) of the legal fees and expenses spent by Chevron in the RICO Litigation. While the Claimants have made a detailed case arguing that the legal fees and expenses they incurred in connection with the RICO Litigation were reasonable and proportionate to the multi-billion-dollar liability arising from the Lago Agrio Judgment, they have not convincingly explained why Chevron decided to spend potentially hundreds of millions of dollars in pursuit of two RICO claims[2112] under a statute that had never been used before to prevent the enforcement of a foreign judgment when there was no distinct need to do so to achieve that particular goal.

1310. Indeed, the Claimants have not convincingly established that the advantages Chevron claims to have gained as a result of bringing the RICO Litigation could not have been obtained in equal measure without relying on RICO. For instance, as already noted, the Claimants' expert, Prof Silver, opines that "the lawsuit had the potential to place all possible recognition and enforcement actions within the jurisdiction of a single U.S. federal court empowered to enjoin the LAPs, their attorneys, and other parties from proceeding"[2113]. However, the Amended Complaint itself states that the SDNY (a first-instance federal court) could be seized on the sole basis of diversity of citizenship between the Chevron and the RICO defendants, without the need to invoke a federal statute such as RICO.[2114] In the same vein, the RICO Judgment noted that there was "a basis of subject

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2111 Reply, para. 821.

2112 The Tribunal recalls that the Claimants claim approximately USD 323 million under the RICO Litigation category (*see* Reply, para. 1212(2)(c)).

2113 Silver Expert Report, para. 180.

2114 **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 23: "This Court has subject matter jurisdiction over Chevron's claims under 28 U.S.C. §§ 1331 and 1332, and under 18 U.S.C. § 1964(c). Chevron's first claim for relief arises under 18 U.S.C. § 1961 *et seq.*, as hereinafter more fully appears. *There is also complete diversity of citizenship between the parties, and the amount in controversy exceeds $75,000, exclusive of interest and costs*. Chevron's state law claims arise out of the same case or controversy as its federal law claims, as all claims in this action arise out of a common nucleus of operative facts. Thus, this Court also has supplemental jurisdiction over Chevron's state law claims under 28 U.S.C. § 1367." (emphasis by the Tribunal). *See also* **RE-62**, Second Strong Expert Report, fn 21: "The

matter jurisdiction over [Chevron's claims based on non-statutory grounds] and other non-federal claims completely independent of the RICO claims, namely 28 U.S.C. § 1332 [*i.e.*, diversity of citizenship]."[2115]

1311. The Tribunal is also not persuaded that other advantages stemming from the RICO Litigation identified by Prof Silver (enjoining the enforcement of the Lago Agrio Judgment in the United States; obtaining discovery; producing a detailed opinion by a federal court; exposing the defendants to personal civil liability; prompting the litigation funders and Patton Boggs to withdraw; easier access to discovery than when defending a recognition action, obtaining discovery while evidence of the fraud was still available; filing the action before the court where some of the Section 1782 Proceedings were pending; obtaining Judge Zambrano's testimony; and obtaining relief against the ADF – a creditor of the Lago Agrio Judgment)[2116] would not have also applied to an Amended Complaint excluding Counts 1 and 2.

1312. Taking into account all these factors, the Tribunal is not persuaded that the two RICO claims were reasonable steps to take in addition to the other legal steps taken by Chevron (*i.e.*, Counts 3-7 and 9). The Respondent and its expert have suggested other possible rationales for bringing the RICO claims, including "a possible desire on the part of Chevron to distract and/or bankrupt the judgment creditors in order to thwart enforcement efforts; a belief by Chevron that a robust litigation strategy would deter other plaintiffs from undertaking similar actions in the future; and/or a sense of vengeance toward certain individuals, most notably Steven Donziger".[2117] It is unnecessary for the Tribunal to determine whether Chevron pursued these specific goals or any other goal entirely. The Claimants have not discharged the burden incumbent upon them to satisfy the Tribunal that the two RICO claims were reasonable steps to take alongside Claims 3-7 and 9 to mitigate the damage done to them.

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concept of diversity jurisdiction allows federal courts to hear disputes between citizens of different U.S. states or different countries, even in situations where those matters would need to be heard in state courts because of their connection to state substantive law."

[2115] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, fn 1228.

[2116] Silver Expert Report, paras. 181-191.

[2117] **RE-44**, First Strong Report, para. 73.

1313. For the avoidance of doubt, this conclusion does not extend to Chevron's pursuit of Counts 3-7 and 9.[2118] As already noted, all of Counts 3-7 and 9 concern relief seeking to prevent the enforcement of the Lago Agrio Judgment.[2119] Regardless of whether these claims ultimately provided the basis for preventing the LAPs from enforcing the Lago Agrio Judgment in the United States – that was the case only for Count 3 –[2120] there is no similar disconnect between Chevron's filing of Counts 3-7 and 9 and the goal of preventing enforcement.[2121] In the circumstances, the Tribunal considers that the Claimants are owed a certain level of deference as to this specific choice of mitigation measures.[2122] By contrast, there remains substantial uncertainty as to whether Counts 1 and 2 were devised by Chevron as a mitigation measure seeking to address specifically the injury arising from the Respondent's Treaty breaches, as opposed to other sources of concern.

1314. This determination has implications for the fulfilment of the requirement of reasonableness for the compensation of incidental damages under international law. To the extent that the legal fees and expenses spent by Chevron in connection with Counts 1 and 2 were incurred not with the goal of preventing the enforcement of the Lago Agrio Judgment, but primarily with other goals in focus, the requirement of reasonableness is not met, particularly in circumstances in which the legal fees and expenses for which reimbursement is claimed are of an extraordinary magnitude by any account.

1315. Therefore, the Tribunal determines that a significant portion of the legal fees and expenses spent by Chevron in connection with the RICO Litigation were not reasonably incurred to repair damage and otherwise mitigate loss arising from the recognition and enforcement of the Lago Agrio Judgment.

1316. For the reasons stated in paragraph 1290 above, the Tribunal's conclusion in the preceding paragraph should not result in a wholesale exclusion of the RICO Litigation

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2118 *See* para. 1302 above. As discussed, in view of its limited scope, the Tribunal will analyse Count 8 separately in paras. 1456-1461 below.

2119 *See* para. 1302 above. *See also* para. 1190 above.

2120 *See* para. 1304 above.

2121 *See* paras 1331-1343, 1363-1370, and 1442-1455 below for a more detailed analysis of Counts 3-6 and 9.

2122 *See* para. 341 above.

category of damages from compensation. That said, it remains the case that the onus is on the Claimants to establish the requirement of reasonableness in connection with each mitigation measure for which they request compensation,[2123] and they have failed to meet that burden to a significant extent in connection with the RICO Litigation category of damages as a whole. The Claimants have also not provided sufficient elements to the Tribunal to distinguish precisely which portion of the legal fees and expenses incurred by Chevron in connection with the RICO Litigation was meant specifically to prevent the enforcement of the Lago Agrio Judgment, as opposed to pursuing other goals.

1317. Accordingly, the Tribunal assesses that 80% of the total amount of fees and costs claimed under the RICO Litigation category of damages must be excluded from compensation. This figure seeks to reflect the fact that (i) the legal fees and expenses specifically attributable to the two RICO claims represent a portion of the total costs of the RICO Litigation; (ii) while the exact percentage remains uncertain, there are grounds to infer that it is significant; (iii) the burden to establish reasonableness – and thus to remove such uncertainty – falls on the Claimants, and they have failed to meet such burden; and (iv) had the RICO Litigation not been pursued, it is evident that Chevron would have incurred some expenditure in pursuing its legitimate goals by other legal means. For the avoidance of doubt, the Tribunal confirms that this discount is irrespective of the additional exclusion from compensation of legal fees and expenses corresponding to certain circumscribed components of this damages category, as set out in the following sections.

2. Second Step: Analysis of Incidental Damages "Components"

1318. As a second step of its analysis, the Tribunal must determine, within the RICO Litigation category, whether the Claimants have established the requirements 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 category to determine whether any other portion of the legal fees and expenses

[2123] *See* para. 335 above.

claimed under the present heading should be excluded from the final amount of compensation.[2124]

1319. The Parties have identified twenty-three (23) components under the RICO Litigation category, 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.

i. (CLA) Fees Exceeding US$ 32,334,584 / (RES) Fees Exceeding US$ 32,334,584 (amount requested in fee application) [2125]

1320. The Respondent argues that, if the Claimants are at all entitled to damages under this category, they should not exceed USD 32,334,584 – the amount that Chevron publicly sought before the SDNY as reasonable attorneys' fees for the RICO Litigation.[2126]

1321. According to the Respondent, the SDNY is the proper forum where Chevron may seek to recover the legal fees and expenses it incurred in connection with the RICO Litigation. The Respondent highlights that Chevron asked the SDNY for only USD 32 million as reasonable attorneys' fees for "a limited set of activities at the core of its [RICO] case."[2127] According to the Respondent, by asking for only this amount, Chevron effectively conceded that the myriad other RICO activities for which it claims compensation in this Arbitration were "outside the core of [Chevron's] case".[2128] Based on the premise that the standard for recovery of attorneys' fees under RICO is "reasonable and necessary", the Respondent posits that Chevron, in declining to request the vast majority of its fees before the SDNY, effectively acknowledged that no amount it spent going above USD 32 million was reasonable and necessary in pursuing the RICO Litigation.[2129]

1322. The Respondent further rejects the Claimants' explanation that its decision to seek only 10% of the amount it claims in this Arbitration before the SDNY sought to "streamline"

2124 *See* paras. 559-565 above.

2125 For an explanation of the names assigned to components *see* para. 568 above.

2126 Counter-Memorial, para. 338; Rejoinder, para. 1210.

2127 Counter-Memorial, para. 336-338.

2128 Counter-Memorial, paras. 338, 497.

2129 Counter-Memorial, paras. 339-340, 458.

the SDNY's consideration of Chevron's application.[2130] According to the Respondent, there is a nearly "one-to one" alignment between the activities for which it claims compensation in this Arbitration and the activities for which Chevron requested fees for in the RICO Litigation, *i.e.*, "[1] preparing its complaint, [2] handling discovery, [3] analyzing matters of Ecuadorian law, [4] analyzing the racketeering enterprise's complex financial issues, [5] preparing and litigating motions—including participation in court hearings—[6] responding to [the RICO] Defendants' ill-taken writ petition, and, [7] finally, trial and related court submissions."[2131] The Respondent states that the ten-fold increase in the Claimants' fee request in this Arbitration can only be explained by the Claimants "attempting to take advantage" of the confidentiality of these proceedings and the Tribunal's lesser familiarity with the RICO Litigation in particular and the U.S. trial system in general.[2132]

1323. In essence, the Claimants respond that the basis on which they rely to claim the costs incurred in connection with the RICO Litigation is not U.S. federal law, but rather international law, under which they are entitled to full reparation for all fees and expenses they incurred as a consequence of the Respondent's Treaty breaches.[2133]

1324. At the outset, the Tribunal recalls the principle laid out in paragraph 483 above: even when domestic cost-shifting standards incorporate an assessment of reasonableness, 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.

[2130] Rejoinder, para. 1323.

[2131] Rejoinder, para. 1323, **R-1603**, *Chevron Corp. v. Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1890 Memorandum of Law ISO Application for Attorneys' Fees, 18 March 2014, p. 15.

[2132] Rejoinder, para. 1324.

[2133] Reply, para. 854-855.

1325. For these reasons, the Tribunal determines that any representations made by Chevron in the RICO Litigation regarding the reasonableness of the legal fees and expenses they incurred in the context of those proceedings addressed a different subject matter and, therefore, are irrelevant for the Tribunal's present analysis of the damages suffered by the Claimants as a result of the Respondent's Treaty breaches. In the same vein, the Tribunal confirms that none those representations, and none of the costs decisions made by U.S. courts on the basis of such representations, are capable of giving rise to any form of *res judicata* or estoppel in this Arbitration, particularly in view of the fact that the Respondent was not a party to the RICO Litigation. Accordingly, the Tribunal rejects the Respondent's argument under the present heading.

1326. Notwithstanding this conclusion, the Tribunal also recalls that, as stated in paragraph 488 above, 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. As regards the RICO Litigation, a distinction must be drawn between attorneys' fees and other costs for which Chevron claimed reimbursement in those proceedings.

1327. First, the Tribunal observes that while Chevron applied for the reimbursement of USD 32,334,584 in attorneys' fees before the SDNY,[2134] it does not appear from the record that the SDNY ever granted such request[2135] or that Chevron was able to recover any such amount.[2136] In its Rejoinder, the Respondent indicated that a decision on this fee petition remains pending.[2137] It is thus unnecessary to deduct any corresponding amounts from compensation at this stage.

[2134] *See* **R-1603**, *Chevron Corp. v. Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1890 Memorandum of Law ISO Application for Attorneys' Fees, 18 March 2014, p. 24.

[2135] *See* Memorial, Appendix 9, para. 184, where the Claimants note that, as of May 2019, "Judge Kaplan has not yet decided whether to award Chevron any attorneys' fees" in the RICO Litigation.

[2136] *See* **C-3037**, RICO Docket, ECF No. 1902 (29 April 2014), which records an Order of even date terminating Chevron's first motion for attorneys' fees dated 18 March 2014, without prejudice to Chevron requesting that the motion be reactivated after the determination of Mr Donziger's appeal. Chevron did request this reactivation, which was first denied (*see* **C-3037**, RICO Docket, ECF Nos. 1915 and 1916 (8 November 2016)), and then granted (*see* **C-3037**, RICO Docket, ECF Nos. 1922 and 1923 (19 June and 17 July 2017)), pursuant to which the SDNY ordered the exchange of submissions with which the parties complied with (*see* **C-3037**, RICO Docket ECF Nos. 1927, 1934, and 1936 (7 August, 28 August, and 12 September 2017). It does not appear from the RICO Docket that the application for attorneys' fees was granted.

[2137] Rejoinder, para. 1325.

1328. Second, the Tribunal notes that while Chevron's application for attorneys' fees in the RICO Litigation is yet to be decided, the SDNY did allocate other costs. In an Order entered on 28 February 2018, the SDNY awarded costs in favour of Chevron and against Mr Donziger in the amount of USD 813,602.71 (reduced from an earlier award of USD 944,463.85).[2138] According to the Claimants, Mr Donziger has refused to satisfy this ruling voluntarily and collection efforts have only resulted in the reimbursement of approximately USD 150,000.[2139]

1329. Thus, the amount of USD 150,000, representing the costs awarded and collected by Chevron in the RICO Litigation, must be deducted from compensation. There is otherwise no evidence that the Claimants unreasonably failed to pursue the collection of the outstanding amount of this costs award in breach of their duty to mitigate under international law.[2140] As such, no further deductions are warranted at this stage.

1330. For these reasons, the Tribunal rejects the Respondent's argument that any damages award under this category should be limited to USD 32,334,584. However, the amount of USD 150,000, representing costs awarded and collected by Chevron in the RICO Litigation, must be deducted from the final amount of compensation. Lastly, to prevent a double recovery, any further legal fees and expenses the Claimants may collect in the RICO Litigation must also be excluded from the final amount of compensation.

ii. (CLA) Work relating solely to Count IX (including Preliminary Injunction) / (RES) Work relating to Count IX (including Preliminary Injunction)[2141]

1331. As explained above, the early stages of the RICO Litigation focused on (i) Count 9, *i.e.*, Chevron's request for a declaratory judgment that the Lago Agrio Judgment is non-

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[2138] *See*, **C-3037**, RICO Docket, ECF Nos. 1928 (8 August 2017), 1959 (28 February 2018). *See also* Track II Award, para. 4.114; **C-2547**, Michael I. Krauss, "The Ecuador Saga Continues: Steven Donziger now owes Chevron more than $800,000," FORBES, 14 March 2018, which quotes an earlier award of USD 944,463.85 (RICO Docket ECF No. 1928). This amount was reduced following a motion to review from Mr Donziger (*see* RICO Docket ECF No. 1959).

[2139] Memorial, Appendix 9, para. 188.

[2140] *See* para. 505(ii) above. In respect of Chevron's efforts to collect the money judgment against Mr Donziger, *see also* paras. 1382-1389 *below*.

[2141] The name given to this component is taken from the list of components prepared by the Parties, who labelled Count 9 as "Count IX" using Roman numerals. (*See* Letter from the Respondent to the Tribunal dated 21 October 2022; Letter from the Claimants to the Tribunal dated 22 October 2022, Attachment A). For the avoidance of

recognizable and unenforceable; and (ii) Chevron's request for a global injunction against the enforcement of the Lago Agrio Judgment. The SDNY granted Chevron's request for a global preliminary injunction in part on 7 March 2011 on the basis of Count 9[2142] and severed Count 9 as a whole for separate adjudication on 31 May 2011.[2143] Thereafter, on 26 January 2012, the Second Circuit vacated the preliminary injunction and ordered the SDNY to dismiss Count 9 in its entirety.[2144]

1332. According to the Respondent's Damages Model, the Claimants claim approximately USD 52.6 million for all legal fees and expenses incurred by Chevron in pursuit of Count 9 between 14 February 2011 and late January 2012, when Count 9 was dismissed.[2145]

1333. In the Respondent's view, pursuing these actions was a significantly costly yet unsuccessful endeavour that was the "overwhelming focus" of the first nine months of the RICO Litigation.[2146] As evidence that all activity relating to the preliminary injunction and to Count 9 was unnecessary, the Respondent points to the Second Circuit's decision to vacate the preliminary injunction and to order Count 9 to be dismissed entirely.[2147] Citing the opinion of the Second Circuit, the Respondent contends that the Count 9 proceedings, despite costing "a fortune", "lacked a sound legal basis and ultimately afforded Chevron no relief from the Lago Agrio Judgment."[2148] Since Chevron did not succeed on the merits of its global injunction theory, the Respondent considers that it should not be made to "foot the bill" for this "ill-advised" novelty.[2149]

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doubt, the Tribunal confirms that regardless of whether a cause of action is given an Arabic or a Roman numeral in this Award, the RICO Litigation arose from a single set of causes of action, comprising Counts 1 through 9 (or Counts I through IX).

2142 **C-972**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691, United States District Court for the Southern District of New York, Opinion, 7 March 2011.

2143 **C-3037**, RICO Docket, ECF No. 328 (31 May 2011).

2144 **R-1558**, *Chevron Corp. v. Camacho Naranjo*, 667 F.3d 232 (2d Cir. 2012), 26 January 2012.

2145 Letter from the Respondent to the Tribunal dated 2 November 2022.

2146 Rejoinder, para. 1296. *See also* Counter-Memorial, paras. 487, 517, 766.

2147 Counter-Memorial, para. 487.

2148 Rejoinder, paras. 1296-1297.

2149 Rejoinder, para. 1297.

1334. As explained in paragraph 1289 above, the Claimants have established that Chevron's pursuit of the RICO Litigation sought to prevent the recognition and enforcement of the Lago Agrio Judgment, thus fulfilling the requirement of causation for the compensation of incidental damages under international law. The Tribunal confirms that this finding extends to Chevron's pursuit of Count 9 and a global preliminary injunction against enforcement of the Lago Agrio Judgment.

1335. To recall, Chevron's prayer for relief under Count 9 reads as follows:

> **On the Ninth Claim for Relief:**
>
> 9. For a declaration that the judgment against Chevron in the Lago Agrio Litigation is non-recognizable and unenforceable for each and everyone of the reasons set forth herein; and
>
> 10. For equitable relief as appropriate pursuant to applicable law, including but not limited to issuing a temporary restraining order, a preliminary injunction and a permanent injunction that bars the Front, the Lago Agrio Plaintiffs, their assignees and anyone else acting in concert with them-including the other RICO Defendants, the law firms of Emery Celli, Motley Rice and Patton Boggs, and H5 and financial backers such as Burford and Russell De Leon from commencing, prosecuting, or advancing in any way-directly or indirectly-any attempt to recognize or enforce the Lago Agrio judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad, including any attempt to attach or seize any Chevron or Chevron subsidiary's or co-venturer's assets, whether pre-judgment or otherwise, until this Court determines the merits and enters judgment on Chevron's claims against the Defendants in this action, or until such time as this Court deems appropriate.

1336. As such, consistent with the Tribunal's finding in paragraph 1289 above, Count 9 was geared towards the compensable objectives of (i) seeking a temporary restraining order, a preliminary injunction, and permanent injunction barring any attempt "to recognize or enforce the Lago Agrio judgment in any court, tribunal, or administrative agency in any jurisdiction, in the United States or abroad";[2150] and (ii) a request for a declaratory judgment that the Lago Agrio Judgment is unenforceable and non-recognizable.[2151]

1337. A separate analysis of the second requirement for the compensation of incidental damages – reasonableness – vis-à-vis Count 9 is in order. In essence, the Respondent challenges the reasonableness of Chevron's pursuit of Count 9 on the grounds that these

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[2150] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

[2151] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

proceedings "lacked a sound legal basis and ultimately afforded Chevron no relief from the Lago Agrio Judgment [] [b]ut they cost Chevron a fortune."[2152]

1338. As already noted by the Tribunal, reasonableness should be assessed contemporaneously and not with the benefit of hindsight.[2153] Accordingly, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific actions to bring as part of the RICO Litigation.[2154] For the same reason, the ultimate success of Count 9 should not be a decisive factor when determining whether it was reasonable for the Claimants to pursue such action; rather, the relevant inquiry is whether Count 9 was a reasonable step towards the goal of removing the risk of enforcement.

1339. In the Tribunal's view, the reasonableness of Chevron's choice of mitigation measures is confirmed by the SDNY's Order of 7 March 2011.[2155] The SDNY there granted a global preliminary injunction against the enforcement of the Lago Agrio Judgment on the basis of Count 9 upon a finding, *inter alia*, that Chevron "is sufficiently likely to prevail on its claim for a declaration that the Ecuadorian judgment is not entitled to recognition or enforcement and that efforts in that direction should be enjoined".[2156] As a consequence, all the defendants, save for the Stratus Defendants, were:

> 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.[2157]

2152 Rejoinder, para. 1297.

2153 *See* para. 340 above.

2154 *See* para. 341 above.

2155 *See* para. 1193 above.

2156 **C-972**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691, United States District Court for the Southern District of New York, Opinion, 7 March 2011, p. 87.

2157 **C-972**, *Chevron Corp. v. Donziger et al.*, Case No. 11-cv-00691, United States District Court for the Southern District of New York, Opinion, 7 March 2011, p. 125.

1340. As such, the SDNY's Order of 7 March 2011 confirms that, at the start of the RICO Litigation, Chevron had a reasonable basis on which to bring Count 9 and put forward a request for a global injunction, preliminary or otherwise. The fact that the Second Circuit later overturned the SDNY's Order does not alter this conclusion: as already explained, it would not be appropriate for the Tribunal to determine with the benefit of hindsight that the defeat of Count 9 implies that Chevron's decision to bring Count 9 was unreasonable.

1341. Lastly, aside from the reasonableness of Chevron's choice of measures, the Respondent questions the reasonableness of the amounts spent by Chevron in connection with Count 9. As already noted, the Claimants claim approximately USD 52.6 million for all legal fees and expenses incurred by Chevron in pursuit of Count 9 between February 2011 and January 2012.[2158] While the Tribunal considers this amount to be extraordinary for an action that lasted a little under a year, its reasonableness must be ascertained in light of the circumstances in which it was spent – the interim period between the issuance of the Lago Agrio Judgment and the date on which the Judgment was rendered enforceable by the Lago Agrio Court (1 March 2012).[2159] In the Tribunal's view, it was reasonable for Chevron to display substantial efforts – and thus incur significant fees and expenses – to obtain some form of relief preventing the enforcement of the Lago Agrio Judgment in the United States before enforcement became possible as a matter of law.

1342. The conclusion that Count 9 is compensable, however, is subject to the Tribunal's analysis of other grounds supporting the Respondent's argument that the amount of the Claimants' spending in connection with the RICO Litigation was unreasonable – concerning, primarily, Chevron's attorneys' billing practices – which are addressed in sub-section 3 below.

1343. For these reasons, the Tribunal declines to exclude from compensation the fees incurred by Chevron for work relating to Count 9.

2158 Letter from the Respondent to the Tribunal dated 2 November 2022.

2159 *See* para. 350 above.

iii. Work related to bringing a Complaint Against NY State Comptroller DiNapoli

1344. The Parties disagree on whether Chevron may recover the fees and costs it incurred in filing an ethics complaint against Mr Thomas DiNapoli, then New York State Comptroller and trustee of the New York Common Retirement Fund, which held significant shares of stock in Chevron. According to the Claimants, the ethics complaint stemmed from public statements made by Mr DiNapoli, including an article he wrote in the Huffington Post urging Chevron to settle with the LAPs, allegedly as part of a broader pressure campaign against Chevron.[2160]

1345. The Respondent rejects this claim, arguing that it should not be made to bear the costs of Chevron's "public relations war". In particular, the Respondent contends that if its own statements did not violate the Treaty, it certainly cannot be held liable for statements made by others, particularly foreign public officials like Mr DiNapoli.[2161]

1346. In its complaint against Mr DiNapoli, Chevron "urge[d] the New York State Joint Commission on Public Ethics . . . to investigate the apparent misconduct of New York State Comptroller Thomas P. DiNapoli in violation of New York Public Officers Law Section 74 *et seq*".[2162] Chevron alleged that "[Mr] Donziger and his associates have given [Mr] DiNapoli consideration . . . including large monetary contributions . . . [i]n apparent exchange . . . [for] the unwavering support of [Mr] DiNapoli and his office" in publicly denouncing and attacking Chevron.[2163] According to Chevron, Mr DiNapoli's actions "have apparently violated several New York State laws governing the ethics of public

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2160 Memorial, para. 428; **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, pp. 372-374.

2161 Counter-Memorial, para. 935.

2162 **C-2915**, *In re the Matter of an Investigation into Apparent Misconduct by N.Y. State Comptroller Thomas P. DiNapoli (Chevron Corp. v. DiNapoli)*, N.Y. Joint Commission on Public Ethics, Complaint, 15 November 2012, p. 2.

2163 **C-2915**, *In re the Matter of an Investigation into Apparent Misconduct by N.Y. State Comptroller Thomas P. DiNapoli (Chevron Corp. v. DiNapoli)*, N.Y. Joint Commission on Public Ethics, Complaint, 15 November 2012, pp. 2-3.

officials" and the matter "warrants the Commission's immediate consideration and a thorough investigation."[2164]

1347. Applying the rationale set out in paragraph 1286 above, the Tribunal determines that the legal fees and expenses incurred by Chevron in bringing a complaint against Mr DiNapoli were not incurred to mitigate the injury arising from the recognition and enforcement of the Lago Agrio Judgment. Rather, Chevron's ethics complaint sought to hold Mr DiNapoli, a public official, accountable under New York state laws for alleged unethical conduct – an objective that bears no relation to preventing the recognition and enforcement of the Lago Agrio Judgment in the United States or elsewhere. While there was nothing seemingly improper in Chevron's decision to bring an ethics complaint, the Respondent has no obligation to reimburse the associated costs.

1348. Accordingly, the Tribunal excludes from compensation all fees and costs incurred by the Claimants in relation to Chevron's ethics complaint against New York State Comptroller Mr Thomas DiNapoli.

iv. Work related to opposing John Keker's pro hac vice application

1349. The Respondent asserts that the fees and costs relating to Chevron's "needless" opposition to the application of Mr John Keker to appear in the RICO Litigation as *pro hac vice* counsel of Mr Donziger (that is, to appear before New York courts while not being admitted to practice in New York) should be deducted from compensation.[2165] The Respondent also points to Chevron's decision to submit a written response regarding Mr Keker's withdrawal from the case despite not opposing it as an example of Chevron's "needless[] attack" on such routine and typically unopposed motions,[2166] thereby inflating its fees and costs. According to the Respondent, this behaviour is an example of the "unnecessary filings" Chevron made throughout the RICO Litigation.[2167]

[2164] **C-2915**, *In re the Matter of an Investigation into Apparent Misconduct by N.Y. State Comptroller Thomas P. DiNapoli (Chevron Corp. v. DiNapoli)*, N.Y. Joint Commission on Public Ethics, Complaint, 15 November 2012, p. 50.

[2165] Counter-Memorial, para. 549.

[2166] Counter-Memorial, para. 549.

[2167] Counter-Memorial, para. 773.

1350. The Tribunal notes that the Claimants have not addressed how opposing Mr Keker's *pro hac vice* application could have furthered the objective of preventing the enforcement of the Lago Agrio Judgment or how such measure fit within Chevron's larger litigation strategy in the RICO Litigation. Indeed, the ultimate goal of Chevron's opposition is unclear to the Tribunal. In opposing the admission *pro hac vice* of Mr Keker, Chevron argued the following:

> Plaintiff Chevron Corporation ("Chevron") opposes the motion. It argues that Mr. Keker and his firm (1) violated (a) this Court's order of February 8, 2011, which required the filing on or before February 11, 2011, of all papers in opposition to Chevron's preliminary injunction motion, (b) its verbal direction on February 18, 2011, and (c) the provisions of S.D.N.Y. Civ R. 6.1(b), all by filing on February 25, 2011, a 35 page brief, a declaration, and supporting exhibits in opposition to the motion, (2) filed a frivolous application to transfer the case to the Honorable Jed S. Rakoff, and (3) and made misleading and false assertions in their February 25, 2011 submission.[2168]

1351. In turn, in rejecting Chevron's opposition, the SDNY dealt with "the first two points [in the preceding quote] and decline[d] . . . to be embroiled in the third":

> 1. The February 25 , 2011 filing was made in direct violation of the Court's orders and the local rules. The fact that it was Donziger's only written submission in opposition to the preliminary injunction motion is a product of Donziger's failure to file his opposition within the period prescribed by the Court. The fact that the Keker firm was not retained until after the papers were due did not justify it in ignoring the orders and rules. If it felt that the Court erred in fixing the schedule, its remedy was an appeal from the preliminary injunction, not disobedience.
>
> 2. The application to transfer the case to Judge Rakoff, already denied by the Court, was utterly without merit for reasons explained in that ruling.
>
> There is no evidence before the Court on the present motion that shows that Mr. Keker knowingly made false or misleading statements in the February 25, 2011 submission, even assuming arguendo that inaccurate or misleading statements were made. If there were inaccuracies, the Court is confident that Mr. Keker will be more careful in the future . It trusts also that he henceforth will conform his actions and those of his firm to the requirements of the rules and the Court. While the Court has ample means of dealing with any future problems, it hopes that there will not be any.
>
> The motion to admit John W. Keker, Esq., *pro hac vice* for purposes of this case [DI 166] is granted.[2169]

[2168] **R-1576**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 192 Granted Motion to Admit J. Keker Pro Hac Vice , 9 March 2011.

[2169] **R-1576**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 192 Granted Motion to Admit J. Keker Pro Hac Vice , 9 March 2011.

1352. While the Tribunal understands that Chevron sought to oppose certain actions taken by Mr Keker and his firm in the context of the RICO Litigation, the Tribunal has difficulty understanding how opposing the admission *pro hac vice* of Mr Keker was an appropriate procedural tool to address those particular concerns or, more generally, how such course of action contributed to Chevron's efforts to prevent the recognition and enforcement of the Lago Agrio Judgment.

1353. The Tribunal draws a similar conclusion in respect of Chevron's decision to respond to Mr Keker's motion to withdraw as counsel in May 2013. Chevron stated the following:

> Chevron does not object to the Keker and Smyser firms' coordinated requests to withdraw as counsel for their respective clients, defendants Steven Donziger and the LAPs. In a sense, one can hardly blame them for wanting to get out, with mounting evidence that their clients and co-counsel are engaged in an ongoing fraud that their own acts serve to further and with no credible defense that they can offer to controvert that evidence. The Keker and Smyser withdrawals will not leave Defendants without counsel, since Mr. Gomez remains to represent the LAPs, Donziger is himself a lawyer, and Patton Boggs presumably continues its "behind-the-curtain" role. The withdrawal, therefore, should not serve as a pretext to delay these proceedings, or forestall the outcome of the pending sanctions motion. *But while Chevron does not object to counsel's withdrawal, it must respond to the manner in which counsel seek to take their leave, and correct some of the false and disrespectful statements made in their papers that have no place other than to promote their clients' public-relations purposes*.[2170]

1354. Thereafter, noting Mr Keker's claim that its attorneys' fees remained unpaid since September 2012, Chevron argued:

> In sum, Defendants' counsels' assertion that their clients' failure to pay them is due to Chevron's "litigation strategy" is a smokescreen. Defendants have matched and even exceeded Chevron motion for motion, discovery request for discovery request, and have sought to expand, not limit, the scope of this action. If Defendants, in fact, cannot pay their counsel, it is not because of Chevron's litigation strategy, but because of the facts. It is because the evidence adduced in this proceeding and elsewhere has hampered their efforts to raise capital on the back of their fraudulent judgment. While it is understandable why these counsel would choose to withdraw, they should at least be honest about it. They have no one to blame but themselves for taking on this case, knowing at the time that there was already so much evidence of fraud and wrongdoing that other lawyers felt constrained to withdraw in other proceedings, rather than continue to take positions they no longer

2170 **R-1896**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1140 Memorandum of Law Response to Motions for Leave to Withdraw as Counsel, 11 May 2013, p. 1 (emphasis by the Tribunal).

believed in good faith they could assert. *So while these counsel should be permitted to withdraw, their attacks on Chevron and this Court are baseless and dishonorable*.[2171]

1355. It appears from these materials that Chevron commented on Mr Keker's motion to withdraw seeking to manage the public and the SDNY's perception of Chevron's litigation strategy – and, in particular, to make the point that Mr Keker's alleged "attacks on Chevron and [the SDNY] are baseless and dishonorable."[2172] Once again, the Tribunal is unable to identify a connection between such course of action and the goal of mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

1356. In sum, absent an explanation from the Claimants of the rationale of such a measure – let alone the need for it – the Tribunal determines that the Claimants have failed to establish that the legal fees and expenses incurred by Chevron in opposing Mr Keker's *pro hac vice* application were incurred to mitigate the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

1357. Accordingly, the Tribunal excludes from compensation all fees and expenses incurred by the Claimants in connection with Chevron's opposition to Mr 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

1358. The Respondent faults the Claimants for claiming "considerable fees for pursuing activities that it later abandoned", including work relating to the preparation of a Second Amended Complaint that Chevron never filed.[2173] According to the Respondent's expert, Mr John Trunko, Chevron's lawyers collectively billed USD 302,317.07 for work relating to the unfiled Second Amended Complaint.[2174]

[2171] **R-1896**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1140 Memorandum of Law Response to Motions for Leave to Withdraw as Counsel, 11 May 2013, pp. 2-3 (emphasis by the Tribunal).

[2172] **R-1896**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1140 Memorandum of Law Response to Motions for Leave to Withdraw as Counsel, 11 May 2013, p. 3.

[2173] Rejoinder, para. 873; **RE-51**, Trunko Expert Report, **SM K-8**.

[2174] **RE-51**, Trunko Expert Report, **SM K-10**.

1359. The Claimants do not specifically address the Respondent's arguments in connection with this component, except to refer to the Expert Report of Mr Clyde Lea and assert that this component "overlaps with multiple components in the RICO category."[2175] According to Mr Lea, "an abandoned or voluntarily dismissed matter should not automatically be considered 'unreasonable'" as abandonment "may occur because facts have changed, the purpose of the motion is moot, the objective has been otherwise accomplished, or the likelihood of success has declined during the proceeding."[2176]

1360. While the Tribunal acknowledges that there could be a number of legitimate reasons behind a decision not to file a pleading, the Tribunal cannot overlook the fact that the Claimants have failed to explain fully the nature of Chevron's Second Amended Complaint and the circumstances surrounding its decision not to file it. Here, the Tribunal distinguishes between litigation measures taken by Chevron in the ordinary course of litigation, for which it is entitled to a certain level of deference,[2177] and measures which it undertook but later abandoned for reasons not clearly explained to the Tribunal. In the absence of a proper explanation regarding the rationale behind Chevron's decision not to proceed with the Second Amended Complaint, the Tribunal is unable to assess whether the substantial work invested in its preparation contributed to preventing the recognition and enforcement of the Lago Agrio Judgment, or indeed, whether the decision to abandon the Second Amended Complaint was reasonable under the circumstances.

1361. Accordingly, the Tribunal excludes from compensation all fees and expenses incurred by Chevron in connection with the preparation of Chevron's unfiled Second Amended Complaint.

1362. The Tribunal notes that, aside from the Second Amended Complaint, the Respondent also asserts that it should not be ordered to bear the legal fees and expenses incurred by Chevron for exploring bringing additional separate lawsuits that Chevron never initiated, such as a "Delaware declaratory action to declare Chevron free from Texaco's liabilities"

[2175] Letter from the Claimants dated 22 October 2022, Annex A, p. 7.

[2176] Lea Expert Report, para. 50.

[2177] *See* para. 340 above.

or a shareholder litigation.[2178] The legal fees and expenses incurred by the Claimants in this connection must be excluded from compensation for the same reasons underlying the Tribunal's decision in respect of the legal fees and expenses incurred in connection with the Second Amended Complaint. The Tribunal shall address this question together with other issues relevant to the RICO Litigation in Section VIII.G.3(d)3.xvi below.

vi. (CLA) Work relating solely to Unjust Enrichment / (RES) Work relating to Unjust Enrichment

1363. The Respondent points to the Claimants' continued pursuit of Chevron's unjust enrichment claim under Count 6 of the RICO Litigation as an example of its "unreasonable in the extreme" conduct in the RICO Litigation.[2179] According to the Respondent, Chevron "wasted time and money" in prosecuting this claim and twice attempting to revive it after dismissal.[2180] The Respondent highlights that, in support of its first motion for reconsideration, Chevron submitted "two memoranda of law and over a thousand pages of exhibits", which the SDNY summarily denied, characterising the claim as "*de minimis*".[2181] The Respondent also underscores that, despite the claim's "maximum value of USD [358.92]", Chevron allegedly spent "at least 1,206 attorney hours and USD 731,205.09" pursuing it.[2182]

1364. During the Track III Hearing, Mr Peter Seley – a partner at Gibson, Dunn & Crutcher who, among other things, represented Chevron in the RICO Litigation – testified that the amount in dispute in the unjust enrichment claim "varied over time" but confirmed that it was a *de minimis* amount the first time it was dismissed without prejudice.[2183] Mr Seley further noted that the SDNY dismissed Count 6 "without prejudice to bringing it again if the [LAPs] had been successful in securing larger assets from Chevron."[2184]

2178 Rejoinder, para. 873(3).

2179 Rejoinder, para. 1285.

2180 Counter-Memorial, paras. 556, 770-771.

2181 Counter-Memorial, paras. 556, 770.

2182 Rejoinder, paras. 1285-1286. According to Mr Trunko, Chevron's lawyers collectively billed USD 731,205.09 for work relating to Chevron's claim for unjust enrichment in the RICO Litigation (**RE-51**, Trunko Expert Report, **SM K-12**).

2183 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 648-649 (Seley).

2184 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 648-649 (Seley).

1365. The Tribunal recalls that the SDNY, in its Opinion dated 14 May 2012, dismissed Count 6 without prejudice for being premature:[2185]

> A plaintiff seeking damages on an unjust enrichment claim must allege that "(1) defendant was enriched; (2) the enrichment was at plaintiff's expense; and (3) the circumstances were such that equity and good conscience require defendants to make restitution."
>
> . . .
>
> As the Donziger Defendants have not recovered on the Judgment to date, the unjust enrichment claim is premature at best. "The essence of [an unjust enrichment] claim is that one party *has* received money or a benefit at the expense of another." It cannot be said at this point that the Donziger Defendants have been enriched – unjustly or otherwise – especially considering that none of Chevron's assets have been seized to satisfy the Judgment, and the Donziger Defendants have yet to receive any contingent fees. Indeed, "[w]here the party against whom a judgment has been rendered succeeds in postponing the execution or the effectiveness of the judgment pending review . . . [a claim in restitution as necessary to avoid unjust enrichment] will not arise because the judgment will not be paid."
>
> Moreover, any enrichment received by the Donziger Defendants to date – allegedly from litigation funding agreements – did not come at Chevron's expense. Although an unjust enrichment claim in some circumstances can arise from the conferral on a defendant of a benefit by a third party, the plaintiff must have an interest in or right to the benefit thus conferred in order to recover for unjust enrichment. But Chevron has not alleged any right to the litigation funding received by the Donziger Defendants. . .[2186]

1366. On 12 February 2013, Chevron moved for reconsideration of the dismissal of Count 6.[2187] This prompted opposition from both the Stratus Defendants and the Donziger Defendants,[2188] followed by a reply from Chevron in further support of its motion.[2189] The SDNY denied the motion, again without prejudice, stating:

> The only enrichment of the LAP Representatives – as opposed to restraint of Chevron or subsidiaries' assets that may or may not be released – said to have occurred to date *pertains to $358.92 in a TexPet account at Banco Pichincha*. Chevron's own witness claims only that "the totality of those funds, in the sum of $358.92, have been segregated by Banco Pichincha into a separate account, not controlled by TexPet, for the benefit of the LAPs" (Callejas Decl. ¶ 12) – not that the money has been paid to or placed under the control of the LAPs. Chevron's reliance on a statement made on a radio show by one of the LAPs' Ecuadorian lawyers to the effect that this is the first $350 that Chevron has paid the LAPs just does not cut it in the face of the paper record. In any event, everyone in this $18-19

2185 *See* para. 1215 above.

2186 **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, pp. 47-49.

2187 *See* para. 1217 above; **C-3037**, RICO Docket, ECF Nos. 782, 783, 784, 785 (12 February 2013).

2188 **C-3037**, RICO Docket, ECF Nos. 869, 876 (1 March 2013).

2189 **C-3037**, RICO Docket, ECF No. 885 (11 March 2013).

> billion case has more important things to do than to deal with a claim that was dismissed previously as premature simply because $358.92 now may – or may not – have changed hands. *De minimis non curat lex.*[2190]

1367. Chevron later made a second attempt to reinstate its Count 6 claim,[2191] which the LAPs opposed.[2192] Chevron then submitted another reply memorandum with supporting documents.[2193] Thereafter, the SDNY summarily denied Chevron's second attempt to reinstate Count 6, stating that "[t]here is still no basis for any suggestion that any of the defendants has been enriched. Even if there were, the Court as a matter of sound case management would decline to inject this claim, which appears to rest on what may be fairly complicated facts and law, in the midst of a trial."[2194]

1368. Based on the record before it, the Tribunal understands that Chevron filed Count 6 seeking pre-emptively to minimize the injury that might arise if the LAPs succeeded in their efforts to have the Lago Agrio Judgment recognized and enforced (item (iii) in paragraph 1286 above), thereby fulfilling the requirement of causation for the compensation of incidental damages under international law.

1369. By contrast, other factors call into question the reasonableness of Chevron's choice of measures. The Tribunal accepts that it was reasonable for Chevron to bring Count 6 pre-emptively at the outset of the RICO Litigation in case the LAPs' enforcement efforts eventually bore fruit. However, Chevron's insistence in seeking reconsideration of *de minimis* claim – valued at just USD 358.92 – after it was dismissed without prejudice for being premature strikes the Tribunal as unreasonable. As gleaned from the decisions of the SDNY denying reconsideration of Count 6, a reasonable litigant would not have attempted to seek reconsideration of Count 6 unless and until the LAPs had successfully derived some form of benefit from the enforcement of the Lago Agrio Judgment.

[2190] **R-1593**, Memorandum Endorsement, 12 March 2013, p. 2 (emphasis by the Tribunal); **C-3037**, RICO Docket, ECF No. 889 (12 March 2013).

[2191] *See* para. 1217 above; **C-3037**, RICO Docket, ECF Nos. 1470-1473 (30 September 2013).

[2192] **C-3037**, RICO Docket, ECF No. 1511 (8 October 2013).

[2193] **C-3037**, RICO Docket, ECF Nos. 1515-1517, 1579 (9 October 2013).

[2194] **C-3037**, RICO Docket, ECF No. 1662 (1 November 2013).

1370. Accordingly, having considered the particular circumstances of this case, the Tribunal excludes from compensation all fees and costs incurred by Chevron in connection with its unjust enrichment claim under Count 6 of the RICO Litigation after 14 May 2012 – the date on which the SDNY first dismissed Count 6 without prejudice.

vii. Work dedicated to withdrawn demand for money damages

1371. The Respondent faults Chevron for "abandoning" all of its damages claims in the RICO Litigation approximately one month before the start of trial[2195] without explaining why it "waited so long" to do so, especially in respect of the damages claims against the LAPs, who "resided in the Amazon rainforest and had no apparent wealth against which to recover."[2196] On this basis, the Respondent asserts that all legal fees and expenses incurred in developing Chevron's damages claims in the RICO Litigation should be excluded from compensation.[2197] According to Mr Trunko, Chevron's lawyers collectively billed USD 314,660.15 in connection with Chevron's damages claims.[2198]

1372. The Tribunal recalls that in its Amended Complaint Chevron prayed for, *inter alia*, the recovery of treble general damages, pre-judgment interest, and attorneys' fees under RICO (Counts 1 and 2); general damages (Counts 1 to 7) and punitive damages according to proof at trial (Counts 3, 4, 5 and 7); as well as treble general damages and attorneys' fees under the Judiciary Law (Count 8). While Counts 4, 5, 6 and 9 were dismissed in their entirety, Counts 1, 2, 3, 7 and 8 survived to trial.[2199]

1373. The Tribunal has partial insight into why Chevron decided to withdraw its money damages claims prior to trial. Chevron's 8 September 2013 notice of waiver of its money damages claims reads, in its entirety, as follows:

> TO ALL PARTIES AND COUNSEL OF RECORD, Chevron hereby gives notice that it will not seek money damages against Hugo Gerardo Camacho Naranjo and Javier Piaguaje Payaguaje ("LAP Defendants") in this action. At trial and in all other phases of this action, Chevron will seek only equitable relief against the LAP Defendants. Chevron waives all

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[2195] *See* para. 1249 above.

[2196] Counter-Memorial, para. 543.

[2197] Counter-Memorial, paras. 543, 757; Rejoinder, para. 873(1).

[2198] **RE-51**, Trunko Expert Report, **SM K-11**.

[2199] *See* **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 299.

> claims for money damages relief against the LAP Defendants for money damages that have accrued and are asserted in this action only.[2200]

1374. Shortly after Chevron withdrew its money damages claims, on 7 October 2013, the SDNY declined to order a jury trial.[2201] While the SDNY's Opinion is not in the record of this Arbitration, in view of the proximity in time between these two events, the Tribunal infers that Chevron's decision to withdraw its money damages claims sought to preclude the RICO Defendants from invoking a right to a jury trial, thus obtaining an advantage in the litigation. Counsel for the LAP Representatives confirmed as much during the RICO trial, where he stated that "Chevron waived millions of dollars in damages because it did not have the courage to face a jury."[2202]

1375. This set of circumstances suffices for the Tribunal to conclude that Chevron's decision to withdraw its money damages claims amounted to a substantive contribution to its pursuit of the RICO Litigation. As such, and having already ascertained that the RICO Litigation category of damages as a whole cannot be excluded from compensation, the Tribunal considers appropriate to apply the same logic to this damages component. The Tribunal does not otherwise consider it necessary to opine further on the appropriateness of Chevron's tactical litigation decisions. As already noted, it is not appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the RICO Litigation.[2203]

1376. Accordingly, the Tribunal declines to exclude from compensation the fees and costs incurred by the Claimants in connection with Chevron's withdrawn demand for money damages.

[2200] **R-1898**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1404 Notice of Waiver of Money Damages Against H. Naranjo and J. Payaguaje, 8 September 2013.

[2201] **C-3037**, RICO Docket, ECF No. 1500 (7 October 2013); **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 300: "Chevron waived all claims for damages and sought only equitable relief. The case was tried without a jury from October 15 through November 26, 2013."

[2202] **C-2365**, RICO Trial Transcript, Day One, p. 41.

[2203] *See* para. 341 above.

viii. Fees and costs claimed for period prior to filing complaint

1377. The Parties disagree on whether the Claimants may recover the legal fees and expenses Chevron incurred before the filing of its original RICO complaint on 1 February 2011, that is, prior to the issuance of the Lago Agrio Judgment and over a year before the Judgment became enforceable on 1 March 2012.[2204]

1378. According to the Claimants, Chevron incurred significant costs performing extensive preparatory work that spanned over two years, as well as planning for the service of its original Complaint to numerous defendants who resided in Ecuador.[2205]

1379. The Respondent, on the other hand, contends that Chevron's pre-filing fees are unreasonable and should not be reimbursed.[2206] The Respondent notes that in its public application for attorney's fees in the RICO Litigation, Chevron did not seek compensation for any work performed before January 2011, effectively acknowledging that its two-year preparatory work was "excessive, unreasonable, and unworthy of compensation."[2207] Moreover, the Respondent contends that much of the USD 8.67 million[2208] spent during this period was either "abandoned" once Chevron settled on bringing a RICO claim before the SDNY,[2209] or was undertaken on behalf of Mr Veiga and Dr Pérez in their individual capacities.[2210]

1380. 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 attached 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

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2204 Rejoinder, para. 1237.

2205 Memorial, para. 298; Litvack Expert Report, paras. 95-96.

2206 Rejoinder, paras. 1291-1292.

2207 Counter-Memorial, paras. 570, 764.

2208 Rejoinder, para. 1291.

2209 Rejoinder, paras. 1291, 1294.

2210 Rejoinder, para. 1293.

suffered by undertaking work before 14 February 2011 in preparation for the RICO Litigation was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[2211]

1381. Accordingly, the Tribunal finds that the Claimants are not entitled to claim compensation for legal fees and expenses incurred in connection with the RICO Litigation 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 in this category section.

ix. (CLA) Work related solely to pursuing civil contempt proceedings against Donziger / (RES) Work related to pursuing civil contempt proceedings against Donziger

1382. According to the Respondent, the RICO Litigation is part of Chevron's "anti-Donziger barrage" designed to cast Mr Donziger as a "criminal conspirator" to discredit him.[2212] The Respondent posits that, as part of its strategy to "apply maximum pressure" on Mr Donziger, Chevron obtained a money judgment of USD 813,602.71 in litigation costs. To enforce that money judgment, says the Respondent, "Chevron has moved to compel Donziger to respond to post-judgment discovery requests, subpoenaed banks for documents concerning Donziger's personal finances, moved to compel Donziger's wife to produce personal financial information, and filed at least five motions to hold Donziger in civil contempt of court."[2213] The Respondent notes that after the SDNY found Mr Donziger in contempt, Chevron applied to recover more than USD 3.4 million of attorneys' fees it spent on the contempt proceedings, which the SDNY granted.[2214] In the Respondent's view, such legal fees and expenses are not recoverable in this Arbitration.[2215]

2211 *See* paras. 362, 371, 397 above.

2212 Counter-Memorial, paras. 789, 791.

2213 Counter-Memorial, para. 790; Rejoinder, paras. 1248-1249.

2214 Counter-Memorial, para. 790; **R-1567**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 2264 Motion for Award of Attorneys' Fees, 16 July 2019.

2215 Rejoinder, paras. 1250, 1251.

1383. In response, the Claimants deny any vendetta, asserting that Chevron's post-judgment discovery requests and motions to hold Mr Donziger in contempt were "lawful and legitimate remedies available to Chevron in light of Mr Donziger's continued refusal to voluntarily satisfy the RICO judgment of USD 813,602.71, his failure to transfer his shares in Amazonia and his attempts to monetize the Lago Agrio Judgment in violation of the RICO court's orders."[2216]

1384. The Tribunal notes that on 23 May 2019, the SDNY granted in part four motions to hold the Donziger Defendants in civil contempt.[2217] Among other things, Mr Donziger was held in contempt for (i) failing to transfer to Chevron, as required under the RICO Judgment, contractual rights to a contingent fee under a retainer agreement with the ADF; (ii) failing to transfer to Chevron, as required under the RICO Judgment, his 6.3% contingency interest in the Lago Agrio Judgment; and (iii) attempting to monetize from the Lago Agrio Judgment "by selling, assigning, pledging, transferring or encumbering a portion of his own personal interest in the [Lago Agrio Judgment] in exchange for personal services". The SDNY also found that Chevron was entitled to recover reasonable attorneys' fees in prosecuting those applications.[2218] Thereafter, on 18 June 2019, Chevron filed a motion for attorneys' fees seeking an award of USD 3,433,384.30 for "those activities directly related to the contempt motions that the Court granted in the May 23, 2019 order".[2219] The SDNY granted this motion in all respects on 16 July 2019.[2220]

1385. In the Tribunal's view, by seeking to thwart Mr Donziger's attempts to monetize the Lago Agrio Judgment and to cause him to transfer his shares in Amazonia – a Gibraltar company created by the LAPs' representatives "for receipt and distribution of any funds

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[2216] Reply, para. 858.

[2217] *See* para. 1281 above.

[2218] **C-3116**, *Chevron Corporation v. Steven Donziger*, Case 1:11-cv-00691-LAK-RWL, Document 2209, Memorandum Opinion, 23 May 2019, pp. 8-9.

[2219] **R-1610**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 2244 Chevron Memorandum of Law ISO Motion for Attorneys' Fees, 18 June 2019.

[2220] **R-1567**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 2264 Motion for Award of Attorneys' Fees, 16 July 2019.

in consequence of the Judgment"[2221] – Chevron reasonably sought both to prevent the enforcement of the Lago Agrio Judgment and to minimize the injury that might arise if the LAPs succeeded in their efforts to enforce it (items (i) and (iii) in paragraph 1286 above).

1386. Furthermore, to the extent Chevron's pursuit of civil contempt proceedings sought to collect on Chevron's money judgment of USD 813,602.71 against Mr Donziger in litigation costs, the Tribunal recalls that, as part of their duty to mitigate under international law, the Claimants were required pursue the collection of legal costs where there were reasonable chances of success so as to reduce their damages and must therefore be compensated for their collection efforts.[2222] Chevron's partial collection of USD 150,000 is testament to the fact that Chevron's efforts bore fruit.[2223]

1387. Overall, therefore, the Tribunal finds that Chevron's pursuit of civil contempt proceedings against Mr Donziger sought reasonably to mitigate the injury arising from the recognition and enforcement of the Lago Agrio Judgment. This finding, does not extend to the pursuit of *criminal* contempt proceedings and disbarment proceedings against Mr Donziger, which is addressed separately in paragraphs 1462-1465 below.

1388. The Tribunal's ruling on this component is also made in the understanding that, as stated in paragraph 494 above, any fees Chevron may collect under the SDNY's order of 16 July 2019[2224] must be deducted from the final amount of compensation to prevent any double recovery.

1389. For these reasons, the Tribunal declines to exclude from compensation the legal fees and expenses incurred by the Claimants for work related to pursuing civil contempt proceedings against Mr Donziger.

[2221] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, fn 1110.

[2222] *See* para. 490 above.

[2223] Memorial, Appendix 9, para. 188.

[2224] **R-1567**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 2264 Motion for Award of Attorneys' Fees, 16 July 2019.

x. *Kobre & Kim LLP*

1390. Apart from the legal fees and expenses of its counsel of record in the RICO Litigation, Gibson, Dunn & Crutcher LLP and Stern Kilcullen & Rufolo LLC,[2225] the Claimants seek the recovery of fees and costs for the services of 62 other vendors under this damages category.[2226] This includes multiple law firms which, according to the Respondent, never appeared in the RICO Litigation or whose participation was never explained.[2227] Kobre & Kim LLP is one such law firm that did not appear as counsel of record in the RICO Litigation but billed USD 3,373,921.28 for work performed in connection with those proceedings. The Claimants seek reimbursement of that amount in this Arbitration.

1391. According to the Respondent, the Claimants "chose the most expensive possible option" and acted unreasonably by spending USD 87 million on firms that did not even represent Chevron in the RICO Litigation.[2228]

1392. The Claimants, on the other hand, assert that "no one law firm could do it all"[2229] and that Chevron's hiring of the "best law firms" was reasonable.[2230] The Claimants explain that (i) each law firm representing Chevron had its own role and assignments but all firms acted together as one team; (ii) Chevron's outside counsel worked efficiently as needs arose; (iii) all outside counsel's billing practices complied with Chevron's expectations; and (iv) Chevron strategically used lower cost vendors wherever possible.[2231] The Claimants' witness, Mr Peter Seley, similarly testified that the law firms engaged by Chevron worked together as if they were "one firm", since Chevron "wanted to be sure that for every task on the Ecuador Disputes, the right attorney was doing the work, who had the right experience, with the right team, regardless of what firm they were attached

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2225 *See* **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, p. 166; **C-3037**, RICO Docket, pp. 1-4.

2226 *See* **RE-51**, Trunko Expert Report, **SM J-1**.

2227 **RE-51**, Trunko Expert Report, **SM J-1**; Track III Hearing - Respondent's Closing Presentation, Slide 129 (where the Respondent enumerates these firms to be Jones Day, Boies Schiller & Flexner LLP, Rivero Mestre LLP, Kobre & Kim LLP, Covington & Burling LLP, Gardere Wynne Sewell LLP, Three Crowns LLP, and Asesorias Bofill Escobar).

2228 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3593.

2229 Track III Hearing Transcript, Day 3 (22 August 2022), p. 462.

2230 Reply, para. 693.

2231 Reply, paras. 693-698.

to."[2232] Moreover, the Claimants argue that since their basis for claiming costs incurred in the RICO Litigation is not U.S. law but international law, it is irrelevant that certain law firms did not formally appear in the RICO Litigation: the Respondent's breach of its international law obligations entitles Chevron to full compensation, including all legal fees and expenses it incurred in connection with the RICO Litigation.[2233]

1393. The Tribunal notes that 12 law firms reportedly worked in the RICO Litigation. From among them, nine are based or have operations in the United States (*i.e.*, Gibson, Dunn & Crutcher LLP, Jones Day, Boies Schiller & Flexner LLP, Rivero Mestre LLP, Kobre & Kim LLP, Covington & Burling LLP, Stern Kilcullen & Rufolo LLC, Gardere Wynne Sewell LLP, and Three Crowns LLP). Two additional law firms appear to be based in Chile (*i.e.*, Asesorias Bofill Escobar and Barros Letelier & Compania Abogados – the fees of which the Claimants identify as an expert expense, not a law firm expense)[2234] and an additional law firm is based in Peru, the fees of which the Claimants identify as a vendor expense, not a law firm expense[2235] (*i.e.*, Bullard, Falla & Ezcurra Abogados).[2236] The Tribunal also notes that, save for Gibson Dunn and Stern Kilcullen, none of these other law firms appeared or are listed as Chevron's representatives in the RICO Litigation.[2237] The Claimants also do not provide a delineation of the roles and tasks of each of these law firms, save for what can be gleaned from the individual time entries in the underlying invoices.

1394. While, 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,[2238] the Tribunal has difficulty understanding how the participation of 8 law firms that did not act as counsel of record could have reasonably assisted the Claimants in preventing the recognition and enforcement of the unremedied Lago Agrio Judgment in

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2232 Track III Hearing Transcript, Day 3 (22 August 2022), p. 617 (Seley).

2233 Reply, paras. 854-855.

2234 Reply, Updated Appendix 2, p. 109.

2235 Reply, Updated Appendix 2, p. 125.

2236 Reply, Updated Appendix 2, pp. 3, 89, 109, 125; **RE-51**, Trunko Expert Report, **SM J-1**, pp. 1-3.

2237 *See* **C-3037**, RICO Docket, pp. 1-4.

2238 *See* para. 341 above.

the course of the RICO Litigation. Here, the Tribunal draws a distinction between firms identified by the Claimants as experts or vendors, for which a separate analysis is in order (*i.e.*, Barros Letelier & Compania Abogados and Bullard, Falla & Ezcurra Abogados) and firms properly identified as law firms (*i.e.*, Gibson, Dunn & Crutcher LLP, Jones Day, Boies Schiller & Flexner LLP, Rivero Mestre LLP, Kobre & Kim LLP, Covington & Burling LLP, Stern Kilcullen & Rufolo LLC, Gardere Wynne Sewell LLP, Three Crowns LLP, and Asesorias Bofill Escobar).

1395. While the Tribunal is prepared to accept that the complexity of Chevron's claims in the RICO Litigation might have required Chevron to engage multiple law firms, the Claimants have failed to explain in sufficient detail how the work of each of those firms contributed to mitigating specifically the injury arising from the recognition and enforcement of the Lago Agrio Judgment, as opposed to other sources of concern.

1396. Having regard to all relevant circumstances, the Tribunal is prepared to grant compensation to the Claimants for the legal fees and expenses charged by Chevron's first counsel of record in the RICO Litigation (Gibson, Dunn & Crutcher LLP) and by the first firm Chevron engaged in connection with the RICO Litigation that did not act as counsel of record, but rather provided additional capacity and coordination support with teams operating in other jurisdictions (Jones Day).[2239] Otherwise, the Tribunal denies compensation for the legal fees and expenses charged by any other law firm in connection with the RICO Litigation, including Kobre & Kim LLP.

xi. Rivero Mestre LLP

1397. The Claimants claim USD 5,378,358.31 in fees and costs charged by Rivero Mestre LLP in connection with the RICO Litigation.[2240] The Respondent rejects this request, noting that aside from not acting as counsel of record in the RICO Litigation, Rivero Mestre was retained to represent Chevron executive Dr Rodrigo Pérez Pallares in his individual capacity, not Chevron.[2241]

[2239] Seley Witness Statement, paras. 14, 20, 43, 50, 63, 64, 69, 85, 88.

[2240] **RE-51**, Trunko Expert Report, **SM J-1**, p. 1.

[2241] Rejoinder, para. 1311.

1398. As explained in paragraph 1396 above, the Tribunal has decided to deny compensation for the legal fees and expenses charged by any law firm other than Gibson, Dunn & Crutcher LLP and Jones Day in connection with the RICO Litigation. Accordingly, the Tribunal excludes from compensation the legal fees and expenses charged by Rivero Mestre LLP in connection with the RICO Litigation.

xii. Covington & Burling LLP

1399. The Claimants claim USD 2,472,240.21 in legal fees and expenses paid to Covington & Burling LLP under this damages category.[2242] The Respondent highlights that Covington & Burling, like Rivero Mestre, did not appear in the RICO Litigation and was retained to represent Mr Ricardo Reis Veiga in his individual capacity, not Chevron.[2243]

1400. As explained in paragraph 1396 above, the Tribunal has decided to deny compensation for the legal fees and expenses charged by any law firm other than Gibson, Dunn & Crutcher LLP and Jones Day in connection with the RICO Litigation. Accordingly, the Tribunal excludes from compensation the legal fees and expenses charged by Covington & Burling LLP in connection with the RICO Litigation.

xiii. Stern Kilcullen & Rufolo LLC

1401. According to the Respondent, the Claimants failed to explain why Stern Kilcullen & Rufolo LLC billed a grand total of USD 4,518,754.98 in legal fees and expenses,[2244] of which USD 3,579,778.36 pertain to this firm's work in the RICO Litigation.[2245] In the Respondent's submission, there is "no evidence of added value provided" by Stern Kilcullen based on the time entries of its lawyers.[2246]

1402. As explained in paragraph 1396 above, the Tribunal has decided to deny compensation for the legal fees and expenses charged by any law firm other than Gibson, Dunn & Crutcher LLP and Jones Day in connection with the RICO Litigation. This finding holds

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2242 **RE-51**, Trunko Expert Report, **SM J-1**.

2243 Rejoinder, para. 1311.

2244 Track III Hearing - Respondent's Closing Presentation, Slides 151-152.

2245 **RE-51**, Trunko Expert Report, **SM J-1**, p. 1.

2246 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3599-3600 (Finsterwald).

particular weight with respect to Stern Kilcullen & Rufolo LLC. The Tribunal notes that while Stern Kilcullen acted as counsel of record in the RICO Litigation,[2247] the Claimants have failed to explain convincingly how this firm's involvement in the RICO Litigation contributed to the Claimants' mitigation efforts.[2248]

1403. It is also significant that the RICO Litigation case docket lacks any indication that any Stern Kilcullen lawyer became counsel of record in those proceedings before 2018. Notably, Mr Herbert J. Stern, a former U.S. Attorney and District Court Judge for New Jersey, moved to appear as counsel *pro hac vice* for Chevron in the RICO Litigation on 20 February 2018[2249] – a motion granted by the SDNY the following day.[2250] By the Claimants' own account, at this stage of the RICO Litigation the main RICO proceedings – including the appeal before the Second Circuit and the *certiorari* proceedings before the U.S. Supreme Court – had long since concluded. The SDNY issued its RICO Judgment on 4 March 2014,[2251] the Second Circuit affirmed it on 8 August 2016,[2252] and the Supreme Court denied *certiorari* on 19 June 2017.[2253] Thus, by the time Stern Kilcullen entered its appearance, only post-judgment incidents remained, such as the contempt proceedings against Mr Donziger.[2254] This further calls into question the extent of Stern Kilcullen's contribution to Chevron's mitigation efforts in the RICO Litigation.

1404. For these reasons, the Tribunal denies compensation under this heading for the legal fees and expenses charged by Stern Kilcullen & Rufolo LLC.

2247 *See* **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, p. 166; **C-3037**, RICO Docket, pp. 1-4.

2248 Track III Hearing - Respondent's Closing Presentation, Slides 151-152.

2249 **C-3037**, RICO Docket, ECF No. 1953 (20 February 2018).

2250 **C-3037**, RICO Docket, ECF No. 1954 (20 February 2018).

2251 Track II Award, para. 4.481.

2252 Memorial, Appendix 9, para. 174.

2253 Memorial, Appendix 9, para. 182.

2254 *See* Memorial, Appendix 9, paras. 192-207.

xiv. Barros Letelier & Compania Abogados

1405. The Claimants claim USD 298,056.00 in legal fees and expenses paid to Barros Letelier & Compania Abogados in connection with the RICO Litigation.[2255] Once again, the Respondent underscores that this law firm did not enter its appearance in the RICO Litigation, and the Claimants do not otherwise provide a satisfactory explanation behind its participation in those proceedings.[2256]

1406. The Tribunal recalls that the Claimants have characterized the legal fees and expenses charged by Barros Letelier & Compania Abogados as an expert expense, not a law firm expense.[2257] Dr Enrique Barros Bourie prepared an expert report on questions of *res judicata* for use in the RICO Litigation,[2258] presumably concerning the *res judicata* effect of the 1995-1998 Settlement and Release Agreements, echoing his own expert reports in this Arbitration.[2259] Among other things, Chevron proffered Dr Barros as an expert for the Count 9 trial.[2260] This set of circumstances suffices for the Tribunal to conclude that Dr Barros made a substantive contribution to the pursuit of the RICO Litigation – including the pursuit of Count 9, which the Tribunal has already determined amounted to a reasonable mitigation measure.[2261] Having already ascertained that the RICO Litigation category of damages as a whole cannot be excluded from compensation, the Tribunal considers appropriate to apply the same logic to this damages component.

[2255] **RE-51**, Trunko Expert Report, **SM J-1**, p. 1.

[2256] Letter from the Respondent dated 21 October 2022, p. 10.

[2257] Reply, Updated Appendix 2, p. 109.

[2258] **C-3359**, CVX-Track III-20001128, Barros Letelier & Compania Abogados; **R-1581**, *Chevron Corp. v. Maria Aguinda Salazar et al.*, Case No. 1:11-cv-03718-LAK-JCF, ECF No. 188, p. 2.

[2259] *See*, *e.g.*, Sixth Barros Bourie Expert Report, para. 7: "In previous reports, my opinion has been that the Lago Agrio lawsuit should not have been successful because the judgment was rendered in contradiction to a settlement contract that released TEXPET and its affiliates from liability, with the effect of res judicata. My report on causation and punitive damages dated June 3, 2013 is subsidiary to this opinion, because res judicata excludes the legitimacy of the Ecuadorian courts deciding on matters that have been the object of a settlement, since a settlement contract produces the same effects as an unappealable judicial decision on the dispute."

[2260] **R-1581**, *Chevron Corp. v. Maria Aguinda Salazar et al.*, Case No. 1:11-cv-03718-LAK-JCF, ECF No. 188, p. 2.

[2261] *See* paras. 1340-1341 above.

1407. Accordingly, the Tribunal declines to exclude from compensation the legal fees and expenses charged by Barros Letelier & Compania Abogados in connection with the RICO Litigation.

xv. Gardere Wynne Sewell LLP

1408. The Claimants claim USD 149,315.86 in fees paid to Gardere Wynne Sewell LLP under this damages category.[2262] Once again, the Respondent highlights that this law firm did not enter its appearance in the RICO Litigation, and the Claimants do not otherwise provide a satisfactory explanation behind its participation in those proceedings.[2263]

1409. As explained in paragraph 1396 above, the Tribunal has decided to deny compensation for the legal fees and expenses charged by any law firm other than Gibson, Dunn & Crutcher LLP and Jones Day in connection with the RICO Litigation. Accordingly, the Tribunal excludes from compensation the legal fees and expenses charged by Gardere Wynne Sewell LLP in connection with the RICO Litigation.

xvi. Jan Paulsson (billed through Freshfields)

1410. The Claimants claim USD 79,578.41 in costs paid to Prof Jan Paulsson under this damages category.[2264] Once again, the Respondent highlights that Prof Paulsson did not enter his appearance in the RICO Litigation, and the Claimants do not otherwise provide a satisfactory explanation behind his participation in those proceedings.[2265]

1411. The Tribunal observes that the USD 79,578.41 paid to Prof Paulsson was billed as a passthrough cost for Gibson, Dunn & Crutcher LLP, for what appears to be expert services rendered in connection with the RICO Litigation.[2266] In particular, as gleaned from a motion filed by several of the RICO defendants, Prof Paulsson was engaged to provide expert evidence on "due process issues surrounding Lago Agrio [L]itigation" in

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2262 **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

2263 Letter from the Respondent dated 21 October 2022, p. 10.

2264 **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

2265 Letter from the Respondent dated 21 October 2022, p. 10.

2266 *See* **C-3287.003**, Gibson, Dunn & Crutcher LLP (Member) – 2011.xlsx, Invoice no. 2011051834, row 505; *see also*, **R-1581**, Letter from R. Mastro, 4 August 2011, p. 2, where Professor Paulsson is identified as one of Chevron's 16 experts for the RICO Litigation.

connection with Count 9.[2267] This suffices for the Tribunal to conclude that Prof Paulsson contributed his expertise to the pursuit of Count 9, which the Tribunal has already determined amounted to a reasonable mitigation measure.[2268]

1412. Accordingly, the Tribunal declines to exclude from compensation the legal fees and expenses charged by Prof Jan Paulsson in connection with the RICO Litigation.

xvii. Three Crowns LLP

1413. The Claimants claim USD 27,965.00 in legal fees and expenses paid to Three Crowns LLP under this damages category.[2269] Once again, the Respondent highlights that this law firm did not enter its appearance in the RICO Litigation, and the Claimants do not otherwise provide a satisfactory explanation behind its participation in those proceedings.[2270]

1414. As explained in paragraph 1396 above, the Tribunal has decided to deny compensation for the legal fees and expenses charged by any law firm other than Gibson, Dunn & Crutcher LLP and Jones Day in connection with the RICO Litigation. Accordingly, the Tribunal excludes from compensation the legal fees and expenses charged by Three Crowns LLP in connection with the RICO Litigation.

xviii. Bullard, Falla & Ezcurra Abogados

1415. The Claimants claim USD 11,048.24 in costs paid to Bullard, Falla & Ezcurra Abogados under this damages category.[2271] Once again, the Respondent highlights that this law firm did not enter its appearance in the RICO Litigation.[2272]

[2267] **R-2079**, *Chevron Corp. v. Steven Donziger*, et al., S.D.N.Y. Case No. 1:11-cv-00694-LAK-RWL, D.E. 968-7, Defendants Hugo Gerardo Camacho Naranjo, Javier Piaguaje Payaguaje, Steven Donziger, the Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC's Motion to Strike Chevron's Excessive and Irrelevant Experts, 3 April 2013, p. 3.

[2268] *See* paras. 1340-1341 *above*.

[2269] **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

[2270] Letter from the Respondent dated 21 October 2022, p. 10.

[2271] **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

[2272] Letter from the Respondent dated 21 October 2022, p. 10.

1416. The Tribunal recalls that the Claimants identify the legal fees and expenses charged by Bullard, Falla & Ezcurra Abogados as a vendor expense, not a law firm expense.[2273] The USD 11,048.24 in costs paid to Bullard were billed as a passthrough cost for Gibson, Dunn & Crutcher LLP and are described as "administrative expenses regarding the hearing in Lima" and "assistance and advisement in the organization of hearing in Lima" taking place in or around July 2013.[2274] The Tribunal infers that these charges correspond to the costs associated to the deposition of certain Ecuadorian witnesses in Lima, Peru, which the SDNY allowed in March 2013 in view of security risks in Ecuador raised by Chevron.[2275] Therefore, Bullard's engagement, albeit limited in scope, amounted to a substantive contribution to the RICO Litigation. Having already ascertained that the RICO Litigation category of damages as a whole cannot be excluded from compensation, the Tribunal considers appropriate to apply the same logic to this damages component.

1417. Accordingly, the Tribunal declines to exclude from compensation the legal fees and expenses charged by Bullard, Falla & Ezcurra Abogados in connection with the RICO Litigation.

xix. Boies Schiller & Flexner LLP

1418. The Claimants claim USD 5,643,437.86 in fees and costs paid to Boies Schiller & Flexner LLP under this damages category.[2276] Once again, the Respondent highlights that this law firm did not enter its appearance in the RICO Litigation, and the Claimants do not otherwise provide a satisfactory explanation behind its participation in those proceedings.[2277]

1419. As explained in paragraph 1396 above, the Tribunal has decided to deny compensation for the legal fees and expenses charged by any law firm other than Gibson, Dunn & Crutcher LLP and Jones Day in connection with the RICO Litigation. Accordingly, the

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2273 Reply, Updated Appendix 2, p. 125.

2274 **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013.xlsx, Invoice Number 2013070936, 19 July 2013, entries 698, 708.

2275 *See* para. 1235 above; Memorial, Appendix 9, paras. 107-108; **C-3037**, RICO Docket, ECF No. 941 (26 March 2013).

2276 **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

2277 Letter from the Respondent dated 21 October 2022, p. 10.

Tribunal excludes from compensation the legal fees and expenses charged by Boies Schiller & Flexner LLP in connection with the RICO Litigation.

xx. Asesorias Bofill Escobar

1420. The Claimants claim USD 18,160.00 in fees paid to Asesorias Bofill Escobar under this damages category.[2278] Once again, the Respondent highlights that this law firm did not enter its appearance in the RICO Litigation, and the Claimants do not otherwise provide a satisfactory explanation behind its participation in those proceedings.[2279]

1421. As explained in paragraph 1396 above, the Tribunal has decided to deny compensation for the legal fees and expenses charged by any law firm other than Gibson, Dunn & Crutcher LLP and Jones Day in connection with the RICO Litigation. This finding holds particular weight with respect to Asesorias Bofill Escobar. The Tribunal notes that while the RICO Litigation arises entirely from claims under U.S. law, Asesorias Bofill Escobar is a Chilean law firm. This further calls into question the nature of Asesorias Bofill Escobar's contribution to Chevron's mitigation efforts in the RICO Litigation.

1422. Accordingly, the Tribunal excludes from compensation the legal fees and expenses charged by Asesorias Bofill Escobar in connection with the RICO Litigation.

xxi. Kroll Associates

1423. The Claimants claim USD 3,797,504.43 in costs paid to Kroll Associates for forensic accounting services and another USD 1,234,852.41 in costs paid for litigation support work.[2280] The Respondent criticizes the vague billing entries behind this component, citing, for example, a pass-along charge of USD 373,885.15 for "legal services" purportedly performed by the law firm K&L Gates without providing the underlying invoice of this firm, which could have shed light on what these legal services entailed.[2281] The Respondent also faults the Claimants for failing to provide witness testimony to analyse and explain the fees and costs set forth in the invoices and note that Kroll's

2278 **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

2279 Letter from the Respondent dated 21 October 2022, p. 10.

2280 **RE-51**, Trunko Expert Report, **SM J-1**, p. 1.

2281 Rejoinder, para. 890; Track III Hearing Transcript, Day 2 (19 August 2022), p. 316 (Ettinger).

billings for "professional services rendered" shed very little light on "what [it] was doing for over $5 million".[2282]

1424. The Tribunal agrees with the Respondent that the billing entries for Kroll Associates do not contain sufficient information to allow the Tribunal to make a determination on whether the work performed by Kroll contributed to Chevron's mitigation efforts in the RICO Litigation. For example, as rightly noted by the Respondent, one billing entry contains a lump-sum charge of USD 373,885.15 for "legal services" purportedly performed by the law firm K&L Gates, without any further indication of what these services entailed.[2283] Numerous entries contain the narrative "professional services rendered", followed by the name of the timekeeper, without providing further information.[2284] This lack of specificity pervades the billing entries for Kroll Associates' services. The Claimants have therefore failed to establish that the legal fees and expenses allegedly paid by Chevron to Kroll Associates sought to mitigate the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

1425. For these reasons, the Tribunal excludes from compensation the legal fees and expenses charged by Kroll Associates in connection with the RICO Litigation.

xxii. Daniel Cooperman

1426. The Claimants claim USD 64,116.59 in costs paid to Mr Daniel Cooperman under this damages category.[2285] This amount was billed as a passthrough cost for Gibson Dunn for "professional services" rendered to Chevron Corporation.[2286] Mr Cooperman was

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[2282] Track III Hearing Transcript, Day 15 (7 September 2022), p. 3599 (Finsterwald); Track III Hearing - Respondent's Closing Presentation, Slide 149-150.

[2283] **C-3309.002**, Kroll Associates Inc. (Member) – 2011.xslx, Invoice Number 1710948, 20 December 2011, row 6.

[2284] *See*, *e.g.*, **C-3309.002**, Kroll Associates Inc. (Member) – 2011.xslx, Invoice Number 2711722, 28 December 2011, entries 6-11; **C-3309.003**, Kroll Associates Inc. (Member) – 2012.xslx, Invoice Number 2711764 copy, 14 May 2012, entries 6-10, 12-13; **C-3309.004**, Kroll Associates Inc. (Member) – 2013.xslx, Invoice Number 2712454, 17 December 2013, entries 6, 8-11, 14-15; **C-3309.005**, Kroll Associates Inc. (Member) – 2014.xslx, Invoice Number 2712480, 29 January 2014, entries 8, 10-12.

[2285] **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

[2286] **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013.xlsx, Invoice Number 2013061050, 23 October 2013, entries 18, 19; **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013.xlsx, Invoice Number 2013100283, 6 October 2013, row 1319; **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013.xlsx, Invoice Number 2013120851, 4 December 2013, row 1414.

engaged by Chevron to provide an opinion on the reasonableness of the legal fees incurred by Chevron within the context of the Canada Enforcement Proceedings.[2287]

1427. The Tribunal understands the Respondent to imply that the legal fees and expenses charged by Mr Cooperman in connection with the RICO Litigation should be excluded from compensation because Chevron withdrew this expert in the course of the proceedings.[2288] This being the case, the Tribunal will address this component as part of a more detailed analysis of Chevron's decision to withdraw expert witnesses in paragraphs 1467-1472 below.

xxiii. Anil Shivdasani

1428. The Claimants claim USD 49,329.78 in costs paid to Mr Anil Shivdasani under this damages category.[2289] This amount was billed as a passthrough cost for Gibson Dunn for "professional services" rendered to Chevron Corporation.[2290] Mr Shivdasani was engaged by Chevron to provide an expert evaluation of Chevron's alleged losses from the Argentina Embargo Order.[2291] The Tribunal understands that this expert report was meant to support, at least, Count 6 (Chevron's claim for unjust enrichment) and Chevron's claims for money damages.[2292]

2287 *See* **R-2087**, Supplemental Expert Report of Daniel Cooperman Regarding Attorneys' Fees Damages, 30 August 2013, p. 1.

2288 Respondent's Letter to the Tribunal dated 21 October 2022, p. 11; Counter-Memorial, para. 544; Rejoinder, para. 873(4).

2289 **RE-51**, Trunko Expert Report, **SM J-1**, p. 2.

2290 **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013.xlsx, Invoice Number 2013051263, 31 May 2013, entries 15, 539; **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013.xlsx, Invoice Number 2013110236A, 10 November 2013, row 2065; **C-3287.005**, Gibson, Dunn & Crutcher LLP (Member) – 2013.xlsx, Invoice Number 2013120851, 4 December 2013, row 51.

2291 **C-1626**, Expert Report of Anil Shivdasani submitted in RICO proceedings, 1 March 2013.

2292 **R-2079**, *Chevron Corp. v. Steven Donziger, et al.*, S.D.N.Y. Case No. 1:11-cv-00694-LAK-RWL, D.E. 968-7, Defendants Hugo Gerardo Camacho Naranjo, Javier Piaguaje Payaguaje, Steven Donziger, the Law Offices of Steven R. Donziger, and Donziger & Associates, PLLC's Motion to Strike Chevron's Excessive and Irrelevant Experts, 3 April 2013, p. 4: "The Court has thrice struck Chevron's unjust enrichment cause of action. Dkts. 472, 634, 889. Chevron cannot now claim that Defendants have been unjustly enriched via the enforcement actions in Ecuador or Argentina. The alleged fraud damages are limited to costs arising from certain litigation activities— not from any embargo orders. See, e.g., Dkt. 918-14 (Chevron's Response to Interrog. No. 1). Thus the following reports assessing foreign embargo orders are irrelevant: . . . Anil Shivdasani – Evaluating Chevron's alleged losses from Argentine embargo order".

1429. The Tribunal understands the Respondent to imply that the legal fees and expenses charged by Mr Shivdasani in connection with the RICO Litigation should be excluded from compensation because Chevron withdrew this expert in the course of the proceedings.[2293] This being the case, the Tribunal will address this component as part of a more detailed analysis of Chevron's decision to withdraw expert witnesses in paragraphs 1467-1472 below.

3. Other issues

1430. In this Section, the Tribunal will address other issues raised by the Parties in connection with this damages category that have not been specifically identified by the Parties as a component. This being the largest damages category, the Tribunal has identified a number of these issues, which it will address *seriatim*.

i. Fees and costs for RICO Litigation awarded in the Gibraltar Proceedings

1431. The Respondent recalls that, in the context of the *Amazonia* Action in the Gibraltar Proceedings, the Supreme Court of Gibraltar allowed Chevron to recover from certain defendants in those proceedings sums of money "derived from" Chevron's RICO fee application, which, as noted above, amounted to USD 32,334,584.[2294] According to the Respondent, by representing to the Supreme Court of Gibraltar that it would not seek to recover fees and costs against both the Gibraltar defendants and the defendants in the RICO Litigation, Chevron effectively acknowledged that the same activities underlie both sets of fees.[2295] As such, the Respondent considers that the Claimants should not be permitted to recover under this damages category the RICO Litigation fees and costs already awarded in the Gibraltar Proceedings.[2296] Critically, the Claimants acknowledge this and confirm that "to the extent that Chevron recovered RICO attorneys' fees from

[2293] Respondent's Letter to the Tribunal dated 21 October 2022, p. 11; Counter-Memorial, para. 544; Rejoinder, para. 873(4).

[2294] Counter-Memorial, paras. 758, 759. *See also* para. 1320 above.

[2295] Counter-Memorial, para. 759.

[2296] Counter-Memorial, para. 758.

Amazonia, ADF and Fromboliere, Chevron does not seek to recover those same fees from Ecuador."[2297]

1432. The Tribunal's analysis of the Gibraltar Proceedings is set out in detail in Section VIII.I below and shall not be repeated here. For context, however, the Tribunal recalls that the Supreme Court of Gibraltar awarded the following sums to Chevron:

(i) USD 28,035,219.37 (not including interest) against Amazonia;[2298]

(ii) USD 33,148,186.71 (not including interest) against Pablo Fajardo, Luis Francisco Yanza and Ermel Chavez;[2299] and

(iii) USD 32,753,048.66 (not including interest) against the ADF and Servicios Fromboliere Compania Limitada[2300] (together, the "***Amazonia*** **Damages Judgments**").

1433. Since, by the Claimants' own admission, the *Amazonia* Damages Judgments "derived from [the] application for attorneys' fees filed by Chevron in the RICO action", the Tribunal must ensure that the Claimants do not recover the same legal fees and expenses they incurred in connection with the RICO Litigation from the Respondent and, simultaneously, from the debtors of the *Amazonia* Damages Judgments.

1434. Accordingly, the Tribunal determines that any sums collected by Chevron in connection with the *Amazonia* Damages Judgments shall be deducted from compensation under the present damages category.

2297 Reply, para. 856.

2298 **C-2995**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgment, 9 December 2015. *See also* 1873 below.

2299 **C-3002**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 14 May 2018. *See also* 1874 below.

2300 **C-3002**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 14 May 2018. *See also* 1874 below.

ii. Work relating to sanctions in the RICO Litigation

1435. The Respondent faults Chevron for "squander[ing] innumerable resources" on repeated motions for sanctions against the LAPs and their counsel.[2301] According to the Respondent, Chevron "indulged its preoccupation with sanctions most enthusiastically in the RICO case", where the Claimants seek approximately USD 2.5 million for approximately 4,000 hours spent investigating, researching, and litigating sanctions motions.[2302] In the Respondent's view, these "serial motions" were "highly unusual and suggestive of an improper purpose."[2303] The legal fees and expenses claimed by the Claimants falling under this description, as particularised by the Respondent, amount to USD 2,493,941.70.[2304]

1436. The Tribunal notes that on 12 March 2013, Chevron filed a "Motion to Sanction and Hold the Donziger Defendants and LAP Representatives in Contempt of Court for Disobeying the Court's Discovery Orders."[2305] This motion was accompanied by a Memorandum of Law and supporting documents.[2306] Chevron's sanctions motion prompted opposition filings from both the Donziger Defendants[2307] and the LAP Representatives,[2308] followed by a reply memorandum from Chevron in support of its motion.[2309] On 10 April 2013, the SDNY ordered an evidentiary hearing on key issues, which it scheduled for up to three trial days beginning on 16 April 2013.[2310] Subsequently, Chevron filed multiple motions to supplement the record[2311] – two of which were granted,[2312] one unopposed and the

2301 Rejoinder, para. 880.

2302 Rejoinder, para. 883.

2303 Rejoinder, para. 880; **RE-66**, Wendel Expert Report, para. 46.

2304 Rejoinder, Annex K-1.

2305 *See* para. 1237 above; **C-3037**, RICO Docket, ECF No. 893 (12 March 2013).

2306 **C-3037**, RICO Docket, ECF Nos. 894-895 (12 March 2013).

2307 **C-3037**, RICO Docket, ECF Nos. 947-948 (26 March 2013).

2308 **C-3037**, RICO Docket, ECF Nos. 950-952 (26 March 2013).

2309 **C-3037**, RICO Docket, ECF Nos. 965-967 (2-3 April 2013).

2310 *See* para. 1238 above; **C-3037**, RICO Docket, ECF No. 997 (10 April 2013).

2311 **C-3037**, RICO Docket, ECF No. 1180 (22 May 2013); **C-3037**, RICO Docket, ECF No. 1220 (7 June 2013).

2312 **C-3037**, RICO Docket, ECF No. 1228 (11 June 2013); **C-3037**, RICO Docket, ECF No. 1237 (12 June 2013).

other over objection.[2313] On 1 October 2013, Chevron again sought leave to supplement the record.[2314]

1437. On 10 October 2013, the SDNY issued an opinion granting the sanctions motion in part and denying it in part:[2315]

> New York attorney Steven Donziger and his Ecuadorian clients have obtained an $18.2 billion judgment against Chevron Corporation ("Chevron") from an Ecuadorian court (the "Judgment"). Chevron sues here for equitable relief, claiming that the Judgment was obtained by fraud – including but not limited to bribery of the Ecuadorian judge – as part of a scheme to extort money from it. The defendants include Mr. Donziger's Ecuadorian clients, their lead Ecuadorian counsel, and several other individuals and organizations allegedly complicit in the scheme. Other than Mr. Donziger and his law firms (the "Donziger Defendants"), all of the defendants save two individual Ecuadorians (the "LAP Representatives") have defaulted.
>
> Chevron has sought discovery – especially document production – from the Donziger Defendants and the LAP Representatives in an effort to substantiate its claims. Its efforts have largely been stonewalled. These defendants have not produced the requested documents or provided other requested information that is in the hands of their own Ecuadorian lawyers and associates. Chevron moved to compel production. While that motion was pending, the Ecuadorian lawyers – at the suggestion of U.S. counsel for the LAP Representatives – caused a collusive lawsuit to be brought in Ecuador, without notice to Chevron, that ultimately resulted in an injunction barring the Ecuadorian lawyers and other associates from turning documents over in this case. This has not stopped these defendants, however, from submitting documents in this case that they obtained from their Ecuadorian lawyers when it suited their purposes – in one case just days after denying that they had control over the documents submitted and claiming they could not produce them to Chevron.
>
> The Court first ordered that the requested documents be produced. Defendants declined to comply. Chevron then moved for sanctions, including contempt and default judgments. The matter has been fully briefed, and the Court has had the benefit of an evidentiary hearing. The Court now concludes that (1) these defendants have the practical ability to produce the documents, (2) the collusive Ecuadorian injunction is no obstacle to the imposition of sanctions, and (3) these defendants have acted in bad faith in their failure to produce documents in the hands of their Ecuadorian attorneys and agents. While it declines to grant the more onerous sanctions sought by Chevron, sanctions narrowly tailored to their actions are appropriate.[2316]

[2313] **C-3037**, RICO Docket, ECF No. 1230 (11 June 2013).

[2314] **C-3037**, RICO Docket, ECF Nos. 1482-1484 (1 October 2013).

[2315] *See* para. 1238 above; **C-3037**, RICO Docket, ECF No. 1529 (10 October 2013); **C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al.*, 10 October 2013.

[2316] **C-3037**, RICO Docket, ECF No. 1529 (10 October 2013); **C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al.*, 10 October 2013, pp. 1-2.

1438. As gleaned from above, Chevron pursued sanctions with a view to supporting its discovery efforts in the RICO Litigation, which were largely "stonewalled" by several of the RICO Defendants. As part of the relief granted by the SDNY in respect of its pursuit of sanctions, Chevron obtained an adverse inference:

> Many of Chevron's document requests seek information relating to the events the Court has found (1) were tainted by fraud, or (2) as to which there is probable cause to suspect fraud. Defendants have failed to produce the documents from their attorneys and agents in Ecuador that would shed light on these events. Their failure to produce may very seriously prejudice Chevron's ability to prove various of its allegations. Thus, the Court in its discretion may infer from defendants' failure to produce documents in the possession of their attorneys and agents that the evidence defendants refused to provide from their Ecuadorian attorneys and agents would have been unfavorable to them.[2317]

1439. The SDNY also directed that the RICO Defendants would be prevented from introducing at trial documents "that were held by defendants' attorneys and agents in Ecuador and responsive to Chevron's requests but that were not produced" in accordance with the Court's original discovery order.[2318]

1440. Based on the above, the Tribunal determines that Chevron's pursuit of sanctions sought to obtain critical procedural relief and therefore amounted to a substantive contribution to the RICO Litigation. Having already ascertained that the RICO Litigation category of damages as a whole cannot be excluded from compensation, the Tribunal considers it appropriate to apply the same logic to Chevron's pursuit of sanctions in the context of the same litigation.

1441. Accordingly, the Tribunal declines to exclude from compensation all legal fees and expenses Chevron incurred for work relating to sanctions in the RICO Litigation.

iii. Work relating to other dismissed claims in the RICO Litigation (Counts 3, 4 and 5)

1442. In addition to the legal fees and expenses relating to Count 6 (Unjust Enrichment), which was addressed in paragraphs 1363-1370 above, the Respondent contends that the Claimants should also be barred from recovering fees and costs incurred in pursuing

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[2317] **C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al.*, 10 October 2013, pp. 102-103.

[2318] **C-2434**, Opinion on Motions to Compel and for Sanctions, Case No. 1:11-cv-0691, *Chevron Corp. v. Donziger, et al.*, 10 October 2013, pp. 103-104.

Chevron's "doomed" claims under Count 4 (Tortious Interference with Contract), Count 5 (Trespass to Chattels), and partially, Count 3 (Fraud) insofar as it alleged detrimental reliance.[2319] These claims were dismissed by the SDNY on 14 May 2012 – prior to trial – in response to a motion to dismiss filed by the Donziger Defendants.[2320]

1443. The Claimants reject this argument, maintaining that "while Chevron did not prevail on all of its claims, none of those claims was vexatious or patently unmeritorious".[2321] The Claimants emphasize that Chevron "was the clear winner in the RICO Litigation"[2322] and that the key consideration is not success on every claim, but the "degree of success obtained", which in their view was substantial.[2323]

1444. In its Opinion dated 14 May 2012, the SDNY rejected Count 3 (in part) and Counts 4 and 5 in their entirety in response to the Donziger Defendants' motion to dismiss the Amended Complaint "for failure to state a claim upon which relief can be granted."[2324] A review of the grounds for the dismissal of these claims is first in order.

1445. First, the Tribunal recalls that Count 3 (Fraud) is based on the premise that the RICO Defendants "and their agents have knowingly misrepresented, omitted, and/or concealed material facts in their pleadings and representations before U.S. courts and before the Lago Agrio court, in their communications to federal and state government agencies and officials, and in their communications to Chevron, Chevron's shareholders, investors, analysts, and the media". According to Chevron, "[a]s a direct, proximate, and foreseeable result of Defendants' fraud, Chevron has been harmed, including significant pecuniary, reputational, and other damages. These injuries include significant damage to Chevron's reputation and goodwill, and the attorneys' fees and costs to defend itself in objectively baseless, improperly motivated sham litigation in Ecuador and in related

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2319 Counter-Memorial, para. 769.

2320 **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012.

2321 Reply, para. 853.

2322 Reply, para. 853.

2323 Reply, para. 853.

2324 *See* para. 1215 above; **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 1.

litigation in the U.S., including the attorneys' fees and costs associated with exposing the Defendants' pervasive fraud in the Section 1782 proceedings".[2325]

1446. In its Opinion dated 14 May 2012, the SDNY dismissed Count 3 only to the extent it was "premised on detrimental reliance by Chevron" (*i.e.*, first-party reliance).[2326] In essence, the Donziger Defendants asserted that to the extent Count 3 rested on alleged reliance by third parties on the RICO Defendants' representations, it was "legally insufficient because reliance by the plaintiff is an essential element of the tort."[2327]

1447. At the outset, the SDNY found that there was no basis for Chevron to assert first-party reliance, as "Chevron incurred no attorneys' fees or costs because it relied on any misrepresentations by the defendants."[2328] In respect of third-party reliance, however, the Donziger Defendants did not "argue that Chevron fails sufficiently to allege that third-parties relied on the allegedly false representations or that such reliance injured Chevron. Rather, they contend only that fraud claims may not be predicated on reliance by third parties."[2329] In this connection, the SDNY ruled that "the New York Court of Appeals' previous decisions allowing recovery for common law fraud based on third party reliance remain authoritative and, in any case, that that Court, were it faced with the question anew, would adhere to that position. Accordingly, Chevron's fraud claim cannot properly be entirely dismissed on the present motion for want of sufficient allegations of first-party reliance."[2330]

1448. Second, Count 4 (Tortious Interference with Contract) is founded on the assertion that that "Defendants have intentionally caused and continued to cause the Republic of

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[2325] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, paras. 388-395.

[2326] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 53.

[2327] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 38.

[2328] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 40.

[2329] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 40.

[2330] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, p. 43.

Ecuador to repeatedly breach the 1995 Settlement Agreement and the 1998 Final Release. Defendants have, through improper influence and the fabricated Cabrera Report, persuaded the Republic of Ecuador to refuse to defend Chevron's rights and those of its subsidiaries under the contracts, to improperly dictate to the judiciary that Chevron be held liable in the Lago Agrio Litigation, and to bring criminal charges against Chevron's employees".[2331]

1449. In its Opinion dated 14 May 2012, the SDNY dismissed Count 4 on the basis that it was time-barred:

> The statute of limitations for tortious interference claims is three years, and it "begins to run when the defendant performs . . . the alleged interference."
>
> The contracts at issue are the 1995 Settlement Agreement and the 1998 Final Release . . . Chevron alleges that the Donziger Defendants and others "improper[ly] influence[d] and . . . persuaded the Republic of Ecuador to refuse to defend Chevron's rights, causing Ecuador to renege on its alleged release of TexPet from all liability associated with the company's Ecuadorian operations."
>
> The Donziger Defendants argue that this claim is time-barred because any alleged interference began in 1999 (when Ecuador enacted the Environmental Management Act of 1999 ("EMA"), which allowed a private right of action to sue for environmental damages) or in 2003 (when the LAPs, relying on the EMA, commenced the Lago Agrio litigation in Ecuador). Chevron does not dispute that the statute of limitations began to run at one of these junctures. Rather, it describes the tortious conduct as persisting and characterizes the Judgment and the Cabrera Report as a new breaches of the contracts.
>
> Chevron's attempt to avoid the bar of the statute of limitations by asserting that any tortious interference is ongoing fails because "tortious interference with contract is not a continuing tort." Moreover, the Court is persuaded that the alleged tortious interference began no later than 2003 when the Lago Agrio litigation was filed and, as alleged in the amended complaint, the Donziger Defendants and others "persuaded the Republic of Ecuador to refuse to defend Chevron's rights." As more than three years have elapsed since the start of the Lago Agrio litigation, the claim is untimely and must be dismissed as to the Donziger Defendants.[2332]

1450. Lastly, Count 5 (Trespass to Chattels) proceeded on the basis that the same subset of defendants against whom Counts 1 and 2 were brought "have engaged in a pattern of extortion, collusion, wrongdoing, and deceit with an intent to interfere with Chevron's property, and the Lago Agrio Plaintiffs have benefited and will continue to benefit from

[2331] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 398.

[2332] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, pp. 47-49.

the RICO Defendants' criminal scheme through a fraudulent judgment. Through these actions, and by prosecuting a fraudulent lawsuit, manufacturing false evidence, tampering with testimony, disseminating misleading statements to courts, the public, and U.S. government officials, and otherwise engaging in the pressure campaign described in the foregoing paragraphs of this Amended Complaint, Defendants have intentionally, and without justification or consent, interfered and intermeddled with Chevron's use and enjoyment of its funds that were intended for Chevron's business purposes and of its business reputation and goodwill".[2333]

1451. Also in its Opinion dated 14 May 2012, the SDNY dismissed Count 5 on the ground that Chevron's claims did not fit the doctrine of trespass to chattels:

> In substance, Chevron alleges that the Donziger Defendants' "fraudulent litigation" and the corresponding "misleading media campaign" has interfered with, disturbed, and damaged its "funds and goodwill" and that they therefore have committed trespass to chattels.
>
> The essential elements of trespass to chattels are "(1) intent, (2) physical interference with (3) possession (4) resulting in harm." Chevron's claim is without merit for two reasons.
>
> First, Chevron does not allege that the Donziger Defendants interfered with a chattel. The only interference alleged involved Chevron's funds and goodwill. "Chattel" is defined as "[m]ovable or transferable property [such as] personal property." Money is fungible and not properly characterized as a "chattel." The same is true of goodwill.
>
> Second, Chevron does not allege that the Donziger Defendants *physically* interfered with possession of its property. Chevron's claim is essentially one for vexatious litigation – a tort that does not exist in New York – and one that cannot be fit into the narrow doctrine of trespass to chattels.[2334]

1452. The Tribunal notes that the Respondent's criticisms of Counts 3, 4, and 5 stem from the fact that they were unsuccessful and, by implication, wasteful. The Respondent does not otherwise argue that Counts 3, 4, and 5 pursued litigation objectives wholly disconnected from mitigating the potential injury that could arise from an enforcement of the Lago Agrio Judgment. Rather, the criticism seems to rest solely on the fact that they were

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[2333] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 404.

[2334] **R-1870**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 14 May 2012, pp. 47-49.

dismissed at an early stage due to failure to state a legally sufficient claim (for Count 3), time bar (for Count 4) and insufficient allegations (for Count 5).[2335]

1453. In this respect, the Tribunal recalls its above finding that all of Counts 3-7 and 9 concern relief seeking to mitigate the damage resulting from the breaches of the Treaty by preventing the enforcement of the Lago Agrio Judgment. Accordingly, Chevron's pursuit of Counts 3, 4, and 5 fulfils the requirement of causation for the compensation of incidental damages under international law.[2336]

1454. The Tribunal reaches the same conclusion in respect of the second requirement for compensation (reasonableness of the measures taken). As already noted by the Tribunal, reasonableness should be assessed contemporaneously and not with the benefit of hindsight.[2337] Accordingly, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific actions to bring as part of the RICO Litigation.[2338] For the same reason, the ultimate success of Counts 3, 4, and 5 should not be a decisive factor when determining whether it was reasonable for the Claimants to pursue such action; rather, the relevant inquiry is whether the claims were reasonable steps towards the goal of removing the risk of enforcement. Having examined the grounds supporting Counts 3, 4, and 5 and the reasons for which the SDNY dismissed them, the Tribunal finds no basis to conclude that these claims were intrinsically frivolous or were devised by Chevron as something other than mitigation measures seeking to address specifically the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

1455. Accordingly, the Tribunal declines to exclude from compensation the legal fees and expenses pertaining to work relating to Counts 3, 4 and 5 in the RICO Litigation on the basis that such actions were not successful.

[2335] Counter-Memorial, para. 519.

[2336] *See* paras. 1302, 1313 above.

[2337] *See* para. 340 above.

[2338] *See* para. 341 above.

iv. Work relating to Count 8

1456. As noted in paragraph 1302 above, while all of Counts 3-7 and 9 concern relief seeking to prevent the enforcement of the Lago Agrio Judgment, Count 8 concerns only a request "for general damages according to proof at trial, trebled according to statute" and "for Chevron's reasonable attorneys' fees and costs according to statute" under Judiciary Law § 487.[2339] This provision, as reproduced in the Amended Complaint, reads in relevant part: "An attorney or counselor who . . . [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party . . . [i]s guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."[2340]

1457. After Chevron withdrew its money damages claims, the relief sought by Chevron with respect to Count 8 was limited to an injunction barring Mr Donziger "from engaging in any deceit or collusion, or consenting to any deceit or collusion, with intent to deceive any court within the state of New York" and requiring him to attach a copy of the order to any initial appearance in any state or federal action" in New York.[2341]

1458. In the RICO Judgment, the SDNY ruled on Count 8 and Chevon's claims premised on third-party reliance as an ensemble. The SDNY noted the following facts:

> *As the foregoing discussion makes clear, Donziger's pressure campaign included a plethora of false and misleading representations to persons and entities* – including among others members of the media, the New York Attorney General, the SEC, the New York State Comptroller, and Chevron shareholders – *often in efforts to pressure Chevron into settlement*. Likewise, Donziger, a member of the New York Bar, attempted to deceive the judges of this Court. Among other things, he suggested that Mark Quarles include statements that Donziger knew to be false in a declaration before the Honorable Leonard Sand to deceive the court into believing that Cabrera was an independent expert. In attempting to explain away the Prieto email, he offered a deliberately false explanation to this Court that contradicted his prior sworn testimony in an obvious attempt to avoid sanctions for failing to produce documents from Ecuador.[2342]

[2339] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, pp. 136-161.

[2340] **C-976**, *Chevron Corp. v. Steven Donziger et al.*, Case No. 11 Civ. 0691 (LAK), Amended Complaint (SDNY), 20 April 2011, para. 421.

[2341] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 409.

[2342] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 408 (emphasis by the Tribunal).

1459. Against this background, the SDNY declined in the exercise of its discretion to grant equitable relief on Count 8, expressing a concern that the relief sought by Chevron was insufficiently specific and noting that the professional consequences of Mr Donziger's behaviour could be addressed by other bodies:

> It is debatable whether the injunctive relief sought by Chevron with respect to these claims would be sufficiently specific to satisfy Rule 65(d)(1). It is debatable also whether it makes practical sense to subject every future public statement by these defendants, or every future action by Donziger in connection with litigation in courts in New York, to the possibility of contempt proceedings for violating an injunction barring "acts of fraud" and any "deceit or collusion." Moreover, the professional consequences of Donziger's behavior, past and future, may be addressed quite adequately by other bodies. Accordingly, the Court, in the exercise of discretion, declines to grant equitable relief on Chevron's claims of third party fraud and violation of Judiciary Law Section 487.[2343]

1460. The Tribunal infers from these materials that Chevron's pursuit of Count 8 sought primarily to prevent Mr Donziger from pursuing his "pressure campaign" intended to compel Chevron to settle the Lago Agrio Judgment. In this respect, the Tribunal recalls that any harm suffered by the Claimants as a result of such campaign – including any legal fees and expenses incurred to oppose the campaign – falls outside the scope of the compensable injury in this case (*i.e.*, the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment).[2344]

1461. The legal fees and expenses incurred by the Claimants in connection with Count 8 must therefore be excluded from compensation. While neither Party has particularized the amounts incurred by Chevron specifically in connection with Count 8, this should not preclude the Tribunal from factoring this exclusion into the determination of the final amount of compensation owed to the Claimants: the fact remains that the onus is on the Claimants to prove every element of their damages claim[2345] and they have failed to meet that burden in connection with their pursuit of Count 8. The Tribunal shall address this question together with other issues relevant to the RICO Litigation in Section (d)(3)xvi below.

[2343] **C-2135**, Opinion of Judge Lewis A. Kaplan, *Chevron Corporation v. Steven Donziger, et al.*, 11 Civ. 0691 (LAK), U.S. District Court, SDNY, 4 March 2014, p. 409.

[2344] *See* para. 317 above.

[2345] *See* para. 548 above.

v. Work related to pursuing criminal contempt proceedings against Donziger

1462. According to the Respondent, following the entry of judgement in Chevron's favour in the RICO Litigation, Chevron engaged in a post-judgment campaign of "inflicting further pain and suffering" on Mr Donziger, including, eventually, assisting in criminal contempt proceedings against him.[2346] The Respondent points out that Gibson Dunn partner Ms Anne Champion "not only testified at the criminal contempt proceedings" but "also met with the Federal Bureau of Investigation 'on the order of 15 to 20' times" to discuss the charges, each time accompanied by at least one other Gibson Dunn attorney.[2347] The Respondent asserts that, in total, Gibson Dunn attorneys spent "approximately 286 hours meeting with U.S. law enforcement to support the criminal contempt charges against Donziger."[2348]

1463. In respect, specifically, of the Claimants' damages claim, the Respondent points out that "numerous Chevron attorneys billed time for investigating the standards for criminal contempt and for facilitating proceedings to disbar Donziger in New York" and that some of these fees for criminal contempt proceedings were allocated under the RICO Litigation category and are now being claimed as damages in this Arbitration.[2349] According to the Respondent, it is highly unusual for a "multi-billion-dollar company to channel its resources into a multi-million-dollar takedown of a private individual":[2350] in its view, none of these activities can be understood as rational business judgments that could support a damages award in this case.[2351]

1464. The Tribunal has already addressed Chevron's pursuit of civil contempt proceedings against Mr Donziger in paragraphs 1382-1389 above. As already noted, on 23 May 2019

[2346] Rejoinder, paras. 1247-1249.

[2347] Rejoinder, para. 1249; **R-2123**, *United States v. Donziger*, S.D.N.Y. Case 1:19-cr-561-LAP, D.E. 315 Trial Transcript, 22 May 2021, pp. 459-460.

[2348] Rejoinder, para. 1249; **R-2123**, *United States v. Donziger*, S.D.N.Y. Case 1:19-cr-561-LAP, D.E. 315 Trial Transcript, 22 May 2021, p. 463.

[2349] Rejoinder, para. 1250.

[2350] Rejoinder, para. 1251.

[2351] Rejoinder, para. 1251.

the SDNY granted in part four motions to hold the Donziger Defendants in contempt.[2352] A few months later, on 16 July 2019, the SDNY granted Chevron's request for attorneys' fees for all activities surrounding those four motions.[2353] Two weeks later, on 31 July 2019, the SDNY issued an order to show cause why Mr Donziger should not be held in criminal contempt.[2354] The local U.S. Attorney's Office thereafter pursued criminal contempt charges against Mr Donziger.[2355]

1465. The Respondent has identified several materials evincing, in its submission, that "Chevron offered up its attorneys to assist in that criminal prosecution".[2356] However, these materials do not support the proposition that Chevron incurred fees in connection with those proceedings. First, Ms Anne Champion, a Gibson Dunn partner, testified under oath that she did not bill to Chevron any of the time she spent in meetings with FBI agents discussing the criminal charges against Mr Donziger.[2357] Second, the Respondent has only identified five time entries, totalling less than 14 hours, allegedly corresponding to time "investigating the standards for criminal contempt and . . . facilitating proceedings to disbar Donziger", many of which bear the label "[NOT CLAIMED]".[2358] In the circumstances, the Tribunal has been given no substantial reasons to exclude any amounts from compensation on account of the time spent by Chevron's counsel in connection with the pursuit of criminal contempt proceedings against Mr Donziger.

2352 **C-3116**, *Chevron Corporation v. Steven Donziger*, Case 1:11-cv-00691-LAK-RWL, Document 2209, Memorandum Opinion, 23 May 2019, pp. 8-9.

2353 **R-1567**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 2264 Motion for Award of Attorneys' Fees, 16 July 2019.

2354 **R-1566**, *Chevron Corp. v. Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 2276 Order to Show Cause Why Def. Steven Donziger Should Not Be Held in Criminal Contempt, 31 July 2019.

2355 **R-2123**, *United States v. Donziger*, S.D.N.Y. Case 1:19-cr-561-LAP, D.E. 315 Trial Transcript, 22 May 2021.

2356 Rejoinder, para. 1249.

2357 **R-2123**, *United States v. Donziger*, S.D.N.Y. Case 1:19-cr-561-LAP, D.E. 315 Trial Transcript, 22 May 2021, p. 464. *See also id.*, p. 466: "Q. . . . Since you're not billing for this, it essentially is a donation, correct? A. I don't view it as a donation, no, to Chevron, or to anybody. I'm under federal subpoena. I would meet with the authorities regarding any crime that they wish to meet with me on. I don't view it as a donation. It's more like paying taxes."

2358 Rejoinder, para. 1250.

vi. Alleged unnecessary witnesses, experts, and exhibits

1466. The Respondent argues that Chevron spent "inordinate amounts of time preparing unnecessary witnesses and compiling unnecessary exhibits" in the RICO Litigation.[2359]

1467. First, the Respondent points to Chevron's admission that it prepared 13 witnesses whom it did not call at the RICO trial.[2360] The Respondent's expert, Mr David Paige, also points to the following as examples of "abandoned" work relating to witnesses and experts, the costs of which, according to him, "should not reasonably or fairly be shifted to Ecuador":

(i) *Expert witnesses in the RICO (Bifurcated Count* [9]*) action*: Chevron advised that it was withdrawing 10 experts as witnesses and that, out of the remaining 16 challenged expert witnesses, the number "will likely continue to shrink as the trial approaches, so [Chevron] do[es] not expect to call all of them".[2361]

(ii) *Forensic expert in RICO action*: the SDNY ordered Chevron to propose an alternative "neutral forensic expert" because the expert that it previously put forward had assisted in the context of the Gibraltar Proceedings, and Chevron had offered to select a different one.[2362]

1468. According to the Respondent, working with "extra experts" caused Chevron to incur considerable fees for which Ecuador should not be held liable, as these activities were all later abandoned.[2363]

1469. Several documents in the record provide insight as to why Chevron decided to withdraw certain witnesses. For instance, Chevron's decision to withdraw several expert witnesses during the Count 9 proceedings (*see* paragraph (i) above) was prompted by a request by the SDNY that Chevron "carefully review the number of expert witnesses [Chevron was]

2359 Counter-Memorial, para. 782.

2360 Counter-Memorial, para. 782; Memorial, Appendix 9, para. 139.

2361 **RE-36**, First Paige Expert Report, para. 185(f); **R-1581**, *Chevron Corp. v. Maria Aguinda Salazar et al.*, Case No. 1:11-cv-03718-LAK-JCF, ECF No. 188.

2362 **RE-36**, First Paige Expert Report, para. 185(g); **R-1608**, *Chevron Corp. v. Donziger, et al.*, Case 1:11-cv-00691-LAK-RWL, ECF No. 2134.

2363 Rejoinder, para. 873(4).

designating as potential trial witnesses."[2364] Chevron's counsel noted that they intended to present to the SDNY legal authorities instead of calling experts to the same effect:

> Because Chevron believes that all 26 of the experts it originally designated would provide relevant testimony on one of the multiple grounds for non-recognition or unenforceability of the Ecuadorian judgment and therefore would assist the Court in resolving important issues at trial, it opposes the attempt by defendants Hugo Camacho Naranjo ("Camacho") and Javier Piaguaje Payaguaje ("Piaguaje") (collectively, the "LAP Representatives") to exclude any of them. Nevertheless, Chevron is prepared to withdraw its designations of the following 10 expert witnesses: William D. DiPaolo; Joseph Dooley; Timothy Dutton QC; Alejandro Guzman Brito; Gus R. Lesnevich; Hector A. Mairal; Professor Keith Rayner; Professor Mitchell A. Seligson; Walter Spurrier; and Dr. Theodore D. Tomasi. Two of those witnesses, Timothy Dutton QC and Hector A. Maira, would otherwise have provided relevant testimony relating to the appropriate remedy here, as experts on Commonwealth and Latin American law and the various enforcement vehicles the LAPs could pursue in those foreign jurisdictions to disrupt Chevron's operations. *We believe that we can present directly to the Court the relevant legal authorities from those jurisdictions such that we do not necessarily have to call experts in that regard*, but we would appreciate hearing from the Court if Your Honor believes such testimony from both sides would be of assistance to the Court.[2365]

1470. Similarly, Chevron proposed an alternative forensic expert (*see* paragraph 1467(ii) above), in response to a direction from the SDNY:

> Chevron Corporation indicated that its proposed neutral forensic expert performed document hosting services for it in litigation in Gibraltar . . . While it contends that this is not disqualifying, it stated that it would propose an [alternative] expert 'in the coming days.' It has not yet done so.
>
> Chevron shall file the name and qualifications of any alternative proposed expert on or before November 28, 2018 at 10 a.m.[2366]

1471. Lastly, in respect of the RICO trial, the Claimants note that "Chevron prepared over 38 fact and expert witnesses for trial, *including preparing statements for each witness as required by the Court*, and ultimately called 25 witnesses at trial."[2367] A letter prepared by Chevron's counsel prior to the Count 9 trial (not the RICO trial) provides further

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[2364] **R-1581**, *Chevron Corp. v. Maria Aguinda Salazar et al.*, Case No. 1:11-cv-03718-LAK-JCF, ECF No. 188, p. 1.

[2365] **R-1581**, *Chevron Corp. v. Maria Aguinda Salazar et al.*, Case No. 1:11-cv-03718-LAK-JCF, ECF No. 188, fn 1 (emphasis by the Tribunal).

[2366] **R-1608**, *Chevron Corp. v. Donziger, et al.*, Case 1:11-cv-00691-LAK-RWL, ECF No. 2134.

[2367] Memorial, Appendix 9, para. 139 (emphasis by the Tribunal).

insight into Judge Kaplan's practices in respect of the submission of sworn written statements instead of oral testimony:

> As for the total number of experts called at trial, as I advised the Court on Tuesday, I anticipate that in the normal course this list will likely continue to shrink as the trial approaches, so I do not expect to call all of them as witnesses at trial. In any event, *this Court will undoubtedly adopt procedures to streamline the trial, for example, by, if a bench trial, requiring sworn written statements in lieu of oral direct testimony from expert witnesses, as contemplated in Your Honor's individual practices*, or by placing caps on the total amount of time allocated for each party for its questioning of witnesses, expert or otherwise.[2368]

1472. In the Tribunal's view, these materials support the proposition that Chevron's decision not to call certain witnesses to testify sought to streamline the trials held in the course of the RICO Litigation, often at the SDNY's behest. It is also apparent that Chevron's decision not to call certain experts to trial at different stages of the RICO Litigation did not necessarily have the effect of excluding their evidence from the SDNY's consideration, since these experts also provided written reports at the SDNY's request. Overall, therefore, the Tribunal rejects the Respondent's request to exclude from compensation the legal fees and expenses incurred by Chevron to engage and prepare such witnesses on the basis that they were "unnecessary".[2369]

1473. Second, the Respondent is critical of the purportedly excessive time spent by Chevron compiling "unnecessary exhibits" in the RICO Litigation.[2370] The Respondent refers in this respect to Chevron's list of 2,561 exhibits, which Judge Kaplan called out for being excessive.[2371]

1474. The Tribunal declines to draw any consequences from the fact that Chevron relied on this number of exhibits in the RICO Litigation. Having already addressed the extent to which the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the RICO Litigation, the Tribunal does not consider it necessary to opine on the appropriateness of the number of exhibits supporting them. As

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[2368] **R-1581**, *Chevron Corp. v. Maria Aguinda Salazar et al.*, Case No. 1:11-cv-03718-LAK-JCF, ECF No. 188, pp. 1-2 (emphasis by the Tribunal).

[2369] Counter-Memorial, para. 782.

[2370] Counter-Memorial, para. 782.

[2371] Counter-Memorial, para 782; **R-1600**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1804 Transcript of Proceedings, 10 December 2013, p. 1379.

already noted, it is not appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the RICO Litigation.[2372]

vii. Alleged unsuccessful work

1475. The Respondent also criticizes the Claimants for engaging in "unsuccessful" activities in the RICO Litigation.[2373] As an example of allegedly non-compensable work, the Respondent cites Chevron's "series of mostly unsuccessful and largely duplicative motions for summary judgment", where Judge Kaplan warned Chevron's counsel of a "significant risk . . . that you will all be wasting your time." Despite this, Chevron proceeded to file a motion that was largely denied without waiting for an opposition filing and ultimately denied as moot after trial.[2374] In addition to work already addressed as components earlier in this Section – *i.e.*, Counts 6 and 9 and Chevron's opposition to Mr Keker's *pro hac vice* appearance – Mr Paige identifies further examples of unsuccessful efforts in the RICO Litigation, which he opines fail to meet the legal standards of reasonableness and necessity:[2375]

(i) *Motion for Summary Judgement on Chevron's Eighth Claim for Relief* (Violation of New York Judiciary Law § 487).[2376] Mr Paige observes that on 5 October 2012, Chevron filed a "Motion for Summary Judgement on Its Eighth Claim for Relief (Violation of New York Judiciary Law § 487)," which was later denied by the SDNY on 4 March 2013.[2377] Mr Paige further observes that Chevron claims between USD 5 million and USD 11.5 million in fees for each month from October 2012 to March 2013, yet the Claimants provide insufficient information to determine how many staff, hours, or expenses were dedicated to this unsuccessful effort.[2378]

2372 *See* para. 341 above.

2373 Counter-Memorial, para. 772.

2374 Counter-Memorial, para. 772.

2375 Track III Hearing - Paige Opening Presentation, Slide 13.

2376 **RE-36**, First Paige Expert Report, para. 188(e)(i); **C-3037**, RICO Docket, ECF No. 583 (5 October 2012).

2377 **RE-36**, First Paige Expert Report, para. 188(e)(i); **LFA-44**, *Chevron Corporation v. Donziger, et al.*, Case 1:11-cv-00691-LAK-RWL (SDNY), ECF No. 878 (4 March 2013).

2378 **RE-36**, First Paige Expert Report, para. 188(e)(i).

(ii) *Motion for Leave to Serve a Second Document Subpoena on Amazon Watch.*[2379] *Mr* Paige notes that on 10 April 2013, Chevron filed a "Motion for Leave to Serve a Second Document Subpoena on Amazon Watch" which Judge Kaplan denied shortly thereafter, stating that the "essence of Chevron's problem is of its own making" due to the overbroad nature of the original subpoena and failure to comply with the law in the Ninth Circuit.[2380] According to Mr Paige, in April 2013 alone, eight law firms billed for the RICO Litigation, involving 250 timekeepers and close to 17,000 hours for a total of approximately USD 7.5 million in fees. Yet the Claimants provide insufficient information to determine how much of this effort and cost was devoted to this unsuccessful motion.[2381]

(iii) *Motion for Partial Summary Judgment on its RICO Claim, Summary Judgment on Certain Affirmative Defenses, and an Order Establishing Findings of Fact Pursuant to Fed. R. Civ. P. 56(g).*[2382] On 16 August 2013, Chevron filed a "Motion for Partial Summary Judgment on Its RICO Claim, Summary Judgment on Certain Affirmative Defenses, and an Order Establishing Findings of Fact Pursuant to Fed. R. Civ. P. 56(g)," a portion of which was denied on 22 August 2013 without even requiring a response from the defendants.[2383] The remaining portions were denied as moot on 4 March 2014.[2384] Mr Paige states that between August 2013 and February 2014, over USD 46 million in fees were claimed for the RICO Litigation. However, due to insufficient information provided by the Claimants, it is not known what portion of this amount relates to this unsuccessful motion.[2385]

[2379] **RE-36**, First Paige Expert Report, para. 188(e)(iv); **LFA-45**, *Chevron Corporation v. Donziger, et al.,* Case 1:11-cv-00691-LAK-RWL (S.D. NY), ECF No. 1000 (10 April 2013).

[2380] **RE-36**, First Paige Expert Report, para. 188(e)(iv); **LFA-46**, *Chevron Corporation v. Donziger, et al.,* Case 1:11-cv-00691-LAK-RWL (S.D. NY), ECF No. 1051 (19 April 2013).

[2381] **RE-36**, First Paige Expert Report, para. 188(e)(iv).

[2382] **RE-36**, First Paige Expert Report, para. 188(e)(v); **C-3037**, RICO Docket, ECF No. 1348 (16 August 2013).

[2383] **RE-36**, First Paige Expert Report, para. 188(e)(v); **R-1561**, *Chevron Corporation v. Donziger, et al.*, Case 1:11-cv-00691-LAK-RWL (S.D. NY), ECF No. 1362 (22 October 2013).

[2384] **RE-36**, First Paige Expert Report, para. 188(e)(v); **C-3037**, ECF No. 1880 (4 March 2014).

[2385] **RE-36**, First Paige Expert Report, para. 188(e)(v).

1476. The Tribunal notes that, unlike in other motions filed by Chevron in the RICO Litigation, the Respondent's main criticism of the motions identified in the preceding paragraph rests solely on the fact that they were ultimately unsuccessful.

1477. In this respect, and as already noted by the Tribunal, reasonableness should be assessed contemporaneously and not with the benefit of hindsight.[2386] Accordingly, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which specific actions to bring as part of the RICO Litigation.[2387] For the same reason, the ultimate success of the motions falling under the present heading should not be a decisive factor when determining whether it was reasonable for the Claimants to pursue them; rather, the relevant inquiry is whether it was reasonable for the Claimants to bring such motions in the first place.

1478. It is unnecessary to perform such inquiry as regards the first motion falling under the present heading (identified in paragraph 1475(i) above), as it relates to Count 8 – an action for which, as found in paragraph 1461 above, the Claimants are not entitled to compensation.

1479. As to the remaining motions falling under the present heading (*i.e.*, those identified in paragraph (ii) and 1475(iii) above), having examined the grounds supporting them and the reasons for which the SDNY dismissed them,[2388] the Tribunal finds no basis to conclude that such motions were intrinsically frivolous or were devised by Chevron as

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[2386] *See* para. 340 above.

[2387] *See* para. 341 above.

[2388] **LFA-46**, *Chevron Corporation v. Donziger, et al.,* Case 1:11-cv-00691-LAK-RWL (S.D. NY), ECF No. 1051 (19 April 2013) ("The essence of Chevron's problem is of its own making. The Law in the Ninth Circuit, notably the *Perry* case, was relatively clear when Chevron served the first Amazon Watch subpoena. By framing the subpoena as broadly as it did, it tool its chances of the result reached by Magistrate Judge Cousins. Nor did it seek to modify its first subpoena to Amazon Watch during the pendency of the extensive proceedings on the motion to quash in the California district court despite the approach and then expiration of the deadline for the service of document requests in this action and despite earlier litigation in this Court concerning the timeliness of the service of the first Amazon Watch subpoena . . . Thus, while Chevron is free to seek review of the Magistrate Judge's ruling with respect to the first subpoena and to make whatever arguments and suggestions it thinks appropriate to the California district court, leave to serve another is denied."); **R-1561**, *Chevron Corporation v. Donziger, et al.*, Case 1:11-cv-00691-LAK-RWL (S.D. NY), ECF No. 1362 (22 October 2013), p. 11 ("In this case, there is nothing questionable about the application of the summary judgment rule. But other considerations counsel the exercise of discretion against considering the merits of this motion at this moment of the litigation.").

something other than mitigation measures seeking to address specifically the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

1480. Accordingly, the Tribunal declines to exclude from compensation all legal fees and expenses incurred by Chevron in connection with its pursuit of the motions identified in paragraph (ii) and 1475(iii) above.

viii. Alleged overstaffing and excessive attendance at hearings and trial

1481. According to the Respondent, Chevron also "egregiously overstaffed" the RICO Litigation, sending "at least five or six attorneys to most hearings" when, "[a]t almost every hearing, only one or two of those attorneys spoke."[2389] The Respondent points to several instances, including a 20 December 2012 hearing on a motion to compel in which six Chevron attorneys appeared but only one (Mr Randy Mastro) intervened,[2390] compared to a single attorney each for the LAP Representatives and Mr Donziger.[2391] The Respondent infers that Chevron routinely sent more than six attorneys to some hearings, pointing to a sanctions hearing attended by between nine and eleven Gibson Dunn attorneys,[2392] where Mr Peter Seley examined a witness even though he was not listed in the attendance on the transcript's cover page.[2393]

1482. The Respondent's expert, Mr Trunko, similarly explains that "hearings and depositions were often attended by multiple attorneys from multiple firms", in marked departure from Chevron's own Billing Guidelines.[2394] Mr Trunko highlights several instances, as follows:

[2389] Counter-Memorial, para. 778.

[2390] Counter-Memorial, para. 778; **R-1883**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 747 Transcript of Proceedings (28 January 2013).

[2391] Counter-Memorial, para. 778.

[2392] Counter-Memorial, para. 779, fn 1548; **R-1604**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1891 Declaration of Christopher M. Joralemon in Support of Chevron Corporation's Fee Application, 18 March 2014, pp. 234-235. According to the Respondent, "[t]he bills indicate that the following attorneys attended the hearing: J. Bell, R. Brodsky, R. Brook, A. Champion, R. Mastro, A. Neuman, P. Seley, J. Stavers, and D. Sullivan. In addition, J. Coren spent eight hours "assist[ing] with sanctions hearing," and M.B. Maloney spent eight hours "assist[ing] R. Mastro during sanctions hearing".

[2393] Counter-Memorial, para. 779; **R-1895**, *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1084 Transcript of Proceedings (29 April 2013), pp. 1, 216.

[2394] **RE-51**, Trunko Expert Report, para. 30.

(i) The RICO trial, which lasted for 20 days, was typically attended each day by 15 to 20 timekeepers.[2395] The Claimants admit that there were two teams of lawyers in court each day during trial – one in the courtroom and one in a jury room – along with a third team at a nearby location providing support.[2396] According to the Respondent, based on Mr Trunko's audit of the invoices, at least 43 different timekeepers attended the RICO trial.[2397]

(ii) The RICO closing argument was attended by no less than 22 timekeepers, including 21 from Gibson Dunn and one from Jones Day.[2398] This is even though only one of Chevron's attorneys, Mr Mastro, actually delivered the closing statement.[2399]

(iii) The 9 December 2010 Second Circuit argument was attended by no less than 10 timekeepers from four different law firms.[2400]

(iv) The 20 April 2015 Second Circuit argument was attended by no less than 10 timekeepers from two different law firms.[2401]

(v) The sanctions hearing from 16 April 2013 to 18 April 2013 was attended by at least 12, 20 and 16 timekeepers respectively on each of the three days.[2402]

(vi) The 20 December and 21 December 2012 discovery hearing was attended by at least 8 and 9 timekeepers respectively on each of the two days.[2403]

2395 **RE-51**, Trunko Expert Report, para. 31; **SM D-1**. *See also* Track III Hearing - Trunko Direct Presentation (31 August 2022), Slide 49.

2396 Memorial, Appendix 9, paras. 141-142.

2397 Rejoinder, para. 1317; **RE-51**, Trunko Expert Report, **SM D-2**.

2398 **RE-51**, Trunko Expert Report, para. 31; **SM D-2**.

2399 Rejoinder, para. 1317; **C-2384**, *Chevron Corp. v. Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL, D.E. 1826 Trial Transcript (26 November 2013), pp. 2833-2878.

2400 **RE-51**, Trunko Expert Report, para. 32; **SM D-3**.

2401 **RE-51**, Trunko Expert Report, para. 32; **SM D-4**.

2402 **RE-51**, Trunko Expert Report, para. 32; **SM D-5**.

2403 **RE-51**, Trunko Expert Report, para. 32; **SM D-6**.

(vii) The 8 February 2011 preliminary injunction hearing was attended by at least 9 timekeepers from at least two firms.[2404]

(viii) The 18 February 2011 preliminary injunction hearing was attended by at least 9 timekeepers from at least two firms.[2405]

(ix) The 5 March 2012 Rule 16 (pre-trial) hearing was attended by at least 9 timekeepers from at least two firms.[2406]

(x) The 15 March 2012 hearing on temporary restraining order was attended by at least 10 timekeepers from at least two firms.[2407]

(xi) The 26 September 2013 argument before the Second Circuit was attended by at least 9 timekeepers from at least two firms.[2408]

1483. The Respondent reiterates its observations on overstaffing in its Rejoinder,[2409] highlighting that Chevron "may have simply employed too many attorneys".[2410] Other examples of overstaffing include the payment of USD 71,657.76 for nearly 60 timekeepers to review the Second Circuit's opinion vacating the global preliminary injunction and USD 35,052.64 for at least 40 timekeepers to review the SDNY's decisions on Chevron's motions to dismiss and for attachment.[2411]

1484. The Tribunal notes that it has already addressed the participation of multiple law firms in Section VIII.G.3(d)2.x above. All other matters raised by the Parties under this heading – including the attendance of multiple Gibson Dunn lawyers in several hearings and during trial at the RICO Litigation – will be addressed by the Tribunal as part of its

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2404 **RE-51**, Trunko Expert Report, para. 32; **SM D-7**.

2405 **RE-51**, Trunko Expert Report, para. 32; **SM D-8**.

2406 **RE-51**, Trunko Expert Report, para. 32; **SM D-9**.

2407 **RE-51**, Trunko Expert Report, para. 32; **SM D-10**.

2408 **RE-51**, Trunko Expert Report, para. 32; **SM D-11**.

2409 Rejoinder, para. 1317.

2410 Rejoinder, para. 1318.

2411 Rejoinder, para. 678; **RE-51**, Trunko Expert Report, **SM E-1**, **SM E-2**.

analysis of cross-cutting "elements" impacting multiple categories (in particular, "Multiple Attendance at Events") in Section VIII.N below.[2412]

ix. Alleged duplicative activities

1485. According to the Respondent's expert, Mr Trunko, in many instances multiple timekeepers from multiple firms billed to review the same pleading or document.[2413] Mr Trunko highlights, in particular, two instances in the RICO Litigation:

(i) Review of the Second Circuit's Opinion of 26 January 2012 dismissing Count 9, where at least nearly 60 timekeepers from Gibson Dunn and Jones Day billed to review the same decision;[2414] and

(ii) Review of Judge Kaplan's 14 May 2012 rulings on the Donziger Defendants' motion to dismiss and Chevron's motion for an order of attachment, where at least 40 timekeepers from Gibson Dunn and Jones Day billed to review the decision.[2415]

1486. The Tribunal notes that it has already addressed the participation of multiple law firms in SectionVIII.G.3(d)2.x above. All other overstaffing issues raised by the Parties under this heading will be addressed by the Tribunal as part of its analysis of cross-cutting "elements" impacting multiple categories (in particular, "Multiple Attendance at Events") in Section VIII.N below.[2416]

x. Alleged unrelated activities

1487. In its Rejoinder, the Respondent states that, in addition to the audit performed by Mr Trunko and his team, it conducted its own review of the Claimants' invoices, which revealed a number of "unrelated, duplicative, abandoned, frivolous, excessive, and/or

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[2412] *See* para. 571 above.

[2413] **RE-51**, Trunko Expert Report, para. 35.

[2414] **RE-51**, Trunko Expert Report, para. 35; **SM E-1**; Track III Hearing - Trunko Direct Presentation (31 August 2022), Slide 52.

[2415] **RE-51**, Trunko Expert Report, para. 35; **SM E-2**; Track III Hearing - Trunko Direct Presentation (31 August 2022), Slide 52.

[2416] *See* para. 571 above.

otherwise improperly billed" activities that should be deemed unreasonable and therefore non-compensable.[2417]

1488. In relation to allegedly unrelated activities, the Respondent faults Chevron for having developed arguments that had no discernible connection to the Treaty breaches, including searching for evidence that the LAPs spent excessively on litigation.[2418] Some of these activities – including reviewing Crude outtakes and forensic accounting documents for evidence of excessive spending by the LAPs – were billed under the RICO Litigation category.[2419]

1489. In addition, the Respondent points to Chevron's other "extra-legal side projects" claimed under the RICO Litigation, including efforts to "burnish[ ] its image to the [i] public, [ii] the U.S. government, and [iii] its own shareholders."[2420] In this connection, the Respondent highlights the time entries of Mr Luke Sobota, then of Jones Day, which show that he spent at least 33.2 hours and charged approximately USD 21,580.00 in the RICO Litigation "just for reading news clips".[2421] The Respondent further points to billing for time spent "boosting Chevron's party line" through law school presentations, law review articles, op-eds, and other commentary.[2422] This includes, among others, time spent preparing for a presentation at University of Wyoming Law School, drafting a letter to Penn Law Symposium, presenting at Duke Law School, drafting an op-ed, drafting "fraud one-pagers" for a Harvard event, and responding to a law review article on *Aguinda v. Chevron* and mass toxic tort claims against U.S. companies – all claimed under the RICO Litigation category.[2423]

1490. As regards government relations activities, the Respondent states that certain invoices corresponding to the RICO Litigation include entries pertaining to "extensive lobbying and other government relations activity", including expenses claimed by Chevron's

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[2417] Rejoinder, para. 848.

[2418] Rejoinder, para. 852.

[2419] Rejoinder, para. 852; **C-3287.003**, Gibson, Dunn & Crutcher LLP Invoices.

[2420] Rejoinder, para. 862.

[2421] Rejoinder, para. 864; **C-3303.005**, Jones Day Invoices.

[2422] Rejoinder, para. 865; **C-3287.004**, **C-3287.005**, and **C-3287.006**, Gibson, Dunn & Crutcher LLP Invoices.

[2423] Rejoinder, para. 865; **C-3287.004**, **C-3287.005**, and **C-3287.006**, Gibson, Dunn & Crutcher LLP Invoices.

counsel for attendance at U.S. Department of State meetings and meetings with various Congressional aides and journalists.[2424]

1491. Activities relating to shareholder relations were also billed under the RICO Litigation category, including time entries by Chevron's counsel and pass-through costs totalling approximately USD 194,686.02, charged through Gibson Dunn for Splendidvid, LLC invoices relating to the preparation of multilingual video presentations for Chevron's shareholders.[2425] In Annex D-1 of its Rejoinder, the Respondent identifies over USD 200,000 worth of entries relating to shareholder relations improperly claimed under the RICO Litigation category alone.[2426]

1492. The Tribunal notes that the activities identified under the present heading overlap with certain cross-cutting "elements" impacting multiple categories, including "(CLA) Activities allegedly relating to Media and Public Relations / (RES) Activities relating to Media and Public Relations", "(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)", and "(CLA) Allegedly Nondefense-Related Activities / (RES) Nondefense-Related Activities".[2427] The Tribunal will address these issues together with other elements in Section VIII.N below.

xi. Alleged excessive activities

1493. The Respondent also criticizes Chevron's counsel for the "extraordinary amounts of time [billed] for tasks, including tasks that are standard, if not mundane".[2428] Specifically in the RICO Litigation, the Respondent points, *inter alia*, to the time spent by Chevron's attorneys electronically filing motions and exhibits with the court, printing and assembling exhibits, revising submissions to reflect team edits, coordinating translations, gathering and preparing documents for deposition, revising briefs, and reviewing

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[2424] Rejoinder, para. 867; **C-3287.003** and **C-3287.004**, Gibson, Dunn & Crutcher LLP Invoices.

[2425] Rejoinder, para. 869; **C-3287.004**, **C-3287.005**, and **C-3287.006**, Gibson, Dunn & Crutcher LLP Invoices. The sum of USD 194,686.02 was derived by adding the entries pertaining to Splendidvid LLC in the table presented by the Respondent in paragraph 869 of its Rejoinder.

[2426] Rejoinder, Annex D-1. *See also* Rejoinder, para. 1312.

[2427] *See* para. 571 above.

[2428] Rejoinder, para. 878.

documents – each of which showed individual time entries of more than eight hours.[2429] Further, the Respondent points to instances of overbilling, such as a Gibson Dunn associate billing more than 42 hours for summarizing RICO decisions in preparation for a Second Circuit oral argument.[2430]

1494. The Respondent also singles out the time entries of Mr Alan Vinegard, a partner at Covington & Burling, for billing at least 99.1 hours or USD 93,178 just to review RICO filings, orders and correspondence.[2431]

1495. The Tribunal recalls that it has excluded from compensation the legal fees and expenses charged by Covington & Burling LLP in connection with the RICO Litigation, including those billed by Mr Vinegard.[2432] All other alleged "excessive activities" falling under the present heading will be addressed by the Tribunal as part of its analysis of cross-cutting "elements" impacting multiple categories (in particular, "(CLA) Alleged Excessively Long Billing Days and Excessive Time; (RES) Excessively Long Billing Days and Excessive Time")[2433] in Section VIII.N below.

xii. Alleged double billing entries

1496. The Respondent asserts that Chevron double-billed some activities and spent "extravagantly" in many instances without exercising the requisite diligence in reviewing and approving its external counsel's billings.[2434] For example, in its Counter-Memorial the Respondent pointed to multiple instances in Chevron's "carefully-curated" RICO fee application before the SDNY in which Mr Christopher Joralemon, a Gibson Dunn partner, billed twice for the same activity.[2435] In the Respondent's view, considering that this fee application was presumably reviewed by Chevron and Gibson Dunn attorneys before it was filed, yet double-billed entries remained, the logical inference is that double-

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[2429] Rejoinder, para. 878; **C-3287.001**, **C-3287.003**, **C-3287.004**, **C-3287.005**, and **C-3287. 006**, Gibson, Dunn & Crutcher LLP Invoices.

[2430] Rejoinder, para. 1304; **C-3243**, Representative Invoice Sample.

[2431] Rejoinder, para. 879.

[2432] *See* para. 1400 above.

[2433] *See* para. 571 above.

[2434] Counter-Memorial, paras. 774, 777.

[2435] Counter-Memorial, para. 775.

billing did occur and "probably occurred in many more instances than the cleansed RICO fee application".[2436]

1497. In its Rejoinder, the Respondent highlights that Chevron approved invoices that demonstrate that two different attorneys from Jones Day performed precisely the same task on the same day,[2437] or that the same attorney from Kobre & Kim billed twice for performing the same task on the same day.[2438] The Respondent argues that these instances clearly negate the Claimants' assertions that Chevron exercised the requisite diligence in reviewing and approving fees.

1498. The Tribunal recalls that double billing has been identified by the Parties as a cross-cutting element impacting multiple damages categories (*i.e.*, "(CLA) Alleged Double Billing Entries; (RES) Double Billing Entries").[2439] Accordingly, the Tribunal will address this issue together with other elements in Section VIII.N below.

xiii. Alleged administrative and clerical activities

1499. The Respondent also faults the Claimants for claiming time billed for billing-related and administrative or clerical tasks under the RICO Litigation damages category.[2440] This includes entries such as attending to billing issues, calling a client regarding billing and budgeting issues, and following up on internal billing and staffing issues.[2441] In its Rejoinder, the Respondent also identifies a number of invoices reflecting charges for clerical activities such as basic software tutorials, organizing files, data entry and management, updating charts, storing documents, and assembling binders.[2442] In addition, the Respondent points to billing entries showing that Chevron's lawyers also hand

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2436 Counter-Memorial, para. 776. In respect of Chevron's RICO fee application, *see* paras. 1320-1330 above.

2437 Rejoinder, para. 1315; **C-3303.006**, Jones Day Invoices.

2438 Rejoinder, para. 1316; **C-3307.002**, Kobre & Kim LLP Invoices.

2439 Rejoinder, paras. 1484-1497.

2440 Rejoinder, paras. 884, 885.

2441 Rejoinder, para. 884; **C-3303.003**, **C-3303.004**, **C-3303.005**, Jones Day Invoices.

2442 Rejoinder, para. 885.

delivered documents to the court, "charg[ing] hundreds of dollars per hour for these messenger tasks."[2443]

1500. The Tribunal recalls that administrative and clerical activities have been identified by the Parties as a cross-cutting element impacting multiple damages categories (*i.e.*, "(CLA) Alleged Administrative and Clerical Activities; (RES) Administrative and Clerical Activities").[2444] Accordingly, the Tribunal will address this issue together with other elements in Section VIII.N below.

xiv. Alleged vaguely described activities and vague billing entries

1501. The Respondent criticizes "countless vague time entries" in the Claimants' invoices, which it argues violates Chevron's own Billing Guidelines. In the RICO Litigation in particular, the Respondent identifies a number of vague billing entries, including narrative entries such as "Review documents", "Legal research", "Prepare package", "Review documents in connection with special project", "Review cases and developments", "Review and revise drafts and e-mails regarding same", "Correspondence", "Meetings", and "Review materials", among others.[2445]

1502. Furthermore, the Respondent identifies numerous allegedly vague billing entries from a Gibson Dunn partner, Mr Randy Mastro, "offer[ing] almost no insight into what work he was performing for nearly $1,000/hour".[2446] The Respondent also notes instances of "wholly inadequate descriptions of the work performed", which in its view preclude the Tribunal from relying on the Claimants' experts assurances that Chevron's counsel's bills in the RICO Litigation were, on the whole, reasonable.[2447] These "inadequate narratives"

[2443] Rejoinder, para. 886.

[2444] Rejoinder, paras. 1484-1497.

[2445] Rejoinder, para. 891; **C-3260.003**, Boies Schiller & Flexner Invoices; **C-3287.004** and **C-3287.003**, Gibson, Dunn & Crutcher LLP Invoices; **C-3342.009**, Stern Kilcullen & Rufolo LLC Invoices; **C-3268.003,** Covington & Burling LLP.

[2446] Rejoinder, para. 1305; **C-3243**, Representative Invoice Sample.

[2447] *See* Rejoinder, paras. 1307, 1309.

include entries such as "Communicate", "Continued review", "Reviewing papers", and "Brainstorming on strategy" from different timekeepers in different law firms.[2448]

1503. Lastly, the Respondent has identified several purportedly vague billing entries from some of Chevron's highest-paid attorneys, who charged more than USD 1,000/hour. As an example, the Respondent points to the time charges of Mr Theodore Olson, a Gibson Dunn partner who allegedly charged USD 1,800/hour on such "fruitless" tasks as reading a finalized and filed certiorari petition, preparing for an "April program", and preparing for a "California trip and program".[2449]

1504. The Tribunal recalls that vague billing entries have been identified by the Parties as a cross-cutting element impacting multiple damages categories (*i.e.*, "(CLA) Allegedly Vague Billing Entries / (RES) Vague Billing Entries").[2450] Accordingly, the Tribunal will address this issue together with other elements in Section VIII.N below.

xv. Alleged illegitimate tactics

1505. The Respondent focuses on several observations made by Judge Kaplan and other magistrate judges in the RICO Litigation expressing concern over the behaviour of Chevron's counsel for alleged abuse of process, unreasonable behaviour, and wasteful conduct.[2451] In particular, aside from a series of admonitions from Judge Kaplan to counsel at different stages of the RICO Litigation,[2452] the Respondent cites two instances where (i) a magistrate judge "called out Chevron for improper, hypocritical conduct in discovery";[2453] and (ii) a different magistrate judge found that Chevron's subpoena for a deposition "was, at least in part, meant to harass."[2454]

2448 Rejoinder, para. 1310; **C-3303.006**, Jones Day Invoices; **C-3260.004**, Boies Schiller & Flexner Invoices; **C-3342.007**, Stern Kilcullen & Rufolo LLC Invoices; and **C-3287.004**, Gibson, Dunn & Crutcher LLP Invoices.

2449 Rejoinder, para. 1313; **C-3287.004** and **C-3287.009**, Gibson, Dunn & Crutcher LLP Invoices.

2450 Rejoinder, paras. 1484-1497.

2451 Counter-Memorial, para. 783-785.

2452 Counter-Memorial, para. 783.

2453 Counter-Memorial, para. 784; **R-1837**, *Chevron Corp. v. Maria Salazar and Steven Donziger*, S.D.N.Y. Case 1:11-cv-03718-LAK-JCF, D.E. 360 Memorandum and Order, 20 September 2011.

2454 Counter-Memorial, para. 785; **R-1585**, *Chevron Corp. v. Maria Salazar*, D. OR. Case 6:11-mc-07003-TC, D.E. 36 Granting ELAW's Petition for $32,945.20 in Fees, 30 November 2011 (Order entered in *Chevron Corp. v. Steven Donziger*, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL), p. 6.

1506. According to the Respondent, the RICO Litigation "is replete with such examples", which should be considered "strong evidence" that Chevron engaged in many "unreasonable, unprofessional, wasteful, and sanctionable" activities and thus should not be compensated for its "vexatious antics".[2455]

1507. Overall, the Tribunal declines to draw any consequences from the instances of purported misconduct by Chevron and its counsel identified by the Respondent. It would be inappropriate for the Tribunal to determine with the benefit of hindsight that a particular tactical litigation decision pursued an illegitimate goal simply because a judge made an admonition to Chevron without, for example, backing up the admonition with a costs order.[2456] Strong litigation tactics, or tactics whose outcomes are uncertain in advance, may still rest on a reasonable rationale, even if they ultimately fail and result in an admonition.

1508. However, the Tribunal must make an exception in respect of procedural misconduct for which Chevron was sanctioned by local courts. In particular, the Tribunal recalls that Chevron was sanctioned for serving a subpoena on non-parties ELAW and its director, Bern Johnson. The magistrate judge noted the following:

> The underlying record here, presented largely through ELAW's declarations and attached exhibits, reveals that ELAW provided over two thousand pages of non-privileged documents and a privilege log to Chevron. Despite being required by the terms of the stipulation to challenge the privilege log by August 5, 2011, Chevron raised numerous concerns about the log starting after August 10, 2011. Given that the parties had stipulated that challenges to the log were to be made by August 5, 2011 (and, as part of the negotiation for the stipulation, ELAW agreed to forego challenges to what it believed was an invalid subpoena), it was unreasonable for Chevron to continue to request clarification of ELAW's privilege log. *It is a reasonable conclusion that Chevron's subpoena for Johnson's deposition was, at least in part, meant to harass*. Chevron served Johnson with the deposition subpoena after numerous exchanges between the parties about clarification of the privilege log. ELAW's counsel requested that Chevron limit or explain the scope of Johnson's deposition, but Chevron declined to do so. Ultimately, Johnson spent an entire day in deposition, part of which consisted of Chevron going through the list of 300+ people name-by-name asking after each if Johnson was familiar with the name. In short, after reviewing the record, I find that Chevron's conduct is sanctionable under Rule 45(c)(l).[2457]

[2455] Counter-Memorial, para. 786.

[2456] *See* para. 340 above.

[2457] **R-1585**, *Chevron Corp. v. Maria Salazar*, D. OR. Case 6:11-mc-07003-TC, D.E. 36 Granting ELAW's Petition for $32,945.20 in Fees, 30 November 2011 (Order entered in Chevron Corp. v. Steven Donziger, S.D.N.Y. Case 1:11-cv-00691-LAK-RWL), p. 6 (emphasis by the Tribunal).

1509. In the Tribunal's view, the fact that the magistrate judge sanctioned this tactic as an instance of harassment precludes the conclusion that it amounted to a reasonable mitigation measure. Accordingly, any amounts spent by Chevron in connection with the subpoena on ELAW and its director must be excluded from compensation.

1510. While neither Party has particularized the amounts incurred by Chevron specifically in connection with this subpoena, this should not preclude the Tribunal from factoring this exclusion into the determination of the final amount of compensation owed to the Claimants: the fact remains that the onus is on the Claimants to prove every element of their damages claim[2458] and they have failed to meet that burden in connection with this subpoena. The Tribunal shall address this question together with other issues relevant to the RICO Litigation in the sub-section that follows.

xvi. Other alleged frivolous, wasteful or excessive spending

1511. The Respondent criticizes Chevron for pursuing "frivolous, unnecessary, duplicative, unrelated, and/or unsuccessful" activities in the RICO Litigation.[2459] According to the Respondent, legal fees and expenses incurred in connection with activities that are "petty, wasteful, hopeless, or abusive" should not be recoverable as damages resulting from its Treaty breaches.[2460] Beyond the matters already addressed earlier in this sub-section, the Respondent identifies other allegedly problematic billing entries that, in the Tribunal's understanding, speak to a general condemnation of Chevron's behaviour in the RICO Litigation, characterizing it as frivolous, vexatious, excessive, or wasteful.

1512. For alleged frivolous billings, the Respondent highlights miscellaneous entries in certain Gibson Dunn invoices such as costs pertaining to purchasing an iPad; fees for analysing whether a RICO injunction could be used to shut down the movie "Rumble in the Jungle";

[2458] *See* para. 548 above.

[2459] Counter-Memorial, para. 772.

[2460] Rejoinder, para. 874.

and time charges for team dining activities.[2461] Regarding meals, Mr Trunko also identifies entries where Chevron's counsel billed for team meetings and lunches.[2462]

1513. Similarly, the Respondent refers to Chevron's renting of office space for the RICO trial as another example of needless spending. According to the Claimants, in addition to the two teams of lawyers assembled at the SDNY court, Chevron funded a third team based at a facility close to the courthouse rented specifically for the trial. This location functioned as "a fully functional satellite firm office" equipped with industrial printing capabilities and meeting areas to support the trial team.[2463] The Respondent criticizes this as wasteful, noting that Claimants fail to explain why such rental was necessary.[2464] In particular, the Respondent notes that the Claimants have not disclosed the location of this rental office or confirmed that it was closer to the courthouse than the New York offices of Jones Day – located less than a mile away from the SDNY courthouse[2465] – or Gibson Dunn, just two subway stops away.[2466]

1514. The Respondent also challenges certain time entries in the RICO Litigation, alleging that Claimants seek the reimbursement of legal fees and expenses for non-working travel time and clerical tasks such as making travel arrangements. According to the Respondent, these billings violate Chevron's own Billing Guidelines, and Claimants have not produced any evidence of prior approval to bill for such non-working travel time.[2467] For instance, the Respondent identified entries for travel to New York and Quito, Ecuador; transport of documents from Quito to Houston; travel to the offices of Boies Schiller for

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[2461] Rejoinder, paras. 875-877; **C-3287.003**, **C-3287.007**, **C-3287-008**, and **C-3287-009**, Gibson, Dunn & Crutcher LLP Invoices.

[2462] *See* **RE-51**, Trunko Expert Report, **SM K-9**.

[2463] Memorial, Appendix 9, para. 142.

[2464] Counter-Memorial, para. 781. The Respondent contends that renting office space was unnecessary for the reasons cited by the Claimants. For mass printing needs, Chevron used couriers to deliver materials to the courthouse, reportedly spending over USD 38,000 on courier services alone during the two months of trial. (*See* Counter-Memorial, para. 781, citing Memorial, Appendix 2, p. 115). The Respondent also questions why Chevron could not have used Jones Day's facilities for printing or why its couriers could not travel less than a mile. It further asserts that the extra office space was not needed for meetings, as the entire team, including the two courthouse teams, apparently assembled daily at "counsel's New York office." (*See* Counter-Memorial, para. 781; Memorial, Appendix 9, para. 144.)

[2465] Counter-Memorial, paras. 576, 781.

[2466] Counter-Memorial, para. 781.

[2467] Rejoinder, para. 894.

a meeting; and time spent on airport check-in, security, baggage claim and immigration procedures, among others.[2468] Citing entries for time billings of a Gibson Dunn paralegal, the Respondent argues that the Claimants improperly seek compensation for clearly non-compensable activities like airport processing.[2469] The Respondent also criticizes Chevron's counsel for failing to "exercise good judgment" in cost control, pointing to charges for expensive flights and hotels;[2470] an unused airline reservation;[2471] and a car service on stand-by throughout a hearing.[2472]

1515. Lastly, another example of billing practices that the Respondent considers unreasonable concerns invoice entries for time spent not working, including two entries in the RICO Litigation during which two timekeepers from Huron Consulting appear not to be working due to access problems and computer downtime.[2473]

1516. The Claimants do not address the Respondent's many criticisms of specific invoice entries. However, in response to Respondent's broader arguments against reasonableness, the Claimants cite their experts Messrs Litvack, Lea, and Ryan, who opine that Chevron's actions were reasonable given the potential injury of approximately USD 18.2 billion and the need to mitigate this extraordinary risk.[2474] Additionally, they reference the opinions of fee experts Professors Silver and Miller, who state that "[a]ll available empirical evidence indicates that Chevron's fees and costs bore an 'appropriate relationship to the litigation stakes'"[2475] and that the rates paid to outside U.S. counsel were reasonable for a matter of such scale and complexity.[2476] The Claimants also cite the "data-driven

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2468 Rejoinder, para. 894; **C-3287.003**, **C-3287.004**, and **C-3287.009**, Gibson, Dunn & Crutcher LLP Invoices; **C-3303.004** and **C-3303.006**, Jones Day Invoices; **C-3342.003**, **C-3342.004**, **C-3342.005**, and **C-3342.006**, Stern Kilcullen & Rufolo LLC.

2469 Rejoinder, para. 1314; **C-3287.003**, Gibson, Dunn & Crutcher LLP Invoices.

2470 Rejoinder, para. 895, citing a 28 November 2012 entry from Stern Kilcullen for USD 10,358.70 airfare to and USD 1,927.92 hotel in London (**C-3342.003**).

2471 Rejoinder, para. 895, citing a 28 February 2013 entry from Jones Day for a non-refundable ticket that was never used (**C-3303.006**).

2472 Rejoinder, para. 895, citing a 5 July 2011 entry from Gibson Dunn for car services during hearing (**C-3287.003**).

2473 Rejoinder, paras. 896, 1319.

2474 Reply, para. 316.

2475 Reply, para. 316; Silver Expert Report, para. 30.

2476 Reply, para. 316; Miller Expert Report, para. 153.

findings" of their expert, Mr Mark McGrath, who identified "metrics, trends, and patterns" in the claimed invoices and concluded that "Chevron had strong processes in place to manage and control its legal spend and invoice review."[2477]

1517. At the outset, the Tribunal notes that, unlike other purported deficiencies addressed in the preceding sub-sections, which have been identified by the Parties as cross-cutting elements impacting multiple categories,[2478] the issues addressed by the Tribunal under the present heading are specific to the RICO Litigation. A separate analysis of these alleged deficiencies in thus in order.

1518. The Tribunal has carefully reviewed the evidence identified under the present heading supporting the Respondent's argument that many activities undertaken by the Claimants in the course of the RICO Litigation were unreasonable. In the Tribunal's view, it is unclear how many of those activities served reasonably to mitigate the injury arising from the recognition and enforcement of the Lago Agrio Judgment. Most of the instances of purported frivolous conduct identified by the Respondent point to excessive billing or to conduct disconnected from the goal of swaying the decision of a U.S. court in Chevron's favour to prevent the enforcement of the Lago Agrio Judgment.

1519. Critically, the Respondent has not particularized the time entries corresponding to each of the perceived deficiencies identified in the preceding paragraphs: the Respondent states that "there are simply far too many" and has thus provided only a "selection of examples . . . to illustrate the sort of non-compensable activities that pervade the damages claim".[2479] However, irrespective of their precise prevalence across the RICO Litigation damages category, the Tribunal considers that these deficiencies, viewed in the aggregate, cast doubts on the overall reasonableness of Chevron's spending in the RICO Litigation. The Tribunal also recalls that the Claimants bear the burden of establishing every element

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2477 Reply, para. 320; McGrath Expert Report, paras. 1, 26, 145.

2478 *See* sub-sections VIII.G.3(d)3.viii, VIII.G.3(d)3.ix, VIII.G.3(d)3.x, VIII.G.3(d)3.xi, VIII.G.3(d)3.xii, VIII.G.3(d)3.xiii, and VIII.G.3(d)3.xiv.

2479 Rejoinder, para. 849.

of their damages claim[2480] and they have failed generally to meet that burden in respect to the activities falling under the present heading.

1520. In the circumstances, the Tribunal considers appropriate to apply a discount to the final amount of compensation owed to the Claimants in connection with the RICO Litigation. This discount should also encompass other non-compensable activities for which the Parties have not provided an itemized breakdown of costs, such as (i) work related to bringing additional separate lawsuits that Chevron never initiated;[2481] (ii) Chevron's pursuit of Count 8;[2482] or (iii) procedural tactics for which Chevron was sanctioned by local courts.[2483]

1521. When determining the amount of the discount, the Tribunal must also have regard to its decision to (i) apply an 80% discount to the legal fees and expenses incurred in connection with the RICO Litigation damages category as a whole;[2484] (ii) exclude a number of components of the RICO Litigation from compensation, as set out earlier in this section; and (iii) apply a 15% discount to the total amount of compensation due to the Claimants for all damages categories comprising legal fees and expenses (*see* Section VIII.N below on cross-cutting elements).

1522. Taking into account all of the above factors, and having considered the particular circumstances of this case, the Tribunal assesses that it would be appropriate to increase the 80% discount it has already applied to the total amount of fees and costs claimed under the RICO Litigation category of damages to 85%.

4. Conclusion on RICO Litigation

1523. For the foregoing reasons, the Tribunal, subject to co-arbitrator Horacio A. Grigera Naon's separate dissenting opinion:

2480 *See* para. 548 above.

2481 *See* para. 1362 above.

2482 *See* para. 1461 above.

2483 *See* para. 1470 above.

2484 *See* para. 1317 above.

(i) Declines to exclude from compensation the RICO Litigation category of damages as a whole;

(ii) Excludes from compensation 85% of the total amount claimed by the Claimants in connection with the RICO Litigation, without prejudice to the exclusion from compensation of additional legal fees and expenses as set out in this paragraph;

(iii) Excludes from compensation any costs Chevron has collected or may in the future collect in the RICO Litigation, including USD 150,000 collected by Chevron pursuant to the SDNY's Order of 28 February 2018 (*see* paragraphs 1328-1329 above);

(iv) Excludes from compensation all legal fees and expenses corresponding to the component "Work related to bringing a Complaint Against NY State Comptroller DiNapoli";

(v) Excludes from compensation all legal fees and expenses corresponding to the component "Work related to opposing John Keker's *pro hac vice* application";

(vi) Excludes from compensation all legal fees and expenses corresponding to the component "(CLA) Work related solely to the Second Amended Complaint / (RES) Work related to the Second Amended Complaint";

(vii) Excludes from compensation all legal fees and expenses corresponding to the component "(CLA) Work relating solely to Unjust Enrichment / (RES) Work relating to Unjust Enrichment" corresponding to services rendered after 14 May 2012;

(viii) Excludes from compensation all fees and expenses incurred by the Claimants in connection with the RICO Litigation corresponding to services rendered before 14 February 2011;

(ix) Excludes from compensation all fees and expenses incurred by the Claimants in connection with the RICO Litigation corresponding to services provided by the firms Boies Schiller & Flexner LLP, Rivero Mestre LLP, Kobre & Kim LLP,

Covington & Burling LLP, Stern Kilcullen & Rufolo LLC, Gardere Wynne Sewell LLP, Three Crowns LLP, Asesorias Bofill Escobar, and Kroll Associates;

(x) Declares that any sums collected by Chevron in connection with the *Amazonia* Damages Judgments shall be deducted from compensation;

(xi) Defers its determination of the amount of compensation corresponding to the activities identified in paragraphs 1484, 1486, 1492, 1495, 1498, 1500 and 1504 above to its analysis of cross-cutting elements set out in Section VIII.N below;

(xii) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the RICO Litigation category of damages, to the extent not already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[2485] and

(xiii) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the RICO Litigation category of damages. The Tribunal will determine the exact amount of compensation corresponding to the RICO Litigation category in Section VIII.O below.

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[2485] *See* paras. 564-566 above.

H. SECTION 1782 PROCEEDINGS

1. The Claimants' Position

(a) Description of the Proceedings[2486]

1524. According to the Claimants, Chevron's successful efforts to obtain discovery through the U.S. District Courts pursuant to Section 1782 of Title 28 of the U.S. Code ("**Section 1782**") was "critical" to its ability both to uncover the nature and extent of the fraud underlying the Lago Agrio Judgment and prove Ecuador's violations of international law.[2487] The Ecuadorian courts, the Claimants recall, failed to investigate Chevron's allegations (dating back to 2007) of procedural fraud and judicial misconduct, while Ecuador's prosecutorial authorities left this fraud unremedied, despite the available evidence and the recognition by U.S. courts of the "untenable circumstances" that forced Chevron to incur the expense of the Section 1782 Proceedings.[2488]

1525. The Claimants explain that the relevant statute required Chevron to initiate Section 1782 actions wherever the witnesses were located, while the LAPs, occasionally aided by Ecuador, opposed the actions with "obstructive" and "bad-faith delay tactics", including multiple appeals at numerous Circuit Courts.[2489] According to the Claimants, Ecuador also availed itself of Section 1782 actions to validate the Lago Agrio Judgment, forcing Chevron to defend itself and incur significant costs, which likewise qualify as damages to the extent that the 1995-1998 Settlement and Release Agreements barred Ecuador's effort to re-litigate the environmental issues.[2490]

1526. The Claimants stress the importance of the Section 1782 Proceedings and insist that Chevron made "extensive use" of the resulting evidence in other proceedings,[2491] recalling that:

2486 For a detailed description of the procedural history of these proceedings, *see generally* Memorial, Appendices 11, 12, 14-42, 44.

2487 Memorial, para. 244; Track II Award, para. 4.327.

2488 Memorial, paras. 245-246; Track II Award, paras. 8.28, 8.60; **C-2738**, *In re Chevron*, 749 F. Supp. 2d 170, 173 (SDNY 2010), 30 November 2010.

2489 Memorial, para. 247.

2490 Memorial, paras. 248-249; Track II Award, paras. 7.28-7.45.

2491 Memorial, para. 250.

(i) the Tribunal cited extensively to, and relied on, evidence uncovered through the Section 1782 Proceedings in the Track II Award;[2492]

(ii) Chevron continuously submitted evidence of the LAPs' fraud obtained through the Section 1782 actions to the Lago Agrio Court and to the Appellate Court, requesting that certain actions be taken in response, although these requests were either denied or reserved for later decision;[2493]

(iii) evidence from the Section 1782 Proceedings was relevant and material to the RICO Litigation, including to streamline costs and to assist Judge Kaplan's decisions;[2494]

(iv) from the outset of the Brazil Recognition Proceedings, Chevron cited to, relied on and submitted evidence collected during the Section 1782 proceedings, to which the court referred in its decisions, including in denying recognition and enforcement of the Lago Agrio Judgment;[2495] and

(v) Chevron submitted substantial evidence obtained through the Section 1782 Proceedings in defence of the Argentina Enforcement Proceedings.[2496]

(b) Costs Incurred

1527. The Claimants explain that Chevron filed 23 actions against 27 individuals and entities pursuant to Section 1782 across the United States generally falling into six respondent groups:

> (1) the LAPs' U.S.-based scientific expert in the Lago Agrio two-party judicial inspections [Dr Charles Calmbacher]; (2) the LAP's then-current and former U.S.-based counsel; (3) the LAPs' U.S.-based consultants participating in the Cabrera Fraud; (4) the LAPs' U.S.-based "cleansing experts" who were hired in an attempt to erase the impact of the Cabrera Fraud on the Lago Agrio Litigation; (5) the media and public relations entities affiliated with the LAPs' and/or . . . Ecuador's propaganda campaigns against Chevron; and (6) the situs of the LAPs' secret bank account, Banco Pichincha.[2497]

[2492] Memorial, paras. 251-253; Track II Award, paras. 4.213, 4.216, 4.219, 4.224-4.225, 4.241, 4.251, 4.258, 4.308-4.318, 4.328, 4.343, 4.377-4.378, 4.388, 8.54, Part V, Annex 8.

[2493] Memorial, paras. 254-258.

[2494] Memorial, para. 259.

[2495] Memorial, paras. 260-262.

[2496] Memorial, paras. 263-265.

[2497] Memorial, Appendix 44, p. 2.

1528. According to the Claimants, these proceedings involved depositions of 25 witnesses as well as the collection and review of over 550,000 pages of documents and over 600 hours of outtakes of the film *Crude*.[2498] The Claimants also claim to have incurred significant legal fees and expenses "combatting" the opposition of the LAPs and Ecuador to this discovery, as well as defending against the Section 1782 actions that Ecuador initiated against 12 individuals and entities engaged by Chevron during the Lago Agrio Litigation.[2499]

1529. In sum, the Claimants seek USD 62,363,592.93 for legal fees and expenses incurred between January 2009 and March 2018 in the Section 1782 Proceedings, as evidenced by the underlying invoices, the witness statements of Ms Kent, Mr Rankin and Mr Turner, the expert report of Mr Stanton, and Appendix 2 to the Claimants' Memorial (as updated with the Claimants' Reply), which provides a monthly breakdown of law firm fees by type of timekeeper, as well as the costs of law firms, experts and vendors.[2500]

(c) Request for Full Reparation

1530. The Claimants submit that the Respondent must make full reparation for the legal fees and expenses incurred by Chevron in connection with the Section 1782 Proceedings as direct damages, since they are the natural and foreseeable consequence of Ecuador's Denial of Justice, Umbrella Clause and Interim Awards Breaches.[2501]

1531. In the Claimants' view, it was "natural and foreseeable" that Chevron, facing the imminent prospect of a multibillion-dollar fraudulent judgment and being unable to obtain any relief from the Ecuadorian authorities, would pursue other means of obtaining evidence of procedural fraud and judicial misconduct, which in this case included the Section 1782 Proceedings given that some of the LAPs' "co-conspirators" and other relevant parties were based in the United States[2502] The Claimants explain that the

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[2498] Memorial, para. 267.

[2499] Memorial, paras. 267-268; Reply, para. 762.

[2500] Memorial, paras. 269, 281; Reply, paras. 761, 763, Updated Appendix 2, p. 737; **C-3462**, Indices of Claimed Invoices by Damage Category ("1782 Actions" tab).

[2501] Memorial, para. 270; Reply, paras. 761-762, 764, 779; **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J. (Ser. A) No. 17, Judgment, 13 September 1928, para. 47.

[2502] Memorial, paras. 271-272; Reply, paras. 767-768; Track II Award, paras. 4.223, 4.330, 4.369, 5.239. The Claimants also assert that their conduct in pursuing the Section 1782 actions was reasonable, even if reasonableness is "irrelevant" to their entitlement to these expenses as direct damages. Reply, para. 767.

suspected fraudulent activity of an officer of Ecuador's judicial branch triggered these discovery efforts, which foreseeably revealed new indicia of fraud and collusion that also required investigation, and they provided the evidence of fraud that was produced to the Ecuadorian courts and prosecutorial authorities on a rolling basis, "but to no avail".[2503] Accordingly, the Claimants say that Ecuador's Denial of Justice was the proximate cause of all the fees and costs Chevron incurred in the affirmative Section 1782 Proceedings it initiated, which amount to direct damages.[2504] To the extent that "other factors" aside from foreseeability "may also be relevant" to a causation analysis, the Claimants assert that those expenses qualify as direct damages because the Respondent's conduct "intentionally" harmed the Claimants and caused them to file the Section 1782 Proceedings.[2505]

1532. Further, the Claimants note, it is irrelevant that the majority of the Section 1782 Proceedings were initiated by Chevron or that the actions aimed to obtain discovery from parties other than Ecuador, since the existence of other concurrent events that are not attributable to the State would not "diminish the State's responsibility".[2506] The Claimants also insist that cost issues before domestic courts have no bearing on the Tribunal's assessment of damages under international law, stressing that Chevron never stipulated that it would not seek its legal fees and expenses as damages against the Respondent.[2507] The fact that the Claimants decided to discontinue certain Section 1782 Proceedings is equally irrelevant, since, in their view, the decision to file Section 1782 Proceedings and the legal fees and expenses incurred in connection with them were caused by Ecuador's delicts.[2508]

1533. The Claimants also reject the Respondent's assertion that the Section 1782 Proceedings bore little fruit, and assert that those proceedings yielded "critical evidence demonstrating

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2503 Reply, paras. 769-770; Fourth Veiga Witness Statement, paras. 61, 65.

2504 Reply, paras. 769-771; Track II Award, paras. 5.235, 8.33-8.34, 8.76.

2505 Reply, paras. 777-778; **CLA-291**, ILC Articles on State Responsibility, Commentary to Article 31, para. 10; **CLA-652**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 137.

2506 Memorial, paras. 273-274; **CLA-291**, ILC Articles on State Responsibility, Commentary to Article 31, para. 12; **CLA-664**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award, 18 April 2017, paras. 269-270.

2507 Reply, para. 772.

2508 Reply, para. 773.

Ecuador's breaches".[2509] In particular, the Claimants reiterate that the Tribunal cited and relied on the evidence that Chevron obtained in the Section 1782 Proceedings in reaching several significant factual conclusions underlying the Respondent's liability, including that (i) the LAPs' representatives "ghostwrote" the Lago Agrio Judgment; (ii) Mr Donziger and Mr Fajardo had blackmailed Judge Yanez to cancel the remaining judicial inspections and appoint Mr Cabrera as the court's "impartial" expert; and (iii) Mr Cabrera "improperly favoured" the case of the LAPs and "improperly colluded with and permitted certain of the LAPs' representatives and experts to write, covertly, the Cabrera Report" in exchange for bribes.[2510]

1534. Moreover, the Claimants contend that Ecuador's own improper conduct in the Section 1782 Proceedings caused further delay and expense, exacerbating Chevron's harm for which the Respondent is responsible.[2511]

1535. The Claimants further submit that they are also entitled to recover as direct damages the expenses incurred between January 2009 and July 2017 in connection with the Section 1782 Proceedings initiated by Ecuador against Chevron, as those expenses were proximately caused by Ecuador's breaches.[2512] The Claimants dispute the assertion that they were "unsuccessful" in these proceedings, and explain that Chevron intervened to avoid a privilege waiver and to preclude privileged and confidential information from being improperly disclosed, noting that none of the evidence obtained by Ecuador was used by the Tribunal in its Track II Award.[2513] In addition, the Claimants contend that Ecuador's use of Section 1782 actions to support its efforts to defend the Lago Agrio Judgment was a breach of the Tribunal's Interim Orders and Awards and proximately caused Chevron's losses in the form of the legal fees and expenses incurred to defend against those actions.[2514]

[2509] Reply, paras. 774-776; Track II Award, paras. 4.272-4.275, 4.277, 4.327.

[2510] Memorial, paras. 275-279; Reply, para. 776; Track II Award, paras. 4.29-4.30, 4.33, 4.35, 4.213, 4.216, 4.235, 4.239-4.240, 4.245-4.248, 4.250-4.251, 4.253, 4.258-4.259, 4.263, 4.273-4.279, 4.282, 4.287-4.288, 4.291-4.292, 4.294-4.295, 4.299, 4.301-4.303, 4.310, 4.318, 4.326-4.327, 4.377-4.378, 4.387, 4.473, 5.227, 5.245.

[2511] Memorial, para. 280.

[2512] Reply, paras. 761-762, 779-783.

[2513] The Claimants also deny that their activities were unreasonable. Reply, paras. 780-781; Seley Witness Statement, para. 62.

[2514] Reply, paras. 782-783; Order for Interim Measures, 9 February 2011, p. 3.

1536. In the alternative, the Claimants submit that they are entitled to recover USD 15,951,000 in legal fees and expenses incurred as direct damages after 1 March 2012 in the Section 1782 Proceedings as a natural and foreseeable result of Ecuador's breaches.[2515] By that date, the Claimants recall, the Respondent had defied the First Interim Award and consummated its Denial of Justice Breach by rendering the Lago Agrio Judgment enforceable.[2516]

1537. Additionally, and in the alternative to their primary claim under this category, the Claimants submit that they are entitled to recover the legal fees and expenses they incurred in connection with the Section 1782 Proceedings as incidental damages, since these proceedings mitigated the Claimants' harm arising from Ecuador's wrongdoings and the enforceability of the Lago Agrio Judgment.[2517] Indeed, the Claimants assert that their pursuit and defence of the Section 1782 actions meets the tests applicable to incidental damages, since (i) the evidence procured was extensively relied upon by the Tribunal in adjudicating Ecuador's Treaty breaches, and hence "successful in averting the harm"; and (ii) the costs and expenses incurred by the Claimants were largely proportionate to the extent and character of the harm threatened, namely, the worldwide enforceability of a (then) USD 18 billion judgment.[2518] As such, the Claimants posit that the Section 1782 Proceedings were reasonable and calculated mitigation measures to defend themselves against the Lago Agrio Judgment and Ecuador's efforts to support its enforcement, rejecting any criticism made with the benefit of hindsight.[2519]

2. The Respondent's Position

1538. The Respondent submits that the Claimants have failed to meet their burden of proof regarding the legal fees and expenses incurred in connection with the Section 1782 Proceedings, since they were "the result of a campaign that was unreasonable, unnecessary, punitive, and not compatible with a measured and proportionate legal

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2515 Reply, paras. 784, 786.

2516 Reply, para. 785; Track II Award, para. 7.130.

2517 Reply, para. 787.

2518 Reply, paras. 788-790; **RLA-738**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016), p. 306.

2519 Paras. 791-793; **CLA-633**, *Himpurna California Energy Ltd v. PT (Persero) Perusahaan Listruik Nagara (PLN)*, Final Award of 4 May 1999 (2000) 25 YCA 13, para. 258.

strategy".[2520] To the extent that the Claimants have not substantiated their assertion that these legal fees and expenses were a "natural and foreseeable consequence" of Ecuador's breaches, the Respondent says, they are not direct damages, and even if they were, they must be proven to be reasonable.[2521] The Respondent likewise rejects the characterization of these expenses as incidental damages, stressing that the amount of the Lago Agrio Judgment does not "automatically" make any action the Claimants took reasonable and compensable.[2522] Indeed, the Respondent insists that the case records and invoice data show that the Claimants' claimed fees and costs were not reasonable and necessary, noting, for instance, that (i) there are numerous examples of waste; (ii) no "critical evidence" emanated from 20 of these proceedings; and (iii) Chevron obstructed Ecuador's legitimate discovery requests and funded the resistance efforts of non-parties.[2523]

(a) Section 1782 Actions Initiated by Chevron

1539. The Respondent submits that the Claimants are not entitled to the fees and costs claimed for the Section 1782 Proceedings filed by Chevron, referring to various instances of "waste and abuse" and criticizing the company's "undisciplined approach".[2524]

1540. First, the Respondent claims that Chevron "exploited Section 1782 to wage an expensive and wasteful campaign to divert its opponents' resources and to harass third parties", exceeding the scope of the statute and engaging in various frivolous, unsuccessful and abusive activities for which the Claimants should not recover fees and costs.[2525] In particular, the Respondent highlights that Chevron improperly treated the Section 1782 Proceedings as opportunities to re-litigate the Lago Agrio Litigation and to obtain

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[2520] Counter-Memorial, paras. 686-687, 729; Rejoinder, paras. 1162-1163, 1207.

[2521] In particular, the Respondent recalls that the breaches had not yet occurred at the time Chevron began its Section 1782 Proceedings and that Chevron was not a party to the Section 1782 Proceedings initiated by Ecuador. Rejoinder, paras. 1164-1165.

[2522] Rejoinder, para. 1166.

[2523] Rejoinder, paras. 1166-1169.

[2524] Counter-Memorial, paras. 151-153; Rejoinder, para. 1170.

[2525] Counter-Memorial, para. 688.

discovery outside of the United States, which was rejected by U.S. courts.[2526] Moreover, the Respondent explains, Chevron drove up the fees and costs with excessively voluminous filings and by unnecessarily overstaffing its teams.[2527] The Respondent further criticizes that Chevron (i) fought "even the most benign requests" from other parties; (ii) attacked law firms representing the Section 1782 targets; (iii) failed to conduct basic diligence regarding certain Section 1782 Proceedings, which were "ill-conceived and frivolous" in their inception; and (iv) filed redundant actions.[2528]

1541. Second, the Respondent asserts that the Claimants' decisions to discontinue certain actions, or to prepare but not pursue them, shows that they were not necessary or even useful, and hence the Claimants should not be permitted to recover any fees or costs related to them.[2529]

1542. Third, the Respondent argues that many of Chevron's Section 1782 Proceedings had little or no impact on the Track II Award or the Lago Agrio Litigation, and hence the Claimants should not recover any legal fees incurred in pursuing unnecessary actions.[2530] In particular, the Respondent observes that (i) the materials obtained in seven actions were not used in either this Arbitration or the Lago Agrio Litigation; (ii) the Claimants allege that the Tribunal relied on a significant amount of material that is not even mentioned in the Track II Award, in which the Tribunal supported its opinion with evidence from only two Section 1782 Proceedings; (iii) the Tribunal made limited citations to documents from other actions as background for its award, but it did not discuss them in its substantive analysis; and (iv) the Tribunal did not cite any of the materials from seven actions that Chevron supposedly presented to the Lago Agrio Court.[2531]

1543. Fourth, the Respondent posits that the Claimants should not recover fees and costs for Section 1782 actions in which each party, including Chevron (and sometimes Ecuador),

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[2526] Counter-Memorial, paras. 689-693. *See e.g.* **R-1802**, *In re The Application of Chevron Corporation*, D. Mass. Case 3:10-mc-30022-MAP, D.E. 47 Memorandum with Regard to Applications for Discovery, 22 December 2010, pp. 4-5; **R-1787**, Wray 1782 Docket, p. 14 (Minute Order dated 27 July 2010).

[2527] Counter-Memorial, paras. 694-695.

[2528] Counter-Memorial, paras. 696-699.

[2529] Counter-Memorial, paras. 698, 705-707; Rejoinder, para. 1171.

[2530] Counter-Memorial, paras. 708, 713.

[2531] Counter-Memorial, paras. 709-712; Track II Award, paras. 4.171, 4.213, 4.216, 4.251, 4.272-4.273, 4.278, 4.292, 4.294, 4.309-4.319, 4.357, 4.362, 4.368, 4.388.

stipulated that it would bear its own fees and costs, such as the actions relating to the Weinberg Group, Kohn, and MCSquared.[2532] The Respondent notes that, while the Claimants later withdrew their damages claims related to the actions for Kohn and MCSquared, the invoices that remain in the claim still contain specific fee and cost entries for work done on those actions, which must be rejected.[2533]

1544. Fifth and last, the Respondent contends that the legal expenses allegedly paid to law firms that represented Mr Veiga and Dr Pérez individually and filed parallel Section 1782 Proceedings on their behalf are not compensable, since those individuals are neither investors under the Treaty nor claimants in this Arbitration.[2534] While these individuals sought to gather evidence to aid their criminal defence, the Respondent reiterates that the Criminal Proceedings were litigated separately from the Lago Agrio Litigation and were not found by the Tribunal to constitute a breach of the Treaty.[2535] Accordingly, it insists that it is not liable for the "significant" fees and expenses that Chevron "voluntarily" assumed on behalf of these non-parties, including any legal fees paid for the purpose of coordinating with Mr Veiga and Dr Pérez's lawyers.[2536]

(b) Section 1782 Actions Initiated by Ecuador and the LAPs

1545. The Respondent underscores that it had every right to initiate Section 1782 actions against Chevron for the purposes of this Arbitration, and submits that the Claimants are not entitled to a reimbursement of the legal fees and expenses they incurred in connection with those proceedings.[2537] According to the Respondent, Ecuador initiated these actions to obtain evidence from third parties for use in this Arbitration because it had not been a party to the Lago Agrio Litigation and Chevron refused to provide the underlying data

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2532 Counter-Memorial, paras. 701-704. *See* **R-1587**, *Chevron Corp. v. Weinberg Group*, DDC Case 1:11-mc-00030-CKK, D.E. 46 Joint Stipulation for Voluntary Dismissal, 15 October 2012.

2533 Rejoinder, paras. 1172-1174. *See e.g.* **C-3287.002**, Gibson, Dunn & Crutcher LLP (Member) – 2010.xlsx; **C-3303.007**, Jones Day (Member) – 2014.xlsx.

2534 Counter-Memorial, para. 727; Rejoinder, para. 1175.

2535 Counter-Memorial, paras. 725-726.

2536 Counter-Memorial, para. 728; Rejoinder, paras. 1176-1179; **RE-51**, Trunko Expert Report, **SM J-8**. *See e.g.* **C-3287.002**, Gibson, Dunn & Crutcher LLP (Member) – 2010.xlsx.

2537 These fees and costs, the Respondent notes, include those that the Claimants spent on their own counsel and those that they voluntarily spent on counsel for the non-party discovery targets who are not investors in Ecuador or parties to this Arbitration. Rejoinder, paras. 1180-1182.

supporting its reports in that action.[2538] The Respondent argues that the Claimants cannot justify attempting to intervene in these actions, stressing that there is no provision in the 1995-1998 Settlement and Release Agreements barring the Respondent from pursuing U.S. discovery in aid of this Arbitration, and that the Tribunal never ordered the Respondent not to engage in discovery through Section 1782 actions.[2539]

1546. The Respondent accuses Chevron of attempting to stop it from taking discovery in its Section 1782 actions and thereby forcing the Respondent to spend more time and resources in "unnecessary litigation", even if the U.S. district courts rejected the company's attempts to "stonewall" discovery.[2540] The Respondent provides examples of Chevron's "overzealousness", "wastefulness" and "pointless effort[s]" in these Section 1782 actions, and it recalls that courts admonished it for taking positions that were "diametrically opposed" to those it took when seeking discovery through its own Section 1782 actions.[2541] Similarly, the Respondent also refers to claimed fees for "unnecessary work" on preparing to intervene in proceedings in which the Claimants did not enter an appearance or file any papers, such as the Hansen Section 1782 Proceeding.[2542] Lastly, and contrary to the Claimants' assertions, the Respondent notes that protecting privilege comprised only a fraction of the significant legal costs they allegedly incurred.[2543]

(c) Further Non-compensable Activities

1547. The Respondent contends that the invoices produced by the Claimants contain numerous wasteful and non-compensable activities and, in particular, that they used their "General

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2538 The Claimants seek compensation for 15 of these Section 1782 proceedings, 13 of which were initiated by Ecuador and two brought by the LAPs. Chevron intervened in all of these actions except for one. The Respondent further notes that the Claimants have not included any legal fees attributable to the GSI Section 1782 action in Appendix 2 to their Memorial, and therefore conveys the understanding that the Claimants have waived any claim to fees and costs from this action. Counter-Memorial, paras. 714-715.

2539 Rejoinder, paras. 1180-1182.

2540 Counter-Memorial, paras. 716, 720; Rejoinder, para. 1183.

2541 Counter-Memorial, paras. 718-719, 721-723. The Respondent further considers that Chevron's purported fees from the Stratus § 1782 actions are especially "[s]uspect", noting that the Claimants' Memorial does not distinguish between fees from the "offensive" and "defensive" proceedings and that Chevron performed very limited work in the latter. *See* Counter-Memorial, para. 724.

2542 Counter-Memorial, para. 717; Rejoinder, para. 1185; **RE-51**, Trunko Expert Report, **J-8**, p. 3; *see e.g.* **C-3303.003**, Jones Day (Member) – 2010.xlsx.

2543 Rejoinder, paras. 1183-1184; **C-3287.003**, Gibson, Dunn & Crutcher LLP (Member) – 2011.xlsx; **C-3287.004**, Gibson, Dunn & Crutcher LLP (Member) – 2012.xlsx.

1782" subcategory to house dubious fees and costs relating to various Section 1782 Proceedings which did not provide any "streamlining or efficiency benefits".[2544] The work described in the time entries under this subcategory, says the Respondent, is frequently far from "general" and could have been allocated to a specific Section 1782 action, while numerous entries contain alleged fees and costs that are entirely unrelated to the Section 1782 campaign.[2545] The Respondent further criticizes the three subcategories of work within the "General 1782" subcategory.[2546]

1548. First, the Respondent notes that the "General 1782 Work" subcategory contains fees and costs for activities with no meaningful connection to the Section 1782 Proceedings and which have not been proven to have resulted in any substantive action with positive results.[2547] This category also includes work done in connection with certain Section 1782 actions that the Claimants did not pursue and for which they are not claiming directly, which, in the Respondent's view, confirms that they were not reasonable or necessary.[2548] Other types of non-compensable tasks for which the Claimants' attorneys billed, the Respondent says, include administrative and clerical tasks, which are considered overhead costs and cannot be billed even under Chevron's Guidelines, and those concerning the coordination of support services and vendors.[2549]

1549. Second, the Respondent asserts that the Claimants have used the "Indeterminate 1782 Work" subcategory to "camouflage" non-compensable activity that they cannot rationalize, as it includes tasks that are vaguely described and whose objectives and relevance cannot be determined.[2550]

2544 Rejoinder, paras. 1186-1187.

2545 Rejoinder, paras. 1188-1191; *see e.g.* **C-3287.003**, Gibson, Dunn & Crutcher LLP (Member) – 2011.xlsx; **C-3287.006**, Gibson, Dunn & Crutcher LLP (Member) – 2014.xlsx.

2546 Rejoinder, para. 1192.

2547 Rejoinder, paras. 1193-1194; *see e.g.* **C-3287.001**, Gibson, Dunn & Crutcher LLP (Member) – 2009.xlsx.

2548 Rejoinder, para. 1195; *see e.g.* **C-3287.002**, Gibson, Dunn & Crutcher LLP (Member) – 2010.xlsx.

2549 Rejoinder, paras. 1196-1198; *see e.g.* **C-3303.003**, Jones Day (Member) - 2010.xlsx; **C-3287.002**, Gibson, Dunn & Crutcher LLP (Member) – 2010.xlsx; **RE-51**, Trunko Expert Report, paras. 21–22; **RE-61**, Second Leigh Expert Report, para. 28, fns. 46-47.

2550 Rejoinder, paras. 1199-1201; *see e.g.* **C-3303.002**, Jones Day (Member) - 2009.xlsx; **C-3287.003**, Gibson, Dunn & Crutcher LLP (Member) – 2011.xlsx.

1550. Third and last, the Respondent disputes the purported efficiencies created by combining Section 1782 work, and opines that the Claimants' "disorganized approach" during their Section 1782 campaign resulted in large amounts of "duplicative and fruitless work".[2551] This excess, it explains, was the consequence of the Claimants' overstaffing, which involved more than 200 timekeepers in the "General 1782" subcategory and led to inefficiencies, repeated efforts, unnecessary time spent discussing tasks and reviewing work product for consistency, and overall "inflated" fees and costs.[2552]

3. The Tribunal's Analysis

(a) Introduction

1551. In Track III, the Claimants seek a total of USD 62,363,592.93 as legal fees and expenses incurred between January 2009 and March 2018 in connection with the Section 1782 Proceedings.[2553]

1552. Section 1782 of Title 28 of the U.S. Code permits a U.S. District Court, upon the application of any interested person, to order a person found or residing within the district "to give testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal". The factors to be considered in exercising this discretionary power are set out in the U.S. Supreme Court's judgment in *Intel Corp. v. Advanced Memo Devices Inc. 542 US 241 (2004)*. Section 1782 does not apply to persons not subject to the jurisdiction of U.S. courts.[2554]

1553. As noted by the Tribunal in its Track II Award, beginning in December 2009 Chevron initiated numerous legal proceedings in several U.S. District Courts in the United States of America under Section 1782 in order to obtain discovery for use in the Lago Agrio Litigation, the Criminal Proceedings, and this Arbitration. These proceedings were directed at (*inter alios*) Mr Donziger, Mr Berlinger, Mr Bonifaz, Mr Kohn, Mr Wray, Dr Calmbacher, Mr Champ, Mr Rourke, Stratus Consulting Inc. ("**Stratus**"), E-Tech International ("**E-Tech**") and Banco Pichincha. The Respondent, in turn, later initiated

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[2551] Rejoinder, paras. 1202-1203.

[2552] Rejoinder, paras. 1204-1206; **RE-51**, Trunko Expert Report, **SM T**; **RE-61**, Second Leigh Expert Report, para. 28, fns. 41, 48.

[2553] Reply, para. 761; Updated Appendix 2, pp. 737-1061.

[2554] Track II Award, para. 4.107.

legal proceedings in the United States under Section 1782 in order to obtain discovery for use in this Arbitration.[2555]

1554. Before beginning its analysis of the Claimants' damages claim in respect of the Section 1782 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.[2556] 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 to mitigate any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[2557]

1555. 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 Section 1782 Proceedings must be granted for the reasons and to the extent set out below.

(b) First Step: Analysis of Incidental Damages "Category"

1556. As a first step of its analysis, the Tribunal must determine whether the Section 1782 Proceedings category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

1557. 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

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2555 Track II Award, para. 4.106.

2556 Reply, para. 760.

2557 *See* para. 317 above.

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.

1558. 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.[2558]

1559. As particularised by the Claimants, the Section 1782 Proceedings category comprises three distinct sub-categories:

(i) The Affirmative Section 1782 Actions ("**Affirmative 1782s**") comprised 23 Section 1782 actions filed starting in December 2009 "to pursue U.S.-based discovery aimed at uncovering what [Chevron] then believed to be extensive fraud and corruption in the Lago Agrio Litigation in large part because its efforts to obtain redress through the Ecuadorean courts had proven futile."[2559] According to the Claimants, these actions

> fell into six respondent categories: (1) the LAPs' U.S.-based scientific expert in the Lago Agrio two-party judicial inspections; (2) the LAPs' then-current and former U.S.-based counsel; (3) the LAPs' U.S.-based consultants participating in the Cabrera Fraud; (4) the LAPs' U.S.-based 'cleansing experts' who were hired in an attempt to erase the impact of the Cabrera Fraud on the Lago Agrio Litigation; (5) the media and public relations entities affiliated with the LAPs' and/or the Ecuador's propaganda campaigns against Chevron; and (6) the situs of the LAPs' secret bank account, Banco Pichincha.[2560]

[2558] *See* para. 556 above.

[2559] Memorial, Appendix 44, pp. 1-2.

[2560] Memorial, Appendix 44, p. 2. Chevron initiated the Affirmative 1782s by filing the following applications: **C-2941**, Allen 1782 Docket, ECF No. 1 **(**22 October 2010**)** ("**Allen 1782**"); **C-2935**, Banco Pichincha 1782 Docket, ECF No. 1 (22 December 2011) ("**Banco Pichincha 1782**"); **C-2897**, Barnthouse 1782 Docket, ECF No. 1 (22 October 2010) ("**Barnthouse 1782**"); **C-3048**, Berlinger 1782 Docket, ECF No. 1 (9 April 2010)

(ii) The Defensive Section 1782 Actions ("**Defensive 1782s**") are described by the Claimants as follows: "After seeing that Chevron had obtained discovery for use in the Lago Agrio Litigation, Ecuador and the LAPs began filing 1782 actions as well. Chevron was involved in thirteen such cases that are the subject of this submission, falling within the following three categories: (1) Chevron scientists and experts, including actions brought against Bjorn Bjorkman, TestAmerica Laboratories, Inc. (formerly Severn Trent Laboratories), Dr Douglas M. Mackay, Dr Michael A. Kelsh and his employer, Exponent, Inc., Robert Hinchee, John A. Connor and his environmental consulting firm, GSI, and Gregory S. Douglas; (2) targets aimed at undermining Ecuador's bribery scandal involving Judge Nuñez (including Diego Borja, Wayne Hansen, and the Mason Investigative Group); and (3) Stratus Consulting, against whom Ecuador brought a 1782 action in 2013 after Stratus disavowed its work on the Ecuador case and finally admitted to its role in fabricating evidence and ghostwriting the Cabrera Report. In most of these actions, Chevron had to intervene to protect applicable privileges and correct misrepresentations made by Ecuador and/or the LAPs as to the facts of the Lago Agrio Litigation. These proceedings did not reveal any 'key' evidence or admissions for Ecuador."[2561]

("**Berlinger 1782**"); **C-2931**, Bonifaz 1782 Docket, ECF No. 1 (19 November 2010) ("**Bonifaz 1782**"); **C-2837**, Calmbacher 1782 Docket, ECF No. 1 (19 February 2010) ("**Calmbacher 1782**"); **C-2928**, Champ 1782 Docket, ECF No. 1 (16 August 2010) ("**Champ 1782**"); **C-3027**, Donziger 1782 Docket, ECF No. 11 (18 August 2010) ("**Donziger 1782**") (according to the Claimants, the Donziger 1782 was initially filed on 4 August 2010, *see* Memorial, Appendix 21, para. 3); **C-2929**, Kohn 1782 Docket, ECF No. 1 (16 November 2010) ("**Kohn 1782**"); **C-2938**, MCSquared 1782 Docket, ECF No. 1 (24 November 2014) ("**MCSquared 1782**"); **C-2813**, E-Tech/Kamp 1782 Docket, ECF No. 1 (16 August 2010) ("**E-Tech/Kamp 1782**"); **C-2811**, E-Tech/Powers 1782 Docket, ECF No. 1 (27 May 2010) ("**E-Tech/Powers 1782**"); **C-2810**, Netflix 1782 Docket, ECF No. 1 (9 April 2010) ("**Netflix 1782**"); **C-2933**, Page 1782 Docket, ECF No. 1 (1 November 2011) ("**Page 1782**"); **C-2907**, Picone 1782 Docket, ECF No. 4 (22 October 2010) ("**Picone 1782**"); **C-2926**, Quarles 1782 Docket, ECF No. 1 (16 July 2010) ("**Quarles 1782**"); **C-2908**, Rourke 1782 Docket, ECF No. 5 (22 October 2010) ("**Rourke 1782**"); **C-2903**, Scardina 1782 Docket, ECF No. 1 (4 November 2010) ("**Scardina 1782**"); **C-2905**, Shefftz 1782 Docket ("**Shefftz 1782**") (according to the Claimants, the Shefftz 1782 was initially filed on 22 October 2010, *see* Memorial, Appendix 33, para. 3); **C-2864**, Stratus 1782 Docket, ECF No. 2 (18 December 2009) ("**Stratus 1782**"); **C-2939**, UBR 1782 Docket, ECF No. 1 (26 May 2010) ("**UBR 1782**"); **C-2899**, Weinberg 1782 Docket, ECF No. 1 (21 January 2011) ("**Weinberg 1782**"); **C-2943**, Wray 1782 Docket, ECF No. 1 (8 June 2010) ("**Wray 1782**").

[2561] Memorial, Appendix 44, pp. 8-9. The Defensive 1782s were initiated with the filing of the following applications: **C-978**, Application of the Republic of Ecuador and Dr Diego García Carrión, the Attorney General of The Republic of Ecuador, For the Issuance of a Subpoena Under § 1782(A) to Bjorn Bjorkman For The Taking of A Deposition And the Production of Documents for Use in a Foreign Proceeding, *In re Application of Republic of Ecuador and Dr Diego García Carrión, the Attorney General of The Republic of Ecuador*, No. 11-CV-01470-WYD (D.C. Colo.), 6 June 2011; **C-2947**, Borja 1782 Docket, ECF No. 1 (10 September 2010); **C-2889**, Connor

(iii) General Section 1782 Work ("**General 1782 Work**") is described by the Claimants as follows: "In addition to the fees and expenses expended in connection with the various individual Section 1782 actions, Chevron incurred fees and expenses for Section 1782-related expenses that cannot be allocated to a single 1782 action. These expenses fall into three categories: (1) general Section 1782 work; (2) indeterminate Section 1782 work; and (3) efficiencies created by combining Section 1782 work."[2562]

1560. Each of these three sub-categories requires a differentiated analysis for present purposes. They are addressed consecutively in the paragraphs that follow.

1. Affirmative 1782s

1561. Reduced to its essence, the Claimants' position is that their decision to pursue the Affirmative 1782s starting in 2009 "aimed at uncovering what [Chevron] then believed to be extensive fraud and corruption in the Lago Agrio Litigation".[2563] According to the Claimants, Chevron's efforts through the Affirmative 1782s were "critical to its ability to

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1782 Docket, ECF No. 1 (28 November 2011); **C-2851**, Douglas 1782 Docket, ECF No. 1 (31 October 2011); **C-980**, Application Of the Republic of Ecuador and Dr Diego García Carrión For the Issuance of a Subpoena Under 28 U.S.C. § 1782 to Exponent, Inc. D/B/A Delaware Exponent, Inc. for The Production of Documents for Use in a Foreign Proceeding, *In re Application of The Republic of Ecuador and Dr Diego García Carrión, the Attorney General of the Republic of Ecuador*, No. 11-MC-80171-SI (N.D. Cal.), 21 July 2011; **C-2892**, GSI Environmental 1782 Docket, ECF No. 1 (28 November 2011); **C-2948**, Hansen 1782 Docket, ECF No. 1 (14 September 2010); **C-979**, Republic of Ecuador and Dr Diego García Carrión's Application For An Order Under 28 U.S.C. § 1782(A) To Issue a Subpoena To Robert E. Hinchee For The Taking Of A Deposition And The Production of Documents For Use In A Foreign Proceeding, *In re Application of Republic of Ecuador and Dr Diego García Carrión, the Attorney General of The Republic of Ecuador*, No. 11-MC- 00073-RH-WCS (N.D. Fla.), 20 July 2011; **C-981**, Application of the Republic of Ecuador and Dr Diego García Carrión For the Issuance of A Subpoena Under 28 U.S.C. § 1782 To Dr Michael A. Kelsh For the Taking of a Deposition And the Production of Documents For Use In A Foreign Proceeding, *In re Application of The Republic of Ecuador and Dr Diego García Carrión, the Attorney General of the Republic of Ecuador*, No. 11- CV-80171-SI (N.D. Cal.), 21 July 2011; **C-977**, Application For An Order Under 28 U.S.C. § 1782 For The Issuance of a Subpoena To Douglas M. Mackay For The Taking Of A Deposition And The Production of Documents For Use In A Foreign Proceeding, *In re Application of Republic of Ecuador and Dr Diego García Carrión, the Attorney General of The Republic of Ecuador*, No. 11-MC-00052-GSA (E.D. Cal.), 3 June 2011; **C-2949**, Mason Investigative Group, Mason and Parisi 1782 Docket, ECF No. 1 (16 May 2011); **C-2950**, Mason, Parisi and Mason Investigative Group 1782 Docket, ECF No. 1 (27 April 2011); **C-2870**, Stratus 1782 Docket, ECF Nos. 1, 4 (25 April 2013); **C-992**, *In re Application of Republic of Ecuador et al.*, Case No. 4:11-mc-00088-RH-WCS, Ecuador's Application for an Order under 28 U.S.C. § 1782, (N.D. Fla.), Oct. 20, 2011.

2562 Memorial, Appendix 44, pp. 9-11.

2563 Memorial, Appendix 44, pp. 1-2.

uncover the nature and extent of both the fraud that underlay the Lago Agrio Judgment and prove Ecuador's violations of international law."[2564]

1562. Against this background, the first question the Tribunal must address is whether the Affirmative 1782s fulfil the requirement of causation for the compensation of incidental damages under international law. In other words, the Tribunal must determine whether by attempting to uncover "extensive fraud and corruption"[2565] in the Lago Agrio Litigation through the Affirmative 1782s Chevron sought to (i) prevent the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) to the extent such efforts were unsuccessful, thereafter sought to render the Judgment unenforceable; or (iii) minimize the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution, or howsoever otherwise.[2566]

1563. At the outset, the Tribunal observes that a key feature of all but two[2567] of the Affirmative 1782s is that they were brought by Chevron *before* the issuance of the Lago Agrio Judgment on 14 February 2011.[2568] At their inception, then, most of the Affirmative 1782s could not have been initiated by Chevron in response to the Lago Agrio Judgment because such judgment had not yet come into existence. Rather, the Claimants' attempts to uncover "fraud and corruption in the Lago Agrio Litigation"[2569] before 14 February 2011 arose principally in reaction to the conduct of third-party individuals Chevron suspected were involved in fraudulent activities: the LAPs' representatives and other related actors.[2570] While the "prolonged, malign conduct" of those individuals "towards the Respondent's legal system" was later found by this Tribunal to constitute a necessary condition for the "ghostwriting" of the Lago Agrio Judgment, the Tribunal also determined that such conduct was not the immediate cause of the Respondent's Treaty

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[2564] Memorial, para. 244.

[2565] Memorial, Appendix 44, p. 2.

[2566] *See* para. 1557 above.

[2567] **C-2935**, Banco Pinchincha 1782 Docket, ECF No. 1 (22 December 2011); **C-2933**, Page 1782 Docket, ECF No. 1 (1 November 2011).

[2568] *See* fn 2560 above.

[2569] Memorial, Appendix 44, pp. 1-2.

[2570] Reply, para. 762 ("Claimants' damages consist of: the legal fees and costs incurred in connection with Section 1782 actions that Claimants initiated against 27 individuals and entities, each of whom Claimants had reason to believe possessed evidence relating to the fraud being perpetrated by the LAPs, their representatives, and Mr. Cabrera").

breaches.[2571] The cause came from the "ghostwriting" exercise of the Lago Agrio Judgment by Judge Zambrano, who was acting as an Ecuadorian judge within the scope of his professional duties.[2572]

1564. In this connection, the Tribunal remains mindful that the Claimants initiated the Affirmative 1782s upon the failure of the Ecuadorian judicial and prosecutorial activities to investigate their allegations of procedural fraud and judicial misconduct at the heart of the Lago Agrio Litigation.[2573] The Tribunal is also mindful that the Claimants' efforts were ultimately successful at proving the existence of corruption.[2574] However, the Tribunal is not called upon to assess the harm arising from any inaction on the part of the

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[2571] Track II Award, para. 5.229. *See also* Track II Award, paras. 5.244, 5.246-5.247, 5.249, 8.53-8.56; Partial Award on Track III, paras. 118-124; paras. 357-363, 371, 377, 397 above. *See in particular* Track II Award, paras. 8.55-8.56: "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."

[2572] Track II Award, para. 5.224. *See also* Track II Award, paras. 4.5, 5.229-5.230, 5.246-5.247, 5.249, 8.53-8.56.

[2573] Track II Award, paras. 8.28-8.33: "In Part V above, the Tribunal has found that the Lago Agrio Court, the Appellate Court, the Cassation Court and the Constitutional Court did not investigate Chevron's allegations of procedural fraud and judicial misconduct; and the Appellate, Cassation and Constitutional Courts also did not investigate the allegedly corrupt 'ghostwriting' of the Lago Agrio Judgment. This was not done in ignorance of Chevron's specific allegations at the time. In the Tribunal's view, these Courts had sufficient information available to them so as to amount (at least) to a strong prima facie case of judicial misconduct, procedural fraud in the Lago Agrio Litigation and (as regards the Appellate, Cassation and Constitutional Courts) the 'ghostwriting' of the Lago Agrio Judgment . . . There is little in this Award (or the RICO Judgment) that would add to the substance of the allegations made by Chevron to the Lago Agrio Appellate, Cassation and Constitutional Courts in 2011, 2012 and 2018. In all material respects, at these times, there was before these three Courts at least strong prima facie evidence of judicial misconduct, procedural fraud and (particularly) 'ghostwriting', raising justifiable concerns as to the judicial propriety of the Lago Agrio Litigation and the Lago Agrio Judgment. The same situation prevailed as regards the Respondent's prosecutorial authorities, beginning at an earlier time."

[2574] Track II Award, paras. 8.53-8.56. *See also* Track II Award, para. 4.327: "Chevron also obtained other documentation, in the US Section 1782 Litigation, from Mr Donziger, Stratus Consulting and several others. Chevron also took depositions and witness statements from several persons, including Dr Calmbacher, Mr Beltman, Dr Maest and, for 13 days, Mr Donziger himself. This unprecedented mass of evidential material, ordinarily protected by journalistic or legal privileges, was a major development for Chevron's case, both for its RICO Litigation in New York and also for this arbitration under the Treaty. It was the product of more than 20 actions brought by Chevron in different US Federal Courts across the USA."

Respondent's authorities: the analysis required of the Tribunal in Track III is circumscribed to the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment.[2575]

1565. As already explained, the date of issuance of the Lago Agrio Judgment (14 February 2011) was the date upon which the risks connected to the enforcement of the Lago Agrio 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.[2576] Whatever harm the Claimants may have suffered by undertaking work before 14 February 2011 to uncover "fraud and corruption in the Lago Agrio Litigation"[2577] was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in Track III.[2578]

1566. For the avoidance of doubt, the Tribunal confirms that the determination in the preceding paragraph pertains only to the Claimants' claim for damages arising from the Respondent's Treaty breaches. It is without prejudice to any costs claim the Claimants might bring in Track IV of the Arbitration under Articles 38 and 40 of the UNCITRAL Rules in respect of legal fees and expenses incurred before 14 February 2011 in connection with the Affirmative 1782s.[2579]

1567. Notwithstanding the above, the fact that the Claimants initiated most of the Affirmative 1782s before the issuance of the Lago Agrio Judgment does not mean that their continued efforts to uncover "fraud and corruption in the Lago Agrio Litigation"[2580] *after* the issuance of the Judgment did not amount to a reasonable mitigation measure. By the time the Lago Agrio Judgment was issued, the Claimants had amassed substantial evidence of a corrupt scheme at the heart of the Lago Agrio Litigation – including, among many

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2575 *See* para. 317 above.

2576 *See* paras. 362, 371, 397 above.

2577 Memorial, Appendix 44, pp. 1-2.

2578 *See* paras. 362, 371, 397 above.

2579 Procedural Order No. 84, para. 13(i).

2580 Memorial, Appendix 44, pp. 1-2.

others, Mr Donziger's personal notebook,[2581] the outtakes of the film *Crude*,[2582] the Invictus Memorandum,[2583] and a chart assigning drafting tasks for the "ghostwriting" of the so-called "Cabrera Reports".[2584] In the circumstances then prevailing, it was reasonable for the Claimants to believe that any additional evidence they might obtain pointing to fraud and corruption at the heart of the Lago Agrio Litigation could eventually become instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment. This was later evidenced by the Claimants' successful attempt at obtaining relief to that effect before this Tribunal.[2585]

1568. In other words, the Claimants' efforts to obtain evidence of "fraud and corruption in the Lago Agrio Litigation"[2586] in the Affirmative 1782s *after 14 February 2011* sought ultimately, and to varying extents, (i) to 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; and (iii) to minimize the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution, or howsoever otherwise.[2587]

1569. For this reason, the Tribunal determines, as a matter of principle, that any legal fees and expenses reasonably incurred by the Claimants in connection with the Affirmative 1782s

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[2581] **C-716**, Donziger Diary (Steven Donziger Deposition, 8 December 2010, Exhibit 422 [DONZ00027156, DONZ00027256]). *See also* Track II Award, para. 4.29.

[2582] **C-360**, *Crude* Outtakes. *See also* Track II Award, paras. 4.33, 4.324-4.327.

[2583] **C-903**, "Invictus, Path Forward: Securing and Enforcing Judgment and Reaching Settlement" by Patton Boggs, undated; Fourth Veiga Witness Statement, para. 33 ("At this point, there can be no doubt—not that there had ever been any—that the Plaintiffs were planning for aggressive enforcement efforts and that the risk was both real and imminent. Indeed, the Lago Agrio Plaintiffs had already implemented various steps envisioned in the Invictus memorandum by the time we obtained it in January 2011").

[2584] **C-2909**, E-mail from D. Beltman to S. Donziger, Subject: Annex tracking table, 5 March 2008 [STRATUS-NATIVE057599 through STRATUS-NATIVE057601]; Memorial, Appendix 11, para. 13; Track II Award, para. 4.312.

[2585] Track II Award, para. 4.327: "Subsequently, as a result of these 'Crude outtakes', Chevron also obtained other documentation, in the US Section 1782 Litigation, from Mr Donziger, Stratus Consulting and several others. Chevron also took depositions and witness statements from several persons, including Dr Calmbacher, Mr Beltman, Dr Maest and, for 13 days, Mr Donziger himself. This unprecedented mass of evidential material, ordinarily protected by journalistic or legal privileges, was a major development for Chevron's case, both for its RICO Litigation in New York and also for this arbitration under the Treaty. It was the product of more than 20 actions brought by Chevron in different US Federal Courts across the USA".

[2586] Memorial, Appendix 44, pp. 1-2.

[2587] *See* para. 1557 above.

after 14 February 2011 to attempt to uncover fraud and corruption in the Lago Agrio Litigation amount to incidental damages caused by the Respondent's Treaty breaches.

1570. The ensuing question for the Tribunal is how to assess the second requirement for the compensation of incidental damages – reasonableness – vis-à-vis the Affirmative 1782s. In the Tribunal's view, two factors govern the question of reasonableness of the Claimants' choice of mitigation measures in this particular context.

1571. The first factor impacting upon the Tribunal's assessment of reasonableness is the nature of the exercise underlying the Affirmative 1782s, whereby the Claimants initiated discovery actions without being aware of the exact nature of the suspected fraud or being able to anticipate precisely what evidence their discovery efforts would yield. As already noted by the Tribunal, reasonableness should be assessed contemporaneously and not with the benefit of hindsight.[2588] Accordingly, the Tribunal is prepared to grant a certain level of deference to the Claimants' decisions as to which Affirmative 1782s to initiate and when to stop pursuing them.[2589] For the same reason, the ultimate success of the Affirmative 1782s should not be a decisive factor when determining whether it was reasonable for the Claimants to pursue those proceedings; rather, the relevant inquiry is whether the Claimants had a reasonable basis to initiate the Affirmative 1782s and to continue pursuing them after the Lago Agrio Judgment was issued.

1572. Second, a more flexible inquiry as to the reasonableness of the Affirmative 1782s is also warranted in view of the fact that the Lago Agrio Court issued the Lago Agrio Judgment in spite of Chevron's allegations of procedural fraud and misconduct before the Respondent's judicial and prosecutorial authorities. As already explained, the Tribunal determined in its Track II Award that the Respondent's authorities failed to investigate Chevron's allegations despite having sufficient information available to them so as to amount (at least) to a strong *prima facie* case of judicial misconduct and procedural fraud in the Lago Agrio Litigation.[2590] In these circumstances, it was reasonable for Chevron to deploy significant efforts to attempt to uncover by itself any existing fraud. The Tribunal considers that the Respondent's failure to investigate Chevron's fraud allegations should

2588 *See* para. 340 above.

2589 *See* para. 341 above.

2590 Track II Award, paras. 8.28-8.34.

result in a more relaxed application of the requirement of reasonableness as regards the Affirmative 1782s when compared to other categories of damages addressed in this Award.

1573. Flowing from the above two factors, the Tribunal determines that the dispositive question as regards reasonableness is whether the Claimants were in possession of *prima facie* evidence signalling that initiating Affirmative 1782s after 14 February 2011, or continuing to pursue such proceedings to the extent they had already been initiated before that date, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1574. In this connection, the Claimants have identified "six respondent categories", hereinafter referred to as "groups", against whom they initiated the Affirmative 1782s.[2591] The respondents in each of these groups share common traits that are relevant for the present analysis. As such, the Tribunal believes it is useful to make a preliminary assessment on whether the Claimants were in possession of *prima facie* evidence at the relevant times signalling that pursuing Affirmative 1782s against the respondents included in each of these groups was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. Each respondent group is addressed consecutively in the paragraphs that follow.

1575. *Group One: The LAPs' Judicial Inspection Experts*. According to the Claimants:

> The first [group] of 1782 respondents include only Dr. Charles Calmbacher, a scientist hired by Donziger and the LAPs in the summer of 2004 to serve as a LAP judicial inspection expert. That action sought discovery based [on] irregularities in Dr. Calmbacher's work, including an instance in which a report submitted to the Lago Agrio court ostensibly drafted and signed by Dr. Calmbacher misspelled his own name as 'Dr. Chuck Calbacher.' This 1782 revealed one of the LAPs' earliest frauds in the Lago Agrio Litigation: submitting reports in Dr. Calmbacher's name that he did not author. Dr. Calmbacher's testimony in this 1782 was not only used at the RICO trial and in this arbitration, but it was also relied on to support nearly all of the 1782s that Chevron subsequently filed.[2592]

1576. As explained below, the legal fees and expenses incurred by the Claimants in connection with the Calmbacher 1782 must be excluded from the final amount of compensation,

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[2591] Memorial, Appendix 44, p. 2.

[2592] Memorial, Appendix 44, pp. 3-4.

essentially because they originate at a time prior to the issuance of the Lago Agrio Judgment.[2593] It thus is unnecessary to address this respondent group of the Affirmative 1782s any further.

1577. *Group Two: The LAPs' Then-Current and Former U.S.-Based Counsel*. According to the Claimants,

> This second [group] of respondents includes the lawyers who oversaw the LAPs' litigation team and who also funded the Litigation. It was anticipated that, as a group, they would have extensive evidence of the ongoing fraud and corruption in the Lago Agrio Litigation. This [group] of 1782 respondents includes: (A) Steven Donziger, the LAPs' lead U.S. counsel and ringleader; (B) Aaron Marr Page, an attorney who worked extensively with Donziger since approximately 2005; (C) Joseph Kohn, an attorney who financed the Lago Agrio Litigation from its initiation through the Cabrera Fraud, including by paying Donziger and Stratus; he also served as co-lead counsel during the early *Aguinda* litigation and continued to litigate the matter with Donziger until he became aware of the Cabrera Fraud; (D) Cristobal Bonifaz, co-lead American counsel, along with Kohn, to the LAPs from the *Aguinda* litigation until approximately 2005; and (E) Alberto Wray, as the LAPs' first lead Ecuadorian lawyer in the Lago Agrio Litigation until Pablo Fajardo replaced him in 2005, and who interacted with Ecuador. While taking discovery from a litigant's current and former and opposing counsel is rare, it was wholly warranted under the circumstances of this case; nevertheless, each of these 1782s was heavily litigated while the courts determined the proper balance between necessary discovery and valid claims of privilege and work protection.[2594]

1578. Against this background, the Tribunal is persuaded that the Claimants were in possession of *prima facie* evidence signalling that seeking discovery from the LAPs' then-current and former U.S.-based counsel was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. As already explained, by 14 February 2011 the Claimants had uncovered evidence of fraud and corruption in the Lago Agrio Litigation involving (at the very least) Mr Steven Donziger.[2595] It was thus reasonable for the Claimants to continue to seek discovery from Mr Donziger and from any other person who had acted as co-counsel for the LAPs together with him at any point in time.

[2593] *See* paras. 1670-1672 below.

[2594] Memorial, Appendix 44, p. 4.

[2595] *See* para. 1567 above.

1579. The Tribunal recalls that the Claimants have withdrawn their claim for the Kohn 1782, which was also included by the Claimants in this respondent group of the Affirmative 1782s.[2596] It is therefore unnecessary to address that particular proceeding any further.

1580. The Tribunal further recalls for context that Chevron ultimately obtained relevant discovery from the LAPs' counsel in the Section 1782 Proceedings, as noted by the Tribunal in its Track II Award:

> Chevron also obtained other documentation, in the US Section 1782 Litigation, from Mr Donziger, Stratus Consulting and several others. Chevron also took depositions and witness statements from several persons, including Dr Calmbacher, Mr Beltman, Dr Maest and, for 13 days, Mr Donziger himself. This unprecedented mass of evidential material, ordinarily protected by journalistic or legal privileges, was a major development for Chevron's case, both for its RICO Litigation in New York and also for this arbitration under the Treaty. It was the product of more than 20 actions brought by Chevron in different US Federal Courts across the USA.[2597]
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> The Tribunal has also made extensive use of Mr Donziger's personal notebook (or "diary"). This was originally a private document written by Mr Donziger for his own personal use only. It was disclosed by Mr Donziger to Chevron under court orders in the US Section 1782 and RICO Litigation brought by Chevron against Mr Donziger, along with his private email correspondence and computer hard drives. As a resident of New York, Mr Donziger was (and remains) subject to the jurisdiction of the courts of the USA.[2598]

1581. *Group Three: The LAPs' U.S.-Based Consultants Participating in the Cabrera Fraud*. According to the Claimants,

> This [group] of 1782s includes: (A) Stratus Consulting, an environmental group whose scientists served as primary ghostwriters of the Cabrera Report; (B) E-Tech International, an environmental consulting firm that was also involved in the Cabrera ghostwriting, including separate actions against its then-Chief Engineer William Powers and its then-director Richard Kamp; (C) Mark Quarles, a scientist affiliated with E-Tech; (D) Charles Camp, a scientist who traveled to Ecuador in 2007 to assist Donziger and Stratus with the planning of the Cabrera Report; and (E) Uhl, Baron, Rana & Associates, an environmental consulting firm the LAPs hired to further assist with the Cabrera Fraud. Chevron's impetus for seeking discovery from these environmental consultants arose when similarities between the Cabrera Report and documents published by people working with Stratus and documents produced by Stratus in a mediation proceeding led to its suspicion that Stratus had written all or at least part of the Cabrera Report. Chevron sought the discovery to substantiate the ghostwriting fraud and also to prove that the work of these consultants—which formed the 'scientific' support for the Cabrera Report—in fact had no basis in

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2596 Reply, fn 1412.

2597 Track II Award, para. 4.327.

2598 Track II Award, paras. 4.29-4.30.

science but were instead directed by Donziger to support his claims in the Lago Agrio Litigation.[2599]

1582. The Tribunal accepts the Claimants' explanation that Chevron decided to seek discovery from the above-listed U.S.-based consultants of the LAPs after similarities arose "between the Cabrera Report and documents published by people working with Stratus and documents produced by Stratus in a mediation proceeding".[2600] This amounts to *prima facie* evidence signalling to the Claimants that seeking discovery from Stratus, as well as any scientist or environmental consultant connected with that group, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1583. The Tribunal recalls for context the following excerpts of its Track II Award concerning Stratus Consulting and other related individuals:

> *13-19 January 2008*: Mr Beltman (in charge of Stratus Consulting's "Ecuador Project" for the Lago Agrio Plaintiffs) and Dr Maest travel to Ecuador, at Mr Donziger's request, to meet Mr Cabrera privately, with certain of the Lago Agrio Plaintiffs' representatives. This meeting is not disclosed to or known by Chevron at the time. In his later witness statement, Mr Beltman testifies that:
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>> *"15. Based on that meeting with Cabrera and a review of his background, Cabrera lacked the skill, qualifications, and experience to conduct or review a multidisciplinary environmental damages assessment himself.*
>>
>> *16. At no time did I ever see any indication of an independent Cabrera "team" nor did I ever meet anyone I understood to be a member of Cabrera's "independent team." To the contrary, individuals that I am aware of who assisted in preparing the Cabrera Report were affiliated with or working at the direction of Donziger and the LAPs' representatives.*
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>> *17. At no point during Stratus's time working on the Ecuador Project, including at the January 2008 meeting, did I have an understanding that Cabrera was preparing his own report. It was clear from statements Donziger and others made that the LAPs' team expected the Lago Agrio court to rely upon the Cabrera Report in rendering its judgment."*
>
> *22 February 2008*: In his email message to his colleagues at Stratus Consulting, Mr Beltman writes: "The project is at a key point right now. We have to write, over the next 2 to 3 weeks, probably the single most important technical document for the case. The document will pull together all of the work over the last 15 or so years on the case and make recommendations for the court to consider in making its judgment . . ." This "document" was to be the "Cabrera Report".

2599 Memorial, Appendix 44, pp. 5-6.

2600 Memorial, Appendix 44, p. 5.

26 February 2008: Mr Beltman sends to his colleagues within Stratus Consulting an outline and chart showing how they should falsely "attribute" their work on the Cabrera Report to Mr Cabrera's "team." The chart identifies who would be responsible for drafting each section, the reviewer/approver, and to whom it would be falsely attributed.

12 March 2008: Stratus Consulting exchanges English language drafts of the "Cabrera Report" (Mr Cabrera does not speak English). Mr Beltman emails the English draft report for Spanish translation to "info@translatingspanish.com," stating that "[t]he main [Cabrera] report (the one attached to this email) is the highest priority." Mr Beltman notes that he would travel to Quito to review and make revisions to the report in Spanish

. . .

31 March 2008: The Lago Agrio Plaintiffs' representatives and advisers work on the so-called "Cabrera Report" until its filing in the Lago Agrio Court.

According to Mr McGowan's expert testimony (of Stroz Friedberg, for Chevron in the US Litigation), the Lago Agrio Plaintiffs' representatives saved the latest version of the "Cabrera Report" on 31 March 2008 at 11:09 EST, and, "[t]he text of [the Lago Agrio Plaintiffs' report] . . . is identical to text of the report filed by Richard Stalin Cabrera Vega on April 1, 2008."

1 April 2008: Mr Cabrera formally files the Cabrera Report with the Lago Agrio Court. It advises the Court that Chevron should pay compensation in excess of US$ 16 billion. Mr Cabrera files an amended expert report in November 2008, with a revised figure for compensation of US$ 27.3 billion. . .

Later, in US legal proceedings, Mr Beltman and Mr Donziger both admitted that Stratus Consulting covertly wrote Mr Cabrera's Report. In this arbitration, the Respondent does not dispute that certain of the Lago Agrio Plaintiffs' experts wrote the Cabrera Report.[2601]

21 March 2013: In his witness statement in the RICO Litigation, Mr Beltman (of Stratus Consulting) admits that Mr Cabrera did not write the Cabrera Report filed in April 2008, as follows:

> *"I prepared the first drafts of substantial parts of . . . the main body of the Cabrera Report. At Donziger's direction, I drafted my portions of the report in the first person as though it was written by Richard Cabrera. I supervised the preparation by Dr Maest and other Stratus personnel or subcontractors of 11 of the 24 sub-reports and appendices, known as Annexes, to the Cabrera Report" . . . "Donziger and Fajardo told me to whom authorship of the various Cabrera Report Annexes should be attributed, and I recorded those names in a table. Donziger told me that the reason for the attribution was to make it more difficult to uncover that Stratus had written the Annexes. Donziger told Stratus to indicate on the draft Summary Report that it was written 'By Richard Cabrera' and instructed Stratus to draft its portions of the Summary Report in the first person " . . . "I understood that portions of the Cabrera Response that Stratus was drafting would be filed with the Lago Agrio court as if written by Cabrera. My discussions about this work with Donziger and the LAPs' representatives confirmed that Donziger and the LAPs' team wanted the Cabrera's Responses to increase the damages assessed by billions of dollars." . . . "I understood that Cabrera filed the 'Cabrera Response' based at least in part on text written by the LAPs' representatives and consultants, including Stratus, on*

[2601] Track II Award, paras. 4.310-4.318.

> *November 17, 2008. The Cabrera Response incorporated work, calculations, and text written by Stratus, among others, and increased the damages assessed in the Cabrera Report from $16 billion to $27 billion . . .. ".*[2602]

1584. *Group Four: U.S.-based Cleansing Experts*. According to the Claimants,

> When it became clear in March 2010 that the Stratus 1782 would eventually reveal irrefutable evidence of the ghostwriting of the Cabrera Report, '[t]he LAP team quickly developed a plan to 'cleanse' the Cabrera Report in Ecuador—that is, to provide an alternative evidentiary basis for the Lago Agrio case against the possibility that the Cabrera Report would be stricken or discredited or be relied upon as evidence of fraud in a foreign court where the LAPs would seek enforcement of any favorable judgment.' As part of that plan, in September 2010 the LAPs submitted seven purported supplemental expert reports to the Lago Agrio court. Chevron subsequently filed 1782 actions against the following respondents, each of whom played a role in the cleansing scheme: (A) Douglas C. Allen, who submitted a report on alleged environmental remediation damages; (B) Jonathan S. Shefftz, who submitted a report on alleged unjust enrichment damages; (C) Daniel L. Rourke, a statistician who submitted a report on alleged excess cancer deaths; (D) Carlos E. Picone, who submitted a report on the costs of providing health care to the purportedly affected population in Ecuador; (E) Lawrence Barnthouse, who submitted a report on purported natural resources damages; (F) Robert Scardina, who submitted a report on the purported costs of providing a potable water system to the allegedly affected area; and (G) the Weinberg Group, the entity involved in retaining and managing all of these cleansing experts, as Chevron learned through discovery from the six U.S.-based cleansing experts.
>
> Each of the cleansing expert 1782s was necessary to reveal that there was no independent scientific basis for any of their opinions—many of which had been misrepresented by the LAPs in their pleadings—and that the cleansing experts had all reviewed the Cabrera Report and, in some instances, adopted its findings.[2603]

1585. The Tribunal recalls for context the following excerpts of its Track II Award concerning these so-called "cleansing experts":

> *2 August 2010*: The false origins of the "Cabrera Reports" are raised by Chevron in the Lago Agrio Litigation. Chevron had received the off-cuts from "Crude" in July 2010. Following an application in the Lago Agrio Litigation, the Lago Agrio Court (Judge Ordóñez) issues an order allowing the reports attributed to Mr Cabrera to be substituted by 'cleansing' expert reports, to be submitted within 45 days.
>
> *18 August 2010*: The Lago Agrio Plaintiffs' representatives consider the effect of Mr Cabrera's departure as the Lago Agrio Court's sole global assessment expert and his replacement with the parties' cleansing experts. This includes an email message, marked "privileged and confidential – attorney work product", from Mr Small (of Patton Boggs) to Mr Donziger: "While our new expert [sic] will most likely rely on some of the same data as Cabrera (and come to the same conclusions as Cabrera) . . . we probably wouldn't want to draw that much attention to Cabrera . . . our expert might address Cabrera's findings in such a subtle way that someone reading the new expert report (the Court in Lago or an

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2602 Track II Award, para. 4.473.

2603 Memorial, Appendix 44, pp. 6-7.

> enforcement court elsewhere) might feel comfortable concluding that certain parts of Cabrera are a valid basis for damages."
>
> None of the Lago Agrio Plaintiffs' cleansing experts visit Ecuador, inspect the former concession area or conduct any sampling or environmental testing, as Mr Donziger later confirmed during his testimony in the RICO Litigation. The Lago Agrio Plaintiffs produce their seven expert reports on 16 September 2010, submitted to the Lago Agrio Court within the 45 days' time limit.
>
> One of the Lago Agrio Plaintiffs' cleansing experts, Dr Lawrence W. Barnthouse, relies upon the Cabrera Report "to see exactly how he [Cabrera] had done it." The Lago Agrio Judgment in turn relies upon Dr Barnthouse to arrive at its damages of US$ 200,000,000 for the recovery of flora, fauna and aquatic life. Hence, the Lago Agrio Judgment indirectly relies upon the Cabrera Report.[2604]

1586. Thus, Chevron decided to bring Affirmative 1782s against these cleansing experts after it had become aware of the false origins of the Cabrera Reports and the Lago Agrio Court decided to allow the reports attributed to Mr Cabrera to be substituted by cleansing expert reports. This amounts to *prima facie* evidence signalling to the Claimants that seeking discovery from the cleansing experts retained by the LAPs' representatives to replace Mr Cabrera, or any person or entity connected to them, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1587. *Group Five: Crude and other Media and Public Relations Entities*. According to the Claimants,

> Chevron filed two groups of 1782 actions within this [respondent group], one concerning the film *Crude* and the other concerning a public relations firm whose retention demonstrated that Ecuador colluded with the LAPs to attack Chevron.
>
> In 2010 Chevron sought discovery from Joseph Berlinger, a filmmaker and producer of the documentary film *Crude: The Real Price of Oil* about the Ecuadorian litigation, as well as from Netflix, which had produced the film and provided a streaming version of the film that differed from the versions otherwise publicly available. The *Crude* outtakes provided some of the most significant evidence of wrongdoing in the Lago Agrio Litigation, including proof that the LAPs had improper meetings with Cabrera, judges and representatives of Ecuador. The *Crude* outtakes also contained outright admissions of the corruption of the Ecuadorian litigation.
>
> In addition, in 2014 Chevron pursued 1782 discovery against MCSquared PR, Inc., a New York-based public relations company that entered into a $6.4 million contract with Ecuador to implement an anti-Chevron public relations campaign. Discovery revealed that Ecuador

[2604] Track II Award, paras. 4.385-4.388.

was working hand-in-glove with the LAPs to denigrate Chevron and extort a settlement payout on the fraudulent judgment.[2605]

1588. The Tribunal recalls for context the following excerpts of its Track II Award concerning the film *Crude*:

> *January 2009*: The film "Crude", directed by Mr Joseph Berlinger, is shown at the Sundance Film Festival in Utah, USA. The film was principally funded by Mr Russell DeLeon, at the time a major non-party funder for the Lago Agrio Plaintiffs in the Lago Agrio Litigation.
>
> The film was subsequently released to the public. Chevron's legal advisers noted that one of these public releases was differently edited, suggesting that the unpublished outtakes might contain relevant material. In particular, that public version showed Dr Carlos Martín Beristain (a member of Mr Cabrera's team) appearing to work privately with the Lago Agrio Plaintiffs' representatives. Mr Berlinger testified that he had removed from other versions of the film these scenes of Dr Beristain at the express request of the Lago Agrio Plaintiffs' representatives. (It is not clear why the other public version was not similarly edited; but it had significant consequences for the Lago Agrio Litigation).
>
> Chevron brought legal proceedings in New York against Mr Berlinger and others to produce unpublished outtakes from the film "Crude" showing the representatives for the Lago Agrio Plaintiffs, private or court-appointed experts in that proceeding and current or former officials of the Government of Ecuador. On 15 July 2010, Chevron obtained copies of these outtakes, amounting to about 600 hours (compared to some 90 minutes of edited film), by court order made by the US District Court for the Southern District of New York (Judge Kaplan) under Section 1782 affirmed (as modified) on appeal by the US Court of Appeals for the Second Circuit on 15 July 2010.
>
> Subsequently, as a result of these "Crude outtakes", Chevron also obtained other documentation, in the US Section 1782 Litigation, from Mr Donziger, Stratus Consulting and several others. Chevron also took depositions and witness statements from several persons, including Dr Calmbacher, Mr Beltman, Dr Maest and, for 13 days, Mr Donziger himself. This unprecedented mass of evidential material, ordinarily protected by journalistic or legal privileges, was a major development for Chevron's case, both for its RICO Litigation in New York and also for this arbitration under the Treaty. It was the product of more than 20 actions brought by Chevron in different US Federal Courts across the USA. As of January 2009, however, all this still lay in the future.[2606]

1589. As noted in this excerpt, Chevron brought this set of Affirmative 1782s after Chevron's legal advisers noted that one of these public releases of the film *Crude* was differently edited, suggesting that the unpublished outtakes might contain relevant material. This amounts to *prima facie* evidence signalling to the Claimants that seeking discovery from Mr Joseph Berlinger, Netflix Inc. ("**Netflix**"), and any other individual or entity connected with the production of the film *Crude* was a reasonable step towards locating

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[2605] Memorial, Appendix 44, p. 8.

[2606] Track II Award, paras. 4.324-4.327.

evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1590. The Tribunal recalls that the Claimants have withdrawn their claim for the MCSquared 1782, which was also included by the Claimants in this respondent group of the Affirmative 1782s.[2607] It is therefore unnecessary to address that particular proceeding any further.

1591. *Group Six: Banco Pichincha.* The Claimants explain that

> Prior to the filing [of] the Banco Pichincha 1782 and based in large part on Donziger 1782 discovery, Chevron had determined that more than US$ 100,000 in payments appeared to have been made from the LAPs' 'secret account' (as it was referred to in their internal e-mails) to the individual code-named 'Wao' (which Chevron suspected was Cabrera).[2608]

According to the Claimants, "[t]he Banco Pichincha 1782 revealed direct evidence of the LAPs' bribery of Cabrera, including via wire transfer payments from what they described as a 'secret' bank account."[2609]

1592. The Tribunal accepts the Claimants' explanation that the Donziger Section 1782 discovery had yielded evidence of the existence of a "secret" bank account in Banco Pichincha connected to the LAPs and Mr Cabrera. This amounts to *prima facie* evidence signalling to the Claimants that seeking discovery from the Banco Pichincha was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1593. The Tribunal recalls for context the following excerpts of its Track II Award concerning the LAPs' representatives' account in Banco Pichincha:

> *3 September 2007*: . . .
>
> By now, the Lago Plaintiffs' representatives maintain a "secret" bank account at the Banco Pichincha for the purpose of making covert payments to Mr Cabrera. This was one of the accounts used by Selva Viva, an Ecuadorian legal entity controlled by certain of the Lago Agrio Plaintiffs' representatives for the purpose of the Lago Agrio Litigation. Mr Donziger is the president of Selva Viva. One of its employees involved in banking transactions, is Ms Ximera Centeno. The Lago Agrio Plaintiffs' internal documents identify her as the

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2607 Reply, fn 1412.

2608 Memorial, Appendix 25, para. 1.

2609 Memorial, Appendix 44, p. 8.

Lago Agrio Plaintiffs' librarian, receptionist and payment administrator. (As described below, Ms Centeno also made monetary deposits to Mr Guerra on behalf the Lago Agrio Plaintiffs' representatives).

12 September 2007: The Lago Agrio Plaintiffs' representatives are now paying more than US$ 100,000 to Mr Cabrera through the "secret" bank account, including a single payment of US$ 30,000.

. . .

At the RICO trial in New York, Mr Donziger testified that he could not recall "any other purpose for which this secret account was established", other than to pay Mr Cabrera.

On the evidence adduced in this arbitration, the Tribunal finds that these payments to Mr Cabrera were made corruptly as bribes by certain of the Lago Agrio Plaintiffs' representatives, including Mr Fajardo, Mr Yanza and Mr Donziger.[2610]

1594. *Conclusion on Affirmative 1782s*. For the above reasons, the Tribunal determines that the requirements of causation and reasonableness for the compensation of incidental damages under international law are met as regards the Affirmative 1782s sub-category of damages as a whole.

1595. This conclusion does not exhaust the Tribunal's analysis of the Affirmative 1782s. The Tribunal's determination that it must assess the existing evidence on damages at an appropriate level of detail[2611] requires a particularized consideration of the Claimants' damages claim in respect of each Affirmative 1782 individually, that is, as a "component" in the sense given to this term in the methodology laid out in Section VII.G.5 above.[2612] While the Parties chose not to identify individual Affirmative 1782s as "components" in their agreed list of components,[2613] the Tribunal indicated previously in its Procedural Order No. 83 that each Section 1782 Proceeding should be addressed as a component going forward.[2614]

1596. The Tribunal's analysis of components falling under the Section 1782 Proceedings category of damages is set out in Section (c) below.

[2610] Track II Award, paras. 4.299-4.303.

[2611] *See* para. 549 above.

[2612] *See* para. 552(ii) above.

[2613] *See* para. 568 above.

[2614] *See* Procedural Order No. 83, para. 8(ii): "'component' shall refer to 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.)".

2. Defensive 1782s

1597. As already noted in paragraph 1559(ii) above, the Defensive 1782s comprise thirteen 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", and Stratus.[2615]

1598. Chevron did not act as applicant or defendant in any of the Defensive 1782s. Rather, as explained by the Claimants, by participating in most of the Defensive 1782s Chevron sought to "intervene to protect applicable privileges and correct misrepresentations made by Ecuador and/or the LAPs as to the facts of the Lago Agrio Litigation".[2616] The testimony of Mr Peter Seley, a partner with the law firm Gibson Dunn & Crutcher LLP who acted as "one of the leaders of . . . the team defending the § 1782 actions filed by the Republic of Ecuador"[2617] provides further context:

> The issues being litigated in the defensive § 1782 cases centered on protection of Chevron's attorney-client privilege and attorney-work product. The Republic of Ecuador (and the LAPs) argued that all communications with Chevron's experts in the Lago Agrio Case were discoverable, regardless of who sent them and whether they revealed attorney thought processes, under a then-repealed version of the rules of procedure in United States federal courts. Chevron had to litigate those cases to avoid any waiver of privilege, a particularly important issue given the ongoing RICO litigation and the LAPs' repeated efforts to obtain privileged and protected documents.[2618]

1599. Based on the evidence on record, the Tribunal understands that the Claimants' legal spending in the Defensive 1782s was incurred in reaction to Section 1782 actions brought by Ecuador and the LAPs and *not* in reaction to concrete efforts to render the Lago Agrio

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[2615] Memorial, Appendix 44, p. 9.

[2616] Memorial, Appendix 44, p. 9. The Tribunal understands that the only Defensive 1782 in which Chevron did not intervene as an interested party was that initiated by Ecuador against Wayne Hansen, who according to the Claimants took it upon himself, together with Diego Borja, "to secretly record a series of private meetings between Judge Juan Nuñez, who was then presiding over the Lago Agrio Litigation, and remediation contractors". Memorial, Appendix 29, para. 1. The Claimants explain that "Ecuador ultimately was unable to locate and serve Hansen; accordingly, Hansen did not produce documents or sit for a deposition, and the action did not proceed further. As a result, although Chevron never entered an appearance or filed any papers in this Section 1782 proceeding, it nonetheless incurred expenses in anticipation of discovery and motion practice". Memorial, Appendix 29, para. 9. In the Tribunal's view, this set of circumstances is indicative of further remoteness between the legal fees and expenses incurred by the Claimants in connection with the Defensive 1782 against Wayne Hansen and the injury flowing from the recognition and enforcement of the unremedied Lago Agrio Judgment.

[2617] Seley Witness Statement, para. 5.

[2618] Seley Witness Statement, para. 62.

Judgment enforceable, defend its enforceability, or actually seek to enforce it.[2619] This is indicative of remoteness between the injury flowing from the Respondent's Treaty breaches and the legal fees and expenses claimed under this heading. The link between the Claimants' efforts to protect "Chevron's attorney-client privilege and attorney-work product"[2620] by intervening in the Defensive 1782s and the goal of mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment remains insufficiently explained by the Claimants. The Tribunal remains uninformed as to the precise nature of the attorney-client-privileged information and attorney-work product which, if produced to the LAPs, could have improperly contributed to their attempts to enforce the Lago Agrio Judgment. Indeed, there was nothing improper *per se* in the Respondent's decision to seek discovery from third parties connected with Chevron. The Tribunal would therefore be reluctant to grant compensation to the Claimants for the costs they incurred to intervene in discovery proceedings initiated by the Respondent against third parties. A different conclusion would create a significant hurdle for discovery actions, thus impairing the Respondent's right of access to justice.

1600. For these reasons, the Tribunal excludes from compensation the legal fees and expenses claimed by the Claimants in connection with the Defensive 1782s sub-category of damages as a whole.

3. General 1782 Work

1601. According to the Claimants, the General 1782 Work sub-category includes "fees and expenses for Section 1782-related expenses that cannot be allocated to a single 1782 action",[2621] totalling USD 9,774,728.94 in legal fees and USD 3,469,935.57 in expenses.[2622] The Claimants, in turn, sub-divide General 1782 Work into three sub-categories:

(i) "General Section 1782 Work", which, as per the Claimants, concerns "work in general preparation for and execution of Section 1782 actions that is not attributable to any specific proceeding", including (1) "[p]lanning and

[2619] *See* para. 1557 above.

[2620] Seley Witness Statement, para. 62.

[2621] Memorial, Appendix 44, p. 9.

[2622] Reply, Updated Appendix 2, p. 739.

coordinating strategy relating to the Section 1782 applications as a whole"; (2) "[f]act development, including drafting and updating factual narratives, timelines, and document/deposition summaries relevant to briefs across simultaneous Section 1782 actions"; (3) "maintaining overarching system records and effective case management procedures for efficiency and pursuing a multi-pronged discovery effort"; and (4) "coordinating global ancillary Section 1782 action support services such as e-discovery vendors and protocols for attorneys to use in reviewing documents."[2623]

(ii) "Indeterminate Section 1782 actions work", which is explained by the Claimants as follows:

> The urgency of the pending criminal charges against Chevron attorneys in Ecuador and the looming threat of the imminent issuance of the fraudulent Lago Agrio judgment necessitated work at a breakneck pace for Chevron's legal counsel. On occasion, lawyers were working on multiple Section 1782 actions simultaneously and their time cannot always be allocated to a single matter. Where, because of the timing and nature of the work, time could not be certainly allocated to a single Section 1782 action, that time has been allocated to this category.[2624]

(iii) "Efficiencies created by combining Section 1782 work", which, according to the Claimants, arise from the fact that "Chevron frequently had to simultaneously litigate many different Section 1782 actions across multiple courts and jurisdictions."[2625] For instance, in respect of the Affirmative 1782s against the so-called cleansing experts,[2626] the Claimants explain that "[b]ecause those Section 1782 actions and the targets involved had a shared background, many tasks related to these cases were combined to cover all six actions, creating efficiencies, but also leading to more general Section 1782 timekeeping."[2627] For these reasons, "[w]here a single time entry covers work done for more than one

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2623 Memorial, Appendix 44, pp. 9-10.

2624 Memorial, Appendix 44, p. 10.

2625 Memorial, Appendix 44, p. 10.

2626 *See* para. 1584 above.

2627 Memorial, Appendix 44, pp. 10-11.

specific Section 1782 action, it has been allocated to this category instead of to any of its component actions."[2628]

1602. In sum, as described by the Claimants, General 1782 Work comprises legal fees and expenses that could not be allocated to individual Section 1782 Proceedings for one of three reasons: (i) they were incurred in connection with coordination and support work underlying all Section 1782 Proceedings; (ii) at times, counsel were unable to allocate legal fees and expenses to a single Section 1782 Proceeding in real time because "[t]he urgency of the pending criminal charges against Chevron attorneys in Ecuador and the looming threat of the imminent issuance of the fraudulent Lago Agrio judgment necessitated work at a breakneck pace";[2629] or (iii) they were incurred as a result of tasks impacting multiple Section 1782 Proceedings at a time.

1603. These circumstances create significant difficulties for the Tribunal's damages assessment of the legal fees and expenses incurred by the Claimants for General 1782 Work. On the one hand, the Tribunal infers from the underlying invoices and billing records that a portion of all General 1782 Work corresponds generally to work performed in connection with the Affirmative 1782s and related coordination efforts, meaning that such work is compensable in principle.[2630] On the other hand, another portion of General 1782 Work was performed in connection with the Defensive 1782s, for which the Tribunal has determined it will not grant any compensation.[2631] The Respondent has also alerted the Tribunal to the existence of General 1782 Work entries corresponding to potentially non-compensable activities, including entries related to the Kohn and MCSquared 1782s, for which the Claimants no longer claim compensation.[2632] Overall, the Tribunal has not been presented with sufficient elements to ascertain which portion of General 1782 Work was

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[2628] Memorial, Appendix 44, p. 11.

[2629] Memorial, Appendix 44, p. 10.

[2630] *See* para. 1594 above. *See also*, *e.g.*, **C-3287.003**, Invoice Number 2011071741, row 16, 30 June 2011: "Analyze case file documents in 1782 databases identifying and analyzing key documents for evidence of contacts with Cabrera Team members. (7.8) [1782s: Gnl 1782];"; Invoice Number 2011061707B, row 67, 30 June 2011: "E-mails and telephone conferences regarding UBR and Donziger. (.5) [1782s: Gnl 1782]".

[2631] *See* para. 1600 above. *See also*, *e.g.*, **C-3287.004**, Invoice Number 2012120498, row 104, 5 December 2012: "Review Kelsh and Bjorkman filings and e-mail exchange with team regarding same. (1.2) [1782s: Gnl 1782]"; entry 110, 5 December 2012 "Compile notice of appeals for Kelsh, Mackay and Bjorkman at R. Gray's request. (.2) [1782s: Gnl 1782]". As noted at para. 1559(ii) above, Mr Bjorn Bjorkman, Dr Douglas M. Mackay, and Dr Michael A. Kelsh were defendants in the Defensive 1782s.

[2632] Rejoinder, paras. 1173, 1191-1198. *See* Reply, fn 1412.

performed in connection with compensable activities (*e.g.*, Affirmative 1782s) or, conversely, which portion formed part of other non-compensable efforts (*e.g.*, Defensive 1782s, Kohn and MCSquared 1782s).

1604. Even to the extent General 1782 Work could be deemed to correspond to work performed in connection with the Affirmative 1782s, the Claimants' own inability to fit the legal fees and expenses corresponding to General 1782 Work within specific Affirmative 1782s means that the Tribunal is unable to make precise assessments as to how the Claimants' General 1782 Work contributed to minimizing the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment in the context of each of the Affirmative 1782s. As already noted in paragraph 1595 above, the Tribunal's determination that it must assess the existing evidence on damages at an appropriate level of detail requires a particularized consideration of the Claimants' damages claim in respect of each Affirmative 1782 individually. The same holds true for any General 1782 Work performed in connection with each of the Affirmative 1782s.

1605. In fact, the Tribunal's analysis of individual Affirmative 1782s, as set out below, has resulted in the exclusion from compensation of all legal fees and expenses corresponding to several of the Affirmative 1782s.[2633] This means that any General 1782 Work connected with those proceedings would also be non-compensable.

1606. In sum, while the Claimants have established that a portion of all General 1782 Work corresponds to compensable activities, they have generally failed to meet their burden to establish the required causal link clearly and in an itemized fashion for General 1782 Work to warrant compensation as incidental damages.[2634]

1607. Having considered all of the above circumstances, and in view of the uncertainty surrounding the connection between General 1782 Work and the goal of uncovering "fraud and corruption in the Lago Agrio Litigation" by way of the Affirmative 1782s,[2635] the Tribunal assesses that 90% of the legal fees and expenses claimed in connection with

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[2633] *See* Section VIII.H.3(c) below.

[2634] *See* para. 330 above.

[2635] *See* para. 1569 above.

General 1782 Work that were incurred after 14 February 2011 must be excluded from compensation.

4. Conclusion on Section 1782 Proceedings Category

1608. In sum, for the above reasons, the Tribunal declines to exclude from compensation the Section 1782 Proceedings category of damages as a whole. However, the Tribunal excludes from compensation (i) all legal fees and expenses incurred in connection with the Defensive 1782s, as determined in paragraph 1600 above; and (ii) General 1782 Work, to the extent indicated in paragraph 1607 above.

(c) Second Step: Analysis of Incidental Damages "Components"

1609. As a second step of its analysis, the Tribunal must determine, within the Section 1782 Proceedings category, whether the Claimants have established the requirement for each individual costs "component" identified by the Parties and the Tribunal to qualify as incidental damages.[2636] 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.[2637]

1610. As stated in paragraph 1595 above, the Tribunal considers it necessary to address each of the Affirmative 1782s as a component. In addition, the Parties have also identified three components involving the legal fees and expenses incurred by the Claimants in connection with the Section 1782 Proceedings.[2638] The Tribunal has already addressed and disposed of one of those components – the Defensive 1782s.[2639]

1611. Therefore, the Affirmative 1782s are addressed *seriatim* below, followed by the two additional components falling under this category. Other issues raised by the Parties in

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[2636] *See* para. 559 above.

[2637] *See* para. 569 above.

[2638] *See* para. 568 above. The three components falling under the Section 1782 Proceedings category are: (i) "(C) Work related solely to pursuing sanctions against the LAPs' law firms / (R) Pursuing sanctions against the LAPs' law firms"; (ii) "(C) Fees and costs billed by Rivero Mestre and Covington & Burling in connection with their representation of Perez and Veiga (Rivero Mestre and Covington & Burling) / (R) Fees and costs billed by Perez and Veiga's law firms (Rivero Mestre and Covington & Burling)"; and (iii) "'Defensive' 1782s".

[2639] *See* para. 1600 above.

connection with this damages category but not expressly identified by them as a component are addressed immediately thereafter.

1612. Before embarking on its analysis of each of the Affirmative 1782s, the Tribunal clarifies that its description of the background of each of those proceedings is drawn largely from the corresponding Appendices to the Claimants' Memorial, which are largely uncontested by the Respondent as regards the underlying facts, albeit not as regards their implications for the Tribunal's current analysis. The Tribunal has also consulted extensively the case docket sheets for each of the Affirmative 1782s.

1613. The Tribunal does not purport for its summary descriptions of the Affirmative 1782s to be exhaustive or to recount those proceedings in full. They are only meant to place in context its decisions regarding the compensation of the legal fees and expenses allegedly incurred in connection with each of those proceedings. The Tribunal's analysis and decision on each of the Affirmative 1782s is identified expressly as such.

1. Allen 1782

1614. *Background*. The Claimants describe Mr Douglas Allen as "a consultant based in Vermont who was retained by the LAPs as one of their Cleansing Experts in an attempt to whitewash, or 'cleanse,' the LAPs' fraudulent ghostwriting of the reports falsely submitted by court-appointed expert Richard Stalin Cabrera Vega."[2640]

1615. Chevron filed an application on 22 October 2010 before the U.S. District Court for the District of Vermont for discovery against Mr Allen, seeking an order issuing a subpoena to obtain documents and deposition testimony to expose the LAPs' counsel wrongdoing – including, particularly documents and testimony regarding the genesis and development of Mr Allen's expert opinion in the Lago Agrio Litigation.[2641]

1616. While Mr Allen and the LAPs opposed the issuance of the subpoena,[2642] the District Court eventually granted Chevron's discovery motion in part on 2 December 2010 (as amended

[2640] Memorial, Appendix 30, para. 1. *See generally* Memorial, Appendix 30; **C-2941**, Allen 1782 Docket.

[2641] Memorial, Appendix 30, para. 5; **C-2941**, Allen 1782 Docket, ECF No. 1.

[2642] Memorial, Appendix 30, para. 6; **C-2941**, Allen 1782 Docket, ECF No. 21 (16 November 2010).

the following day).[2643] Mr Allen produced documents on 3 December 2010, 6 December 2010, 7 December 2010, 10 December 2010, 13 December 2010, 14 December 2010, and 6 January 2011.[2644] He was also deposed on 16 December 2010.[2645]

1617. According to the Claimants, Mr Allen produced documents just 36 hours before his deposition, preventing Chevron from deposing him on those documents.[2646] On 14 January 2011, Chevron filed a motion "seeking additional deposition time with Allen because of substantial gaps in Allen's discovery responses",[2647] which was opposed by Mr Allen and the LAPs through written exchanges leading to 18 February 2011.[2648]

1618. The Claimants explain that while that motion for additional deposition was pending, Chevron filed the RICO action in New York and served Allen with a subpoena in that action.[2649] The Claimants do not describe the Allen 1782 Proceedings further beyond 18 February 2011.[2650]

1619. The Claimants seek USD 425,339.95 as damages corresponding to the legal fees and expenses they allegedly incurred in connection with the Allen 1782 between September 2010 and July 2012.[2651]

1620. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2652] As gleaned from the above timeline, all key events in the Allen 1782 took place before 14 February 2011: Chevron's discovery application was granted on 19 November 2010, while all production, as well as Mr Allen's deposition, had taken place by 6 January 2011.

[2643] **C-2941**, Allen 1782 Docket, ECF Nos. 38-39.

[2644] Memorial, Appendix 30, p. 8.

[2645] Memorial, Appendix 30, para. 10.

[2646] Memorial, Appendix 30, para. 9; **C-2941**, Allen 1782 Docket, ECF No. 52 (14 January 2011).

[2647] Memorial, Appendix 30, p. 10; **C-2941**, Allen 1782 Docket, ECF No. 52.

[2648] Memorial, Appendix 30, p. 10; **C-2941**, Allen 1782 Docket, ECF No. 54 (31 January 2011).

[2649] Memorial, Appendix 10, p. 11.

[2650] Memorial, Appendix 30, p. 10.

[2651] Reply, Updated Appendix 2, p. 1019.

[2652] *See* para. 1565 above.

The docket sheet for the Allen 1782 records the exchange of further written briefs on Chevron's 14 January 2011 application for additional deposition time, ending in May 2011, but does not indicate whether or how the District Court ruled on that application.[2653]

1621. While the Claimants claim compensation for legal fees and expenses incurred until July 2012, the Tribunal has not been informed of the outcome of Chevron's 14 January 2011 application for additional deposition time and is also unaware of whether additional discovery took place after that date. Thus, the Tribunal is not in a position to determine whether the Claimants' continued pursuit of the Allen 1782 after 14 February 2011 – to the limited extent such pursuit actually took place – was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1622. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Allen 1782s before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Allen 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Allen 1782 are excluded from compensation.

2. Banco Pichincha 1782

1623. *Background*. The Claimants describe Banco Pichincha as "the bank the LAPs' counsel used to fund bribery payments in the Lago Agrio Litigation."[2654] As explained by the Claimants:

> The LAPs' counsel maintained their self-designated "secret account" used, among other things, to fund bribery payments to Mr. Cabrera at Banco Pichincha, at an Ecuadorian bank which maintains a branch in Miami, Florida. Prior to the filing the Banco Pichincha 1782 [sic] and based in large part on Donziger 1782 discovery, Chevron had determined that more than US$ 100,000 in payments appeared to have been made from the LAPs' "secret account" (as it was referred to in their internal e-mails) to the individual code-named, "Wao" (which Chevron suspected was Cabrera). In his 1782 deposition, Donziger claimed

[2653] **C-2941**, Allen 1782 Docket, ECF No. 61 (9 May 2011).

[2654] Memorial, Appendix 25, para. 1. *See generally* Memorial, Appendix 25; **C-2935**, Banco Pinchincha 1782 Docket; **C-2937**, Banco Pichincha 1782 Court of Appeals Docket.

"not to recall" the meaning of the code words used in his e-mail communications nor would he confirm the occurrence, timing or amounts of any payments made to Mr. Cabrera.[2655]

1624. According to the Claimants, Chevron filed an application on 22 December 2011 before the U.S. District Court for the Southern District of Florida seeking an order for the issuance of a subpoena to Banco Pichincha "for deposition testimony and the production of all records related to the 'secret account' and other accounts maintained by the LAPs, including those known to be used by the LAPs' counsel, as well as any other documents in the bank's possession associated with the LAPs, their counsel, or their representatives."[2656]

1625. Banco Pichincha and the LAPs opposed the issuance of the subpoena – as defendant and intervening parties, respectively. However, on 11 June 2012 the Magistrate Judge recommended that the application be granted and the subpoena be issued.[2657] The District Court concluded that "Chevron has obtained mounds of evidence, in multiple § 1782 proceedings, that suggests that the judgment itself was also ghostwritten."[2658]

1626. While Banco Pichincha continued to resist production, it eventually produced approximately 6,600 pages of documents between 1 May and 17 May 2013.[2659]

1627. The Claimants seek USD 1,688,229.70 as damages corresponding to the legal fees and expenses they allegedly incurred in connection with the Banco Pichincha 1782 between August 2010 and June 2017.[2660]

1628. *Analysis and decision*. At the outset, the Tribunal observes that the entirety of the Banco Pichincha 1782 proceedings took place after 14 February 2011, which, as explained above, is the critical date for the compensation of incidental damages in this Arbitration.[2661] However, some preparatory work appears to have taken place before that

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2655 Memorial, Appendix 25, para. 1; **C-2935**, Banco Pichincha 1782 Docket, ECF Nos. 1 (22 December 2011), 5 (23 December 2011).

2656 Memorial, Appendix 25, para. 2; **C-2935**, Banco Pichincha 1782 Docket, ECF No. 23 (25 January 2012.

2657 Memorial, Appendix 25, para. 4; **C-2935**, Banco Pichincha 1782 Docket, ECF No. 82 (11 June 2012).

2658 Memorial, Appendix 25, para. 4; **C-2935**, Banco Pichincha 1782 Docket, ECF No. 82 (11 June 2012).

2659 Memorial, Appendix 25, para. 9.

2660 Reply, Updated Appendix 2, pp. 893-904.

2661 *See* para. 1565 above.

date, starting in August 2010.[2662] As already determined by the Tribunal, all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable.[2663]

1629. Furthermore, as gleaned from the above timeline, all key events in the Banco Pichincha 1782 had taken place by 17 May 2013, by which date Banco Pichincha had completed its document production. The Claimants have failed to explain why they incurred legal fees and expenses after that date and ending in June 2017.[2664] The Tribunal is prepared to grant compensation for work performed until 31 July 2013 on account of the need for Chevron to review and analyse the discovery obtained in the Banco Pichincha 1782,[2665] but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 31 July 2013.

1630. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 31 July 2013 in connection with the Banco Pichincha 1782 are compensable in this Arbitration. As explained in paragraph 1592 above, the Tribunal accepts the Claimants' explanation that the Donziger 1782 discovery had yielded evidence of the existence of a "secret" bank account in Banco Pichincha connected to the LAPs and Mr Cabrera. This amounts to *prima facie* evidence signalling to the Claimants that seeking discovery from the Banco Pichincha was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was therefore reasonable for the Claimants to pursue the Banco Pichincha

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[2662] Reply, Updated Appendix 2, p. 893.

[2663] *See* para. 1565 above.

[2664] Reply, Updated Appendix 2, pp. 902-904.

[2665] The Tribunal also notes that the last entry recorded in the docket sheets for the Banco Pichincha 1782 is dated 19 July 2013: "ORDER of Dismissal from USCA, pursuant to Appellant Banco Pichincha motion for voluntary dismissal, was dismissed on July 19, 2013 as to 137 Notice of Appeal,, filed by Banco Pichincha, 157 Notice of Appeal,, filed by Banco Pichincha, USCA # 13- 11049-FF; 13-11611-FF (hh) (Entered: 07/19/2013)". **C-2935**, Banco Pichincha 1782 Docket, ECF No. 183 (19 July 2013). *See also* **C-2937**, Banco Pichincha 1782 Court of Appeals Docket, p. 4 (19 July 2013).

1782 as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2666]

1631. For these reasons, the Tribunal determines that the Claimants should receive compensation for the legal fees and expenses they incurred in connection with the Banco Pichincha 1782 between 14 February 2011 and 31 July 2013.

3. Barnthouse 1782

1632. *Background*. The Claimants describe Mr Lawrence W. Barnthouse as "a consultant based in Hamilton, Ohio who was retained by the LAPs as one of their Cleansing Experts in an effort to whitewash the so-called Cabrera Fraud."[2667] As explained by the Claimants:

> In that role, Barnthouse signed an expert report filed by the LAPs in Lago Agrio Litigation. Barnthouse's report concluded that Chevron should be responsible for damages ranging from $1.42 million to $874.5 million for alleged losses of natural resources in the oil concession area in Ecuador, despite the fact that Barnthouse never visited Ecuador or the purportedly contaminated area. Instead, Dr. Barnthouse's opinion was not derived from original, untainted work, but instead relied almost entirely on the discredited report of Richard Stalin Cabrera Vega, a purportedly independent expert appointed by the Ecuadorian court, who made a $27 billion fraudulent "damage assessment" against Chevron. That Barnthouse report was part of the LAPs' efforts to "cleanse" the Cabrera Report by submitting new damages reports to justify and substantiate a large damages award against Chevron without directly relying on the assessment in the Cabrera Report.[2668]

1633. Chevron filed an application on 22 October 2010 before the U.S. District Court for the Southern District of Ohio for an order allowing Chevron to serve a subpoena on Mr Barnthouse to take his deposition and obtain his documents.[2669]

1634. The Claimants explain that Mr Barnthouse and the LAPs objected to Chevron's subpoena.[2670] However, on 26 November 2010 the District Court granted the Barnthouse 1782 and ordered Chevron to modify its proposed subpoena.[2671]

[2666] *See* para. 1573 above.

[2667] Memorial, Appendix 31, para. 1. *See generally* Memorial, Appendix 31; **C-2897**, Barnthouse 1782 Docket.

[2668] Memorial, Appendix 31, para. 1.

[2669] Memorial, Appendix 31, para. 5; Barnthouse 1782 Docket, ECF No. 1.

[2670] Memorial, Appendix 31, para. 6.

[2671] **C-2897**, Barnthouse 1782 Docket, ECF No. 36.

1635. According to the Claimants, Mr Barnthouse produced over 2,400 pages of documents on 1 December 2010.[2672] He was also deposed on 10 December 2010.[2673]

1636. The Claimants seek USD 200,485.99 as damages corresponding to the legal fees and expenses they allegedly incurred in connection with the Barnthouse 1782 between July 2010 and March 2012.[2674]

1637. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2675] As gleaned from the above timeline, all key events in the Barnthouse 1782 took place before 14 February 2011: Chevron's discovery application was granted on 26 November 2010, while all production, as well as Mr Barnthouse's deposition, had taken place by 10 December 2010.

1638. The Tribunal has not been informed of further developments in the Barnthouse 1782 after that date.[2676] Thus, the Tribunal is not in a position to determine whether the Claimants' continued pursuit of the Barnthouse 1782 after 14 February 2011 – to the limited extent such pursuit actually took place – was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1639. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Barnthouse 1782s before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Barnthouse 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Barnthouse 1782 are excluded from compensation.

[2672] Memorial, Appendix 31, para.6.

[2673] Memorial, Appendix 31, para. 6; **Exhibit C-899**, *Chevron Corp. v. Barnthouse*, Civil Action No. 1:10-MC-00053-SSB-KLL (D. Ohio), Deposition Lawrence W. Barnthouse, Dec. 10, 2010.

[2674] Reply, Updated Appendix 2, pp. 1047-1048.

[2675] *See* para. 1565 above.

[2676] *See generally* Memorial, Appendix 31; **C-2897**, Barnthouse 1782 Docket.

4. Berlinger 1782

1640. *Background*. The Claimants describe Mr Joseph Berlinger as "a filmmaker and producer, best known for his documentary films."[2677] As explained by the Claimants:

> In 2005, Steven Donziger, the LAPs' lead U.S. counsel, solicited Berlinger to make a film depicting the Lago Agrio Litigation from the perspective of Donziger and the LAPs and assisted in arranging financing for the film. Berlinger accepted, and for the next three years, Berlinger's film crew shadowed the LAPs' lawyers, filmed the events surrounding the trial, and compiled more than 600 hours of raw footage, which was ultimately used to create the film, *Crude: The Real Price of Oil*. According to its press package, *Crude* "capture[d] the evidentiary phase of the Lago Agrio trial, including field inspections and the appointment of independent expert Richard Cabrera to assess the region." In reality, however, the result was commissioned by Donziger to serve as propaganda for himself and the LAPs, and to pressure Chevron into settlement by manipulating public opinion.
>
> On April 9, 2010, after considerable time conducting research and preparation, and after carefully considering the issues to be raised in an action against a well-known documentary film-maker, Chevron filed a petition in the U.S. District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1782 (In In re Application of Chevron Corporation, No. M-19-111 (S.D.N.Y.)), seeking to obtain from Berlinger and his affiliates the "outtakes" (i.e., the more than 600 hours of video not contained in the movie itself) shot by Berlinger and his affiliates in connection with the filming of *Crude*. On the same day, Chevron employee Ricardo Reis Veiga and outside counsel Rodrigo Perez Pallares, who each faced retaliatory, sham criminal charges in Ecuador for their role in defending the Company, filed a parallel Section 1782 Application.[2678]

1641. In sum, on 9 April 2010, Chevron, as well as Mr Veiga and Dr Pérez, filed two parallel Section 1782 applications before the U.S. District Court for the Southern District of New York to obtain discovery from Mr Berlinger – seeking, in particular, the outtakes of the film *Crude*.[2679]

1642. The Claimants assert that Mr Berlinger and the LAPs opposed the Section 1782 applications by arguing, *inter alia*, that the *Crude* outtakes were subject to journalist privilege and that the discovery would undermine the Ecuadorian proceedings.[2680]

[2677] Memorial, Appendix 14, para. 1. *See generally* Memorial, Appendix 14; **C-3048**, Berlinger 1782 Docket; **C-3049**, Berlinger 1782 Docket; **C-3093a**, In re Application of Chevron Corporation, Case No. M19-111 (SDNY), Memorandum Opinion (Corrected), 20 May 2010.

[2678] Memorial, Appendix 14, paras. 1-2.

[2679] Memorial, Appendix 14, para. 2; **C-3049**, Berlinger 1782 Docket, ECF No. 4.

[2680] Memorial, Appendix 14, para. 4; **C-3093a**, *In re Application of Chevron Corporation*, Case No. M19-111 (SDNY), Memorandum Opinion (Corrected), 20 May 2010.

1643. On 10 May 2010, the District Court ordered the production of the *Crude* outtakes.[2681] After several motions and appeals, Mr Berlinger eventually produced certain *Crude* footage following a 15 July 2010 order from the Second Circuit.[2682]

1644. On 3 August 2010, Chevron requested additional discovery from Mr Berlinger, including, among others: (i) communications with the LAPs and Ecuadorian officials; (ii) directions by the LAPs to stop filming; and (iii) what Berlinger saw and heard after the camera stopped filming.[2683] The application for additional discovery was granted on 7 September 2010.[2684] Thus, after the filing of several motions to compel Mr Berlinger to comply with the court's orders, Mr Berlinger produced the original footage log, back up tapes, and a revised privilege log, among others.[2685]

1645. Mr Berlinger was eventually deposed on 28 October 2010, 5 November 2010, 6 November 2010, and 10 March 2011.[2686] Mr Michael Bonfiglio, who the Claimants describe as an associate of Mr Berlinger, was also deposed in connection with the Berlinger 1782 on 23 November 2010, 30 November 2010, 2 December 2010, and 12 January 2011.[2687] The last event recorded by the Claimants in their timeline of the Berlinger 1782 is an order issued by the District Court on 8 November 2015 denying a motion for reconsideration that had been filed by the LAPs on 14 September 2010.

[2681] Memorial, Appendix 14, para. 5; **C-3093a**, *In re Application of Chevron Corporation*, Case No. M19-111 (SDNY), Memorandum Opinion (Corrected), 20 May 2010, p. 2.

[2682] Memorial, Appendix 14, paras. 6-9; **Exhibit C-3049**, Berlinger 1782 Docket, ECF No. 45; **C-3075**, Berlinger 1782 Court of Appeals Docket; **C-3076**, Berlinger 1782 Court of Appeals Docket, ECF Nos. 8, 68, 187, 278.

[2683] Memorial, Appendix 14, para. 10.

[2684] Memorial, para. 10, p. 21; **C-649**, Order, *In re Application of Chevron Corp.*, No. 10-mc-00001 (SDNY), 7 September 2010.

[2685] Memorial, Appendix 14, para. 10.

[2686] Memorial, Appendix 14, para. 19, pp. 21, 23; **C-3047**, Berlinger Deposition, 28 October 2010, Vol. 1; **C-3050**, In re Application of Chevron, SDNY, Case No. 10 MC 00001, Joseph Berlinger Deposition Transcript, 5 November 2010; **C-3055**, In re Chevron, SDNY, Case. No. 10 MC 0001, Berlinger Deposition Transcript, 6 November 2010; **C-3056**, In re Chevron, SDNY, Case. No. 10 MC 0001, Berlinger Deposition Transcript, 10 March 2011.

[2687] Memorial, para. 19, p. 22; **C-3057**, In re Chevron, SDNY, Case. No. 10 MC 0001, Deposition of Michael Bonfiglio, 23 November 2010; **C-3058**, In re Chevron, SDNY, Case. No. 10 MC 0001, Deposition of Michael Bonfiglio, 30 November 2010; **C-3059**, In re Chevron, SDNY, Case. No. 10 MC 0001, Deposition of Michael Bonfiglio, 2 December 2010; **C-3100**, In re Application of Chevron Corporation, Case No. 10-mc-00001 (LAK) Michael Bonfiglio Deposition, 12 January, 2011, Vol. 4.

1646. According to the Claimants, "Berlinger eventually produced hundreds of hours of raw *Crude* footage and approximately 249,000 pages of documents", all of which, in the Claimants' submission, were reviewed by with the help of Spanish-speaking attorneys and technical consultants for transcription, subtitling, and coding for filing.[2688]

1647. The Claimants seek USD 5,449,152.86 and USD 2,097.55 as damages corresponding, respectively, to the legal fees and expenses they allegedly incurred in connection with the Berlinger 1782 between August 2009 and February 2016.[2689]

1648. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2690] In respect of work performed in connection with the Berlinger 1782 after 14 February 2011, the Tribunal has determined in paragraph 1589 above that the Claimants were in possession of *prima facie* evidence signalling that seeking discovery from Mr Berlinger, Netflix, and any other individual or entity connected with the film *Crude* was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. The Tribunal has also determined in paragraph 1571 above that it is prepared to grant a certain level of deference to the Claimants' decisions as to which Affirmative 1782s to initiate and when to stop pursuing them.

1649. Thus, despite the fact that the Berlinger 1782 was initiated before the critical date of 14 February 2011, the Tribunal determines that it was reasonable for the Claimants to continue pursuing those proceedings after that date as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2691] The Tribunal observes in this respect that the evidence obtained by the Claimants after 14 February 2011 includes, *inter alia*, Mr Berlinger's 10 March 2011

[2688] Memorial, Appendix 14, para. 18.

[2689] Reply, Updated Appendix 2, pp. 807-822.

[2690] *See* para. 1565 above.

[2691] *See* para. 1573 above.

deposition.[2692] The case continued to be active until at least 8 November 2015, at which time the District Court issued an order denying a motion for reconsideration.[2693]

1650. Lastly, the Tribunal has taken note of the Respondent's argument that the Netflix 1782 sought discovery of the same materials as the Berlinger 1782 and that, accordingly, any duplicative work should be excluded from compensation.[2694] In view of the Tribunal's decision (below) to deny compensation for the Netflix 1782, this argument has been rendered moot.[2695]

1651. For these reasons, the Tribunal determines that the Claimants should receive compensation for the legal fees and expenses they incurred in connection with the Berlinger 1782 after 14 February 2011.

1652. To the extent that the legal fees and expenses claimed by the Claimants under this heading may relate to the representation of Mr Veiga and Dr Pérez, they are addressed separately in Section VIII.K below.

5. Bonifaz 1782

1653. *Background*. The Claimants assert that Mr Cristobal Bonifaz "served as a member of the LAPs legal team from 2003 to 2006 . . . [and] assisted in the initiation of the Lago Agrio lawsuit in 2003. Although Bonifaz was fired from the LAPs' legal team in 2006, he continued to maintain an economic interest in the case, and materials Chevron obtained through other Section 1782 Petitions revealed that he may have continued to coordinate with the LAPs' counsel even after his dismissal".[2696]

1654. On 19 November 2010 Chevron, as well as Mr Veiga and Dr Pérez filed two parallel Section 1782 actions before the U.S. District Court for the District of Massachusetts seeking an order granting leave to serve a subpoena seeking documents and deposition

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2692 Memorial, Appendix 14, para. 19; **C-3047**, Berlinger Deposition, 28 October 2010, Vol. 1; **C-3050**, In re Application of Chevron, SDNY, Case No. 10 MC 00001, Joseph Berlinger Deposition Transcript, 5 November 2010; **C-3055**, In re Chevron, SDNY, Case. No. 10 MC 0001, Berlinger Deposition Transcript, 6 November 2010; **C-3056**, In re Chevron, SDNY, Case. No. 10 MC 0001, Berlinger Deposition Transcript, 10 March 2011.

2693 Memorial, Appendix 14, p. 23.

2694 Counter-Memorial, para. 510.

2695 *See* para. 1718 below.

2696 Memorial, Appendix 23, para. 1. *See generally* Memorial, Appendix 23; **C-2931**, Bonifaz 1782 Docket.

testimony from Mr Bonifaz.[2697] The two actions were later consolidated upon Mr Bonifaz's motion without opposition by Mr Veiga and Dr Pérez.[2698]

1655. The Claimants explain that Mr Bonifaz himself did not oppose the 1782 applications, but both the LAPs and Ecuador filed separate memoranda in opposition and in partial opposition to the applications, respectively.[2699]

1656. The District Court granted Chevron's 1782 application on 22 December 2010 in part with respect to the Lago Agrio Litigation and denied the application without prejudice as regards this Arbitration.[2700]

1657. The Claimants state that Mr Bonifaz produced 11,566 pages of documents. He was also deposed on 30 December 2010 by counsel for Mr Veiga and Dr Pérez, followed by counsel for Chevron on 25 March 2011.[2701] The case was eventually dismissed on 6 May 2011.[2702]

1658. The Claimants seek USD 809,822.58 and USD 82.00 corresponding, respectively, to the legal fees and expenses they allegedly incurred in connection with the Bonifaz 1782 between September 2009 and October 2013.[2703]

1659. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2704]

1660. Furthermore, as gleaned from the above timeline, all key events in the Bonifaz 1782 had taken place by 6 May 2011. The Claimants have failed to explain why they incurred legal

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2697 Memorial, Appendix 23, para. 2; **C-2931**, Bonifaz 1782 Docket, ECF No. 1; **Exhibit C-2932**, Veiga/Perez Bonifaz 1782 Docket, ECF No. 1.

2698 Memorial, Appendix 23, para. 2. *See* **C-2931**, Bonifaz 1782 Docket, ECF Nos. 13 (29 November 2010), 32 (9 December 2010).

2699 Memorial, Appendix 23, para. 8. *See* **C-2931**, Bonifaz 1782 Docket, ECF Nos. 23 (7 December 2010), 26 (7 December 2010).

2700 Memorial, Appendix 23, para. 11. *See* **C-2931**, Bonifaz 1782 Docket, p. 8.

2701 Memorial, Appendix 23, para. 15.

2702 **C-2931**, Bonifaz 1782 Docket, ECF No. 61.

2703 Reply, Updated Appendix 2, pp. 981-990.

2704 *See* para. 1565 above.

fees and expenses after that date and ending in October 2013. The Tribunal is prepared to grant compensation for work performed until 31 May 2011 on account of the need for Chevron to perform closing tasks after the case was dismissed, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 31 May 2011.

1661. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 31 May 2011 in connection with the Bonifaz 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1578 above that by 14 February 2011 the Claimants were in possession of *prima facie* evidence signalling that seeking discovery from the LAPs' then-current and former U.S.-based counsel, including Mr Bonifaz, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue pursuing those proceedings after that date as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2705]

1662. Furthermore, the Tribunal has taken note of the Respondent's argument that Chevron treated the Bonifaz 1782 as an opportunity to relitigate the Lago Agrio Litigation by submitting extensive briefs and exhibits.[2706] The Tribunal, however, does not consider it necessary to opine on the substance or magnitude of the Claimants' submissions in those proceedings. It is not appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the Affirmative 1782s.[2707]

1663. Lastly, the Tribunal has also taken note of the Respondent's argument that the Bonifaz 1782 "was duplicative of a prior suit that Chevron had brought against Bonifaz in

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[2705] *See* para. 1573 above.

[2706] Counter-Memorial, para. 689.

[2707] *See* para. 341 above. In any event, it appears that the submissions criticised by the Respondent were filed by Chevron prior to 14 February 2011, meaning that any costs they may have generated have already been determined to fall outside the scope of compensable injury. *See* **R-1802**, *In re The Application of Chevron Corporation*, D. Mass. Case 3:10-mc-30022-MAP, D.E. 47 Memorandum with Regard to Applications for Discovery, 22 December 2010, p. 4.

California for malicious prosecution".[2708] In the Tribunal's view, the Respondent has not sufficiently informed the Tribunal regarding the particulars of Chevron's prior suit, or the discovery it might have obtained in those proceedings. The Tribunal is therefore unable to conclude that Chevron's efforts in each of those actions were duplicative. Accordingly, the Tribunal rejects this argument.

1664. For these reasons, the Tribunal determines that the Claimants should receive compensation for the legal fees and expenses they incurred in connection with the Bonifaz 1782 between 14 February 2011 and 31 May 2011.

1665. To the extent that the legal fees and expenses claimed by the Claimants under this heading may relate to the representation of Mr Veiga and Dr Pérez, they are addressed separately in Section VIII.K below.

6. Calmbacher 1782

1666. *Background*. As described by the Claimants, "Dr. Charles William Calmbacher served as a Judicial Inspection expert for the LAPs in the Lago Agrio Litigation. The LAPs hired him in the summer of 2004 to serve as a Judicial Inspection expert for four sites, although he ultimately only inspected two."[2709]

1667. On 19 February 2010, Chevron filed an *ex parte* application in the United States District Court for the Northern District of Georgia seeking document discovery and a deposition from Dr Calmbacher.[2710] According to the Claimants, Chevron's application was based on evidence that two reports filed under Dr Calmbacher's name asserting a $27 billion "damage assessment" might have been forged.[2711]

[2708] Counter-Memorial, para. 514; **R-1793**, *Chevron Corp. v. Cristóbal Bonifaz* N.D. Cal. Case 4:09-cv-05371-CW, D.E. 70 Order, 8 October 2010.

[2709] Memorial, Appendix 12, para. 1 (internal citations omitted). *See generally* Memorial, Appendix 12; **C-2837**, Calmbacher 1782 Docket.

[2710] Memorial, Appendix 12, para. 2; **C-2837**, Calmbacher 1782 Docket, ECF No. 1.

[2711] Memorial, Appendix 12, para. 3.

1668. The Claimants state that the District Court granted Chevron's application on 2 March 2010.[2712] Dr Calmbacher produced 249 pages of documents on 24 March 2010 and appeared for his deposition on 29 March 2010.[2713]

1669. The Claimants seek USD 373,234.24 as damages corresponding to the legal fees and expenses they allegedly incurred in connection with the Calmbacher 1782 between September 2009 and January 2013.[2714]

1670. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2715] As gleaned from the above timeline, all key events in the Calmbacher 1782 took place before 14 February 2011: Chevron's discovery application was granted on 2 March 2010, while all production, as well as Mr Calmbacher's deposition, had taken place by 29 March 2010.

1671. While the Claimants claim compensation for legal fees and expenses incurred until January 2013, the Tribunal is not sufficiently informed as to whether additional discovery took place after 29 March 2010. Thus, the Tribunal is not in a position to determine whether the Claimants' continued pursuit of the Calmbacher 1782 after 14 February 2011 – to the limited extent such pursuit actually took place – was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1672. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Calmbacher 1782 before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Calmbacher 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Calmbacher 1782 are excluded from compensation.

2712 Memorial, Appendix 12, para. 3. *See* **C-2837**, Calmbacher 1782 Docket, ECF No. 5.

2713 Memorial, Appendix 12, p. 6.

2714 Reply, Updated Appendix 2, pp. 1029-1033.

2715 *See* para. 1565 above.

7. Champ 1782

1673. *Background*. The Claimants describe Mr Charles W. Champ Sr. as "an environmental consultant located in Asheville, North Carolina who participated in the Cabrera Fraud by authoring portions of [the Cabrera Report] that a supposedly independent court-appointed expert in the Lago Agrio Litigation, Richard Stalin Cabrera Vega, falsely claimed to have drafted."[2716]

1674. On 16 August 2010, Chevron filed an application before the U.S. District Court for the Western District of North Carolina for an order granting leave to serve a subpoena seeking documents and deposition testimony from Mr Champ.[2717] Mr Veiga and Dr Pérez also filed a Section 1782 application seeking discovery from Champ in aid of the then-pending Criminal Proceedings.[2718]

1675. Mr Champ filed a response to Chevron's application.[2719] The Magistrate Judge later granted Chevron's application on 30 August 2010.[2720] Mr Champ filed an appeal to the District Court's order and a motion to stay,[2721] both of which were denied.[2722]

1676. According to the Claimants, Mr Champ produced 7,744 pages of responsive documents on 1 September, 2 September, and 8 September 2010.[2723] He was deposed by Chevron on 9 and 10 September 2010.[2724] The last event recorded by the Claimants in their timeline of the Champ 1782 is a decision issued by the District Court on 30 November 2010 denying Mr Champ's appeal of the order granting Chevron's application.[2725]

2716 Memorial, Appendix 20, para. 1. *See generally* Memorial, Appendix 20; **C-2928**, Champ 1782 Docket.

2717 **C-2928**, Champ 1782 Docket, ECF No. 1.

2718 Memorial, Appendix 20, para. 3.

2719 **C-2928**, Champ 1782 Docket, ECF No. 20 (24 August 2010).

2720 Memorial, Appendix 20, para. 6; **C-2928**, Champ 1782 Docket, ECF No. 26.

2721 Memorial, Appendix 20, para. 8; **C-2928**, Champ 1782 Docket, ECF Nos. 27 (30 August 2010), 28 (30 August 2010).

2722 Memorial, Appendix 20, para. 8; **C-2928**, Champ 1782 Docket, ECF Nos. 32 (31 August 2010); 54 (31 November 2010).

2723 Memorial, Appendix 20, p. 9.

2724 Memorial, Appendix, p. 9.

2725 Memorial, Appendix 20, p. 10; **C-2928**, Champ 1782 Docket, ECF No. 54.

1677. The Claimants seek USD 426,543.86 as damages corresponding to the legal fees and expenses they allegedly incurred in connection with the Champ 1782 between July 2010 and November 2014.[2726]

1678. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2727] As gleaned from the above timeline, all key events in the Champ 1782 took place before 14 February 2011: Chevron's discovery application was granted on 30 August 2010, while all production, as well as Mr Champ's deposition, had taken place by 10 September 2010.

1679. The Tribunal has not been informed of further significant developments in the Champ 1782 after 30 November 2010.[2728] Thus, the Tribunal is not in a position to determine whether the Claimants' continued pursuit of the Champ 1782 after 14 February 2011 – to the limited extent such pursuit actually took place – was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation.

1680. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Champ 1782s before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Champ 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Champ 1782 are excluded from compensation.

[2726] Reply, Updated Appendix 2, pp. 1014-1017.

[2727] *See* para. 1565 above.

[2728] Memorial, Appendix 20, p. 10; **C-2928**, Champ 1782 Docket, ECF No. 54. The docket sheet for the Champ 1782 records a single event taking place after 30 November 2010, dated 6 May 2015, described as "CLERK'S NOTICE of return to the filing Attorney of the Electronic Exhibit X - CD of excerpts from unreleased footage from the movie CRUDE filed with the Court, Attachment # 4 to Doc. 51 Declaration filed by Chevron Corporation. (ejb)". **C-2928**, Champ 1782 Docket, ECF No. 55. This entry refers to a notice issued by the District Court clerk and is not indicative of any action taken by Chevron in the Champ 1782 at the time.

8. Donziger 1782

1681. *Background*. The Claimants describe Mr Steven Donziger as "the lead U.S. lawyer for the LAPs who resides in New York, [and who] was the mastermind of the fraudulent scheme to procure through corrupt means the Lago Agrio Judgment against Chevron."[2729]

1682. On 4 August 2010, Chevron filed a petition with the U.S. District Court for the Southern District of New York seeking the Court's authorization to issue subpoenas to take discovery from Mr Donziger.[2730] Mr Veiga and Dr Pérez also filed a Section 1782 application seeking discovery from Mr Donziger in aid of the then-pending Criminal Proceedings.[2731]

1683. On 6 August 2010, the District Court granted the discovery petitions, subject to Mr Donziger's right to quash the subpoenas.[2732] Mr Donziger, the LAPs, and Ecuador all appeared in the proceeding through counsel.[2733] On 27 August 2010, Mr Donziger and the LAPs filed separate motions to quash the subpoenas.[2734] These motions to quash were denied by the District Court on 20 October 2010, at which point the Court also appointed a Special Master to supervise Mr Donziger's deposition and to issue preliminary rulings on any objections during the course of the deposition.[2735] After the filing of additional motions (regarding, in particular, Mr Donziger's assertions of privilege), an oral hearing and an appeal on the order of the District Court by Mr Donziger and the LAPs, on 30 November 2010 the District Court ordered Mr Donziger to produce all documents responsive to the subpoenas regardless of any claimed privilege, while the Second Circuit affirmed in full the orders of the District Court on 12 December 2010.[2736]

[2729] Memorial, Appendix 21, para. 1. *See generally* Memorial, Appendix 21; **C-3027**, Donziger 1782 Docket.

[2730] Memorial, Appendix 21, para. 3.

[2731] Memorial, Appendix 21, para. 3.

[2732] Memorial, Appendix 21, para. 3; **C-3027**, Donziger 1782 Docket, ECF No. 2.

[2733] Memorial, Appendix 21, para. 6. *See also* **C-3027**, Donziger 1782 Docket, pp. 1-5.

[2734] Memorial, Appendix 21, para. 6; **C-3027**, Donziger 1782 Docket, ECF Nos. 23, 27.

[2735] Memorial, Appendix 21, para. 9; **C-3027**, Donziger 1782 Docket, ECF No. 86.

[2736] Memorial, Appendix 21, paras. 10-13; **C-3027**, Donziger 1782 Docket, ECF Nos. 88 (25 October 2010), 105 (17 November 2010), 113 (19 November 2010), 124 (30 November 2010); **C-3029**, *Lago Agrio Plaintiffs v. Chevron Corp.*, 409 F. App'x 393 (2d Cir. 2010), p. 395.

1684. Earlier, on 19 November 2010, Ecuador had filed a Notice of Appearance in the District Court, but the District Court denied it as untimely.[2737]

1685. According to the Claimants, Mr Donziger was deposed on 29 November 2010, 1 December 2010, 8 December 2010, 10 December 2010, 13 December 2010, 22 December 2010, 23 December 2010, 29 December 2010, 8 January 2011, 14 January 2011, 15 January 2011, 18 January 2011, 19 January 2011, 29 January 2011, 31 January 2011, 23 March 2011, and 19 July 2011.[2738]

1686. On 10 January 2011, Chevron filed a motion for an order to show cause to hold Mr Donziger in contempt for failing to produce all responsive documents, leading the District Court to issue further document production orders.[2739] On 29 August 2011, Chevron filed a supplemental memorandum of law in further support of its application to hold Mr Donziger in contempt for failing to produce all responsive documents in his control, including documents in the possession of Mr Andrew Woods, Ms Laura Garr, and Mr Joseph Kohn.[2740] Eventually, on 8 May and 22 May 2013, the District Court signed stipulations submitted by parties including Chevron, Mr Donziger, Ms Garr, and Mr John that allowed Chevron to review certain documents in the possession of Ms Garr, Mr Kohn, and Mr Kohn's law firm.[2741]

1687. The Claimants seek USD 11,824,059.31 and USD 719.04 corresponding, respectively, to the legal fees and expenses they allegedly incurred in connection with the Donziger 1782 between November 2009 and March 2018.[2742]

2737 Memorial, Appendix 21, para. 12; **C-3027**, Donziger 1782 Docket, ECF Nos. 113 (19 November 2010), 123 (29 November 2010).

2738 Memorial, Appendix 21, pp. 16-19.

2739 Memorial, Appendix 21, para. 15; **C-3027**, Donziger 1782 Docket, ECF Nos. 147 (10 January 2011), 161 (13 January 2010).

2740 Memorial, Appendix 21, para. 16; **C-3027**, Donziger 1782 Docket, ECF No. 204.

2741 Memorial, Appendix 21, para. 16; **C-3027**, Donziger 1782 Docket, ECF Nos. 208, 211.

2742 Reply, Updated Appendix 2, p. 784-805.

1688. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2743]

1689. Furthermore, as gleaned from the above timeline, all key events in the Donziger 1782 had taken place by May 2013, by which date Chevron gained access to documents in the possession of Ms Garr, Mr Kohn, and Mr Kohn's law firm. The Claimants have failed to explain why they incurred legal fees and expenses after that date and ending in March 2018. The Tribunal is prepared to grant compensation for work performed until 31 July 2013 on account of the need for Chevron to review and analyse the discovery obtained in the Donziger 1782, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law.[2744] Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 31 July 2013.

1690. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 31 July 2013 in connection with the Donziger 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1578 above that by 14 February 2011 the Claimants were in possession of *prima facie* evidence signalling that seeking discovery from the LAPs' then-current and former U.S.-based counsel – including, in particular, Mr Donziger – was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue to seek discovery from Mr Donziger as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2745]

[2743] *See* para. 1565 above.

[2744] The docket sheet for the Donziger 1782 records only two events taking place after May 2013, described as "C ORDER terminating 78 Motion (HEREBY ORDERED by Judge Lewis A. Kaplan)" and "ORDER terminating 144 Motion to Appear Pro Hac Vice (HEREBY ORDERED by Judge Lewis A. Kaplan)", both dated 8 November 2015. **C-3027**, Donziger 1782 Docket, ECF Nos. 212-213. These entries refer to orders issued by the District Court and are not indicative of any action taken by Chevron in the Donziger 1782 at the time.

[2745] *See* para. 1573 above.

1691. For these reasons, the Tribunal determines that the Claimants should receive compensation for the legal fees and expenses they incurred in connection with the Donziger 1782 between 14 February 2011 and 31 July 2013.

9. E-Tech/Kamp 1782

1692. *Background*. The Claimants describe Mr Richard Kamp as the director of E-Tech.[2746] As already explained,[2747] the Claimants state that

> E-Tech and Kamp were hired by the LAPs' counsel to assist them in developing their claims of alleged environmental contamination in the Lago Agrio Litigation. E-Tech sampled groundwater, soil, and surface water for the LAPs ostensibly to determine the extent, if any, of environmental contamination and calculate the cost of remediating any alleged environmental damage. Cabrera undertook to conduct nearly identical sampling as part of his inspection process, and Chevron suspected E-Tech was secretly sharing its data or analysis, or both, with Cabrera."[2748]

1693. On 16 August 2010, Chevron filed a discovery application before the U.S. District Court for the District of New Mexico for an order granting leave to serve subpoenas on E-Tech and Mr Kamp, seeking the deposition testimony of Mr Kamp and the production of documents related to the work E-Tech performed for the LAPs, E-Tech's contributions to the Cabrera Reports, and communications between E-Tech and Mr Cabrera.[2749]

1694. On 20 August 2010, the Magistrate Judge entered an order to show cause why the subpoenas should not be issued.[2750] On 25 August 2010, the LAPs, whose counsel also purported to represent E-Tech and Mr Kamp according to the Claimants, opposed the subpoenas.[2751] On 1 September 2010 (as amended on 2 September 2010), the Magistrate

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[2746] Memorial, Appendix 17, para. 1. *See generally* Memorial, Appendix 17; **C-2813**, E-Tech/Kamp 1782 Docket.

[2747] Regarding E-Tech and Mr Powers, *see* para. 1702 below.

[2748] Memorial, Appendix 17, para. 1.

[2749] Memorial, Appendix 17, paras. 3, 5; **C-2813**, E-Tech/Kamp 1782 Docket, ECF Nos. 2, 17.

[2750] Memorial, Appendix 17, para. 8. *See* **C-2813**, E-Tech/Kamp 1782 Docket, ECF No. 50.

[2751] Memorial, Appendix 17, para. 8. *See* **C-2813**, E-Tech/Kamp 1782 Docket, ECF No. 60. The Claimants explain that Chevron had instituted a separate 1782 against E-Tech in the U.S. District Court for the Southern District of California, to which E-Tech, a New Mexico company, objected to on jurisdictional grounds. Memorial, Appendix 17, fn 10; **C-2811**, E-Tech/Powers 1782 Docket, ECF No. 1 (27 May 2010).

Judge granted the application to issue, subpoenas and ordered E-Tech and Mr Kamp to respond.[2752]

1695. Eventually, following the LAPs and E-Tech's objections to the Magistrate Judge's on 13 September 2010 the District Court ordered the discovery of non-privileged documents and, on the same day, the Magistrate Judge conducted an in-camera review of these purportedly privileged documents and confirmed that none of them were afforded that protection.[2753]

1696. According to the Claimants, Mr Kamp was deposed on 7 October 2010 and 8 October 2010. E-Tech and Kamp produced jointly 2,252 pages of documents.[2754]

1697. On 10 December 2010, the District Court closed and dismissed the case.[2755]

1698. The Claimants seek USD 922,519.21 as damages corresponding to the legal fees and expenses they allegedly incurred in connection with the E-Tech/Kamp 1782 between June 2010 and January 2012.[2756]

1699. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2757] As gleaned from the above timeline, all key events in the E-Tech/Kamp 1782 took place before 14 February 2011, as the District Court dismissed the case on 10 December 2010.

1700. The Tribunal has not been informed of further developments in the E-Tech/Kamp 1782 after 10 December 2010.[2758] The Claimants have failed to explain why they incurred legal fees and expenses after that date.

[2752] Memorial, Appendix 17, para. 9; **C-2813**, E-Tech/Kamp 1782 Docket, ECF Nos. 76 (1 September 2010), 77 (2 September 2010).

[2753] Memorial, Appendix 17, paras. 10-11; **C-2813**, E-Tech/Kamp 1782 Docket, ECF Nos. 78 (7 September 2010), 80 (8 September 2010), 84 (10 September 2010), 173-174 (13 September 2010).

[2754] Memorial, Appendix 17, para. 12.

[2755] Memorial, Appendix 17, para. 12; **C-2813**, E-Tech/Kamp 1782 Docket, ECF No. 200.

[2756] Reply, Updated Appendix 2, pp. 960-963.

[2757] *See* para. 1565 above.

[2758] Memorial, Appendix 17, p. 11.

1701. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the E-Tech/Kamp 1782 before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the E-Tech/Kamp 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. This is considering that the District Court had dismissed the case already on 10 December 2010. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the E-Tech/Kamp 1782 are excluded from compensation.

10. E-Tech/Powers 1782

1702. *Background*. The Claimants describe E-Tech and Mr William Powers as "an environmental consulting firm and its chief engineer, respectively."[2759] According to the Claimants,

> E-Tech and Powers were hired by the LAPs' counsel to assist them in developing their claims of alleged environmental contamination in the Lago Agrio Litigation. E-Tech sampled groundwater, soil, and surface water for the LAPs ostensibly to determine the extent, if any, of environmental contamination and calculate the cost of remediating any alleged environmental damage. Cabrera undertook to conduct nearly identical sampling as part of his inspection process, and Chevron suspected E-Tech was secretly sharing its false data or analysis, or both, with Cabrera.[2760]

1703. On 27 May 2010, Chevron filed a discovery application before the U.S. District Court for the Southern District of California, seeking an order granting leave to serve subpoenas on E-Tech and Mr Powers.[2761] On 26 June 2010, E-Tech and Mr Powers moved to quash the subpoenas.[2762] The Parties filed several more motions.[2763] On 20 July 2020, Chevron also

[2759] Memorial, Appendix 16, para. 1. *See generally* Memorial, Appendix 16; **C-2811**, E-Tech/Powers 1782 Docket; **C-2812**, *Chevron Corporation v. E-Tech International*, Civil Docket No. 10-56410, 9th Circuit Court of Appeals.

[2760] Memorial, Appendix 16, para. 1.

[2761] Memorial, Appendix 16, para. 4; **C-2811**, E-Tech/Powers 1782 Docket, ECF No. 1.

[2762] Memorial, Appendix 16, para. 7; **C-2811**, E-Tech/Powers 1782 Docket, ECF No. 18 (26 June 2010).

[2763] *See* **C-2811**, E-Tech/Powers 1782 Docket, ECF Nos. 20 (30 June 2010), 21 (6 July 2010).

filed a motion to supplement the record with discovery obtained in the Stratus 1782,[2764] to which E-Tech and Mr Powers objected.[2765]

1704. On 27 August 2010 and 2 September 2010, the District Court held hearings and ordered that Mr Powers produce written discovery and be deposed.[2766] On 2 September 2010, the LAPs also filed an emergency motion to stay the Magistrate Judge's order.[2767] On the same day, the District Court ordered the stay of the discovery until 7 September 2010, on which date it lifted the stay.[2768] On that same date, Chevron voluntarily dismissed E-Tech from the proceeding.[2769] The proceedings continued until 4 April 2012, when Chevron and Mr Powers filed a joint motion to dismiss.[2770] The District Court dismissed the action with prejudice on 6 April 2012.[2771]

1705. According to the Claimants, Mr Powers produced documents at least on 21 September 2011, 27 September 2011, and 15 February 2012.[2772] He was also deposed in September 2010.[2773]

1706. The Claimants seek USD 513,443.31 as damages corresponding to the legal fees and expenses they allegedly incurred in connection with the E-Tech/Powers 1782 between October 2009 and March 2014.[2774]

[2764] Memorial, Appendix 16, p. 9; **C-2811**, E-Tech/Powers 1782 Docket, ECF No. 23.

[2765] Memorial, Appendix 16, p. 9; **C-2811**, E-Tech/Powers 1782 Docket, ECF Nos. 24 (22 July 2010) 27 (5 August 2010). *See also* **C-2811**, E-Tech/Powers 1782 Docket, ECF Nos. 28 (9 August 2010), 30 (12 August 2010).

[2766] Memorial, para. 9. *See* **C-2811**, E-Tech/Powers 1782 Docket, ECF Nos. 45, 54-55.

[2767] Memorial, para. 10; **C-2811**, E-Tech/Powers 1782 Docket, ECF No. 43.

[2768] Memorial, Appendix 16, paras. 10-11, **C-2811**, E-Tech/Powers 1782 Docket, ECF Nos. 44, 58, Between 2 and 7 September 2011, Chevron filed an Emergency Motion to lift the stay, which was denied, and E-Tech and Mr Powers requested an extension of the stay, which a Magistrate Judge granted on 7 September before lifting the stay on the same date. **C-2811**, E-Tech/Powers 1782 Docket, ECF Nos. 50, 55-56, 58.

[2769] Memorial, Appendix 16, p. 11; **C-2811**, *In re: Application of Chevron Corporation*, Civil Docket No. 3:10-CV-01146-IEG-WMC (S.D. Cal.), ECF No. 61.

[2770] Memorial, Appendix 16, p. 13; **C-2811**, *In re: Application of Chevron Corporation*, Civil Docket No. 3:10-CV-01146-IEG-WMC (S.D. Cal.), ECF No. 125.

[2771] Memorial, Appendix 16, p. 13; **C-2811**, *In re: Application of Chevron Corporation*, Civil Docket No. 3:10-CV-01146-IEG-WMC (S.D. Cal.), ECF No. 126.

[2772] Memorial, Appendix 16, pp. 12-13.

[2773] Memorial, Appendix 16, pp. 11-12.

[2774] Reply, Updated Appendix 2, pp. 1000-1007.

1707. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2775]

1708. Furthermore, as gleaned from the above timeline, all key events in the E-Tech/Powers 1782 had taken place by 6 April 2012, when the District Court dismissed Chevron's discovery action with prejudice. The Claimants have failed to explain why they incurred legal fees and expenses after that date and ending in March 2014. The Tribunal is prepared to grant compensation for work performed until 30 April 2012 on account of the need for Chevron to perform closing tasks after the action was dismissed, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 30 April 2012.

1709. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 30 April 2012 in connection with the E-Tech/Powers 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1582 above that seeking discovery from Stratus Consulting, as well any scientist or environmental consultant connected with that group (including Mr Powers), was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue to seek discovery from Mr Powers after 14 February 2011 as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2776]

1710. For these reasons, the Tribunal determines that the Claimants should receive compensation for the legal fees and expenses they incurred in connection with the E-Tech/Powers 1782 between 14 February 2011 and 30 April 2012.

2775 *See* para. 1565 above.

2776 *See* para. 1573 above.

11. Kohn & MCSquared 1782s

1711. As previously noted by the Tribunal, the Claimants withdrew their claim for damages in respect to the Kohn and MCSquared 1782 applications.[2777] Consequently, the Tribunal will not address these actions any further.[2778]

12. Netflix 1782

1712. *Background*. According to the Claimants, Netflix, "through its Red Envelope Entertainment production label, produced the movie *Crude: The Real Price of Oil*. *Crude* was a purported documentary that followed two years of the litigation against Chevron, then pending in the Provincial Court of Justice of Sucumbíos in Lago Agrio, Ecuador".[2779]

1713. On 9 April 2010, Chevron filed an application before the U.S. District Court for the Northern District of California seeking an order permitting Chevron to issue a subpoena for the production of documents and testimony from Netflix.[2780]

1714. According to Chevron, while the Netflix 1782 was pending, the Berlinger 1782 was granted.[2781] Chevron believed that Mr Berlinger was likely in possession, custody and control of the entirety of the required information, and as a result voluntarily dismissed the Netflix Section 1782 on 19 May 2010.[2782]

1715. The Claimants seek a total of USD 43,655.90 corresponding to the legal fees and expenses they allegedly incurred in connection with the Netflix 1782 between December 2009 and November 2012.[2783]

1716. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the

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2777 Reply, fn 1063.

2778 The Tribunal has noted and dealt with the Respondent's assertion that work related to the Kohn and MCSquared 1782s remains claimed in its analysis of General 1782 Work in paragraphs 1603-1607 above.

2779 Memorial, Appendix 15, para. 1. *See generally* Memorial, Appendix 15; **C-2810**, Netflix 1782 Docket.

2780 Memorial, Appendix 15, para. 1; **C-2810**, Netflix 1782 Docket, ECF No. 1.

2781 Memorial, Appendix 15, para. 10.

2782 Memorial, Appendix 15, para. 10; **C-2810**, Netflix 1782 Docket, ECF No. 8.

2783 Reply, Updated Appendix 2, pp. 1056-1057.

Respondent's Treaty breaches and therefore is non-compensable as damages.[2784] As gleaned from the above timeline, all key events in the Netflix 1782 took place before 14 February 2011: Chevron dismissed this action on 19 May 2010.[2785]

1717. The Tribunal has not been informed of further developments in the Netflix 1782 after 19 May 2010.[2786] The Claimants have failed to explain why they incurred legal fees and expenses after that date.

1718. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Netflix 1782s before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Netflix 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. As noted in the preceding paragraph, the Netflix 1782 was dismissed on 19 May 2010. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Netflix 1782 are excluded from compensation.

13. Page 1782

1719. *Background*. The Claimants describe Mr Aaron Marr Page as

> an attorney who played a central role in the LAPs' fraudulent scheme. Page started working with the LAPs and Steven Donziger in 2005, while he was still in law school. Over the past fourteen years, Page has become one of Donziger's staunchest supporters and continues to help Donziger's efforts to pursue the fraudulent Ecuadorian judgment.[2787]

1720. On 1 November 2011, Chevron filed an application before the U.S. District Court for the District of Maryland seeking an order to subpoena Mr Page for discovery for use in the Lago Agrio Litigation and this Arbitration.[2788]

2784 *See* para. 1565 above.

2785 Memorial, Appendix 15, para. 10; **C-2810**, Netflix 1782 Docket, ECF No. 8.

2786 Memorial, Appendix 20, p. 10.

2787 Memorial, Appendix 24, para. 1. *See generally* Memorial, Appendix 24; **C-2933**, Page 1782 Docket; **C-3102**, Page and Fisher Page 1782 Docket; **C-3103**, Page and Fisher Page 1782 Court of Appeals Docket; **C-3104**, Page 1782 Court of Appeals Docket.

2788 Memorial, Appendix 24, para. 2. *See* **C-2933**, ECF No. 1.

1721. This action proceeded in parallel with the RICO Litigation pending in New York, where Chevron also sought discovery from Mr Page.[2789] Among other things, on 15 July 2011 Chevron requested the District Court of Maryland to order Mr Page to comply with the subpoena issued in the RICO Litigation.[2790] Mr Page produced responsive documents on 2 September 2011, but the Court ordered Chevron to return those documents on 14 December 2011 following the Second Circuit's stay of proceedings in a severed portion of the RICO Litigation.[2791] On 28 February 2013, the District Court ordered Mr Page to re-produce those same documents, following which Mr Page appealed that decision to the Fourth Circuit.[2792]

1722. Earlier, on 25 January 2013, the District Court held a hearing on the Page 1782 application.[2793] The Court ordered the parties to submit by 4 February 2013 their positions on the scope of Chevron's subpoena and for Mr Page to testify at a deposition.[2794]

1723. The Page 1782 proceedings continued between January 2013 and May 2015.[2795] Mr Page was deposed on 15 September 2011 in the RICO Litigation and on 23 August 2013 in the Page 1782.[2796] According to the Claimants, Mr Page produced documents on a rolling basis until June 2013. Thereafter, "Chevron discovered through forensic examination that Page's production failed to include thousands of responsive emails sent to or received from Page that were produced by Donziger"[2797] and "sought to engage Page to rectify the deficiencies in his production", including by moving to compel the production of his hard drive.[2798] The Claimants state that a District Court-appointed forensic expert (FTI) produced Mr Page's responsive documents in November 2014 and that the "production

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2789 Memorial, Appendix 24, para. 3.

2790 Memorial, Appendix 24, para. 3; **C-3102**, Page and Fisher Page 1782 Docket, ECF No. 1.

2791 Memorial, Appendix 24, para. 3; **C-3102**, Page and Fisher Page 1782 Docket, ECF Nos. 42, 43 (14 December 2011).

2792 Memorial, Appendix 24, para. 3; **C-3102**, Page and Fisher Page 1782 Docket, ECF No. 50; **C-3103**, Page and Fisher Page 1782 Court of Appeals Docket, ECF Nos. 1-3 (20 August 2013).

2793 Memorial, Appendix 24, para. 2; **C-2933**, Page 1782 Docket, ECF No. 54.

2794 Memorial, Appendix 24, para. 2; **C-2933**, Page 1782 Docket, ECF No. 51.

2795 *See* Memorial, Appendix 24, pp. 9-17.

2796 Memorial, Appendix 24, paras. 9-10.

2797 Memorial, Appendix 24, para. 6.

2798 Memorial, Appendix 24, para. 7.

led to Page making [an] additional attempt to narrow his production, including a motion to claw back certain documents and a motion for clarification."[2799]

1724. The last event recorded by the Claimants in their timeline of the Page 1782 is an order issued on 20 May 2015 by the District Court of Maryland granting in part a motion from Mr Page to claw back documents, as well as "Chevron's motion for an order directing FTI to produce document families."[2800]

1725. In turn, the last event recorded in the docket sheet for the Page 1782 is a letter/order issued by the District Court on 15 December 2015 "regarding review of 'family member' documents and directing FTI to disclose the listed documents."[2801]

1726. The Claimants seek USD 2,764,491.17 and USD 342,017.76 corresponding, respectively, to the legal fees and expenses they allegedly incurred in connection with the Page 1782 between August 2010 and April 2016.[2802]

1727. *Analysis and decision*. At the outset, the Tribunal observes that the entirety of the Page 1782 proceedings took place after 14 February 2011, which, as explained above, is the critical date for the compensation of incidental damages in this Arbitration.[2803] However, some preparatory work appears to have taken place before that date, starting in August 2010.[2804] As already determined by the Tribunal, all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable.[2805]

1728. Furthermore, as gleaned from the above timeline, all key events in the Page 1782 had taken place by 15 December 2015.[2806] The Claimants have failed to explain why they incurred legal fees and expenses after that date and ending in April 2016. The Tribunal is

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[2799] Memorial, Appendix 24, para. 8, p. 15.

[2800] Memorial, Appendix 24, p. 17; **C-2933**, Page 1782 Docket, ECF No. 171.

[2801] **C-2933**, Page 1782 Docket, ECF No. 181.

[2802] Reply, Updated Appendix 2, pp. 841-854.

[2803] *See* para. 1565 above.

[2804] Reply, Updated Appendix 2, p. 841.

[2805] *See* para. 1565 above.

[2806] **C-2933**, Page 1782 Docket, ECF No. 181.

prepared to grant compensation for work performed until 28 February 2016 as a reasonable approximation to the date by which Chevron's review should have been completed after FTI produced documents further to the District Court's 15 December 2015 order, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 28 February 2016.

1729. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 28 February 2016 in connection with the Page 1782 are compensable in this Arbitration. As explained in paragraph 1578 above, by 14 February 2011 the Claimants were in possession of *prima facie* evidence signalling that seeking discovery from the LAPs' then-current and former U.S.-based counsel, including Mr Page, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was therefore reasonable for the Claimants to pursue the Page 1782 as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2807]

1730. Lastly, the Tribunal has taken note of the Respondent's argument that the Page 1782 was duplicative of a parallel discovery action in the RICO Litigation and of the Donziger 1782. In particular, the Respondent argues that "the discovery that Chevron sought from Page was substantially similar, if not identical, to the discovery that Chevron had already obtained from Donziger, who had been Page's boss on the Lago Agrio Litigation team."[2808] The Tribunal rejects these arguments: as noted above, the Tribunal is inclined to grant a certain level of deference to the Claimants' decisions as to which Affirmative 1782s to initiate and when to stop pursuing them, particularly in circumstances where the Claimants could not anticipate precisely what evidence their discovery efforts would yield in each proceeding.[2809]

[2807] *See* para. 1573 above.

[2808] Counter-Memorial, para. 512.

[2809] *See* para. 1571 above.

1731. For these reasons, the Tribunal determines that the Claimants shall receive compensation for the legal fees and expenses they incurred in connection with the Page 1782 between 14 February 2011 and 28 February 2016.

14. Quarles 1782

1732. *Background*. The Claimants describe Mr Mark Quarles as "a participant in the Cabrera Fraud who had also acted as an expert for Ecuador in a related U.S. proceeding on the issue of Cabrera's purported 'independence.'"[2810]

1733. On 16 July 2010, Chevron filed an application before the U.S. District Court for the Middle District of Tennessee to obtain discovery from Mr Quarles.[2811] On 16 August 2010, over Mr Quarles' and the LAPs' objections, the District Court granted Chevron's application authorising, on an expedited basis, the requested discovery of documents and the service of deposition subpoenas.[2812] The proceedings continued through 12 October 2010, when, according to the Claimants, Chevron completed its deposition of Mr Quarles.[2813]

1734. The Claimants seek a total of USD 506,544.96 corresponding to the legal fees and expenses they allegedly incurred in connection with the Quarles 1782 between November 2009 and May 2011.[2814]

1735. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2815] As gleaned from the above timeline, all key events in the Quarles 1782 took place before 14 February 2011: Chevron completed its deposition of Mr Quarles on 12 October 2010.

[2810] Memorial, Appendix 19, para. 1. *See generally* Memorial, Appendix 19; **C-2926**, Quarles 1782 Docket; **C-2927**, Quarles 1782 Court of Appeals Docket.

[2811] Memorial, Appendix 19, para. 1; **Exhibit C-2926**, Quarles 1782 Docket, ECF No. 1**.**

[2812] Memorial, Appendix 19, para. 2; **Exhibit C-2926**, Quarles 1782 Docket, ECF No. 56.

[2813] Memorial, Appendix 19, p. 11; **Exhibit C-2926**, Quarles 1782 Docket, ECF Nos. 113 (30 September 2010); 114 (8 October 2010).

[2814] Reply, Updated Appendix 2, pp. 1009-1012.

[2815] *See* para. 1565 above.

1736. The Tribunal has not been informed of further developments in the Quarles 1782 after 12 October 2010.[2816] The Claimants have failed to explain why they incurred legal fees and expenses after that date.

1737. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Quarles 1782s before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Quarles 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Quarles 1782 are excluded from compensation.

15. Rourke and Picone 1782s

1738. *Background*. According to the Claimants, Mr Daniel Rourke

> served as a testifying expert and signed two expert reports in the Lago Agrio Litigation, which alleged that the oil exploration and production activities in the former Concession area caused an increase in cancer deaths in certain provinces in Ecuador. Rourke also opined that Chevron should be liable for damages in the amount of $69.7 billion.[2817]

1739. In turn, the Claimants describe Mr Carlos Picone as

> a medical doctor based in Chevy Chase, Maryland. He proffered an opinion in the Lago Agrio Litigation about the cost of delivering health care to the residents of the former Concession area, concluding that the region's medical needs 'can be tied back to the long-standing environmental damages caused by Texaco's oil exploitation' and that '[d]eforestation due to the oil exploration has impacted the ability of people in the Concession to obtain their traditional medical treatment.' Chevron alleged that Picone '[did] not say why he [thought] Texaco [was] guilty of 'exploitation' or how oil exploration has led to deforestation or a need for health care.' Rather, he assumed the facts set forth in the Cabrera Report to be true, and by relying on his opinion, the LAPs were 'perpetuat[ing] the fraud by placing distance between the assumed facts and their fraudulent origin.'[2818]

[2816] Memorial, Appendix 19, p. 11. The last event recorded in the docket sheet for the Quarles 1782 is dated 2 August 2011, described as "ORDER: Respondent and Intereste[d] Parties' 67 Motion for Review of the Magistrate Judge's Order Granting Chevron Corporation's Application is DENIED AS MOOT. The discovery at issue in Quarles' motion has already occurred, and no appeal is currently pending. Signed by Senior Judge John T. Nixon on 8/2/11." The Motion for Review referred to was filed on 23 August 2010. No actions were taken by Chevron after 14 February 2011 in the Quarles 1782 Docket. *See* **C-2926**, Quarles 1782 Docket, p. 10.

[2817] Memorial, Appendix 32, para. 3. *See generally* Memorial, Appendix 32; **C-2908**, Rourke 1782 Docket.

[2818] Memorial, Appendix 32, para. 4. *See generally* Memorial, Appendix 32; **C-2907**, Picone 1782 Docket.

1740. On 22 October 2010, Chevron filed applications before the U.S. District Court for the District of Maryland for an order granting leave to serve a subpoena seeking documents and deposition testimony from Mr Rourke and Mr Picone.[2819] On 16 November 2010, Mr Rourke and Mr Picone filed responses in opposition to Chevron's applications.[2820] After further briefing and a hearing, on 24 November 2010 the District Court granted Chevron's applications.[2821]

1741. According to the Claimants, on 1 December 2010 Mr Picone produced approximately 6,400 pages of documents, followed by Mr Rourke on 4 December 2010, who provided approximately 800 pages.[2822] However, "many documents were withheld and logged on a privilege log".[2823] On 10 December 2010, Chevron filed a motion to compel production of all the documents listed in the privilege logs.[2824] On 14 December 2010, Mr Picone produced the documents he had withheld; Chevron thus notified the court that its motion was moot as to Picone, but remained pending as to Rourke.[2825]

1742. On 15 December 2010, Mr Rourke filed a cross-motion for a protective order.[2826] Eventually, on 3 March 2011 the District Court entered an order granting in part Chevron's motion to compel and granting in part Mr Rourke's motion for a protective order, which, *inter alia*, limited the use of the discovery to the Section 1782 action and related Section 1782 Proceedings, the Lago Agrio Litigation, and this Arbitration.[2827]

2819 Memorial, Appendix 31, para. 1, p. 8.

2820 Memorial, Appendix 31, p. 8; **C-2907**, Picone 1782 Docket, ECF No. 18; **C-2908**, Rourke 1782 Docket, ECF No. 24.

2821 Memorial, Appendix 31, p. 8; **C-2907**, ECF Nos. 20 (19 November 2010), 32 (23 November 2010), 28 (24 November 2011); **C-2908**, Rourke 1782 Docket, ECF Nos. 24 (16 November 2010), 26 (19 November 2010), 34 (24 November 2010), 39 (6 December 2010)..

2822 Memorial, Appendix 32, para. 6.

2823 Memorial, Appendix 32, para. 6.

2824 Memorial, Appendix 32, para. 7; **C-2907**, Picone 1782 Docket, ECF No. 35; **C-2908**, Rourke 1782 Docket, ECF No. 42.

2825 Memorial, Appendix 32, para. 8.

2826 Memorial, Appendix 32, para. 10, p. 10; **C-2908**, Rourke 1782 Docket, ECF No. 46.

2827 Memorial, Appendix 32, p. 11; **C-2908**, Rourke 1782 Docket, ECF Nos. 61-63 (3 March 2010), 65 (10 March 2010)**.**

1743. The Claimants state that Chevon took Mr Picone's deposition on 16 December 2010.[2828] Mr Rourke provided deposition testimony on 20 December 2010 and 21 April 2011.[2829] Following completion of the discovery, Chevron filed an unopposed motion to close the Rourke 1782 on 22 November 2011.[2830]

1744. The Claimants seek a total of (i) USD 317,290.86 corresponding to the legal fees and expenses they allegedly incurred in connection with the Rourke 1782 between July 2010 and February 2016;[2831] and (ii) USD 87,699.55 corresponding to the legal fees and expenses they allegedly incurred in connection with the Picone 1782 between September 2010 and June 2012.[2832]

1745. *Analysis and decision*. In respect, first, of the Picone 1782, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable.[2833] As gleaned from the above timeline, all key events in connection with the Picone 1782 took place before 14 February 2011: after Mr Picone produced all documents, Chevron notified the District Court that its motion against Mr Picone was moot on 14 December 2010.[2834] The Claimants have failed to explain why they incurred legal fees and expenses after that date.

1746. Accordingly, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Picone 1782 before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Picone 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Picone 1782 are excluded from compensation.

[2828] Memorial, Appendix 32, para. 9.

[2829] Memorial, Appendix 32, pp. 10-12.

[2830] Memorial, Appendix 32, p. 12; **C-2908**, Rourke 1782 Docket, ECF No. 73.

[2831] Reply, Updated Appendix 2, pp. 1035-1038.

[2832] Reply, Updated Appendix 2, pp. 1053-1054.

[2833] *See* para. 1565 above.

[2834] Memorial, Appendix 32, p. 10; **C-2907**, Picone 1782 Docket, ECF No. 38.

1747. Second, as gleaned from the above timeline, all key events in the Rourke 1782 had taken place by 22 November 2011, when Chevron filed an unopposed motion to close the case.[2835] The Claimants have failed to explain why they incurred legal fees and expenses after that date and ending in February 2016. The Tribunal is prepared to grant compensation for work performed until 31 December 2011 on account of the need for Chevron to perform closing tasks after the case was dismissed, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 31 December 2011.

1748. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 31 December 2011 in connection with the Rourke 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1586 above that seeking discovery from any of the cleansing experts appointed by the LAPs to replace Mr Cabrera, including Mr Rourke, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue to seek discovery from Mr Rourke after 14 February 2011 as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2836]

1749. For these reasons, the Tribunal determines that the Claimants shall receive compensation for the legal fees and expenses they incurred in connection with the Rourke 1782 between 14 February 2011 and 31 December 2011.

16. Scardina 1782

1750. *Background*. The Claimants describe Mr Scardina as "a consultant and professor based in Blacksburg, Virginia who was retained by the LAPs as one of their Cleansing Experts in an effort to whitewash the Cabrera Fraud. In this role, Scardina signed an expert report filed by the LAPs in . . . the Lago Agrio Litigation."[2837]

[2835] **C-2908**, Rourke 1782 Docket, ECF No. 73.

[2836] *See* para. 1573 above.

[2837] Memorial, Appendix 34, para. 1. *See generally* Memorial, Appendix 34; **C-2903**, Scardina 1782 Docket.

1751. On 4 November 2010, Chevron filed an application before the U.S. District Court for the Western District of Virginia for an order granting leave to serve a subpoena seeking documents and deposition testimony from Mr Scardina.[2838] Following Mr Scardina's opposition, subsequent briefing, and a hearing, the District Court entered an order on 24 November 2025 granting Chevron's application.[2839] Chevron filed a motion to compel production of certain documents on 9 December 2010, which was never ruled on.[2840]

1752. According to the Claimants, Mr Scardina produced 296 pages of documents on 15 December 2010 and was deposed by Chevron on 22 December 2010.[2841]

1753. The Claimants state that Chevron notified the District Court on 4 February 2011 that it had filed an action against Mr Donziger in the Southern District of New York, after which there was no further activity in this matter.[2842]

1754. The Claimants seek a total of USD 201,476.06 corresponding to the legal fees and expenses they allegedly incurred in connection with the Scardina 1782 between October 2010 and June 2011.[2843]

1755. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2844] As gleaned from the above timeline, all key events in the Scardina 1782 took place before 14 February 2011: the Claimants state that there was no further activity in this matter after 4 February 2011.[2845] The Claimants have failed to explain why they incurred legal fees and expenses after that date.

2838 Memorial, Appendix 23, p. 6; **C-2903**, Scardina 1782 Docket, ECF No. 1.

2839 Memorial, Appendix 34, p. 6; **C-2903**, Scardina 1782 Docket, ECF Nos. 14 (16 November 2010), 22 (19 November 2010), 31 (23 November 2010), 33-34 (24 November 2010).

2840 Memorial, Appendix 23, para. 8; **C-2903**, Scardina 1782 Docket, ECF No. 37.

2841 Also on 15 December 2010, Mr Scardina filed a brief in opposition to Chevron's motion to compel filed on 9 December 2010. Memorial, Appendix 34, para. 8; **C-2903** Scardina 1782 Docket, ECF No. 44.

2842 Memorial, Appendix 34, para. 10; **C-2903**, Scardina 1782 Docket, ECF No. 46, p. 4.

2843 Reply, Updated Appendix 2, pp. 1044-1045.

2844 *See* para. 1565 above.

2845 **C-2903**, Scardina 1782 Docket, p. 4.

1756. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Scardina 1782s before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Scardina 1782 after that date, they have failed to establish that by incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Scardina 1782 are excluded from compensation.

17. Shefftz 1782

1757. *Background*. The Claimants describe Mr Jonathan Shefftz as

> an economic consultant based in Amherst, Massachusetts who was retained by the LAPs as one of their Cleansing Experts in an attempt to 'whitewash' or 'cleanse' the Cabrera Fraud. In this role, Shefftz signed an expert report filed by the LAPs on September 16, 2010 in the Lago Agrio Litigation in Ecuador. Shefftz's report concluded that Chevron's liability for unjust enrichment damages was anywhere between \$4.57 billion and \$37.86 billion.[2846]

1758. On 22 October 2010, Chevron filed an application before the U.S. District Court for the District of Massachusetts, requesting an order allowing Chevron to serve a subpoena on Mr Shefftz to take his deposition and obtain documents.[2847] In response to a Show Cause Order issued by the Court, Mr Shefftz and the LAPs filed a brief in opposition to the application, as well as objections to the subpoena.[2848]

1759. On 7 December 2010, following further briefings and a hearing, the District Court granted Chevron's application in part.[2849]

1760. According to the Claimants, Mr Shefftz produced documents on 10 December 2010.[2850] On 13 December 2010, Chevron moved to compel the production of certain documents. That same day, the Claimants state, Mr Shefftz "argued that the motion was moot because

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[2846] Memorial, Appendix 33, para. 1. *See generally* Memorial, Appendix 33; **C-2905**, Shefftz 1782 Docket.

[2847] Memorial, Appendix 33, para. 3.

[2848] Memorial, Appendix 33, para. 4; **C-2905**, Shefftz 1782 Docket, ECF Nos. 9 (27 October 2010), 12 (1 November 2011), 21 (16 November 2010), 23 (16 November 2010).

[2849] Memorial, Appendix 33, para. 6; **C-2905**, Shefftz 1782 Docket, ECF No. 44.

[2850] Memorial, Appendix 33, p. 6.

he would already produce the documents previously identified as privileged" and produced over 600 pages of documents.[2851]

1761. Chevron took deposition from Mr Shefftz on 16 December 2010.[2852] The District Court denied Chevron's motion to compel as moot on 7 February 2011.[2853]

1762. The Claimants seek a total of USD 287,136.99 and USD 1,031.20 corresponding, respectively, to the legal fees and expenses they allegedly incurred in connection with the Shefftz 1782 between September 2010 and April 2012.[2854]

1763. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2855] As gleaned from the above timeline, all key events in the Shefftz 1782 took place before 14 February 2011: Chevron took deposition from Mr Shefftz on 16 December 2010 and the District Court denied Chevron's motion to compel as moot on 7 February 2011.[2856] No activity is recorded in this case until it was formally terminated on 10 August 2012.[2857]

1764. The Tribunal has not been informed of further relevant developments in the Shefftz 1782 after 7 February 2011.[2858] The Claimants have failed to explain why they incurred legal fees and expenses after that date.

1765. For these reasons, the Tribunal determines that (i) all legal fees and expenses incurred by the Claimants in connection with the Shefftz 1782s before 14 February 2011 are not compensable; and (ii) to the extent the Claimants incurred legal fees and expenses in connection with the Shefftz 1782 after that date, they have failed to establish that by

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2851 Memorial, Appendix 33, p. 6; **C-2905**, Shefftz 1782 Docket, ECF No. 49.

2852 Memorial, Appendix 33, p. 6; **C-2906**, *Chevron v. Jonathan S. Shefftz*, Case No. 1:10-mc-10352-JLT (D. Mass.), Deposition of Jonathan S. Shefftz, 16 December 2010.

2853 Memorial, Appendix 33, p. 6; **C-2905**, Shefftz 1782 Docket, ECF No. 53.

2854 Reply, Updated Appendix 2, pp. 1040-1042.

2855 *See* para. 1565 above.

2856 **C-2905**, Shefftz 1782 Docket, ECF No. 53; **C-2906**, *Chevron v. Jonathan S. Shefftz*, Case No. 1:10-mc-10352-JLT (D. Mass.), Deposition of Jonathan S. Shefftz, 16 December 2010.

2857 **C-2905**, Shefftz 1782 Docket, p. 5.

2858 Memorial, Appendix 33, p. 6.

incurring those fees they sought to uncover fraud and corruption in the Lago Agrio Litigation. Accordingly, all legal fees and expenses claimed by the Claimants in connection with the Shefftz 1782 are excluded from compensation.

18. Stratus 1782

1766. *Background*. The Claimants describe Stratus as "a known environmental consultant for the LAPs' legal team".[2859]

1767. On 18 December 2009, Chevron filed an application before the U.S. District Court for the District of Colorado seeking discovery from Stratus, Stratus' then-Principal, Mr David J. Chapman; Executive Vice President, Mr Douglas Beltman; Managing Scientist, Ms Ann Maest; Senior Scientist, Ms Jennifer M.H. Peers; and Senior Analyst, Mr David M. Mills.[2860] According to the Claimants, Chevron also named as respondents Mr Peter N. Jones and Ms Laura Belanger, two consultants that Stratus retained or otherwise relied upon.[2861]

1768. On 4 March 2010, the District Court granted Chevron's discovery application.[2862] Numerous procedural incidents followed, including assertions of privilege and motions for sanctions, until 27 June 2011, when the District Court issued an order concerning the allocation of costs.[2863] According to the Claimants, during that time and until 12 December 2012 the respondents in the Stratus 1782 produced 123,455 pages of documents for review and sat for nine days of deposition.[2864] In particular, the Claimants took deposition from Mr Chapman on 23 April 2010; from Mr Beltman on 6 October 2010; from Mr Mills on 20 October 2010; from Ms Peers on 6 November 2010; Ms Belanger on 30 November 2010; and from Ms Maest on 19 January and 20 January 2011.[2865]

[2859] Memorial, Appendix 11, para. 2. *See generally* Memorial, Appendix 11; **C-2864**, Stratus 1782 Docket.

[2860] Memorial, Appendix 11, para. 2; *see* **C-2864**. Stratus 1782 Docket, pp. 2-5.

[2861] Memorial, Appendix 11, fn 1; *see* **C-2864**. Stratus 1782 Docket, pp. 2-5.

[2862] Memorial, Appendix 11, para. 3; **C-2864**, Stratus 1782 Docket, ECF No. 23.

[2863] *See* Memorial, Appendix 11, pp. 11-44; *see generally* **C-2864**, Stratus 1782 Docket.

[2864] Memorial, Appendix 11, para. 16.

[2865] Memorial, Appendix 11, pp. 17, 36, 39.

1769. The Claimants seek a total of USD 5,315,741.18 in legal fees, USD 131,118.02 in expert costs, and USD 217.93 in other costs they allegedly incurred in connection with the Stratus 1782 between July 2009 and March 2015.[2866]

1770. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2867]

1771. Furthermore, as gleaned from the above timeline, all key events in the Stratus 1782 had taken place by 12 December 2012, when all production in connection with these proceedings was completed. The Claimants have failed to explain why they incurred legal fees and expenses after that date and ending in March 2015. The Tribunal is prepared to grant compensation for work performed until 31 January 2013 on account of the need for Chevron to review the 362 pages of documents that were produced on 12 December 2012, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 31 January 2013.

1772. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 31 January 2013 in connection with the Stratus 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1582 above that seeking discovery from Stratus Consulting, as well any scientist or environmental consultant connected with that group, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue to seek discovery from Stratus and the remaining named respondents in the Stratus 1782 after 14 February 2011 as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2868]

[2866] Reply, Updated Appendix 2, pp. 824-839.

[2867] *See* para. 1565 above.

[2868] *See* para. 1573 above.

1773. Lastly, the Tribunal has taken note of the Respondent's argument that "Chevron needlessly drove up costs by fighting even the most benign requests from other parties", referring, in particular, to a motion for a one-day hearing extension in the Stratus 1782.[2869]

1774. Having already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the Stratus 1782 (to the extent set out above), the Tribunal does not consider it necessary to opine on the substance or magnitude of Chevron's 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 Affirmative 1782s, more so in the absence of evidence pointing to the abusive use of court procedures.[2870]

1775. For these reasons, the Tribunal determines that the Claimants should receive compensation for the legal fees and expenses they incurred in connection with the Stratus 1782 between 14 February 2011 and 31 January 2013.[2871]

19. UBR 1782

1776. *Background*. The Claimants describe UBR as

> an environmental consulting firm hired by the LAPs' counsel to assist them in developing their claims of alleged environmental contamination in the Lago Agrio Litigation. UBR was hired and paid by the LAPs to develop a potable water report . . . which ultimately became an appendix to the fraudulent Cabrera Report. The UBR Report was attributed to Juan Cristóbal Villao Yepez . . . an employee of UBR, who was identified as a supposedly independent expert on Cabrera's supposedly independent technical team.[2872]

1777. On 26 May 2010, Chevron filed an application before the U.S. District Court for the District of New Jersey for an order granting leave to serve a subpoena seeking documents and deposition testimony from UBR and Mr Villao Yepez.[2873] On 15 June 2010,

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2869 Counter-Memorial, para. 696.

2870 *See* para. 340 above. In any event, the motion criticised by the Respondent was filed by Chevron before 14 February 2011 (*i.e.*, in May 2010) meaning that any costs it may have generated have already been determined to fall outside the scope of compensable injury. *See* **R-1770**, *Chevron Corp. v. Stratus Consulting*, D. Colo. Case 1:10-cv-00047-MSK-MEH, D.E. 97 Opposition to Motion for Extension of Time, 5 May 2010.

2871 For clarity, the Tribunal recalls that it excludes from compensation the legal fees and expenses claimed by the Claimants in connection with the Defensive 1782s, including the Defensive 1782 involving Stratus. *See* paras. 1559(ii), 1600 above.

2872 Memorial, Appendix 28, para. 1. *See generally* Memorial, Appendix 28; **C-2939**, UBR 1782 Docket; **C-2940**, UBR 1782 Court of Appeals Docket.

2873 Memorial, Appendix 28, para. 1; **C-2939**, UBR 1782 Docket, ECF No. 1.

following briefings and a hearing, the District Court granted the application as to UBR and dismissed the application as to Mr Villao Yepez because he was not located within the district.[2874] The same day, UBR and the LAPs filed a notice of appeal and emergency motion to stay the District Court's order.[2875]

1778. Numerous procedural incidents followed, including a stay pending an appeal before the Third Circuit, until on 3 February 2011 the Court of Appeals affirmed in part the District Court's ruling of 15 June 2010.[2876] On remand, the District Court entered an order on 17 February 2011 to which the parties had stipulated, mandating discovery from UBR.[2877]

1779. According to the Claimants, UBR's chief executive, Mr Vincent Uhl, was deposed on 19 April 2011, 27 July 2011, and 10 July 2012. During that period, UBR produced documents, while Chevron filed several motions to compel additional production from UBR, including as regards Mr Villao Yepez's documents.[2878]

1780. On 26 November 2013, UBR produced a declaration stating that it was unable to locate the last documents it had been ordered to produce.[2879] The case was terminated on 29 May 2014.[2880]

1781. The Claimants seek USD 2,205,784.11 and USD 172.10 corresponding, respectively, to the legal fees and expenses they allegedly incurred in connection with the UBR 1782 between April 2010 and November 2013.[2881]

2874 Memorial, Appendix 28, para. 5; **C-2939**, UBR 1782 Docket, ECF Nos. 6 (7 June 2010), 12 (9 June 2010), 15 (11 June 2010), 21 (15 June 2010).

2875 Memorial, Appendix 28, para. 5; **C-2939**, UBR 1782 Docket, ECF Nos. 24-25.

2876 Memorial, Appendix 28, paras. 6-8; *see* **C-2940**, UBR 1782 Court of Appeals Docket, p. 7.

2877 Memorial, Appendix 28, para. 9; **C-2939**, UBR 1782 Docket, ECF No. 44.

2878 Memorial, Appendix 28, pp. 11-12.

2879 Memorial, Appendix 28, para. 19; **Exhibit C-2939**, UBR 1782 Docket, ECF No. 103.

2880 Memorial, Appendix 28, para. 19; **Exhibit C-2939**, UBR 1782 Docket, p. 9.

2881 Reply, Updated Appendix 2, pp. 870-881.

1782. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2882]

1783. Otherwise, the Tribunal considers that all fees incurred by the Claimants after 14 February 2011 in connection with the UBR 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1582 above that seeking discovery from Stratus Consulting, as well any scientist or environmental consultant connected with that group (including UBR), was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue to seek discovery from UBR after 14 February 2011 as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2883]

1784. Lastly, the Tribunal has taken note of the Respondent's argument that Chevron attempted to use the UBR 1782 improperly to obtain discovery outside the United States.[2884] In particular, the Respondent notes that the District Court rejected Chevron's motion to serve a subpoena on Mr Villao Yepez because he did not reside in the judicial district.[2885] The Respondent is also critical of Chevron's "numerous filings in support of a 'show cause' application" extending to 1,187 pages, which was denied by the District Court as "procedurally deficient".[2886]

1785. Having already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the UBR 1782, the Tribunal does not consider it necessary to opine on the substance or magnitude of Chevron's submissions in those proceedings – much less on questions seemingly concerning the territorial scope of the jurisdiction of a U.S. District Court, a matter on which this Tribunal has not been sufficiently briefed. As already noted, it is not appropriate for the Tribunal

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2882 *See* para. 1565 above.

2883 *See* para. 1573 above.

2884 Counter-Memorial, paras. 692-693.

2885 Counter-Memorial, paras. 692-693.

2886 Counter-Memorial, para. 694.

to apply hindsight to the legal strategies employed in the course of the Affirmative 1782s.[2887]

1786. For these reasons, the Tribunal determines that the Claimants should receive compensation for the legal fees and expenses they incurred in connection with the UBR 1782 after 14 February 2011.

20. Weinberg 1782

1787. *Background*. According to the Claimants, Weinberg Group Inc. (“**Weinberg**”)

> directed the work of the Cleansing Experts, drafted significant portions of at least two reports filed on behalf of the Cleansing Experts, directed one Cleansing Expert to remove important qualifications from his report, and provided the Cleansing Experts with limited information to influence their reports. The Weinberg Group also provided the fraudulent Cabrera Report to each of the Cleansing Experts and instructed them to rely on it, without disclosing its fraudulent nature and the fact that it was not an independent assessment. Notwithstanding its substantial involvement—and its authorship of two of the reports—the Weinberg Group was not mentioned in any of the Cleansing Expert’s reports, and its involvement only came to light through discovery Chevron sought from the Cleansing Experts in other Section 1782 actions.[2888]

1788. On 21 January 2011, Chevron submitted an application before the U.S. District Court for the District of Columbia for an order granting leave to serve a subpoena seeking documents and deposition testimony from Weinberg, Mr Matthew R. Weinberg, Mr Ted Dunkelberger, Mr S. Thomas Golojuch, Mr Christopher Arthur, Mr Kerry Roche, and Ms Marla Scarola.[2889]

1789. According to the Claimants, following the submission of additional briefing, status reports, and notices regarding developments in other related actions, the District Court encouraged the parties to consent to have the case assigned to the District Court for the Southern District of New York, where a related action was pending (*Chevron v. The*

2887 *See* para. 340 above.

2888 Memorial, Appendix 35, para. 3 (internal citations omitted). *See generally* Memorial, Appendix 35; **C-2899**, Weinberg 1782 Docket; **C-2900**, Chevron v. Salazar Docket (DDC); **C-2901**, Chevron v. Salazar SDNY Docket; **C-2902**, Weinberg 1782 Court of Appeals Docket.

2889 Memorial, Appendix 35, para. 1; **C-2899**, Weinberg 1782 Docket, ECF No. 1.

Weinberg Group, Case No. 11-409 (JMF) (DDC)) (the "**Related Action**").[2890] The parties consented to the assignment and the case was referred on 4 August 2011.[2891]

1790. The Claimants assert that, in the Related Action, Chevron sought to enforce a subpoena it had served on Weinberg on 23 May 2011 in the separate case of *Chevron Corp. v. Salazar*, No. 11 Civ. 3718 (LAK) (SDNY), which was a declaratory judgment action regarding the enforceability of the Lago Agrio Judgment also pending before the District Court for the Southern District of New York.[2892] The reason, the Claimants explain, is that there was "substantial overlap between the *Salazar* subpoena and the proposed subpoenas in the 1782 action" and that "the Weinberg Group had withheld at least 1,115 documents and redacted at least 348 more based on meritless privilege claims in *Salazar*".[2893] Chevron's motion to enforce the *Salazar* subpoena was granted in the Related Action on 8 September 2011.[2894] This decision was appealed by Weinberg and the LAPs.[2895]

1791. After a prolonged stay, on 12 June 2012 the U.S. Court of Appeals for the District of Columbia vacated the 8 September 2011 motion.[2896] On 26 September 2012, the District Court for the Southern District of New York issued another order in the Related Action, granting in part Chevron's 23 May 2011 motion to compel production.[2897] According to the Claimants, the District Court ruled that Weinberg's privilege log "was inadequate to support its privilege claims" and ordered Weinberg to make a rolling production of 100 documents per day until the production was complete.[2898]

1792. Subsequently, the Claimants explain that on 3 October 2012 the District Court for the Southern District of New York ordered the parties to "show cause as to why Chevron's

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[2890] Memorial, Appendix 35, paras. 6-8; **C-2899**, Weinberg 1782 Docket, ECF Nos. 8 (28 January 2011), 17 (11 February 2011), 25 (16 February 2011), 26 (23 February 2011), 28 (1 March 2011), 30 (16 March 2011), 31 (21 March 2011), 32 (2 June 2011), p. 10 (8 August 2011).

[2891] Memorial, Appendix 35, para. 8; **C-2899**, Weinberg 1782 Docket, ECF Nos. 35, 37 (30 September 2011).

[2892] Memorial, Appendix 35, para. 9.

[2893] Memorial, Appendix 35, para. 9.

[2894] Memorial, Appendix 35, para. 9; **C-2900**, Chevron v. Salazar Docket (DDC), ECF No. 24.

[2895] Memorial, Appendix 35, para. 10; **C-2902**, Weinberg 1782 Court of Appeals Docket.

[2896] Memorial, Appendix 35, para. 12.

[2897] Memorial, Appendix 35, para. 17; **C-2900**, Chevron v. Salazar Docket (DDC), ECF Nos. 53-54.

[2898] Memorial, Appendix 35, para. 18.

1782 Application and the LAPs' motion to intervene should not be denied as moot in light of the court's recent order on the *Salazar* motion to compel in the Related Action."[2899] According to the Claimants,

> On 15 October 2012, the parties filed a Joint Stipulation for Voluntary Dismissal, in which the Weinberg Group agreed that Chevron would have "the same rights, if any, to use documents obtained through the RICO proceeding [the Related Action] in foreign proceedings as Chevron would have if the documents were obtained through this [Section 1782] action," and that any ruling of the court in the Related Action would apply as if it had been made in [this] Section 1782 proceeding."[2900]

1793. According to the Claimants, Weinberg ultimately produced approximately 3,400 pages of documents.[2901]

1794. The Claimants seek USD 897,330.23 corresponding to the legal fees and expenses they allegedly incurred in connection with the Weinberg 1782 between December 2010 and November 2013.[2902]

1795. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2903]

1796. As gleaned from the above timeline, all key events in the Weinberg 1782 had taken place by 15 October 2012, when the parties filed a Joint Stipulation for Voluntary Dismissal.[2904] The Claimants have failed to explain why they incurred legal fees and expenses in connection with the Weinberg 1782 after that date and ending in November 2013. The Tribunal is prepared to grant compensation for work performed until 31 October 2012 on account of the need for Chevron to perform closing tasks after the Weinberg 1782 was dismissed, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from

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[2899] Memorial, Appendix 35, para. 19; **C-2899**, Weinberg 1782 Docket, p. 19.

[2900] Memorial, Appendix 35, para. 20.

[2901] Memorial, Appendix 35, para. 20.

[2902] Reply, Updated Appendix 2, pp. 965-970.

[2903] *See* para. 1565 above.

[2904] **C-2899**, Weinberg 1782 Docket, ECF No. 46; **R-1587**, *Chevron Corp. v. Weinberg Group*, DDC Case 1:11-mc-00030-CKK, D.E. 46 Joint Stipulation for Voluntary Dismissal, 15 October 2012.

compensation all legal fees and expenses incurred by the Claimants after 31 October 2012.

1797. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 31 October 2012 in connection with the Weinberg 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1586 above that seeking discovery from any of the cleansing experts appointed by the LAPs to replace Mr Cabrera or any person or entity connected to them, such as Weinberg and related individuals, was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue to seek discovery from Weinberg after 14 February 2011 as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2905]

1798. Furthermore, the Tribunal has taken note of the Respondent's argument that that the Claimants cannot recover fees for the Weinberg 1782, as Chevron agreed in the 15 October 2012 Joint Stipulation for Voluntary Dismissal that it would bear its own costs.[2906] However, as already noted in paragraph 500 above, the settlement on costs included in that stipulation stated that all costs orders in the action, or all costs obligations, were acknowledged as fully satisfied between the parties to the Weinberg 1782.[2907] The Tribunal has explained in paragraph 501 above that this language cannot be understood as 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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[2905] *See* para. 1573 above.

[2906] Counter-Memorial, paras. 701-702; **R-1587**, *Chevron Corp. v. Weinberg Group*, DDC Case 1:11-mc-00030-CKK, D.E. 46 Joint Stipulation for Voluntary Dismissal, 15 October 2012.

[2907] **R-1587**, *Chevron Corp. v. Weinberg Group*, DDC Case 1:11-mc-00030-CKK, D.E. 46 Joint Stipulation for Voluntary Dismissal, 15 October 2012, p. 2: "[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."

Claimants' claim for damages in the present proceedings is thus entirely outside the scope of any settlement agreement reached in the Weinberg 1782.

1799. Accordingly, the Tribunal reiterates its ruling in paragraph 505(iv): the Claimants may recover their reasonable legal costs in this Arbitration, even if they were settled in the Weinberg 1782, 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 upon the Respondent.[2908] In this regard, the Tribunal observes that the Respondent has not put forward substantial reasons why the Claimants might have breached their duty to mitigate by settling costs in the Weinberg 1782.[2909]

1800. Lastly, the Tribunal has also taken note of the Respondent's argument that Chevron "voluntarily dismissed the Weinberg 1782 without a deposition and should be denied recovery of fees and costs from that action".[2910] The Tribunal rejects this argument: as explained above, Weinberg produced 3,400 pages of documents to Chevron.[2911] There is therefore no basis for the Tribunal to conclude that the Weinberg 1782 was somehow futile. As already explained, the ultimate outcome of the Affirmative 1782s has limited bearing on whether they amounted to a reasonable mitigation measure in this case.[2912]

1801. For these reasons, the Tribunal determines that the Claimants shall receive compensation for the legal fees and expenses they incurred in connection with the Weinberg 1782 between 14 February 2011 and 31 October 2012.

2908 *See* paras. 503, 505(iv) above.

2909 Counter-Memorial, paras. 701-704.

2910 Counter-Memorial, para. 707.

2911 *See* para. 1793 above.

2912 *See* para. 1571 above.

21. Wray 1782

1802. *Background*. The Claimants describe Mr Norman Nelson Alberto Wray Espinosa "as lead counsel for the LAPs from the filing of the Lago Agrio Complaint in 2003 until early 2006".[2913]

1803. On 8 June 2010, Chevron filed an application before the U.S. District Court for the District of Columbia for an order granting leave to serve a subpoena seeking documents and deposition testimony from Mr Wray for use in the Lago Agrio Litigation and this Arbitration.[2914] Mr Veiga and Dr Pérez filed simultaneous applications for their defence in the Criminal Proceedings.[2915] Ecuador filed an opposition to the application on 23 June 2010, followed by the LAPs on 28 June 2010, and Mr Wray on 29 June 2010.

1804. On 22 July 2010, the District Court granted Chevron's application – clarifying, however, that it would only require Mr Wray to produce documents that were located in D.C. and in his possession, custody, or control. The court ordered the parties to meet and confer regarding the appropriate scope of discovery and required the discovery to be completed by 5 August 2010.[2916]

1805. After additional proceedings and the submission of additional briefs, on 20 October 2010 the District Court granted the full scope of Chevron's discovery request (with discovery limited to documents located within the United States and electronically stored information accessible from the United States).[2917] On 21 October and 22 October 2010, Chevron served Mr Wray with subpoenas to produce documents and for a deposition.[2918]

1806. Thereafter, production took place in parallel with several procedural incidents, including the filing of motions to compel production by Chevron on 29 October 2010 and

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[2913] Memorial, Appendix 18, para. 1. *See generally* Memorial, Appendix 18; **C-2943**, Wray 1782 Docket; **C-2945**, Wray 1782 Court of Appeals Docket.

[2914] Memorial, Appendix 18, paras. 2-3; **C-2943**, Wray 1782 Docket, ECF No. 1.

[2915] Memorial, Appendix 18, para. 2; **C-2942**, Wray 1782 Docket (Pérez & Veiga); **C-2944**, Wray 1782 Docket (Pérez & Veiga).

[2916] Memorial, Appendix 18, para. 7; **C-2943**, Wray 1782 Docket, p. 11.

[2917] Memorial, Appendix 18, paras. 8-11; **C-2943**, Wray 1782 Docket, ECF No. 70.

[2918] Memorial, Appendix 18, para. 12.

17 December 2010; of motions to stay and appeals by Mr Wray, the LAPs and Ecuador on 3 November 2010; and a joint motion for a protective order on 8 November 2010.[2919]

1807. On 11 April 2011, Mr Wray filed a joint stipulation voluntarily dismissing the appeal.[2920] On 22 April 2011, the District Court granted Chevron's second motion to compel in part.[2921] On 29 April 2011, the District Court granted an application from Chevron to vacate the protective order that the court had enacted.[2922] Ultimately, on 30 July 2013 the parties informed the court that there were no remaining disputes, and the District Court closed the matter.[2923]

1808. According to the Claimants, Mr Wray produced documents on or around 22 October 2010 and late December 2010. He was also deposed on 2 November and 3 November 2010.[2924]

1809. The Claimants seek USD 1,491,154.99 and USD 11,742.45 corresponding, respectively, to the legal fees and expenses they allegedly incurred in connection with the Wray 1782 between July 2009 and November 2014.[2925]

1810. *Analysis and decision*. At the outset, the Tribunal recalls that all work performed in connection with the Affirmative 1782s before 14 February 2011 was not caused by the Respondent's Treaty breaches and therefore is non-compensable as damages.[2926]

1811. Furthermore, as gleaned from the above timeline, all key events in the Wray 1782 had taken place by 30 July 2013, when all production in connection with these proceedings was deemed completed.[2927] The Claimants have failed to explain why they incurred legal fees and expenses after that date and ending in November 2014. The Tribunal is prepared to grant compensation for work performed until 31 August 2013 on account of the need

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2919 Memorial, Appendix 18, paras. 13-17; **C-2943**, Wray 1782 Docket, ECF Nos. 72, 81-82, 84, 86, 93.

2920 Memorial, Appendix 18, para. 19; **C-2944**, Wray 1782 Docket (Pérez & Veiga), p. 12.

2921 Memorial, Appendix 18, p. 19; **C-2943**, Wray 1782 Docket, ECF No. 110.

2922 Memorial, Appendix 18, para. 19, p. 19; **C-2943**, Wray 1782 Docket, p. 24.

2923 Memorial, Appendix 18, para. 20; **C-2943**, Wray 1782 Docket, p. 24.

2924 Memorial, Appendix 18, paras. 12, 15.

2925 Reply, Updated Appendix 2, pp. 916-930.

2926 *See* para. 1565 above.

2927 **C-2943**, Wray 1782 Docket, ECF No. 115.

for Chevron to perform closing tasks after the District Court closed the matter, but has otherwise not been provided with sufficient elements to assess whether any fees and expenses incurred after that date fulfil the requirements for the compensation of incidental damages under international law. Accordingly, the Tribunal excludes from compensation all legal fees and expenses incurred by the Claimants after 31 August 2013.

1812. Otherwise, the Tribunal considers that all fees incurred by the Claimants between 14 February 2011 and 31 August 2013 in connection with the Wray 1782 are compensable in this Arbitration. The Tribunal has determined in paragraph 1578 above that by 14 February 2011 the Claimants were in possession of *prima facie* evidence signalling that seeking discovery from the LAPs' then-current and former U.S.-based counsel – including Mr Wray – was a reasonable step towards locating evidence of any fraud or corruption that might have taken place in the Lago Agrio Litigation. It was thus reasonable for the Claimants to continue to seek discovery from Mr Wray as a way of obtaining evidence that could be instrumental in preventing the recognition and enforcement of the Lago Agrio Judgment.[2928]

1813. Lastly, the Tribunal has taken note of the Respondent's argument that Chevron attempted to use the Wray 1782 improperly to obtain discovery outside the United States.[2929] The Tribunal notes that the District Court granted Chevron's discovery motion "except that Wray shall only be required to produce documents within his possession, custody, or control and located within the United States, including electronically stored information accessible from this District."[2930]

1814. Having already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the Wray 1782 (to the extent set out above), the Tribunal does not consider it necessary to opine on the substance of Chevron's submissions in those proceedings – much less on questions seemingly concerning the territorial scope of the jurisdiction of a U.S. District Court, a matter on which this Tribunal has not been sufficiently briefed. As already noted, it is not

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[2928] *See* para. 1573 above.

[2929] Counter-Memorial, para. 691.

[2930] **R-1795**, *In re Application of Chevron Corp.*, DDC Case 1:10-mc-00371-CKK, D.E. 69 Order, 20 October 2010, p. 1.

appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the Affirmative 1782s.[2931]

1815. For these reasons, the Tribunal determines that the Claimants shall receive compensation for the legal fees and expenses they incurred in connection with the Wray 1782 between 14 February 2011 and 31 August 2013.

1816. To the extent that the legal fees and expenses claimed by the Claimants under this heading may relate to the representation of Mr Veiga and Dr Pérez, they are addressed separately in Section VIII.K below.

22. (CLA) Work related solely to pursuing sanctions against the LAPs' law firms / (RES) Pursuing sanctions against the LAPs' law firms

1817. The Respondent requests that the Tribunal deny compensation for the legal fees and expenses incurred by the Claimants in connection with the pursuit of sanctions under U.S. Rule of Civil Procedure 11 against the law firms representing the LAPs in the Section 1782 Proceedings (in particular, the Donziger 1782) in an attempt to bar them from future appearances in the proceeding.[2932] In the Respondent's view, these "serial motions" were "highly unusual and suggestive of an improper purpose."[2933] The legal fees and expenses claimed by the Claimants falling under this description, as particularised by the Respondent, amount to USD 203,173.00.[2934]

1818. The Tribunal has carefully reviewed the evidence on the record and the time entries identified by the Respondent corresponding to the activities falling under the present heading.[2935] A central element emerging from this analysis is Chevron's 10 January 2011 request for sanctions against the three law firms representing the LAPs in the Donziger 1782 – Emery Celli Brinckerhoff & Abady LLP, Motley Rice LLC, and Patton Boggs LLP – "including by barring them from future appearances in this proceeding—for

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2931 *See* para. 341 above.

2932 Counter Memorial, para. 697; Rejoinder, paras. 880-881, Annex K-2.

2933 Rejoinder, para. 880; **RE-66**, Wendel Expert Report, para. 46.

2934 Rejoinder, para. 880, Annex K-2, p. 1.

2935 Rejoinder, Annex K-2; **R-1570**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 145 Order to Show Cause regarding Donziger, 10 January 2011, pp. 1-2.

purporting to represent the plaintiffs when they are not authorized to do so."[2936] As further detailed in Chevron's memorandum in support of this motion:

> The small subset of documents Donziger has produced establish that the U.S. firms have intentionally engaged in obstructionist delay tactics before this Court and other U.S. courts while seemingly lacking any authority to act at all on behalf of the plaintiffs they purport to represent. The firms' unauthorized representation violates ethical rules and standards of professional responsibility, and this Court should issue an order to show cause why Emery Celli, Motley Rice and Patton Boggs should not be barred from this proceeding and sanctioned for their ongoing, extensive, and unauthorized representation of plaintiffs. . .
>
> As detailed above, there is no evidence that any of these firms has a valid retainer agreement with plaintiffs, and the available evidence strongly suggests that the firms' appearances are unauthorized. Indeed, the unauthorized representation by Emery Celli, Motley Rice, and Patton Boggs makes possible the delay and obstruction Donziger is using in hopes of extorting a settlement from Chevron.[2937]

1819. Following the filing of this motion, Emery Celli moved to withdraw from the case.[2938] While it did not oppose withdrawal, on 12 February 2011 Chevron filed a response to Emery Celli's motion stating that the District Court should still impose sanctions against Emery Celli:

> Regardless of whether Emery Celli is now permitted to withdraw, Chevron's motion for sanctions against that firm remains outstanding and should be decided. Emery Celli's withdrawal would not obviate the need for it to be sanctioned for its prior unauthorized appearance . . . Nor would Emery Celli's withdrawal affect in any way the ample cause for this Court *sua sponte* to sanction that firm for its role in the knowing cover-up of the Cabrera fraud, a role that included misrepresentations to this Court and other courts around the country.[2939]

1820. The Tribunal understands that the court did not rule on Emery Celli's motion to withdraw or Chevron's motion for sanctions.[2940]

1821. Against this background, the Tribunal observes that the Claimants have not convincingly explained how pursuing sanctions against the LAPs' counsel in the context of the

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[2936] **R-1570**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 145 Order to Show Cause regarding Donziger, 10 January 2011, pp. 1-2.

[2937] **R-1571**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 147 Memorandum of Law ISO Order to Show Cause, 10 January 2011, pp. 30-31.

[2938] *In re Application of Chevron Corporation*, SDNY. Case 1:10-mc-00002-LAK, D.E. 181 Notice of Motion for Leave to Withdraw as Counsel (7 Feb. 2011) (**R-1814**).

[2939] **R-1574**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 182 Response to Motion for Leave to Withdraw as Counsel, 11 February 2011, p. 7.

[2940] Counter-Memorial, para. 697; **C-3027**, Donziger 1782 Docket.

Donziger 1782 could have substantially furthered any of the mitigation goals warranting compensation identified in paragraph 1557 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.

1822. The Tribunal notes that Chevron filed its request for sanctions against the LAPs' counsel prior to 14 February 2011.[2941] As already explained, any legal fees and expenses corresponding to activities performed before then were not incurred in reaction to the injury flowing from the Respondent's Treaty breaches and must therefore be excluded from compensation.[2942]

1823. To the extent the legal fees and expenses falling under this heading correspond to activities that took place after 14 February 2011, the Tribunal has not been presented with sufficient elements to determine whether such activities resulted in any concrete action in the context of the Donziger 1782, particularly in circumstances where the District Court never ruled on Emery Celli's motion to withdraw or Chevron's motion for sanctions.[2943] In particular, as gleaned from the time entries identified by the Respondent in connection with this component, all post-14 February 2011 activities falling under this component concerned the preparation of sanctions motions that were never filed in the Donziger

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[2941] **C-3027**, Donziger 1782 Docket, ECF No. 147 (10 January 2011); **R-1570**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 145 Order to Show Cause regarding Donziger, 10 January 2011; **R-1571**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 147 Memorandum of Law ISO Order to Show Cause, 10 January 2011; **R-1572**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 157 Reply Memorandum of Law ISO Order to Show Cause, 13 January 2011; **R-1573**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 173 Second Reply Memorandum of Law ISO Order to Show Cause, 24 January 2011; **R-1574**, *In re Application of Chevron Corporation*, SDNY Case 1:10-mc-00002-LAK, D.E. 182 Response to Motion for Leave to Withdraw as Counsel, 11 February 2011.

[2942] *See* para. 1565 above.

[2943] Counter-Memorial, para. 697; **C-3027**, Donziger 1782 Docket.

1782,[2944] or in any other Section 1782 Proceedings in which the filing of sanctions was also explored at different points in time.[2945]

1824. As such, while the Tribunal has concluded that the Claimants' attempts to obtain evidence of fraud and corruption in the Lago Agrio Litigation in the Donziger 1782 amounted to a reasonable mitigation measure,[2946] the Tribunal has not been presented with elements to determine how exactly pursuing sanctions against the LAPs' law firms after 14 February 2011 served to further the Claimants' efforts to minimize the injury arising from the recognition and enforcement of the Lago Agrio Judgment.

1825. For these reasons, the Tribunal finds that the Claimants have failed to establish that the legal fees and expenses they incurred in connection with pursuing sanctions against the LAPs' law firms 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.

23. (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)

1826. The Respondent asserts that the Claimants should not recover any fees related to work carried out by the law firms Rivero Mestre and Covington & Burling, amounting, respectively, to USD 3,203,710.58 and USD 2,426,311.00.[2947] These firms represented

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2944 *See*, *e.g.*, Rejoinder, Annex K-2, entries for 21 February 2011 ("Modify brief in support of motion for sanctions against Patton Boggs based on collected comments. (7.8) [1782s: Donziger]; Analyze research regarding same. (4.2) [1782s: Donziger])"; 23 February 2011 ("Revise and edit the Rule 11 motion against Patton Boggs in the RICO case. (3.3) [1782s: Donziger]"; 28 February 2011 ("Conference with J. Partridge regarding document from Donziger hard drive production for potential use in sanctions motion."); 17 March 2011 ("Draft executive summary of Emery Celli's involvement in the Lago Agrio Litigation and with S. Donziger. (3.4) [1782s: Donziger];" 20 April 2011 ("Look for research on motions for sanctions and contempt for potential contempt motion. (.5) [1782s: Donziger]".

2945 *See*, *e.g.*, Rejoinder, Annex K-2, entry for 31 January 2011 ("Analyze documents produced for potential use in requests for sanctions against plaintiffs' attorneys relating to 1782 petition in Colorado. (2.2) [1782s: Stratus]; Draft chronology of key facts and events relating to same. (5.7) [1782s: Stratus]"); 19 January 2011 ("[1782s: Gnl 1782]; Review representation briefs filed by law firms and outline arguments for reply brief regarding same. (4.1) [1782s: Gnl 1782]; Telephone call with team regarding arguments in plaintiffs' briefs. (.5) [1782s: Gnl 1782]").

2946 *See* para. 1690 above.

2947 Rejoinder, paras. 1175-1177.

Mr Veiga and Dr Pérez in the Criminal Proceedings and several of the 1782 Proceedings.[2948] The Respondent considers that it cannot be held liable "for any costs Claimants voluntarily assumed on behalf of non-parties".[2949]

1827. As noted by the Tribunal in paragraph 1998 below, by defending Mr Veiga and Dr Pérez in the Criminal Proceedings between September 2008 and June 2011, the Claimants sought ultimately to defend themselves from attempts to undermine their case in the Lago Agrio Litigation, aiming to achieve a positive outcome before the Lago Agrio Court at the trial stage. These efforts could not have conceivably sought to mitigate the injury flowing from the recognition and enforcement of the unremedied Lago Agrio Judgment, as required to warrant compensation, because said Judgment was yet to come into existence – indeed, the Lago Agrio Judgment represented the final outcome of the trial court proceedings. Whatever harm Chevron sought to address by defending Mr Veiga and Dr Pérez in the Criminal Proceedings is outside the scope of the injury caused by the Respondent's internationally wrongful acts. Accordingly, the legal fees and expenses incurred by the Claimants in connection with the Criminal Proceedings do not qualify as incidental damages and are therefore not recoverable in this Arbitration.

1828. In the Tribunal's view, the same conclusion extends necessarily to any legal fees and expenses incurred by the Claimants on Mr Veiga and Dr Pérez's behalf in connection with the Affirmative 1782s. To the extent the legal fees and expenses incurred by the Claimants in connection with the Criminal Proceedings do not warrant compensation, any funds spent by the Claimants to obtain evidence for use in those proceedings must also be excluded from compensation.

1829. For these reasons, the Tribunal denies compensation for the legal fees and expenses claimed by the Claimants under the present heading.

2948 Fourth Veiga Witness Statement, para. 116; **RE-51**, Trunko Expert Report, **SM J-8**.

2949 Rejoinder, para. 1176.

24. Other issues

1830. In this section, the Tribunal will address other outstanding issues raised by the Parties in connection with the Section 1782 Proceedings that have not been specifically identified by the Parties as a component.

1831. These include, in particular, the Respondent's argument that the Claimants overstaffed the Section 1782 Proceedings, making "excess and repetition unavoidable."[2950] The Respondent stresses that while Section 1782 actions "are essentially motions to compel discovery, and are thus far less complex than a substantive lawsuit, Claimants used dozens of timekeepers in each 1782 action", ranging from 11 timekeepers in the Netflix 1782 to 255 in the Donziger 1782.[2951]

1832. The Respondent's argument concerns matters that the Parties have identified as cross-cutting elements impacting multiple categories (in particular, "Multiple Attendance at Events" and "(CLA) Alleged Excessively Long Billing Days and Excessive Time; (RES) Excessively Long Billing Days and Excessive Time").[2952] As such, the Tribunal will address this argument as part of its analysis of cross-cutting elements in Section VIII.N below.

4. Conclusion on Section 1782 Proceedings

1833. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Section 1782 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 Section 1782 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 Affirmative 1782s, except for those they incurred

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2950 Rejoinder, para. 1204.

2951 Rejoinder, para. 1205.

2952 *See* para. 571 above.

in connection with (1) the Banco Pichincha 1782 between 14 February 2011 and 31 July 2013; (2) the Berlinger 1782 after 14 February 2011; (3) the Bonifaz 1782 between 14 February 2011 and 31 May 2011; (4) the Donziger 1782 between 14 February 2011 and 31 July 2013; (5) the E-Tech/Powers 1782 between 14 February 2011 and 30 April 2012; (6) the Page 1782 between 14 February 2011 and 28 February 2016; (7) the Rourke 1782 between 14 February 2011 and 31 December 2011; (8) the Stratus 1782 between 14 February 2011 and 31 January 2013; (9) the UBR 1782 after 14 February 2011; (10) the Weinberg 1782 between 14 February 2011 and 31 October 2012; and (11) the Wray 1782 between 14 February 2011 and 31 August 2013;

(iv) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Defensive 1782s;

(v) Excludes from compensation 90% of all legal fees and expenses incurred by the Claimants in connection with General 1782 Work after 14 February 2011;

(vi) Excludes from compensation 100% of the legal fees and expenses corresponding to the component "(CLA) Work related solely to pursuing sanctions against the LAPs' law firms / (RES) Pursuing sanctions against the LAPs' law firms";

(vii) Excludes from compensation 100% of the legal fees and expenses corresponding to the component "(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)";

(viii) Defers its determination regarding the compensation of the legal fees and expenses identified at para. 1831 above to its analysis of cross-cutting elements set out in Section VIII.N below;

(ix) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Section 1782 Proceedings, to the extent not

already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[2953] and

(x) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Section 1782 Proceedings. The Tribunal will determine the exact amount of compensation corresponding to the Section 1782 Proceedings in Section VIII.O below.

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2953 *See* paras. 564-566 above.

I. GIBRALTAR PROCEEDINGS

1834. The Claimants seek USD 38,421,547.26 as direct damages for the legal fees and expenses they incurred between April 2008 and July 2018 for the six Gibraltar actions they initiated against the third-party funders, funding vehicles and related parties upon which the LAPs and Ecuador allegedly relied to fund both the Lago Agrio Litigation and the subsequent enforcement proceedings.[2954] In the alternative, the Claimants submit that they are entitled to recover these legal fees and expenses as incidental damages.[2955]

1835. The Respondent argues the Claimants have failed to prove that the legal fees and expenses they claim were caused by the Treaty breaches and were reasonable and necessary for Chevron to defend against the enforcement of the Lago Agrio Judgment.[2956] Consequently, the Respondent considers that this entire category of claimed damages is non-compensable.[2957]

1. The Claimants' Position

1836. According to the Claimants, Chevron's legal actions against third-party funders seeking to prevent them from funding the enforcement of the Lago Agrio Judgment – and, thus, to undermine the LAPs' efforts to enforce the Judgment – were a natural and foreseeable result of the Respondent's Treaty breaches, as well as the Respondent's refusal to comply with the Tribunal's Interim Orders and Awards.[2958] In this respect, the Claimants underscore that the risk of the LAPs pursuing enforcement outside of Ecuador and the need for them to secure funding was a "certainty" in view of the inherent costs of running a global enforcement campaign.[2959]

2954 Reply, paras. 952, 1212(2)(i), Updated Appendix 2, pp. 1152-1203; **C-3462**, Indexes of Claimed Invoices by Damage Category ("Gibraltar & General Offensive" tab).

2955 Reply, para. 952.

2956 Counter-Memorial, para. 905; Rejoinder, para. 1567.

2957 Counter-Memorial, para. 905; Rejoinder, para. 1520.

2958 Memorial, para. 410.

2959 Reply, paras. 958-959, 961.

1837. In support of their position, the Claimants explain that the purpose of the Gibraltar Proceedings was to prevent further funding of the Lago Agrio conspiracy by known funders, such as (i) Mr James Russell DeLeon; (ii) Mr DeLeon's funding vehicle, Torvia Limited ("**Torvia**"); (iii) Amazonia Recovery Limited (defined earlier as "Amazonia"), a special purpose vehicle used by the LAPs and their affiliates to receive funding for the "Global Pressure Campaign" against Chevron; (iv) Woodsford Litigation Funding Limited ("**Woodsford**"); and (v) other related parties.[2960] As observed by Mr Steven Kobre – a partner at Kobre & Kim LLP and witness on behalf of the Claimants – the successful outcomes of each of the Gibraltar Proceedings "effectively ended the use of large-scale commercial third-party funding of the conspiracy against Chevron and eliminated Gibraltar as the LAPs' chosen forum."[2961] In particular, the Claimants note that they successfully obtained judgments against certain defendants, including Amazonia,[2962] and reached settlements with other funders, whereby they agreed *inter alia* to cease the funding of the Lago Agrio Litigation and the "Global Pressure Campaign".[2963]

1838. The Claimants emphasize that Chevron's strategic decision to deprive the LAPs of access to funding for their enforcement activities was the direct consequence of the Respondent's continued refusal to prevent enforcement of the Lago Agrio Judgment in defiance of the Tribunal's Interim Orders and Awards.[2964] Therefore, for the purposes of recovering the expenses incurred in the Gibraltar Proceedings, the Claimants consider irrelevant whether

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[2960] Memorial, paras. 398-407; **C-2916**, *Chevron Corp. v. James Russell DeLeon & Torvia Ltd.*, Supreme Court of Gibraltar, Claim No. 2012-C-232, Claimants' Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012; **C-2972**, *Chevron v. Amazonia & Other*s, Claim No. 2014-C-110, Supreme Court of Gibraltar, Particulars of Claim, 18 June 2014; **C-2983**, *Chevron Corp. v. Amazonia & Other*s, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order Approving Joinder, 1 December 2014; **C-2998**, *Chevron v. Amazonia & Other*s, Claim No. 2014-C-2014-C-110, Supreme Court of Gibraltar, Eleventh Witness Statement of Stephen Victor Catania for the Claimant, 28 March 2017.

[2961] Reply, paras. 955-956, 963; Kobre Witness Statement, para. 17.

[2962] Memorial, paras. 406, 408; **C-2995**, *Chevron Corp. v. Amazonia* & Others, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgment, 9 December 2015, paras. 1, 14; **C-3001**, Chevron Press Release, "Gibraltar Supreme Court Awards Chevron $38 Million Against Ecuadorian Conspirators", 25 May 2018; **C-3002**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 14 May 2018.

[2963] Memorial, paras. 401, 405; **C-2967**, Settlement Agreement Between Chevron and DeLeon Parties, 13 February 2015; **C-2988**, Woodsford's Executed Settlement Agreement with Chevron, 1 May 2015.

[2964] Memorial, para. 397; Reply, paras. 962, 964.

the litigation funders knew that their actions were improper when they began funding the LAPs' enforcement efforts.[2965]

1839. Further, according to the Claimants, the fact that Chevron has received partial payment from the funders or that they paid expenses for non-party disclosure in the Gibraltar Proceedings does not preclude them from recovering those costs from the Respondent in this Arbitration.[2966] In the Claimants' view, nothing in the underlying court orders or settlement agreements with the defendants in the Gibraltar Proceedings bars Chevron from seeking its costs as damages against a non-party to those proceedings – the Respondent.[2967]

1840. In view of the foregoing, the Claimants submit that Chevron's actions in commencing the Gibraltar Proceedings constitute a reasonable mitigation of the potential losses to which they were exposed by the LAPs' global efforts to enforce the Lago Agrio Judgment.[2968] Accordingly, the Claimants state that Chevron's expenditures in the Gibraltar Proceedings, carried out in mitigation of massive potential liability, are duly recoverable under international law.[2969]

1841. The Claimants submit that – at the very least – they are entitled to recover USD 36,516,000 in direct damages incurred after 1 March 2012.[2970]

1842. According to the Claimants, the fact that they agreed to pay their legal costs without a guarantee that such costs would ever be recoverable demonstrates that the costs were reasonable.[2971] Moreover, the Claimants take the view that a single instance whereby a court denied a specific document production request does not render the legal expenses incurred in those proceedings unreasonable or unnecessary.[2972] In the alternative, the

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[2965] Reply, para. 954.

[2966] Reply, paras. 968-969.

[2967] Reply, para. 970.

[2968] Memorial, para. 411; Reply, para. 960.

[2969] Memorial, para. 411; **CLA-670**, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Award, ICJ Reports 1997, 27 September 1997, para. 80.

[2970] Reply, para. 971.

[2971] Reply, para. 972.

[2972] Reply, para. 974.

Claimants argue that they are entitled to recover the legal fees and expenses incurred in the Gibraltar Proceedings as incidental damages on the grounds that these expenses were reasonable for the reasons set out above.[2973]

2. The Respondent's Position

1843. For the Respondent, there is no causal connection between the Treaty breaches and the Gibraltar Proceedings because the conduct alleged by Chevron in the Gibraltar actions, *i.e.*, that the Gibraltar defendants chose to fund the LAPs' claims despite their knowledge that the LAPs and their counsel were acting dishonestly, predates the issuance of the Lago Agrio Judgment and the declaration of the Treaty breaches by this Tribunal.[2974] In particular, the Respondent notes that Chevron allegedly began incurring legal expenses in Gibraltar as early as 2008, while (i) the first Gibraltar proceeding was actually filed in December 2012; and (ii) the Treaty breaches did not crystallise until the Constitutional Court issued its decision in June 2018.[2975] In the Respondent's view, the Claimants have also failed to establish that "attacking" third-party funders in a "faraway jurisdiction", where no enforcement action was even filed, was necessary for Chevron's successful defence against the enforcement of the Lago Agrio Judgment in other jurisdictions.[2976]

1844. Consequently, the Respondent rejects the Claimants' assertion that the Gibraltar Proceedings were a natural and foreseeable result of the Respondent's Treaty breaches.[2977] Instead, for the Respondent, it was "a result of Chevron's vendetta against the LAPs and anyone related to them" and was about "inflicting as much pain on the LAPs as possible."[2978]

1845. In the same vein, the Respondent argues that "Chevron could simply have defended itself in any recognition or enforcement action in a particular forum" as Chevron had already amassed substantial evidence of the "ghostwriting" of the Lago Agrio Judgment.[2979]

2973 Reply, para. 972-975.

2974 Counter-Memorial, para. 891.

2975 Rejoinder, paras. 1524, 1527-1528.

2976 Counter-Memorial, para. 892; Rejoinder, paras. 1525, 1530, 1533.

2977 Counter-Memorial, para. 890.

2978 Rejoinder, paras. 1528, 1535.

2979 Rejoinder, paras. 1529, 1531.

Therefore, the Respondent rejects the Claimants' assertion that the fees incurred in the Gibraltar Proceedings were necessary to mitigate against the distant possibility of recognition and enforcement of the Lago Agrio Judgment and execution against Chevron's assets.[2980]

1846. For the Respondent, Chevron's settlement in three of the six Gibraltar actions, as well as the Gibraltar court orders in the remaining three actions, on the issue of attorneys' fees and costs, are dispositive as to that specific issue relative to those actions.[2981] Insofar as Chevron agreed to bear the costs of those actions and those agreements were adopted as court orders, or courts otherwise entered orders that disposed of costs issues with finality, the Respondent contends that it is improper for the Claimants to seek double recovery for the same costs in this Arbitration.[2982]

1847. In addition to the failure to prove that the Gibraltar fees and expenses claimed by the Claimants were caused by the Respondent's Treaty breaches, the Respondent maintains that the Claimants have failed to prove that incurring those fees and expenses was reasonable and necessary for them to defend against the enforcement of the Lago Agrio Judgment.[2983] Specifically, the Respondent posits that under Gibraltar law the Claimants are required to prove that the fees they allegedly incurred in the Gibraltar Proceedings were the "lowest amount which [Chevron] could reasonably have been expected to spend in order to have its cases conducted and presented proficiently" to establish that those fees and expenses were reasonable.[2984]

1848. According to the Respondent, the Gibraltar actions were "straightforward cases" because the underlying issues that formed the basis of Chevron's claims – whether the defendants had committed the torts of conspiracy and unlawful interference with Chevron's rights – "were not novel or new under English or Gibraltar law", as observed by Mr Lewis

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[2980] Rejoinder, para. 1529.

[2981] Counter-Memorial, paras. 897-900; Rejoinder, paras. 1536-1537; **RE-52**, Baglietto Expert Report, para. 168.

[2982] Counter-Memorial, para. 901; Rejoinder, para. 1538.

[2983] Counter-Memorial, para. 902; Rejoinder, para. 1543.

[2984] Rejoinder, paras. 1539-1542; **RE-52**, Baglietto Expert Report, paras. 53-54, **LB-18**, *Kazakhstan Kagacy Plc v. Zhunus*, [2015] EWHC 404, 14 ConLR 253, p. 13.

Baglietto, an experienced commercial litigator in Gibraltar[2985] acting as an expert for the Respondent.[2986] As such, in the Respondent's view, the characterisation by non-Gibraltar practitioners of the Gibraltar Proceedings as overly complex amounts to a "self-congratulatory attempt to justify extravagant expenditures" and should be disregarded.[2987]

1849. In view of the above, the Respondent posits that the "excessive" fees claimed for the Gibraltar Proceedings are the result of (i) overstaffing (and thus performing duplicative work) and paying attorneys to educate a vast team about all aspects of "Chevron's global crusade against" the LAPs;[2988] (ii) creating, reviewing, and revising work product that was unnecessary to further Chevron's cases;[2989] and (iii) attorneys billing on projects that were wholly unrelated to the Gibraltar Proceedings, including drafting complaints and papers for actions in other jurisdictions that were not even identified by the Claimants.[2990]

1850. In this respect, the Respondent highlights that when awarding Chevron its reasonable fees and costs (to the extent there were any) the Gibraltar courts determined that Chevron's litigation tactics were "absurd" and led to unnecessary costs and expenses under the guiding principle that "litigation should be conducted in proportionate manner, and, where possible, at a proportionate cost."[2991]

1851. Even assuming *arguendo* that the Gibraltar Proceedings were a proximate consequence of the Treaty breaches, the Respondent submits that the Claimants are only entitled to a maximum of USD 71,815 (later updated to USD 40,502) in fees and costs for the proceedings, subject to showing that the amount was reasonable and necessary.[2992] Yet,

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2985 Baglietto Expert Report, paras. 9-16.

2986 Rejoinder, paras. 1545-1546, 1556; **RE-52**, Baglietto Expert Report, paras. 125-128.

2987 Rejoinder, paras. 1537-1548.

2988 Rejoinder, paras. 1544, 1552-1558; **RE-52**, Baglietto Expert Report, paras. 132-134, 138-140.

2989 Rejoinder, paras. 1544, 1551, 1559; Annex J-3, entries, 396, 423, 424, 605, 681, 752; **RE-52**, Baglietto Expert Report, para. 160.

2990 Rejoinder, paras. 1544, 1551, 1560-1562; Annex J-4, entries, 2, 53, 54, 189.

2991 Counter-Memorial, paras. 902-904; **C-3009**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Judgment, 10 November 2014, para. 34; **RLA-730**, *Lownds v. Home Office*, [2002] C.P. Rrep. 43, 21 March 2002, para. 1.

2992 Counter-Memorial, para. 895; Rejoinder, para. 134; **RE-35**, First Leigh Expert Report, para. 129; **RE-61**, Second Leigh Expert Report, para. 80.

for the above-mentioned reasons, the Respondent argues that the Claimants have failed to make such a showing.[2993]

3. The Tribunal's Analysis

(a) Introduction

1852. On 17 December 2012, Chevron initiated the Gibraltar Proceedings by filing an action against Mr DeLeon – who was alleged to be one of the Lago Agrio Litigation funders – and Torvia – his purported funding vehicle – claiming "damages for losses sustained . . . as a consequence of the Defendants' funding and support of fraudulent litigation brought against the Claimant in the Republic of Ecuador (the 'Lago Agrio Litigation')".[2994] These proceedings were followed by five other actions, including three discovery proceedings, brought against other Gibraltar-based funders, corporate vehicles, and related individuals.[2995] Each of the six Gibraltar Proceedings is described in further detail in paragraphs 1861-1893 below.

1853. The Claimants assert that they initiated the Gibraltar Proceedings "in order to prevent further funding of the conspiracy and to mitigate against potential damages Chevron could face should the [Lago Agrio Judgment] be enforced in light of Ecuador's continued refusal (in defiance of this Tribunal's Interim Orders and Awards) to prevent enforcement of the Judgment."[2996] In particular, the Claimants state that they sought to (i) cut off the sources of funding of the LAPs' representatives; (ii) halt the "potentially irreversible dissipation of funds" through Gibraltar entities; and (iii) dissuade new funders from providing additional resources to the LAPs in their global campaign against Chevron.[2997]

1854. The Respondent opposes the Claimants' damages claim in respect of the Gibraltar Proceedings on several grounds, including the following: (i) the basis of the Gibraltar Proceedings (*i.e.*, the Gibraltar defendants' alleged knowledge that the LAPs and their

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[2993] Counter-Memorial, para. 895.

[2994] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, para. 1.

[2995] Memorial, para. 397; Appendix 7.

[2996] Memorial, para. 397.

[2997] Reply, para. 955; Fourth Veiga Witness Statement, para. 90.

counsel were acting dishonestly and nevertheless chose to fund their activities) predated the Lago Agrio Judgment and the Treaty breaches and could not have been caused by them; (ii) instead of "attack[ing] third-party funders . . . in a faraway jurisdiction" the Claimants could have availed themselves of other remedies in other fora, including directly defending against the Lago Agrio Judgment and any attempts to enforce it; and (iii) if "starting a new cluster of lawsuits on another continent was Chevon's mitigation strategy, it was faulty at best, as there is no evidence to suggest that . . . the LAPs could not have found other funding sources."[2998]

1855. Before beginning its analysis of the Claimants' damages claim in respect of the Gibraltar 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.[2999] 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 to mitigate any other form of harm or geared towards any other goal are *not* compensable in these proceedings.[3000]

1856. Following the methodology laid out in Section VII.G.5 for the assessment of incidental damages, the Tribunal finds that the Claimants' claim for compensation in respect of legal fees and expenses incurred in connection with the Gibraltar Proceedings must be granted for the reasons and to the extent set out below.

(b) First Step: Analysis of Incidental Damages "Category"

1857. As a first step of its analysis, the Tribunal must determine whether the Gibraltar Proceedings category of damages meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.

2998 Counter-Memorial, paras. 891-893; Rejoinder, paras. 44, 1524-1535.

2999 Reply, para. 860.

3000 *See* para. 317 above.

1858. 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.

1859. 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.[3001]

1860. As already noted, the Gibraltar Proceedings comprised six parallel yet distinct actions requiring a differentiated analysis for present purposes. They are addressed consecutively in the paragraphs that follow.

1. Chevron v. James Russell DeLeon and Torvia Limited

1861. On 17 December 2012, Chevron lodged an action against Mr DeLeon and Torvia, a Gibraltar company alleged to be "ultimately owned and/or controlled by" Mr DeLeon, before the Supreme Court of Gibraltar (the "***DeLeon* Action**").[3002] Chevron claimed damages and other remedies for "losses caused by unlawful means conspiracy and/or conspiracy to injure the Claimants' interests by arranging from Gibraltar the funding of a

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[3001] *See* para. 556 above.

[3002] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, para. 8.

fraudulent claim [*i.e.*, the Lago Agrio Litigation]."[3003] Chevron alleged that Mr DeLeon and Torvia "funded such litigation knowing or being recklessly indifferent as to the commission of the said frauds, which included the making of fraudulent misrepresentations as to the identity and independence of the authors of the expert reports on which the Lago Agrio Judgment was to a large extent based, and also the intimidation and corruption of the Ecuadorian judiciary."[3004] Chevron further stated that Mr DeLeon had contributed an initial amount of USD 1 million to fund the Lago Agrio Litigation, for which Mr DeLeon and Torvia were to receive 7% of the net recoveries from the enforcement of the Lago Agrio Judgment.[3005]

1862. On 13 February 2015, Chevron entered into a settlement agreement with Mr DeLeon, Torvia and Mr Julian Jarvis (a defendant in the *Amazonia* and *Jarvis* Actions described below)[3006] whereby, among other things, they agreed to cease funding the LAPs in connection with the Lago Agrio Litigation and Judgment, the "Global Pressure Campaign", and any related proceedings in any jurisdiction.[3007] They also agreed to comply "with any request from Chevron in relation to their legal, beneficial or financial interest in the Lago Agrio Litigation, the Lago Agrio Judgment, any Related Actions, and any proceeds they receive as a consequence of their interest in the Lago Agrio Judgment or in Amazonia".[3008]

1863. On 18 February 2015, the Supreme Court of Gibraltar issued a consent order acknowledging that the parties in the *DeLeon* Action had agreed to a discontinuance of

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[3003] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, p. 1, Brief Details of Claim.

[3004] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, p. 1, Brief Details of Claim.

[3005] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, paras. 43, 51; **C-2917**, *Chevron Corp. v. James Russell DeLeon & Torvia Limited*, Supreme Court of Gibraltar, Claim No. 2012-C-232, Defence and Counterclaim of the First and Second Defendants, 30 July 30 2014, para. 4.

[3006] *See* paras. 1870-1889 below.

[3007] **C-2967**, Settlement Agreement Between Chevron and DeLeon Parties, 13 February 2015, para. 2.

[3008] **C-2967**, Settlement Agreement Between Chevron and DeLeon Parties, 13 February 2015, para. 4.

the proceedings and ordering, with consent of the parties, that all existing costs shall stand as fully satisfied between the parties.[3009]

1864. Based on the above, the Tribunal determines that by bringing the *DeLeon* Action after the Lago Agrio Judgment was rendered enforceable on 1 March 2012,[3010] Chevron sought primarily to deprive the LAPs from access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign. Since the Claimants have established sufficiently that the LAPs could not have pursued the Lago Agrio Litigation or any enforcement proceedings without significant funding,[3011] the Tribunal determines that the Claimants' efforts geared towards cutting off funding for the LAPs had the direct goal of undermining existing attempts, as well as preventing future attempts, to render enforceable and/or enforce the Lago Agrio Judgment in multiple jurisdictions worldwide (as described in items (i) and (iii) in paragraph 1858 above). The requirement of causation for the compensation of incidental damages is therefore established as regards the *DeLeon* Action.

1865. In reaching this conclusion, the Tribunal remains mindful that, by bringing the *DeLeon* Action, the Claimants also sought to cut off funding for the LAPs' so-called "Global Pressure Campaign" (*i.e.*, "a dishonest adverse publicity campaign intended to compel [Chevron] to settle the [Lago Agrio Judgment]").[3012] In this respect, the Tribunal recalls that any harm suffered by the Claimants as a result of such campaign – including any

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[3009] **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.

[3010] Track II Award, para. 4.462.

[3011] Track II Award, paras. 4.34, 4.410, 4.412; **C-1217**, Burford Funding Agreement, 31 October 2010; **C-1218**, Intercreditor Agreement, 31 October 2010. *See in particular* Track II Award, para. 4.34: "The Lago Agrio Plaintiffs' representatives and legal advisers, at different times, included Mr Norman Alberto Wray (a senior Ecuadorian lawyer and former judge of the Ecuadorian Supreme Court), Mr Cristóbal Bonifaz (of Amherst, MA, USA), Mr Pablo Fajardo Mendoza (from 2005), Mr Juan Pablo Sáenz, Mr Julio Prieto Méndez, Mr Alejandro Ponce Villacis, Mr Luís Yanza (a director of the "Frente de Defensa La Amazonia" or "Frente" and, in English, the "Amazon Defence Front" or "ADF"), Mr Icoca Manuel Tegautal, Mr Joseph Kohn (of Kohn, Swift & Graf, Philadelphia, PA, USA); Patton Boggs (a law firm in Washington DC, USA from about August 2010) and, as already indicated, Mr Donziger. The funding for such legal representation came principally from Mr Kohn (until 2010), Mr Russell DeLeon, Patton Boggs and (from 2010) Burford Capital, in return for success fees calculated on recoveries from Chevron upon the eventual enforcement of the Lago Agrio Judgment. Other non-party funders appear to have become involved in the Lago Agrio Judgment's enforcement proceedings outside Ecuador."

[3012] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, p.1, Brief Details of Claim.

legal fees and expenses incurred to oppose the campaign – falls outside the scope of the compensable injury in this case (*i.e.*, the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment).[3013]

1866. However, the Tribunal considers that the two goals pursued by the *DeLeon* Action – mitigating both the injury arising from the recognition and enforcement of the Lago Agrio Judgment and the harm caused by the "Global Pressure Campaign" – were inextricable, as Mr DeLeon and Torvia allegedly funded the LAPs' enforcement efforts and the "Global Pressure Campaign" jointly as part of a coordinated strategy.[3014] In the Tribunal's view, the fact that the *DeLeon* Action may have had other goals beyond its basic objective of mitigating the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment does not alter the conclusion that the Claimants have established the required causal link between the legal fees and expenses claimed under the present heading and the Respondent's wrongs.

1867. The question whether pursuing the *DeLeon* Action fulfils the requirement of reasonableness for the compensation of incidental damages merits a separate assessment. Critically, the *DeLeon* Action was not brought against the injuring party (Ecuador) or the LAPs, but rather against litigation funders who supported the LAPs' efforts to derive proceeds from the Lago Agrio Judgment. In normal circumstances, the Tribunal would be cautious to grant compensation for costs incurred by an injured party in proceedings against third-party litigation funders, as doing so could raise issues of access to justice. However, in the Tribunal's view, no access-to-justice considerations apply where, as here, the injured party has substantial reasons to believe that the funders in question have actual or constructive knowledge that they are funding fraudulent activities.

1868. In this connection, the Tribunal has examined Chevron's Particulars of Claim in the *DeLeon* Action and taken note, in particular, of the materials alleged to have come to Mr DeLeon's attention regarding the 'ghostwriting' of the Lago Agrio Judgment between

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[3013] *See* para. 317 above.

[3014] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, p. 1, Brief Details of Claim. *See also* Track II Award, para. 7.27: "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."

2007 and 2010.[3015] In view of the significant overlap between these allegations and the Tribunal's factual findings regarding the 'ghostwriting' of the Judgment in Parts IV and V of its Track II Award, the Tribunal concludes that the Claimants had substantial reasons to believe that Mr DeLeon and Torvia knew or should have known that the Lago Agrio Judgment had been procured fraudulently and decided to fund its enforcement nonetheless. It was therefore reasonable for the Claimants to bring legal proceedings against Mr DeLeon and Torvia as a way to mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment.

1869. For these reasons, the Tribunal determines that the Claimants' pursuit of the *DeLeon* Action fulfils the requirements of causation and reasonableness for the reimbursement of incidental damages.

2. Chevron v. Amazonia & Woodsford

1870. On 18 June 2014, Chevron filed a claim for damages before the Supreme Court of Gibraltar against (i) Amazonia, which was alleged to be owned and controlled by several of the LAPs' representatives and "the clearinghouse for both incoming funding and support and outgoing proceeds of the Conspirators' unlawful scheme";[3016] and (ii) Woodsford, which, in Chevron's submission, "has funded and supported the continued prosecution of the Lago Agrio Litigation (through continued multi-jurisdictional enforcement efforts and in various other legal proceedings) and the continued perpetration of the Global Pressure Campaign in the expectation of itself obtaining a substantial financial benefit as a result"[3017] (the "***Amazonia* Action**").

1871. Later in the proceedings, the Supreme Court of Gibraltar granted Chevron's application to join additional defendants to the action, including three Ecuadorian directors of Amazonia (Mr Pablo Fajardo, Mr Luis Yanza, and Mr Ermel Chavez) and Mr Jarvis, a

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[3015] **C-2916**, *Chevron Corp. v. James Russell DeLeon and Torvia Limited*, Claim No. 2012-C-232, Supreme Court of Gibraltar, Claimant's Sealed Claim Form, Particulars of Claim and Notice of Issue, 17 December 2012, paras. 89-102.

[3016] **C-2972**, *Chevron v. Amazonia & Other*s, Claim No. 2014-C-110, Supreme Court of Gibraltar, Particulars of Claim, 18 June 2014, para. 4.7.

[3017] **C-2972**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Particulars of Claim, 18 June 2014, para. 4.8.

Gibraltar-domiciled director of Amazonia.[3018] As noted above, Mr Jarvis entered into a settlement agreement with Chevron on 13 February 2015.[3019]

1872. On 1 May 2015, Chevron entered into a settlement agreement with Woodsford and Temeraire Limited.[3020] These two companies agreed, *inter alia*, to cease funding the LAPs in connection with the Lago Agrio Litigation and Judgment, the "Global Pressure Campaign", and any related proceedings in any jurisdiction.[3021] They also agreed to comply "with any reasonable request from Chevron in relation to their legal, beneficial or financial interest in the Lago Agrio Litigation, the Lago Agrio Judgment . . . any Related Actions, and any proceeds they receive or are entitled to receive as a consequence of their interest in the Lago Agrio Judgment or in Amazonia".[3022] Thereafter, a consent order was agreed upon by Chevron and Woodsford whereby "all existing costs orders between the parties were acknowledged as fully satisfied".[3023]

1873. On 9 December 2015, Chevron obtained a default judgment against Amazonia for USD 28,035,219.37 in damages, reflecting attorneys' fees incurred in the RICO Litigation, as Chevron had "voluntarily limited their claim against Amazonia to the costs incurred by it in bringing proceedings in the United States."[3024] The Supreme Court of Gibraltar awarded additional relief, including a permanent injunction restraining Amazonia from performing any act in or from Gibraltar for purposes of supporting the conspiracy, enforcing the Lago Agrio Judgment, or distributing proceeds related to enforcement of the same judgment.[3025]

[3018] **C-2983**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order Approving Joinder, 1 December 2014.

[3019] *See* para. 1862 above.

[3020] **C-2988**, Woodsford's Executed Settlement Agreement with Chevron, 1 May 2015. The Claimants describe Temeraire Limited as "a Gibraltar-registered company not named as a party, but used by Woodsford as a special purpose vehicle to acquire an option to purchase shares in Amazonia" (Memorial, Appendix 7, p. 12).

[3021] **C-2988**, Woodsford's Executed Settlement Agreement with Chevron, 1 May 2015, para. 2.

[3022] **C-2988**, Woodsford's Executed Settlement Agreement with Chevron, 1 May 2015, para. 4.

[3023] Memorial, Appendix 7, p. 12; **C-2989**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Consent Order, 4 May 2015.

[3024] **C-2995**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgment, 9 December 2015, paras. 9, 13.

[3025] **C-2995**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgment, 9 December 2015, para. 14.

1874. On 25 May 2018, Chevron also obtained a default judgment for (i) USD 38,093,729.85 in damages and interest against Pablo Fajardo, Luis Francisco Yanza and Ermel Chavez; and (ii) USD 37,638,758.16 in damages and interest against two defendants that had been joined to the *Amazonia* Action on 3 May 2017 and which were also shareholders of Amazonia:[3026] the Amazonian Defence Front or "ADF" (an organization acting as representative of the LAPs in the Lago Agrio Litigation and a named beneficiary of the Lago Agrio Judgment)[3027] and Servicios Fromboliere Compania Limitada (which is described by the Claimants as an Ecuadorian law firm operated by Pablo Fajardo).[3028] These sums also reflected fees and costs incurred by Chevron in the RICO Litigation.[3029] The Supreme Court of Gibraltar granted additional relief including (i) an injunction restraining the defendants from assisting or supporting in any way the LAPs, the enforcement of the Lago Agrio Judgment or the distribution of any related proceeds;[3030] and (ii) an indemnity order "for any loss or expense incurred in any jurisdiction by the Claimant arising out of any and all attempts to enforce the Lago Agrio Judgment", as well as liberty for Chevron to apply for an order to pay specific sums under such indemnity.[3031]

1875. According to the Claimants, Amazonia did not pay any part of the damages awarded against it.[3032] Chevron subsequently applied for and received a court order appointing liquidators over Amazonia, as described in paragraphs 1890-1893 below.

[3026] **C-2999**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 3 May 2017.

[3027] *See* paras. 87-88 above; Track II Award, paras. 4.442, 5.6.

[3028] Memorial, Appendix 7, p. 14; **C-2998**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Eleventh Witness Statement of Stephen Victor Catania for the Claimant, 28 March 2017; **C-3001**, Press Release, "Gibraltar Supreme Court Awards Chevron $38 Million Against Ecuadorian Conspirators," Chevron, 25 May 2018; **C-3002**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 14 May 2018.

[3029] Memorial, Appendix 7, p. 15, fn 84. *See also* **C-3002**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 14 May 2018, para. 1: "the Claimant may not recover more than US $33,148,186.71 in damages and US $4,945,543.14 in interest thereon pursuant to this Order".

[3030] **C-3002**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 14 May 2018, paras. 4-5.

[3031] **C-3002**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order, 14 May 2018, paras. 6-7.

[3032] Memorial, Appendix 7, p. 15.

1876. In sum, echoing the *DeLeon* Action, Chevron brought the *Amazonia* Action seeking primarily to deprive the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign.[3033] In addition, the *Amazonia* Action sought to prevent Amazonia from being used as a "clearinghouse for . . . outgoing proceedings of the Conspirators' unlawful scheme".[3034]

1877. In the Tribunal's view, the Claimants have established that they had substantial reasons to believe that the defendants in the *Amazonia* Action knew or should have known that they were funding fraudulent activities.[3035] Accordingly, for the same reasons stated in paragraphs 1864-1869 above in connection with the *DeLeon* Action, the Tribunal concludes that the Claimants' pursuit of the *Amazonia* Action fulfils the requirements of causation and reasonableness for the reimbursement of incidental damages.

3. Chevron v. GT Nominees Limited

1878. On 18 June 2014, Chevron initiated a discovery action against GT Nominees Limited ("**GT Nominees**"), the purported sole legal owner of Amazonia and Torvia (the "***GT* Action**").[3036] According to Chevron, GT Nominees was "providing nominee shareholder services to the ultimate beneficial owners of Amazonia and Torvia for the purpose of concealing their identities."[3037] On this basis, Chevron sought "disclosure in respect of (a) the ultimate beneficial owners of Amazonia and Torvia and the activities they have carried out in pursuit of the conspiracy and (b) the Defendant's own role in the conspiracy."[3038]

[3033] *See* para. 1864 above.

[3034] **C-2972**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Particulars of Claim, 18 June 2014, para. 4.7. *See also* paras. 1890-1893 below.

[3035] **C-2972**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Particulars of Claim, 18 June 2014, paras. 69-72, 82-112.

[3036] **C-3003**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Claim Form, 18 June 2014.

[3037] **C-3003**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Claim Form, 18 June 2014, p. 1.

[3038] **C-3003**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Claim Form, 18 June 2014, pp. 1-2.

1879. At its request, Torvia was allowed to intervene in the *GT* Action.[3039] At a hearing held on 22 September 2014, the Supreme Court of Gibraltar required GT Nominees and other related entities that were joined to the action (GT Management Limited, GT Fiduciary Services Limited and Grant Thornton Fund Administration Limited) (the "**GT Entities**") to disclose information regarding the beneficial owners of Amazonia and Torvia.[3040] On 24 October 2014, Woodsford filed an application to be added as an interested party in the action for the purpose of being heard on Chevron's outstanding requests for non-party and pre-action disclosure, which was granted on 10 November of the same year.[3041]

1880. On 1 December 2014, the Supreme Court of Gibraltar ordered Chevron to pay Woodsford's costs of intervening (GBP 44,941.81) along with an interim payment of GBP 22,500.[3042] This interim payment was fully offset by a costs award in favour of Chevron in the *Amazonia* Action. As a result of this offset, Chevron instead received GBP 17,500 from Woodsford.[3043] Subsequently, Chevron agreed to (i) a consent order recognizing it would pay GBP 117,050.65, corresponding to Torvia's costs for its application, along with an interim payment of GBP 25,000;[3044] and (ii) a second consent order pursuant to which both Chevron's and Torvia's costs were deemed as fully satisfied.[3045]

[3039] Memorial, Appendix 7, p. 16.

[3040] **C-3007**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Order, 22 September 2014.

[3041] **C-3008**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Witness Statement of James Ian Montado for Woodsford Litigation Funding Limited, Oct. 24, 2014, paras. 2, 32-39; **C-3009**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Judgment, 10 November 2014, paras. 1, 12.

[3042] Memorial, Appendix 7, p. 17; **C-3011**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Order, 1 December 2014. Against the background that Chevron had sought an order "for a very wide disclosure of documents", the Supreme Court of Gibraltar determined "it was appropriate for Woodsford to appear and their arguments were useful and indeed succeeded" and ruled that, in those circumstances, "the usual order ought to follow that Chevron should pay Woodsford's costs of the intervention". *See* **C-3012**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgement (Woodsford Costs), 1 December 2014, paras. 1-2.

[3043] Memorial, Appendix 7, p. 17; **C-3012**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgement (Woodsford Costs), 1 December 2014.

[3044] Memorial, Appendix 7, p. 17; **C-3013**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Order, 2 December 2014.

[3045] Memorial, Appendix 7, p. 17; **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.

1881. On 24 February 2015, after Chevron had already received documents through the above court order, Chevron and the GT Entities agreed to a consent order discontinuing the *GT* Action to the extent it was still outstanding, and agreed that Chevron would pay GBP 130,000 to satisfy the GT Entities' disclosure costs.[3046]

1882. Unlike the *DeLeon* and *Amazonia* Actions, the *GT* Action, being a discovery action, did not *per se* seek to deprive the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign. In the Tribunal's view, however, the *GT* Action did form part of Chevron's coordinated efforts to achieve that very goal, as the documents sought in the *GT* Action were directly relevant to the parallel *DeLeon* and *Amazonia* Actions.[3047]

1883. Accordingly, having already determined that the requirements of causation and reasonableness for the compensation of incidental damages are met as regards the legal fees and expenses incurred by the Claimants in connection with the *DeLeon* and *Amazonia* Actions,[3048] the Tribunal extends the same conclusion to the legal fees and expenses arising from the *GT* Action.

4. Chevron v. TC Payment Services (International) Limited

1884. On 20 June 2014, Chevron initiated discovery against TC Payment Services (International) Limited ("**TCPS**") before the Supreme Court of Gibraltar (the "***TCPS* Action**"). According to Chevron, TCPS was used to make payments on behalf of

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3046 Memorial, Appendix 7, p. 17; **C-3014**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Order, 24 February 2015.

3047 *See* **C-3020**, *Chevron v. James Russell DeLeon & Others*, Claim No. 2012-C-232, Supreme Court of Gibraltar, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, *Chevron v. GT Nominees*, Claim No. 2014-C-111, Supreme Court of Gibraltar, *Chevron v. Julian Jarvis*, Claim No. 2014-C-112, Supreme Court of Gibraltar, Judgment, 10 November 2014.

3048 *See* paras. 1869, 1877 above.

Mr DeLeon and his then-wife[3049] to fund the Lago Agrio Litigation.[3050] Chevron's application was granted on 10 November 2014.[3051]

1885. TCPS applied for standard costs for disclosure proceedings under the law of Gibraltar and the Court awarded an interim payment of GBP 35,000, which was paid by Chevron.[3052] Thereafter, a consent order was issued on 3 March 2015, recognizing that (i) Chevron had withdrawn its pre-action and non-party disclosure applications (which had been granted); (ii) TCPS had also withdrawn its application seeking direction with respect to certain disclosure objections; and (iii) all existing costs orders were fully satisfied.[3053]

1886. Similar to the *GT* Action, while the *TCPS* Action did not have the immediate goal of depriving the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign, it was a discovery proceeding forming part of Chevron's coordinated efforts to achieve that very goal. As such, the Tribunal determines that the requirements of causation and reasonableness for the compensation of incidental damages are met as regards the legal fees and expenses incurred by the Claimants in connection with the *TCPS* Action for the same reasons as the *GT* Action.[3054]

[3049] **C-3020**, *Chevron v. James Russell DeLeon & Others*, Claim No. 2012-C-232, Supreme Court of Gibraltar, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, *Chevron v. GT Nominees*, Claim No. 2014-C-111, Supreme Court of Gibraltar, *Chevron v. Julian Jarvis*, Claim No. 2014-C-112, Supreme Court of Gibraltar, Judgment, 10 November 2014, para. 52.

[3050] **C-3020**, *Chevron v. James Russell DeLeon & Others*, Claim No. 2012-C-232, Supreme Court of Gibraltar, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, *Chevron v. GT Nominees*, Claim No. 2014-C-111, Supreme Court of Gibraltar, *Chevron v. Julian Jarvis*, Claim No. 2014-C-112, Supreme Court of Gibraltar, Judgment, 10 November 2014, para. 54.

[3051] Memorial, Appendix 7, p. 18, **C-3019**, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, Order, 10 November 2014; **C-3020**, *Chevron v. James Russell DeLeon & Others*, Claim No. 2012-C-232, Supreme Court of Gibraltar, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, *Chevron v. GT Nominees*, Claim No. 2014-C-111, Supreme Court of Gibraltar, *Chevron v. Julian Jarvis*, Claim No. 2014-C-112, Supreme Court of Gibraltar, Judgment, 10 November 2014, para. 66.

[3052] Memorial, Appendix 7, p. 18; **C-3019**, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, Order, 10 November 2014, para. 10.

[3053] Memorial, Appendix 7, p. 19; **C-3021**, *Chevron v. TC Payment Services (International) Limited*, Claim No. 2014-C-113, Supreme Court of Gibraltar, Consent Order, 3 March 2015.

[3054] *See* para. 1883 above.

5. Chevron v. Julian Jarvis

1887. On 20 June 2014, Chevron brought a discovery action against Mr Jarvis, who according to the Claimants was involved in the funding scheme as Director of both Amazonia and Torvia (the "***Jarvis* Action**").[3055] This action was withdrawn on 20 October 2014, as Chevron later applied to join Mr Jarvis to the *Amazonia* Action and was granted that application on 1 December 2014.[3056] Following the dismissal of the *Jarvis* Action, Mr Jarvis sought standard costs and was awarded GBP 23,000, which were paid by Chevron on 12 November 2014.[3057]

1888. As already noted, the settlement agreement reached in the *DeLeon* and *Amazonia* Actions also involved Mr Jarvis. In accordance with that agreement, Mr Jarvis agreed to cease funding to the Lago Agrio Litigation and Judgment and cease support to the "Global Pressure Campaign".[3058]

1889. Similar to the *GT* and *TCPS* Actions, while the *Jarvis* Action did not have the immediate goal of depriving the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign, it was a discovery proceeding forming part of Chevron's coordinated efforts to achieve that very goal. As such, the Tribunal determines that the requirements of causation and reasonableness for the compensation of incidental damages are met as regards the legal fees and expenses incurred by the Claimants in connection with the *Jarvis* Action for the same reasons as the *GT* and *TCPS* Actions.[3059]

6. Amazonia Recovery Limited Liquidation

1890. On 2 June 2016, Chevron submitted an application before the Supreme Court of Gibraltar requesting that it appoint joint liquidators for Amazonia on the grounds that Amazonia was insolvent and had failed to pay damages as ordered by the Court in its judgment of 9

3055 Memorial, Appendix 7, p. 20.

3056 **C-3022**, *Chevron v. Julian Jarvis*, Claim No. 2014-C-112, Supreme Court of Gibraltar, Order, 30 October 2014. *See* para. 1871 above.

3057 Memorial, Appendix 7, p. 20; **C-2967**, Settlement Agreement between Chevron and DeLeon Parties, 13 February 2015; **C-2983**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Order Approving Joinder, 1 December 2014, p. 2; **C-3022**, *Chevron v. Julian Jarvis*, Claim No. 2014-C-112, Supreme Court of Gibraltar, Order, 30 October 2014.

3058 *See* para. 1862 above.

3059 *See* paras. 1883, 1886 above.

December 2015 in the *Amazonia* Action (the "***Amazonia* Liquidation Proceedings**").[3060] On 11 July 2016, the Supreme Court appointed two liquidators.[3061]

1891. By displaying efforts to bring Amazonia under receivership, the Claimants sought to prevent Amazonia from being used as a "vehicle to solicit and distribute funding all over the world to support the ongoing Conspiracy and as a conduit through which the proceeds of the Lago Agrio Judgment would flow to Conspirators".[3062] More precisely, because Chevron was awarded substantial damages against Amazonia by the Supreme Court of Gibraltar (USD 28,035,219.37), the *Amazonia* Liquidation Proceedings can ensure that any proceeds from the Lago Agrio Judgment that might flow to Amazonia will revert to Chevron in its capacity as a creditor in the liquidation – thereby minimizing the loss arising directly from the enforcement of the Judgment as described in item (iii) in paragraph 1858 above.

1892. Considering the significant amount awarded in the *Amazonia* Action judgment in favour of Chevron and the immediate effect that its enforcement could have had in minimizing the loss arising from the enforcement of the Lago Agrio Judgment, the Tribunal is also convinced that it was reasonable for Chevron to pursue the *Amazonia* Liquidation Proceedings as a mitigation measure.

1893. For these reasons, the Tribunal determines that the requirements of causation and reasonableness for the compensation of incidental damages are met as regards the legal fees and expenses incurred by the Claimants in connection with the *Amazonia* Liquidation Proceedings.

7. Conclusion on Gibraltar Proceedings category

1894. Having determined that each of the six Gibraltar Proceedings meets the requirements of causation and reasonableness for the compensation of incidental damages under

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[3060] **C-3024**, *Amazonia Recovery Limited Liquidation*, No. 2016-Comp-015, Supreme Court of Gibraltar, 1st Affidavit of Stephen Catania for the Applicant, 2 June 2016.

[3061] **C-3026**, *Amazonia Recovery Limited Liquidation*, No. 2016-Comp-015, Supreme Court of Gibraltar, Notice of Appointment of Liquidator Under Section 146 or 160, 14 July 2016.

[3062] **C-3024**, *Amazonia Recovery Limited Liquidation*, No. 2016-Comp-015, Supreme Court of Gibraltar, 1st Affidavit of Stephen Catania for the Applicant, 2 June 2016, para. 28.

international law, the Tribunal concludes that these requirements are also met as regards the Gibraltar Proceedings category of damages as a whole.

(c) Second Step: Analysis of Incidental Damages "Components"

1895. As a second step of its analysis, the Tribunal must determine, within the Gibraltar Proceedings category, whether the Claimants have met the requirements 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 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.[3063]

1896. The Parties have identified four components involving the legal fees and expenses incurred by the Claimants in Gibraltar, 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.

1. Fees and expenses allegedly incurred before the Gibraltar strategy was launched[3064]

1897. The Parties disagree on whether the Claimants may recover the costs associated with their early preparation works advanced in Gibraltar before the Gibraltar strategy was launched. The Claimants claim legal fees and expenses incurred starting in April 2008,[3065] while the Respondent maintains that the Claimants are not entitled to recover damages incurred before 27 June 2018.[3066]

1898. 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

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[3063] *See* paras. 559-565 above.

[3064] For an explanation of the names assigned to components *see* para. 568 above.

[3065] Reply, Updated Appendix 2, pp. 1129-1179.

[3066] Rejoinder, para. 1527.

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 proceedings in Gibraltar was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in these proceedings.[3067]

1899. Accordingly, the Tribunal finds that the Claimants are not entitled to claim compensation for any expenses associated with work performed in connection with the Gibraltar Proceedings 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.

2. Fees and expenses from firms other than Kobre & Kim and Attias & Levy

1900. The Claimants retained several law firms in connection with the Gibraltar Proceedings. According to Mr Steven Kobre – a partner at Kobre & Kim and witness for the Claimants – Kobre & Kim acted as the lead law firm for Chevron and their lawyers appeared as counsel at each of the hearings with the support of their local counsel, Attias & Levy:

> Kobre & Kim was the lead law firm acting for Chevron in the Gibraltar Proceedings. Our lawyers appeared as counsel at each of the hearings with the support of Attias & Levy. Kobre & Kim was well suited for this matter due to our extensive experience with complex cross-border litigation, our ability to develop a novel legal theory to address a situation that had never been confronted in the courts of Gibraltar, and because our team included skilled advocates who could obtain *pro hac vice* rights of audience in the Gibraltar courts given the close connections between the legal systems of Gibraltar and England & Wales.[3068]

1901. Aside from these two law firms, the Claimants seek compensation for USD 2,849,746.41 in legal fees and expenses incurred in the Gibraltar Proceedings by Stern Kilcullen & Rufolo LLC, Gibson Dunn & Crutcher LLP, Jones Day, Three Crowns LLP, Covington & Burling LLP, and Holland & Knight.[3069]

[3067] *See* paras. 362, 373, 397 above.

[3068] Kobre Witness Statement, para. 12.

[3069] Reply, Updated Appendix 2, pp. 1129-1179.

1902. In the Respondent's view, the Gibraltar Proceedings were not novel under English or Gibraltar laws and in no way demonstrate "why Kobre & Kim's 102 and Attias & Levy's 14 timekeepers needed an additional 150 timekeepers" from these firms (Stern Kilcullen & Rufolo LLC, Gibson Dunn & Crutcher LLP, Jones Day, Three Crowns LLP, Covington & Burling LLP, and Holland & Knight) to pursue the Gibraltar Proceedings.[3070]

1903. 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.[3071] However, the Tribunal has difficulty understanding how the participation of all of the above international law firms – in addition to Kobre & Kim and Attias & Levy – could have reasonably assisted the Claimants in pursuing the Gibraltar Proceedings. The task of arguing before Gibraltar courts would normally be reserved to local lawyers or international lawyers with *pro hac vice* rights (right to appear) qualified to appear before these courts with full understanding of the corresponding legal order – a role that was fully covered by Kobre & Kim and Attias & Levy.

1904. 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 additional foreign law firms, they cannot claim compensation in these proceedings for the legal fees and expenses charged by those firms. To the extent that the goal of depriving the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign might have required international law firms to act as a liaison between the Claimants' headquarters in the United States and the firms acting before the Gibraltar courts, or in a coordinating capacity with teams operating in other jurisdictions, the Tribunal is prepared to grant compensation for the legal fees and expenses charged by Gibson Dunn & Crutcher LLP and Jones Day. As explained by Mr Kobre and accepted by the Tribunal, Kobre & Kim "worked with and received valuable support from teams at Gibson Dunn on matters relating to RICO and factual development, and Jones Day

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[3070] Rejoinder, para. 1557; Rejoinder, Annex J-3.

[3071] *See* para. 341 above.

regarding the Lago Agrio Litigation and with respect to assistance with service of process in Ecuador."[3072]

1905. Otherwise, the Tribunal denies compensation under this heading for the legal fees and expenses charged by all other foreign law firms involved in the Gibraltar Proceedings (Stern Kilcullen & Rufolo LLC, Three Crowns LLP, Covington & Burling LLP, and Holland & Knight).

3. Fees and expenses related to work in non-Gibraltar jurisdictions or to Complaints that were never filed

1906. The Respondent is critical of the legal fees and expenses incurred by the Claimants related to work in other jurisdictions and complaints that were never filed, which it asserts amount to USD 1,904,211.44.[3073] Examples of activities purportedly unrelated to the Gibraltar Proceedings identified by the Respondent include (i) fees for researching, considering and drafting complaints and other papers for jurisdictions such as Panama, Nigeria, Australia, California, and the Cayman Islands;[3074] (ii) fees incurred in connection with research, drafting complaints that were never filed, and reviewing documents related to "H5";[3075] and (iii) entries related to reviewing or summarizing non-Gibraltar proceedings.[3076]

1907. The Tribunal has reviewed the time entries identified by the Respondent corresponding to the activities falling under the present heading.[3077] In respect of item (i) in the preceding paragraph, the Tribunal considers that there is a disconnect between the activities described in the entries in Annex J-4 to the Rejoinder (describing "Time Billed on Non-Gibraltar Work") and the Gibraltar Proceedings.

[3072] Kobre Witness Statement, para. 25.

[3073] Respondent's Damages Model, "Category Reductions" tab.

[3074] Rejoinder, paras. 1561-1562; Annex J-4.

[3075] Rejoinder, paras. 1563-1564, Annex J-1.

[3076] Rejoinder, para. 1565; **RE-52**, Baglietto Expert Report, paras. 118-121, **LB-46**, "Summarizing Non-Gibraltar Proceedings".

[3077] Rejoinder, Annex J-1, Annex J-4; **RE-52**, Baglietto Expert Report, paras. 118-121, **LB-46**, "Summarizing Non-Gibraltar Proceedings".

1908. Indeed, it appears to the Tribunal that a significant number of these activities may have concerned potential proceedings against litigation funders and other entities connected with the LAPs – which is why counsel in the Gibraltar Proceedings were assigned such tasks – but, as noted by the Respondent, concerned work in other jurisdictions. For example, Annex J-4 includes entries for research on tort law and civil extortion claims in California,[3078] which could have formed the basis of a potential action against Woodsford in that jurisdiction – as described in other entries in the same document[3079] – but was otherwise unrelated to the *Amazonia* Action that Chevron actually brought against Woodsford in Gibraltar.[3080]

1909. Faced with this disconnect between these litigation costs and the Gibraltar Proceedings, the Tribunal considers that the Claimants cannot claim the legal fees and expenses charged in connection with "Time Billed on Non-Gibraltar Work" as part of the present damages category. While the Claimants have established that the requirements of causation and reasonableness for the compensation of incidental damages apply to the efforts they displayed before Gibraltar courts to deprive the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign,[3081] they have failed to make the same showing in respect of these activities against other alleged co-conspirators.

1910. The same conclusion applies to item (ii) in paragraph 1906 above. From the evidence on record, the Tribunal infers that the entries referring to "H5" concern a California corporation of the same name that was a party to the 31 October 2010 Intercreditor Agreement on the distribution of proceeds from the Lago Agrio Litigation – which the Tribunal recalls was also executed by Torvia.[3082] This connection between Torvia – a

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[3078] Rejoinder, Annex J-4, entries 1, 164, 167-176.

[3079] Rejoinder, Annex J-4, entries 142, 171-176.

[3080] *See* paras. 1870-1872 above.

[3081] *See* para. 1894 above.

[3082] **C-1218**, Intercreditor Agreement, 31 October 2010, p. 1. Track II Award, para. 4.410: "The Intercreditor Agreement is executed, in counterparts, by Mr Donziger, Mr Fajardo, Patton Boggs, Mr Yanza, the ADF and others on the distribution of proceeds from the Lago Agrio Litigation. The Lago Agrio Plaintiffs rank ninth and last in the 'distribution waterfall' (Clause 3.2.9). This Agreement accompanied the 'Burford Funding Agreement', also of 31 October 2010."

defendant in the *DeLeon* Action[3083] – and H5 could explain why counsel for Chevron in the Gibraltar Proceedings were tasked with exploring actions against H5. Indeed, counsel for Chevron themselves described H5 as "a coconspirator in the LAPs' fraud" in their time entries in the Gibraltar Proceedings.[3084] However, the fact remains that H5 is a California corporation that was not a party to, or otherwise involved in, the Gibraltar Proceedings. As such, the Tribunal considers that the legal fees and expenses incurred in connection with H5 cannot be properly claimed by the Claimants as part of the present damages category.

1911. Lastly, the Tribunal turns to item (iii) in paragraph 1906 above, *i.e.*, entries related to reviewing or summarizing non-Gibraltar proceedings.[3085] It is true that these entries, totalling USD 172,449.62 in fees, generally describe analyses of developments in other proceedings arising in connection with the Lago Agrio Litigation – such as the Section 1782 Proceedings, the RICO Litigation, or this Arbitration. However, as also gleaned from these entries, the underlying work product was meant for use in connection with the Gibraltar Proceedings.[3086] This is unsurprising in view of the transnational character of the Lago Agrio Litigation and the need to coordinate actions in multiple jurisdictions.[3087] The Tribunal therefore accepts that these fees and expenses may be claimed by the Claimants as part of the present damages category.

1912. Taking into account all of the above circumstances, and having considered the particular circumstances of this case, the Tribunal assesses that 90% of the legal fees and expenses claimed under the present heading must be disallowed.

[3083] *See* para. 1861 above.

[3084] Rejoinder, Annex J-6, entry 53.

[3085] Rejoinder, para. 1565, Annex J-1, Annex J-4; **RE-52**, Baglietto Expert Report, paras. 118-121, **LB-46**, "Summarizing Non-Gibraltar Proceedings".

[3086] *See*, *e.g.*, **RE-52**, Baglietto Expert Report, **LB-46**, "Summarizing Non-Gibraltar Proceedings", entries for 30 March 2013: "Draft and revise memorandum summarizing key briefings in RICO Action in preparation for DeLeon's application to strike out, under attorney supervision of Eli Kay-Oliphant and Josef Klazen."; 30 March 2013: "Draft and revise memorandum summarizing key briefings in RICO Action in preparation for DeLeon's application to strike out, under attorney supervision of Eli Kay-Oliphant and Josef Klazen."; 1 April 2013: "Review/analyze Kohn Section 1782 materials for Gibraltar strategy."

[3087] *See* para. 341 above.

4. (CLA) Fees and expenses from Kobre & Kim allegedly related to global oversight / (RES) Fees and expenses from Kobre & Kim related to global oversight.

1913. The Respondent requests that the Tribunal deny compensation for legal fees incurred by Kobre & Kim related to "global oversight" or a "Global Oversight Project". In this respect, the Respondent notes that the Claimants have not explained why Kobre & Kim was in any position to provide "global oversight" or how such work was relevant to the Gibraltar Proceedings.[3088]

1914. The Tribunal has reviewed the time entries identified by the Respondent corresponding to "global oversight".[3089] Most of these entries contain the same narrative description of the underlying tasks: "Review/analyze key filings and media monitoring for global oversight project. (.4) [Gibraltar];" or, in a different formulation, "Review/analyze key filings and media monitoring for global oversight project for purpose of Gibraltar case preparation."[3090] Other recurring entries describe work for "Draft/revise global update for team regarding global oversight issues in preparation for global co-counsel call"[3091] and "Review/analyze key RICO documents, 1782 docket documents, and BIT Arbitration documents, and review/analyze Gibraltar and H5 materials for purpose of global oversight project. (1)[Gibraltar];".[3092]

1915. The Tribunal will not speculate on the precise nature of this "Global Oversight Project". It is sufficient to note that a review of the underlying billing information reveals that these "global oversight" activities concerned broadly the gathering of information in real time for use in the Gibraltar Proceedings. They also encompassed coordination efforts with teams operating in other jurisdictions in defence of the Claimants. For the reasons set out above in paragraph 1911, such activities are generally compensable in this Arbitration.

[3088] Rejoinder, para. 1566.

[3089] Rejoinder, Annex J-5.

[3090] *See*, *e.g.*, Rejoinder, Annex J-5, entries nos. 4, 6, 9-12, 18-20, 23-24, 29-30, 36, 38, 44, 47-50, 56-60, 68, 71-73, 76, 80-87, 89-92, 98-100, 104-107, 109, 113-114, 116, 126-139, 146-148, 150-161, 163-167, 177-178, 181-193, 195, 216-234, 240-257, 270-276, 288-291.

[3091] *See e.g.* Rejoinder, Annex J-5, entries nos. 149, 179.

[3092] *See e.g.* Rejoinder, Annex J-5, entries nos. 96-97.

1916. At the same time, however, these "global oversight" activities would also seem to encompass tasks which have at best a tenuous relationship with the goal of depriving the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign by bringing legal proceedings in Gibraltar, such as media monitoring. As explained in paragraph 1865 above, the legal fees and expenses incurred by the Claimants to mitigate harm caused by the LAPs' "Global Pressure Campaign" are in principle not recoverable in these proceedings.

1917. Having considered all of the above circumstances, and in view of the uncertainty surrounding the connection between the Claimants' "global oversight" activities as a whole and the goal of depriving the LAPs of access to funding for the Lago Agrio Litigation and their worldwide enforcement campaign, the Tribunal assesses that 75% of the legal fees and expenses claimed under the present heading must be excluded from compensation.

5. Other issues

1918. In this Section, the Tribunal will address other issues raised by the Parties in connection with the Gibraltar Proceedings that have not been specifically identified by the Parties as a component. These include (i) the Claimants' purported attempts at double recovery; (ii) the Respondent's argument that the Claimants' claimed legal fees and expenses are not reasonable under Gibraltar law; (iii) the Respondent's argument that the Gibraltar Proceedings were "straightforward cases" and thus cannot justify the "excessive fees" claimed by the Claimants; (iv) the Claimants' alleged overstaffing of their legal teams; and (v) entries from user "delete-delete".

1919. *The Claimants' purported attempts at double recovery*. The Respondent recalls that Chevron settled three of the six Gibraltar Proceedings, including the issue of attorneys' fees and costs, and the Gibraltar courts entered costs orders in the remaining three actions, also including as to attorneys' fees and costs. The Respondent asserts that such settlements and orders are dispositive as to the issue of fees and costs. In its view, "[b]y

attempting to recover beyond what Chevron has already been awarded, or agreed to bear on its own, Claimants seek a windfall."[3093]

1920. In Section VII.E.4 above, the Tribunal has already addressed the issue of the recoverability of legal fees and expenses in this Arbitration in circumstances where costs were settled in local proceedings, either by way of a settlement agreement or a court order. In paragraph 499 above, the Tribunal noted that it found no basis to conclude that the Claimants were violating any agreements settling costs with parties other than Ecuador, or any ensuing court orders, by requesting the reimbursement of the costs that were settled in those proceedings as damages in this Arbitration. Costs settlements, by their nature, will normally operate *inter partes*, such that each party waives the right to 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.

1921. As also noted in paragraph 501 above, none of the settlement instruments or court orders in the Gibraltar Proceedings 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[3094] – meaning that as of yet the Claimants

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[3093] Rejoinder, para. 1536.

[3094] *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.

have not recovered any of those costs. The Claimants' claim for damages in the present proceedings is thus entirely outside the scope of these settlement agreements and court orders.

1922. Accordingly, the Tribunal reiterates its ruling in paragraph 505(iv): the Claimants may recover their reasonable legal costs in this Arbitration, even if they were settled in the Gibraltar Proceedings, 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 upon the Respondent.

1923. In this respect, the Tribunal has already concluded that the legal fees and expenses reasonably incurred by the Claimants in connection with the Gibraltar Proceedings, when considered as a whole, qualify as incidental damages in this Arbitration.[3095] The Tribunal further observes that the Respondent has not put forward substantial reasons why the Claimants might have breached their duty to mitigate by settling costs in the Gibraltar Proceedings.[3096]

1924. For these reasons, the Tribunal determines that the fact that the Claimants settled costs in the Gibraltar Proceedings does not warrant a reduction in the amount of compensation owed to the Claimants under the present heading.

1925. However, the Tribunal recalls that the Claimants collected a net GBP 17,500 in costs from Woodsford in the *DeLeon* and *Amazonia* Actions.[3097] As noted by the Tribunal in paragraph 488 above, 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. Accordingly, the Tribunal deducts USD 27,395 (*i.e.*, GBP 17,500 at the

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[3095] *See* para. 653 above.

[3096] *See* paras. 503, 505(iv) above.

[3097] Memorial, Appendix 7, p. 17; **C-3011**, *Chevron v. GT Nominees Limited & Others*, Claim No. 2014-C-111, Supreme Court of Gibraltar, Order, 1 December 2014; **C-3012**, *Chevron v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgement (Woodsford Costs), 1 December 2014.

applicable exchange rate on 1 December 2014)[3098] from the amount of compensation granted to the Claimants under the present heading.

1926. The Tribunal also recalls that the Claimants were awarded USD 28,035,219.37 in the *Amazonia* Action, reflecting attorneys' fees incurred in the RICO Litigation, as Chevron had "voluntarily limited their claim against Amazonia to the costs incurred by it in bringing proceedings in the United States."[3099] To the extent that an issue of double recovery arises in connection with this award on damages, as implied by the Respondent,[3100] it is addressed under the heading of the RICO Litigation in Section VIII.G above.

1927. For the avoidance of doubt, the Tribunal recalls that its determination of the legal fees and expenses the Claimants may recover as incidental damages under international law goes beyond an analysis of the fees they collected or were awarded in other proceedings. As set out in paragraph 496 above, 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 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 set out in the preceding paragraphs.

1928. *The Respondent's argument that the Claimants' claimed legal fees and expenses are not reasonable under Gibraltar law*. The Respondent argues that the Claimants have failed to establish that the fees they incurred in the Gibraltar Proceedings were reasonable, in accordance with Gibraltar law, *i.e.*, the "lowest amount which [Chevron] could

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3098 The exchange rate applied by the Tribunal is 1 GBP=USD 1.565398 (*see* https://www.ofx.com/en-ie/forex-news/historical-exchange-rates/usd/gbp/).

3099 **C-2995**, *Chevron Corp. v. Amazonia & Others*, Claim No. 2014-C-110, Supreme Court of Gibraltar, Judgment, 9 December 2015, paras. 9, 13.

3100 Counter-Memorial, para. 351.

reasonably have been expected to spend in order to have its cases conducted and presented proficiently”.[3101]

1929. The Tribunal rejects this argument. As explained in paragraph 483 above, even when domestic cost-shifting standards incorporate an assessment of reasonableness, the determinations made by local courts in application of those standards will be of limited relevance for the Tribunal's present analysis, which will examine the question applying the prescribed standard under international law, *i.e.*, not the reasonableness of the legal fees and expenses according to the approaches applied by courts in 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.

1930. *The Respondent's argument that the Gibraltar Proceedings were "straightforward cases" and thus cannot justify the "excessive fees" claimed by the Claimants*. Relying on the expert opinion of Mr Baglietto, the Respondent argues that the Gibraltar Proceedings were "straightforward cases" and thus cannot justify the "excessive fees" claimed by the Claimants. In essence, Mr Baglietto explains that the Gibraltar Proceedings were not "ground-breaking from a legal point of view. Rather, the issue in the case was whether, on the facts, and on the basis of settled English caselaw, the Defendant litigation funders had committed the torts of conspiracy and unlawful interference with Chevron's rights", these being claims that "were not novel or new under English or Gibraltar law."[3102] This is contested by the Claimants' witnesses Mr Veiga and Mr Kobre, who state that the Gibraltar Proceedings required "novel legal theory to address a situation that had never been confronted in the courts of Gibraltar".[3103]

1931. Having already ascertained that the requirements of causation and reasonableness for the reimbursement of incidental damages are met as regards the Gibraltar Proceedings category of damages, the Tribunal does not consider it necessary to opine on the substance

[3101] Rejoinder, paras. 1539-1542; **RE-52**, Baglietto Expert Report, paras. 53-54, **LB-18**, *Kazakhstan Kagacy Plc v. Zhunus*, [2015] EWHC 404, 14 ConLR 253, p. 13.

[3102] Rejoinder, paras. 1545-1549; **RE-52**, Baglietto Expert Report, paras. 125, 128.

[3103] Kobre Witness Statement, para. 12; Fourth Reis Veiga Witness Statement, para. 88.

of the Claimants' submissions in those proceedings or the magnitude of the efforts put into preparing those submissions. As already noted, it is not appropriate for the Tribunal to apply hindsight to the legal strategies employed in the course of the Gibraltar Proceedings.[3104] Consequently, the Tribunal does not consider it necessary to adjust the amounts claimed under this head based on an assessment of the alleged complexity or simplicity of the case.

1932. *The Claimants' alleged overstaffing of their legal teams*. The Respondent argues that the Claimants overstaffed the Gibraltar Proceedings – with at least 266 timekeepers from at least eight law firms – and also "fueled a culture of excessive and unnecessary billing."[3105]

1933. The Tribunal observes that it has already addressed the participation of international law firms other than Kobre & Kim and Attias & Levy in the Gibraltar Proceedings in Section VIII.I.3(c)2 above. All other matters raised by the Parties in connection with the allegation set out in the preceding paragraph will be addressed by the Tribunal as part of its analysis of cross-cutting "elements" impacting multiple categories (in particular, "Multiple Attendance at Events" and "(CLA) Alleged Excessively Long Billing Days and Excessive Time; (RES) Excessively Long Billing Days and Excessive Time")[3106] in Section VIII.N below.

1934. *Entries from user "delete-delete"*. The Respondent is critical of the Claimants' attempt to recover fees and expenses for the work of a Kobre & Kim attorney who was identified in the relevant time entries as "delete delete".[3107]

1935. The relevant entries for timekeeper "delete delete" describe work performed in connection with the Gibraltar Proceedings[3108] and otherwise include the information required to assess causation and reasonableness (date, firm, amount claimed, hourly rate, timekeeper rate and title, etc.). While there appears to be a malfunction in the relevant

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[3104] *See* para. 341 above.

[3105] Rejoinder, paras. 1550-1559.

[3106] *See* para. 571 above.

[3107] Rejoinder, para. 1318, Annex J-6.

[3108] Rejoinder, para. 1318, Annex J-6.

database in terms of the timekeeper's name, the Tribunal has no reason to doubt that the stated work was undertaken in connection with the Gibraltar Proceedings. In the circumstances, the Tribunal declines to exclude the legal fees and expenses generated by this individual for what is better explained as an inconsequential malfunction in the relevant database.

4. Conclusion on Gibraltar Proceedings

1936. For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Gibraltar 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 Gibraltar 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 Gibraltar Proceedings corresponding to services provided by the firms Stern Kilcullen & Rufolo LLC, Three Crowns LLP, Covington & Burling LLP, and Holland & Knight;

(iv) Excludes from compensation 90% of the legal fees and expenses corresponding to the component "Fees and expenses related to work in non-Gibraltar jurisdictions or to Complaints that were never filed";

(v) Excludes from compensation 75% of the legal fees and expenses corresponding to the component "(CLA) Fees and expenses from Kobre & Kim allegedly related to global oversight / (RES) Fees and expenses from Kobre & Kim related to global oversight";

(vi) Excludes from compensation the costs effectively collected by Chevron in connection with the *DeLeon* and *Amazonia* Actions (*i.e.*, USD 27,395);

(vii) Defers its determination regarding the compensation of the legal fees and expenses identified in paragraphs 1932-1933 above to its analysis of cross-cutting elements set out in Section VIII.N below;

(viii) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Gibraltar Proceedings, to the extent not already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below;[3109] and

(ix) Grants compensation for incidental damages for all other fees and expenses claimed by the Claimants in connection with the Gibraltar Proceedings. The Tribunal will determine the exact amount of compensation corresponding to the Gibraltar Proceedings in Section VIII.O below.

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[3109] *See* paras. 564-566 above.

J. GENERAL DEFENCE

1937. The Claimants seek USD 47,213,917.33[3110] as direct damages for the legal fees and expenses incurred between January 2004 and November 2018 in general defence against the Lago Agrio fraud and the resulting Lago Agrio Judgment.[3111] According to the Claimants, the legal fees and expenses incurred in connection with this category are attributable to furthering and coordinating Chevron's overall defence against the Lago Agrio Judgment and the Respondent's wrongful support to the multiple efforts to enforce it.[3112] In the alternative, the Claimants submit that they are entitled to recover these expenses as incidental damages.[3113]

1938. The Respondent argues that the Claimants are not entitled to the expenses as direct or indirect damages because they are not the direct result of the Respondent's Treaty breaches but are expenses that the Claimants undertook of their own volition for which the Claimants alone are responsible.[3114] Nor have the Claimants established that the fees and costs that Chevron generated for the "general defence" activities were reasonable or necessary.[3115]

1. The Claimants' Position

1939. According to the Claimants, the fees and costs claimed in this "general" category stem from more generalized work that was not performed within the context of any specific litigation, action, or arbitration, but had applications in multiple areas and in multiple jurisdictions.[3116]

1940. First, the Claimants seek for fees and costs incurred by five law firms – especially Gibson, Dunn & Crutcher LLP – in coordinating work on the many related cases and performing

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[3110] Reply, para. 1007; Updated Appendix 2, p. 1.

[3111] Memorial, para. 422; Reply, para. 1007.

[3112] Reply, para. 1008; Updated Appendix 2; **C-3462**, Indices of Claimed Invoices by Damage Category ("General Defense" tab).

[3113] Reply, para. 1012.

[3114] Counter-Memorial, para. 929; Rejoinder, para. 1636.

[3115] Counter-Memorial, para. 929; Rejoinder, para. 1636.

[3116] Memorial, para. 423.

general defence work that supported Chevron's overall defence strategy.[3117] According to the Claimants, given the volume of work required and the multiple jurisdictions in question, it was reasonable for the Claimants to rely on external counsel to manage these proceedings, rather than Chevron's in-house legal team alone to handle the work.[3118]

1941. By way of example, the Claimants highlight that Gibson, Dunn & Crutcher LLP coordinated work across multiple parallel proceedings involving counsel from different jurisdictions at various points in time, including: (i) the Lago Agrio Litigation in Ecuador; (ii) the RICO action in New York; (iii) the related third-party subpoena enforcement actions across the United States; (iv) this Arbitration; (v) approximately 35 separate Section 1782 actions throughout the United States; (vi) the recognition and enforcement actions in Brazil, Canada, and Argentina; (vii) the litigation in Gibraltar against James Russell DeLeon and Amazonia Recovery Limited; and (viii) the Respondent's "frivolous challenges" to the Tribunal's Interim and Track II Awards in the Netherlands.[3119]

1942. Legal research, the Claimants posit, also represents a significant cost in Chevron's general defence category.[3120] These costs, the Claimants explain, were incurred in anticipation of actions the LAPs might take to monetize the Lago Agrio Judgment.[3121]

1943. Similarly, the Claimants assert that a substantial portion of the fees and costs under this category were incurred for "independent factual development".[3122] These fees notably covered the Claimants' requests under various Freedom of Information Acts and requests to interview potential witnesses to uncover evidence of fraud, without relying solely on court-overseen discovery.[3123] As shown in the invoices, the Claimants further submit that

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3117 Reply, paras. 1008, 1015.

3118 Reply, para. 1016.

3119 Memorial, para. 423; Reply, para. 1015.

3120 Reply, para. 1017.

3121 Memorial, para. 424; Reply, para. 1017.

3122 Memorial, para. 425; Reply, para. 1018.

3123 Memorial, para. 425; Reply, para. 1018.

none of the fees and costs claimed in the "general defence" category are duplicative of those claimed in any other damage category.[3124]

1944. In addition to the outside law firms, the Claimants seek fees and costs for the work done by three litigation support vendors whose work supported Chevron's defence across multiple legal proceedings, including this Arbitration, and its defence against the Respondent's global pressure campaign.[3125] A variety of services rendered by the litigation support vendors include *inter alia*:

(i) *Investigative Research Inc.* (from 2009): researching and reporting regarding the LAPs and ROE experts, witnesses, and significant events arising in the case; researching and creating linked/interactive demonstrative timelines of key issues to be filed in various legal proceedings; creating graphics, demonstrative exhibits, and presentations to be used in various legal proceedings; maintaining a repository of collected case and reference materials to be used by different members of the legal team; and monitoring online social media;[3126]

(ii) *FTI Consulting, Inc.* (from 2005): preparing graphics for client and court presentations;[3127] and

(iii) *High Impact* (between 2010 and 2015): producing and editing videos that documented the Ecuador fraud; summarizing certain themes and factual aspects of the case for various courts, this Tribunal, other stakeholders, and the public; and adding subtitles to the videos for submissions to courts.[3128]

1945. None of the fees and costs from these litigation support vendors, the Claimants maintain, was included in any other single category of the Claimants' damages claim.[3129]

3124 Reply, para. 1021; **C-3260**, Boies Schiller & Flexner LLP Invoices; **C-3268**, Covington & Burling LLP Invoices; **C-3287**, Gibson, Dunn & Crutcher LLP Invoices; **C-3303**, Jones Day Invoices; **C-3335**, Rivero Mestre LLP Invoices.

3125 Reply, para. 1022.

3126 Reply, para. 1023.

3127 Reply, para. 1024.

3128 Reply, para. 1025.

3129 Reply, para. 1022.

1946. Finally, the Claimants seek to recover costs incurred by seven public relations firms that the Claimants retained to defend against the Respondent's long-running global propaganda campaign against Chevron in the court of public opinion.[3130] In this respect, the Claimants contend that it is foreseeable that Chevron would utilize public relations resources to resist the smear campaign to which it was subjected and to mitigate further harm.[3131]

1947. According to the Claimants, the work of the public relations vendors included, *inter alia*, monitoring and countering Ecuador's and the LAPs' falsehoods, issuing press releases in response, setting up a website to convey a "balanced and truthful" portrayal of the Lago Agrio case against Ecuador-funded or Ecuador-enabled media hits, and filing ethics complaints against governmental officials to resist the LAPs' efforts of inducing governmental officials to join the pressure campaign against Chevron.[3132]

1948. As Chevron was forced to undertake public relations work in many countries, the Claimants insist that it was necessary for Chevron to hire multiple firms with different sets of expertise to address the culture and country-specific aspects of the harm.[3133] In this respect, the Claimants point out that the "[Respondent] itself retained *at least* five outside vendors and spent *at least* US$ 11.7 million to carry out its own malicious and false propaganda campaigns."[3134]

1949. Further, in the Claimants' view, they are entitled to recover the fees and costs incurred by the public relations firms because the expenses "only need to be caused by Ecuador's wrongful acts – which they were – even if they are not constitutive elements of those wrongful acts."[3135]

1950. The Claimants, in the alternative, submit that they are entitled to recover the legal fees and expenses incurred in the general defence against the Lago Agrio Judgment as

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3130 Memorial, para. 426; Reply, para. 1027.

3131 Memorial, para. 429.

3132 Memorial, paras. 427-428; Reply, paras. 1029-1033.

3133 Reply, para. 1037.

3134 Reply, para. 1037 (emphasis in the original).

3135 Reply, para. 1035.

incidental damages.[3136] As set out above, the Claimants argue that the expenses were reasonable, considering the number and the time period of the proceedings, their complexity, and the multitude of propaganda attacks against which the Claimants had to defend.[3137]

2. The Respondent's Position

1951. In the Respondent's view, the "general defence" category is a catch-all "junk drawer" for fees and costs that the Claimants "cannot figure out how to classify but want to claim anyway."[3138] Even the three categories of activities outlined by the Claimants, the Respondent asserts, "do not cover all of the odds and ends that, as the invoices reveal, Claimants threw into this category."[3139]

1952. Addressing the Claimants' request for compensation for the work of five law firms allegedly spent to "coordinate" counsel across multiple actions, the Respondent argues that the Claimants have not substantiated why high-priced outside counsel, instead of Chevron's large in-house counsel team, was better suited to undertake the work.[3140]

1953. Additionally, noting that the task of coordinating counsel is in fact administrative work, the Respondent contends that it should not be responsible for Chevron's "extravagant decision" to allow its outside counsel to bill for non-billable work.[3141] In fact, the Respondent points out that billing times for such administrative tasks is prohibited under Chevron's Guidelines.[3142] Therefore, the Respondent emphasizes that, in addition to the coordination work, any time billed for other administrative tasks carried out by counsel

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3136 Reply, para. 1012.

3137 Reply, para. 1013.

3138 Rejoinder, para. 1631.

3139 Rejoinder, para. 1637.

3140 Counter-Memorial, para. 930; Rejoinder, paras. 1638-1640.

3141 Counter-Memorial, para. 930; Rejoinder, para. 1642.

3142 Rejoinder, paras. 1674-1676; **C-3240**, Chevron Corporation and Affiliates Guidelines for Outside Counsel (CVX-Track III- 00017738—CVX-Track III-00017800), 2017, Sections 2.1, 2.2; Kent Witness Statement, para. 25.

such as organizing documents and translating news articles should have been conducted by non-billing personnel.[3143]

1954. According to the Respondent, the time entries submitted by Chevron's outside counsel also (i) contain vague descriptions in violation of Chevron's Guidelines; (ii) include counsel work on Chevron's internal corporate governance activities, as well as activities unrelated to the Ecuador dispute; and (iii) misallocated expenses that should have been claimed in other damages categories.[3144] Consequently, the Claimants have failed to carry their burden of proving that the alleged fees and costs were reasonable and necessary.[3145]

1955. Further, the Respondent argues that public relations and media fees and costs billed by Chevron's outside counsel, regardless of whether lawyers billed for them, cannot be recovered as damages in this Arbitration.[3146] This is because, according to the Respondent, the Tribunal did not find liability connected to the court of opinion and Chevron's desire to battle there is irrelevant to this stage of the Arbitration.[3147]

1956. As to the legal research fees incurred in anticipation of the LAPs' actions, the Respondent also considers that such research activity is duplicative of the category "Costs of Planning against Potential Enforcement in Other Jurisdictions," for which the Claimants also seek compensation.[3148] The Respondent also maintains that fees billed in planning for hypothetical scenarios were not reasonable and necessary and could not be attributable to the Treaty breaches.[3149]

1957. The Respondent likewise contends that the Claimants are not entitled to recover "independent factual development" expenses, which include the fees and costs for Freedom of Information Act requests.[3150] In particular, the Respondent takes issue with

3143 Rejoinder, para. 1677.

3144 Rejoinder, paras. 1678-1687.

3145 Rejoinder, paras. 1641, 1688.

3146 Rejoinder, paras. 1669-1672.

3147 Rejoinder, para. 1672.

3148 Counter-Memorial, para. 931.

3149 Rejoinder, para. 1643.

3150 Rejoinder, para. 1644.

the requests relating to U.S. government relations activities which, according to the Respondent, are unrelated to the Treaty breaches.[3151] Moreover, contrary to the Claimants' assertion, the invoices concerning the "FOIA Request(s)", which do not specify what the requests concerned, do not prove that these activities gave rise to compensable damages.[3152]

1958. In the same vein, the Respondent points out that the Claimants have not explained why it was necessary to incur costs to interview certain witnesses, nor have they provided the underlying billing data that would permit the Respondent and the Tribunal to examine the specific costs claimed and determine whether the Claimants seek a double recovery.[3153]

1959. Taking issue with the number of public relations vendors the Claimants hired to defend against public criticism, the Respondent further argues that the underlying invoices of the vendors do not provide enough detail to determine how each vendor's work differed from others, what they were working on, where they were doing it, or what their scope was.[3154] Where the invoices do provide certain details, the Respondent asserts that the work was neither reasonable nor necessary and did not relate to the Treaty breaches.[3155]

1960. In regard to the work performed by litigation support vendors, the Respondent posits that the Claimants have failed to demonstrate that the resulting fees and costs were reasonable and necessary:

(i) *Investigative Research Inc.*: It is unclear why the company was researching and reporting regarding the LAPs and ROE experts and witnesses and how it could have cost so much. Monitoring social media and browsing websites cannot amount to damages arising from a Treaty breach.[3156]

3151 Rejoinder, para. 1645.

3152 Rejoinder, para. 1646; **RE-51**, Trunko Expert Report, **SM Q-3**, p. 138.

3153 Counter-Memorial, para. 933.

3154 Rejoinder, paras. 1655-1663.

3155 Rejoinder, para. 1663.

3156 Rejoinder, para. 1665.

(ii) *High Impact*: The Respondent is not responsible for the Claimants' communications with the public which are not related to the Treaty breaches; similarly, the underlying invoices lack specificity.[3157]

(iii) *FTI Consulting, Inc.*: The Respondent is not responsible for the Claimants' internal client presentations or other internal discussions.[3158]

1961. As to the third sub-category of alleged damages, the Respondent rejects that the public relations expenses the Claimants seek were caused by the Treaty breaches for which the Respondent is responsible.[3159] In this regard, the Respondent underscores the Tribunal's finding in the Track II Award that Ecuador's so-called "propaganda campaign" did not breach the Treaty and "that specific statements from Ecuadorian officials, including President Correa, were not the cause of the injury to Claimants."[3160] This finding, in the Respondent's view, renders the Claimants' spending on public relations irrelevant in Track III of this Arbitration.[3161]

1962. In the same vein, the Respondent maintains that it is not responsible for the fees and costs the Claimants allegedly incurred when responding to the LAPs' lobbying or pursuing their own lobbying initiatives.[3162] If the Respondent did not violate the Treaty through its own statements, it takes the view that it could not have done so through the statements of others, including the LAPs.[3163] In support of its contention, the Respondent recalls the Tribunal's finding that the Respondent had no obligation to prevent the Lago Agrio claims from being litigated.[3164] As such, the Respondent posits that none of the Claimants' marketing or political activities spring from any Treaty violation found by the

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[3157] Rejoinder, para. 1667.

[3158] Rejoinder, para. 1666.

[3159] Counter-Memorial, para. 934; Rejoinder, para. 1651.

[3160] Counter-Memorial, para. 934; Rejoinder, para. 1652; Track II Award, paras. 8.68-8.69.

[3161] Rejoinder, para. 1652.

[3162] Rejoinder, para. 1649.

[3163] Counter-Memorial, para. 935; Rejoinder, para. 1654.

[3164] Rejoinder, para. 1654; Decision on Track IB, paras. 181, 186.

Tribunal and that it should not be responsible for Chevron's decision to engage in a public relations war.[3165]

3. The Tribunal's Analysis

1963. The Claimants seek USD 47,213,917.33 for the legal fees and vendor costs incurred between January 2004 and November 2018 for "generalized work streams" with applications in multiple areas relating to Chevron's "general defence" against the Lago Agrio fraud.[3166] These work streams include counsel coordination efforts in various proceedings across multiple jurisdictions,[3167] legal research work in anticipation of hypothetical actions,[3168] factual development outside of court-overseen discovery,[3169] media and public relations,[3170] and expenses relating to government and shareholder relations.[3171] The claimed fees and costs fall generally into three sub-categories: (i) fees billed by five law firms; (ii) costs billed by three litigation support vendors; and (iii) costs billed by seven public relations vendors.[3172]

1964. The Claimants argue that these fees and costs are a natural and foreseeable consequence of the Respondent's Treaty breaches and as such are recoverable as direct damages, or in the alternative, as incidental damages.[3173] The Respondent, on the other hand, submits that the entire category should be excluded, as it is not the direct result of the Respondent's Treaty breaches.[3174] Even assuming there is a causal link between these expenses and the Treaty breaches, the Respondent considers that the Claimants have

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3165 Counter-Memorial, para. 935; Rejoinder, para. 1648.

3166 Reply, para. 1007; Memorial, para. 423.

3167 Memorial, para. 423.

3168 Memorial, para. 424.

3169 Memorial, para. 425.

3170 Memorial, para. 426.

3171 Memorial, para. 428.

3172 Reply, para. 1008; **RE-51**, Trunko Expert Report, **SM J-9**.

3173 Reply, para. 1007.

3174 Counter-Memorial, para. 929; Rejoinder, para. 1636.

failed to establish that the measures undertaken and the fees and costs claimed under this category were reasonable or necessary.[3175]

1965. Following the methodology laid out in Section VII.G.5, the Tribunal finds that the legal fees and expenses and vendor costs claimed by the Claimants under this General Defence category must be excluded in full from the final amount of compensation for want of a causal link with the Respondent's Treaty breaches.

1966. First, the Tribunal recalls the Claimants' position that all of their claimed legal fees and expenses claimed under the General Defence category constitute direct damages and are recoverable in the alternative as incidental damages.[3176] 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 are *not* compensable in these proceedings.[3177]

1967. Second, 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.

3175 Counter-Memorial, para. 929; Rejoinder, para. 1636.

3176 *See* para. 1952 above.

3177 *See* para. 317 above.

1968. As particularised by the Claimants, the General Defence category comprises three distinct sub-categories:

(i) "[w]ork by five law firms—especially work by Gibson Dunn—in coordinating work on the many related cases and/or performing general defense work that supported Chevron's overall defense strategy, and which does not neatly fit within one of the other more specific cost-allocation categories that comprise Chevron's damage claim (approximately US$ 20.54 million)";

(ii) "three litigation support vendors whose work supported Chevron's defense across a number of actions (approximately US$ 8.56 million[)]"; and

(iii) "seven public relations vendors (approximately US$ 18.1 million)."[3178]

1969. Each of these sub-categories requires a differentiated analysis for present purposes.

1970. First, the Tribunal notes that it is the Claimants who have chosen to group all fees and expenses related to "coordination/general defence" work in a separate, self-standing category. Such costs do not relate to Chevron's efforts in a particular jurisdiction but rather to Chevron's "overall defence strategy". In the Claimants' words, the creation of a separate sub-category for these costs is due to their inability to "neatly fit" these fees and expenses "within one of the other more specific cost-allocation categories".[3179]

1971. This sets this "coordination/general defence" sub-category apart from other damages categories in Track III, which generally involve the costs of a particular litigation proceeding.[3180] In fact, most damages categories for which the Tribunal has granted compensation concern the efforts undertaken by the Claimants in pursuit of a clearly defined goal in a specific proceeding, such as attempting to render the Lago Agrio Judgment unenforceable in the jurisdiction where it came into existence (Lago Agrio Litigation)[3181] or defending against the enforcement of the Judgment in several jurisdictions where the Claimants or their subsidiaries held assets (Argentina, Brazil,

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[3178] Reply, para. 1008.

[3179] Reply, para. 1008.

[3180] Memorial, para. 209.

[3181] *See* Section VIII.A above.

Canada and Ecuador Enforcement Proceedings).[3182] For those categories, the Tribunal was able to make precise assessments as to how the Claimants' efforts in the context of specific legal proceedings contributed to minimizing the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment.

1972. By contrast, the Tribunal is unable to determine with any significant degree of precision how these sweeping "coordination/general defence" works contributed to achieving the goal of (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.[3183] As a practical matter, these three goals could only be accomplished by participating in legal proceedings. These "coordination/general defence" works might have supported defence efforts undertaken in those proceedings, but otherwise had no intrinsic objective aligned with these three mitigation goals.

1973. Critically, as a result of the Claimants' own inability to "neatly fit" these fees and expenses "within one of the other more specific cost-allocation categories",[3184] the Tribunal is unable to determine to what extent these "coordination/general defence" works served to support the Claimants' efforts in connection with compensable activities (such as their involvement in the Lago Agrio Litigation) or, conversely, the extent to which they supported non-compensable efforts (such as the Claimants' involvement in the Dutch Set-Aside Proceedings).[3185] In other words, the Tribunal has no basis to determine with sufficient certainty the connection, if any, between these "coordination/general defence" works and the individual litigation categories covering compensable activities. The Claimants have therefore failed to meet their burden to establish the required causal link clearly and in an itemized fashion for these

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3182 *See* Sections VIII.B-E above.

3183 *See* para. 1967 above.

3184 Reply, para. 1008.

3185 *See* Section VIII.L below.

"coordination/general defence" works to warrant compensation as incidental damages.[3186]

1974. While this conclusion is dispositive, the Tribunal must recall that it has already granted compensation for the coordination efforts undertaken by international law firms under several other damage categories.[3187] The Tribunal finds no reason to grant separate compensation under the present heading for *additional* coordination work, much less in circumstances where it is unable to determine the actual impact, if any, that those efforts might have had in mitigating the injury arising from the Respondent's Treaty breaches.

1975. Second, the Claimants claim legal fees and expenses for "three litigation support vendors whose work supported Chevron's defense across a number of actions (approximately US$ 8.56 million[)]".[3188] According to the Claimants:

> The fees and costs for these vendors are claimed under General Defense because their work . . . supported the overall defense effort, and their work product was used in multiple legal cases, this Arbitration proceeding, and in Chevron's defense against the worldwide propaganda and pressure campaign waged by Ecuador and the LAPs for purposes of leveraging the fraudulent Judgment. None of the fees or costs from these litigation support vendors was included in any other single category of the damage claim, so that all of their fees and costs for which Chevron seeks damages are included in this General Defense category.[3189]

1976. The Tribunal's conclusions in respect of "coordination/general defence" work apply with equal force vis-à-vis these litigation support vendors, which also "supported the overall defense effort" and whose "work product was used in multiple legal cases".[3190] The Tribunal is unable to differentiate vendor work performed for compensable activities from vendor work used for non-compensable activities (such as the legal fees and expenses spent in this Arbitration, the costs of which are compensable not as damages but as costs of arbitration under the UNCITRAL Arbitration Rules).[3191] The Claimants have therefore failed to meet their burden to establish the required causal link clearly and in an

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[3186] *See* para. 327 above.

[3187] *See* paras. 773, 859, 953, 1026, and 1904 above.

[3188] Reply, para. 1008.

[3189] Reply, para. 1022.

[3190] Reply, para. 1022.

[3191] *See* Section VIII.M below.

itemized fashion for the legal fees and expenses of these litigation vendors to warrant compensation as incidental damages.[3192]

1977. Third, and last, the Claimants retained seven public relations firms "to defend against Ecuador's long-running and far-ranging propaganda campaign against Chevron, which complemented and amplified the false narrative perpetuated by the LAPs."[3193] In the Claimants' words:

> The LAPs used public relations firms, and the publicity they generated helped pressure the Ecuadorean courts to grant them a judgment. Moreover, the Ecuadorian government used PR efforts worldwide to support enforcement of the fraudulent Judgment. Both used their PR campaigns to pressure Chevron to settle. These campaigns influenced public and political opinion and could not go unanswered.
>
> Given the breadth of the smear campaign, Claimants had to hire outside public relations consultants *inter alia* to monitor and counter Ecuador's and the LAPs' falsehoods, issue press releases in response, set up a website to convey a truthful portrayal of the Lago Agrio case, and otherwise mitigate the damage caused by these falsehoods. . ..[3194]

1978. In the Tribunal's view, whatever harm the Claimants sought to address through these public relations efforts bears no relation with the injury arising specifically from the recognition and enforcement of the unremedied Lago Agrio Judgment. Indeed, no public relations efforts could have possibly (i) prevented the Lago Agrio Judgment from becoming enforceable after its issuance; (ii) contributed to rendering the Judgment unenforceable; or (iii) minimized the loss arising directly from the enforcement of the Judgment, whether by attachment, arrest, interim injunction, execution or howsoever otherwise.[3195] As already explained, the Claimants could only accomplish these three mitigation goals by participating in legal proceedings[3196] – not in the court of public opinion. Accordingly, the Claimants have also failed to establish the requirement of causality as regards this sub-category of damages.

1979. As a final note, the Tribunal observes that this damages category includes items that overlap with cross-cutting elements that impact multiple categories as identified by the

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[3192] *See* para. 327 above.

[3193] Reply, para. 1027.

[3194] Reply, paras. 1028-1029.

[3195] *See* para. 1967 above.

[3196] *See* para. 1972 above.

Parties,[3197] including, (i) activities allegedly relating to Media and Public Relations;[3198] (ii) activities allegedly relating to Government Relations (including but not limited to USTR);[3199] (iii) allegedly nondefense-related activities;[3200] and (iv) alleged administrative and clerical activities.[3201] The Tribunal will address the impact that disallowing this category would have on the determination of these cross-cutting issues in Section VIII.N below.

1980. In sum, for the above reasons, the Tribunal rejects the Claimants' damages claim in respect of the General Defence category of damages.

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3197 *See* para. 571 above.

3198 *See, e.g.*, **RE-51**, Trunko Expert Report, paras. 27, 55; Track III Hearing – Trunko Direct Presentation (31 August 2022), Slides 38-40.

3199 *See, e.g.*, **RE-51**, Trunko Expert Report, para. 29; Track III Hearing – Trunko Direct Presentation (31 August 2022), Slide 44.

3200 *See, e.g.*, **RE-51**, Trunko Expert Report, para. 28; Track III Hearing – Trunko Direct Presentation (31 August 2022), Slides 41-43.

3201 *See, e.g.*, **RE-51**, Trunko Expert Report, para. 21; Track III Hearing – Trunko Direct Presentation (31 August 2022), Slides 25-31.

K. CRIMINAL PROCEEDINGS

1. The Claimants' Position

(a) *Description of the Proceedings*[3202]

1981. The Claimants state that, for more than seven years, Chevron attorneys Mr Ricardo Reis Veiga and Dr Rodrigo Pérez Pallares were subjected to "meritless and abusive" criminal proceedings in Ecuador stemming from their involvement in negotiating and executing the 1995-1998 Settlement and Release Agreements, as part of "the broader long-running collusion between the LAPs and Ecuador to pressure Chevron into a multi-billion-dollar settlement".[3203] Although the State prosecutors initially requested the dismissal of the preliminary investigations in 2006, the Prosecutor General reopened the proceedings in 2008 on the basis of "undisclosed new circumstances and evidence" and without any additional investigation, but with the apparent support of the LAPs' lawyers and the Ecuadorian Executive.[3204]

1982. The Ecuadorian courts, the Claimants say, also played a central role in furthering the Criminal Proceedings, including by failing properly to apply the statute of limitations and allowing the investigation to "lay dormant" for several months.[3205] On 29 April 2010, the Prosecutor General eventually filed charges against Mr Veiga and Dr Pérez, among others, for falsification of public documents, but the Criminal Proceedings were terminated in 2011 before the hearing could be held, supposedly due to "noncompliance with certain procedural requirements".[3206]

[3202] For a detailed description of the procedural history of these proceedings, *see generally* Memorial, Appendix 13.

[3203] Memorial, paras. 227-228, 236; Reply, para. 749; Track II Award, paras. 4.122-4.130. Based on a criminal complaint of the Comptroller General filed a few months after the Lago Agrio Complaint, they note, Ecuadorian prosecutors opened preliminary investigations into alleged falsification of public documents and environmental crimes, which were presumably pushed forward with the collusion of the LAPs' representatives. *See* Memorial, paras. 229-230.

[3204] Memorial, paras. 231-233.

[3205] Memorial, paras. 234-235.

[3206] Memorial, paras. 237-238.

1983. The Claimants underscore that the Criminal Proceedings were not only pursued by the government of Ecuador without regard for Ecuadorian law and procedure, but also had a significant impact on personal and professional lives of Mr Veiga and Dr Pérez.[3207]

(b) Costs Incurred

1984. The Claimants explain that the costs incurred by Chevron are commensurate with the reality that it had to present "a vigorous defense" in light of the very serious consequences facing its employees.[3208] They state that Chevron incurred and paid USD 6,933,905.69 in legal fees (USD 5,988,424.18) and costs (USD 945,481.51) arising from the Criminal Proceedings between September 2008 and August 2011, as evidenced by the underlying invoices for the six law firms involved, the witness statements of Ms Kent, Mr Rankin and Mr Turner, the expert report of Mr Stanton, and Appendix 2 to the Memorial, which provides a monthly breakdown of law firm fees by type of timekeeper, as well as the costs of law firms, experts and vendors.[3209]

(c) Request for Full Reparation

1985. The Claimants submit that they are entitled to recover as direct damages the expenses incurred in the Criminal Proceedings, since they were a natural, foreseeable and proximate consequence of the Respondent's breach of the Umbrella Clause and its denial of justice.[3210] They state that the Respondent must make full reparation for these costs, which they describe as "a direct outgrowth of the Lago Agrio Litigation" as a result of the Respondent's abuse of its prosecutorial powers in an effort to liberate itself from its obligations under the 1995-1998 Settlement and Release Agreements.[3211] Insisting on the collusion between the LAPs' representatives and Ecuadorian government officials, the Claimants argue that the fact that the charges were dropped only when Ecuador was

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[3207] Memorial, para. 239.

[3208] Memorial, para. 241.

[3209] *See* Memorial, Section IX.B.iv, p. 113; Reply, paras. 748, 754-756; Appendix 2, Updated Summary of Chevron's Fees and Costs Claimed as Damages in Track III, 4 August 2021. *See generally* **C-3462**, Indices of Claimed Invoices by Damage Category. The Claimants confirm that the costs claimed under this head of damages are distinct from those claimed under other heads of damages.

[3210] Reply, para. 748.

[3211] Memorial, para. 242.

facing potential liability in this Arbitration further confirms that the Criminal Proceedings "were bogus from the start".[3212]

1986. According to the Claimants, Ecuador used Mr Veiga and Dr Pérez as proxies to attack the 1995-1998 Settlement and Release Agreements and pressure Chevron to settle, such that the Criminal Proceedings intentionally caused harm to the Claimants by directly impacting their defence and attempts to pre-empt the Respondent's internationally wrongful acts.[3213] Recalling that the Tribunal has recognised the direct connection between the Criminal Proceedings and the Lago Agrio Litigation, the Claimants contend that, because those proceedings were designed to nullify or void the agreements at the core of Chevron's defence to the Lago Agrio Litigation, the costs incurred in the Criminal Proceedings were caused by the Respondent's Treaty breaches.[3214]

1987. In the alternative, the Claimants submit that they are entitled to recover the expenses incurred in defending their employees as incidental damages.[3215] While the Claimants insist that no "necessity" requirement should be introduced, they note that the foreign law firms involved in the Criminal Proceedings were actively participating in the defence strategy and coordinating it with the relevant simultaneous proceedings in the United States.[3216] The Claimants add that damages should not be assessed through the filter of hindsight, and that the fact that the Criminal Proceedings were ultimately dismissed should have no bearing on the compensation to be paid by the Respondent.[3217]

2. The Respondent's Position

1988. The Respondent submits that the Claimants' claim pertaining to the Criminal Proceedings should be denied in its entirety because the Tribunal explicitly found in Track II, with *res judicata* effect, that such proceedings were not a breach of the Treaty and had "no causative link" with the Lago Agrio Judgment.[3218] Accusing the Claimants of attempting

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3212 Memorial, para. 243; Track II Award, paras 4.124, 5.240.

3213 Reply, paras. 750-751; Fourth Veiga Witness Statement, paras. 94-95, 98.

3214 Reply, paras. 752-753; Track II Award, para. 5.239.

3215 Reply, para. 757.

3216 Reply, paras. 758-759.

3217 Reply, para. 760.

3218 Counter-Memorial, paras. 674, 676; Rejoinder, paras. 1150-1151; Track II Award, paras. 5.241, 8.17(iv).

to "resurrect" their failed liability theory as a damages claim, the Respondent asserts that these legal fees and expenses are unnecessary, unreasonable and excessive, and have no causal link to the alleged breaches or the Treaty breaches.[3219]

1989. The Respondent underscores that the Tribunal cannot award damages that are unrelated to Ecuador's breaches, such that the Claimants should not be permitted to use the denial of justice and the breach of the Umbrella Clause found by the Tribunal "as a cloak for reintroducing under another guise the precluded [criminal proceedings] claim".[3220] Indeed, the Respondent argues that the Claimants have failed to explain how the Ecuadorian judiciary's breaches could possibly have "caused" the executive branch to investigate Chevron's employees, recalling that the Tribunal (i) held that there was no improper collusion between the Ecuadorian Executive and the LAPs; and (ii) did not conclude that the Criminal Proceedings themselves amounted to a breach of the Treaty or had any link to the Treaty breaches.[3221]

1990. In addition, the Respondent questions the necessity and reasonableness of retaining six firms, including U.S. law firms, to defend two individuals in an investigation, noting that "monitoring the progress" of the investigations and "joining Chevron in multiple 1782 applications" is not necessary criminal defence work, and that these firms' costs duplicated those incurred by Chevron's own legal team.[3222] In particular, the Respondent requests the Tribunal to deny all claimed fees and costs allegedly paid to four firms (namely, Rivero Mestre LLP, Covington & Burling LLP, Williams & Connolly LLP, and Donoso & Donoso Asociados) in relation to the Criminal Proceedings, which the Claimants claim across several categories despite none of these firms having any role in other proceedings or representing Chevron.[3223] The claimed sums for these firms, the Respondent adds, are excessive, and in any event they have not been proven to be related to or caused by the criminal investigations, as the Claimants' "Representative Sample"

[3219] Counter-Memorial, paras. 677, 685; Rejoinder, paras. 1152, 1161.

[3220] Counter-Memorial, paras. 675, 677-679; **RLA-355**, *Marvin Roy Feldman Karpa v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 194; **CLA-692**, *Victor Pey Casado and Foundation "Presidente Allende" v. Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016, paras. 218, 232, 240.

[3221] Rejoinder, paras. 1153-1155; Track II Award, paras. 5.238-5.241, 8.69, 9.75.

[3222] Counter-Memorial, paras. 681-683.

[3223] Rejoinder, para. 1157.

contains various expenses that have no relationship to the matter or are otherwise unreasonable and unnecessary.[3224] In fact, the Respondent opines that the said sample is not representative, since it contains very few entries and invoices for law firms which represent a large portion of the claim.[3225]

1991. Lastly, the Respondent posits that the Claimants have not demonstrated the specifics of the alleged losses arising from, or the necessity to file, parallel 28 U.S.C. § 1782 applications to gather evidence in aid of the defence of Mr Veiga and Dr Pérez, and that they have likewise failed to address the "duplicative and unnecessary work" performed in the Section 1782 proceedings.[3226]

3. The Tribunal's Analysis

1992. The Criminal Proceedings were intermittent criminal investigations, later to become prosecutions, from October 2003 to June 2011 against Mr Veiga and Dr Pérez, TexPet's Vice President and legal representative, respectively, who negotiated and executed the 1995 Settlement Agreement between TexPet and Ecuador, for alleged "falsity in a notarial document" (later "ideological falsehood") concerning said Settlement Agreement.[3227] Certain of the Lago Agrio Plaintiffs' representatives cooperated with members of President Correa's administration to bring these prosecutions in an attempt to nullify the effect of Chevron's reliance upon the 1995 Settlement Agreement as a defence in the Lago Agrio Litigation.[3228] The criminal prosecutions were subsequently dismissed by the Respondent's National Court of Justice (First Criminal Chamber) in June 2011.[3229]

[3224] Rejoinder, paras. 1158-1159; **RE-51**, Trunko Expert Report, SM J-8. These expenses include, *inter alia*, public relations work, work on an "extradition brief", "[u]nauthorized practice" of Ecuadorian law by U.S. lawyers and various travel costs. *See, e.g.,* **C-3243**, Rivero Mestre LLP (Member), Invoice Number 5360, 9 May 2011, CVX-Track III-10000106; **C-3243**, Rivero Mestre LLP (Member), Invoice Number 5588, 12 August 2011, CVX-Track III-10000106; **C-3243**, Covington & Burling LLP (Member), Invoice Number 60538205, 15 April 2011, CVX-Track III-10000106.

[3225] Rejoinder, para. 1160; **RE-65**, Lee Expert Report, para. 27; **RE-51**, Trunko Expert Report, SM J-12.

[3226] Counter-Memorial, paras. 639, 680, 684; Rejoinder, para. 1156.

[3227] Track II Award, paras. 4.122-4.123.

[3228] Track II Award, paras. 4.124-4.126.

[3229] Track II Award, paras. 4.130, 4.448.

Evidence relevant to the timeline of the Criminal Proceedings is documented in the Tribunal's Track II Award.[3230]

1993. In brief, the Claimants argue that the amount of USD 6,933,905.69,[3231] representing legal fees and expenses incurred by Chevron in defence of Mr Veiga and Dr Pérez in the Criminal Proceedings, constitute recoverable damages for both Denial of Justice and Umbrella Clause breaches, as the proceedings were a "direct outgrowth" of the Lago Agrio Litigation committed in abuse of the Respondent's prosecutorial powers.[3232] The Respondent, on the other hand, maintains that this damages category should not survive scrutiny as it is unrelated to and has no causal link with Ecuador's Treaty breaches – as already concluded by the Tribunal in its Track II Award with *res judicata* effect.[3233]

1994. Following the methodology laid out in Section VII.G.5, the Tribunal finds that the legal fees and expenses incurred by the Claimants in connection with the Criminal Proceedings must be excluded in full from the final amount of compensation for want of a causal link with the Respondent's Treaty breaches.

1995. First, the Tribunal recalls the Claimants' position that all of their claimed legal fees and expenses incurred in connection with the Criminal Proceedings constitute direct damages and are recoverable in the alternative as incidental damages.[3234] 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 are *not* compensable in these proceedings.[3235]

3230 Track II Award, paras. 4.122-4.131, 4.220-4.223, 4.290, 4.323, 4.330, 4.448.

3231 This consists of USD 5,988,424.18 as total legal fees and USD 945,481.51 as total costs claimed by the six law firms representing Mr Veiga and Dr Pérez. *See* Reply, Updated Appendix 2, p. 1272.

3232 Memorial, para. 242.

3233 Counter-Memorial, paras. 675-676.

3234 *See* para. 319 above.

3235 *See* para. 317 above.

1996. Second, 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.

1997. The efforts undertaken by the Claimants in connection with the Criminal Proceedings between September 2008 and June 2011 did not pursue any of these objectives. Rather, by defending Mr Veiga and Dr Pérez in the Criminal Proceedings, the Claimants' declared goal was to thwart the attempts of the Respondent's prosecutorial authorities, in cooperation with certain of the LAPs' representatives, "to nullify or void the Settlement and Release Agreements, which also were at the core of Chevron's defense to the Lago Agrio Litigation".[3236]

1998. In other words, by defending Mr Veiga and Dr Pérez in the Criminal Proceedings, the Claimants sought ultimately to defend from attempts to undermine their case in the Lago Agrio Litigation, aiming to achieve a positive outcome before the Lago Agrio Court at the trial stage. These efforts could not have conceivably sought to mitigate the injury flowing from the recognition and enforcement of the unremedied Lago Agrio Judgment, as required to warrant compensation, because said Judgment was yet to come into existence – indeed, the Lago Agrio Judgment represented the final outcome of the trial court proceedings. Whatever harm that Chevron sought to address by defending Mr Veiga and Dr Pérez in the Criminal Proceedings is outside the scope of the injury caused by the Respondent's internationally wrongful acts. Accordingly, the legal fees and expenses

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[3236] Reply, para. 753.

incurred by the Claimants in connection with the Criminal Proceedings do not qualify as incidental damages and are therefore not recoverable in this Arbitration.

1999. The Tribunal's conclusion is supported by the Track II finding that there was no causative link between the Criminal Proceedings and the Lago Agrio Judgment:

> on 1 June 2011, these prosecutions were eventually discontinued by the Respondent's National Court, ostensibly without interference by the Respondent's Government. By that date, the Lago Agrio Judgment had been issued in favour of the Lago Agrio Plaintiffs notwithstanding the 1995 Settlement Agreement.
>
> The Tribunal does not consider proven that these criminal investigations or prosecutions had any causative link with the conduct of the Lago Agrio Litigation or the 'ghostwriting' of the Lago Agrio Judgment by certain of the Lago Agrio Plaintiffs' representatives. Indeed, after bribing Judge Zambrano, these representatives no longer needed to impugn the 1995 Settlement Agreement (with its related agreements) by means of these collusive criminal prosecutions.[3237]

2000. Indeed, the Criminal Proceedings were discontinued in June 2011, shortly after the issuance of the Lago Agrio Judgment on 14 February 2011. As from then, the LAPs' representatives no longer needed to call into question the 1995 Settlement Agreement, nor did Chevron need to defend Mr Veiga and Dr Pérez from the actions of the LAPs' representatives any longer. This evidences a disconnect between the Claimants' spending in the Criminal Proceedings and their efforts to mitigate the injury flowing from the recognition and enforcement of the unremedied Lago Agrio Judgment.

2001. In sum, for the above reasons, the Tribunal rejects the Claimants' damages claim in respect of the Criminal Proceedings.

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[3237] Track II Award, paras. 5.240-5.241.

L. DUTCH SET-ASIDE PROCEEDINGS

2002. The Claimants seek USD 3,676,711.53 in fees and costs incurred in connection with the Dutch Set-Aside Proceedings between August 2010 and September 2018.[3238] These fees were incurred in two separate proceedings before the Dutch courts initiated by two separate actions: (i) the Respondent's 7 January 2014 petition to set aside the First, Second, Third, and Fourth Interim Awards;[3239] and (ii) the Respondent's 10 December 2018 petition to set aside the Track II Award.[3240]

1. The Claimants' Position

2003. The Claimants argue that they are entitled to recover as direct damages the legal fees and expenses incurred in the two Dutch Set-Aside Proceedings, in which they say they were "forced" to defend against the Respondent's attempts to set aside the Tribunal's First, Second, Third and Fourth Interim Awards, the First Partial Award, and the Track II Award.[3241] In view of the Respondent's "pattern of conduct", the Claimants allegedly anticipated that the Respondent would seek to set aside interim measures issued by the Tribunal and thus started preparing their defence in August 2010, after the Tribunal issued its first Order on Interim Measures.[3242]

2004. According to the Claimants, despite having been repeatedly rejected by the Dutch courts, the Respondent continued to advance the same arguments in the Dutch Set-Aside Proceedings in a "frivolous and vexatious" serial litigation, wherein the Claimants have prevailed.[3243] The Respondent's "dilatory use of the Dutch set-aside proceedings and of the limited grounds to set-aside an award under Dutch law"[3244] forced the Claimants to

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[3238] This consists of USD 2,935,540.22 as total legal fees and USD 683,518.79 as total costs claimed by the five law firms with billings under this damages category, and USD 57,652.52 as expert's costs. *See* Reply, para. 986; Updated Appendix 2, pp. 1298-1328.

[3239] **C-2740**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, Writ of Summons, 7 January 2014.

[3240] **C-2752**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, District Court of the Hague, Case No. C/ 09/570029, Writ of Summons, 10 December 2018.

[3241] Reply, para. 988; Memorial; Appendix 10.

[3242] Reply, para. 983.

[3243] Memorial, para. 418; Reply, para. 998; Letter from the Claimants to the Tribunal dated 22 November 2023.

[3244] Reply, para. 999.

engage Dutch counsel to represent them and incur additional costs to defend the Tribunal's decisions and awards in these "lengthy and burdensome" proceedings before the Dutch courts.[3245]

2005. The Claimants further clarify that, as evidenced by the invoices they produced, the costs incurred in the Dutch Set-Aside Proceedings arise solely out of the two set-aside proceedings against this Tribunal's awards and do not involve any costs incurred in the separate *Chevron v. Ecuador I* set-aside proceedings relating to an earlier arbitration between the Parties.[3246]

2006. As to the work performed by the U.S. law firms in the Dutch Set-Aside Proceedings, the Claimants submit that:

> international courts and tribunals generally refrain from second-guessing the business decisions undertaken by a claimant when mitigating its losses so long as they were incurred to achieve a legitimate purpose or objective. *A fortiori*, this Tribunal should refrain from second-guessing Chevron's reliance on Gibson Dunn and Jones day's support and input in this arbitration.[3247]

2007. The Claimants deny that their damages claim with respect to the Dutch Set-Aside Proceedings is already *res judicata*.[3248] While the Dutch courts granted reimbursement of the legal fees and expenses in the amount of EUR 13,484.34, the Claimants contend that legal fees in national litigation based on domestic law should be distinguished from damages based on international law.[3249] Citing *Helnan v. Egypt*, the Claimants assert that the doctrine of *res judicata* applies only between courts and tribunals belonging to the same legal order.[3250] The Claimants state that they have not waived their damages claim by being granted reimbursement for costs by the Dutch courts.[3251] In the Claimants' view,

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[3245] Memorial, para. 419; Reply, para. 1000.

[3246] Reply, para. 990; **C-3262**, Bureau Brandeis BV, Invoices 2014-2018; **C-3287**, Gibson, Dunn & Crutcher LLP (Member), Invoices 2012, 2014, 2016; **C-3303.009**, Jones Day (Member) – 2016; **C-3305**, King & Spalding (Member), Invoices 2014-2018; **C-3341**, Spigt Litigators, Invoices 2010-2014.

[3247] Reply, para. 1003.

[3248] Reply, para. 994.

[3249] Reply, para. 991.

[3250] Reply, para. 994; **CLA-568**, *Helnan International Hotel A/S v. Egypt*, ICSID Case No. 05/19, Award, 3 July 2008, para. 124.

[3251] Reply, para. 993.

this Tribunal can still assess and award damages to the Claimants under international law for the costs they incurred in defending against the Respondent's set-aside actions.[3252] However, to avoid double recovery, the Claimants propose to deduct the amount of EUR 13,484.34, which the Respondent paid to the Claimants, from the sum claimed by the Claimants as damages in this Arbitration.[3253]

2008. Assuming that they cannot recover costs from August 2010, the Claimants submit that, at the very least, they are entitled to recover USD 3,298,000 in direct damages incurred after 1 March 2012.[3254] In the alternative, they consider they are entitled to recover the costs incurred by the Claimants as incidental damages because the invoices produced in support of the claimed costs demonstrate that the time spent by Gibson Dunn, Jones Day, and other law firms "was reasonable for the tasks to which it corresponds."[3255] Emphasizing that the costs would not have been incurred without the Respondent's internationally wrongful conduct, the Claimants posit that said costs were reasonable in light of their legitimate purpose and objective: enforcing the Claimants' rights in this Arbitration and preserving any award rendered by this Tribunal.[3256]

2009. While, in their view, only reasonableness of the legal fees and expenses needs to be shown, the Claimants argue that the expenses were, in any event, necessary, even indispensable, for the Claimants to repair, through this Arbitration, the damage caused by the Respondent's Treaty breaches.[3257]

2. The Respondent's Position

2010. The Respondent argues that this category of damages should be denied in its entirety. First, the Respondent asserts that its exercise of the right to seek the setting aside of the Tribunal's awards at the seat of arbitration, regardless of the ultimate outcome, does not amount either to internationally wrongful conduct or to a Treaty breach giving rise to

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[3252] Reply, para. 994.

[3253] Reply, para. 995.

[3254] Reply, para. 1001.

[3255] Reply, paras. 1002, 1004.

[3256] Reply, para. 1005.

[3257] Reply, para. 1006.

liability.[3258] For the Respondent, the fact that the Claimants did not assert before the Dutch courts that the Dutch Set-Aside Proceedings were frivolous and did not seek legal fees in excess of what those courts awarded them confirms that the Claimants' allegations of improper motives are without merit.[3259]

2011. Additionally, the Respondent notes that the Claimants already recovered their legal expenses in the Dutch Set-Aside Proceedings in the amount of EUR 13,484.34, in line with the fixed remuneration system applied by the Dutch courts.[3260] In the Respondent's view, the Dutch courts are the only appropriate forum to seek fees and costs for the Dutch Set-Aside Proceedings, given that The Hague is the seat of this Arbitration.[3261] Therefore, contrary to the Claimants' suggestion, the Respondent considers that the principle of *res judicata* is irrelevant in this context, where the Dutch courts have been specifically designated to review the proceedings under the agreement of the Parties in compliance with the Treaty and the UNCITRAL Arbitration Rules.[3262]

2012. In any event, the Respondent maintains that the invoices submitted for the Dutch Set-Aside Proceedings do not show, on their face, that the fees allegedly incurred by the Claimants were reasonable, necessary, and caused by the Treaty breaches.[3263]

2013. First, according to the Respondent, the costs sought under this category likely do not arise solely out of the two set-aside proceedings relating to this Arbitration, which did not begin until 7 January 2014.[3264] The invoices, however, were dated as early as August 2010 and must therefore reflect fees and costs incurred in the separate *Chevron v. Ecuador I* set-aside proceedings that commenced on 7 July 2010.[3265]

3258 Counter-Memorial, para. 913; Rejoinder, paras. 1606, 1608.

3259 Counter-Memorial, paras. 914, 918; Rejoinder, para. 1614.

3260 Counter-Memorial, para. 925; Rejoinder, para. 1613.

3261 Rejoinder, paras. 1611, 1616.

3262 Rejoinder, para. 1616.

3263 Rejoinder, para. 1617.

3264 Counter-Memorial, paras. 919-920.

3265 Counter-Memorial, para. 920; Rejoinder, para. 1628; Reply, Updated Appendix 2, p. 1298.

2014. In addition, the Respondent asserts that the contents of the invoices, including those that refer to the "BIT final award annulment proceedings [] with respect to commercial claims" show that they relate to *Chevron v. Ecuador I*. [3266] A careful review of the invoices for the time periods during which both the Dutch Set-Aside Proceedings and the *Chevron v. Ecuador I* proceedings were pending also suggests that all fees and costs sought by the Claimants at the District Court level before 7 January 2014, at the Court of Appeals level before 13 April 2016, and at the Supreme Court level before 18 October 2017 "were not necessary" and "may well relate" to the *Chevron v. Ecuador I* set-aside proceedings only.[3267]

2015. Second, the Respondent asserts that the Claimants failed to explain why U.S. counsel were needed in the Dutch Set-Aside Proceedings and why they billed more hours than Dutch counsel in the same phase of the proceedings.[3268] Considering that the five limited grounds for set-aside in the Netherlands are necessarily governed by Dutch law, and that the Claimants were already represented by eminently qualified Dutch counsel, U.S. counsel could not have been needed to any significant extent to support the Claimants' position in the Dutch Set-Aside Proceedings.[3269] The Respondent also notes that the fees billed by U.S. counsel show duplication of work of the Dutch attorneys, expenses for attorneys to travel to hearings, and time attending hearings.[3270]

2016. Third, the Respondent contends that the fees and costs billed by Dutch counsel were similarly duplicative.[3271] Under Dutch law, the designation of an attorney as counsel of record means that no other attorney could act for the Claimants in that capacity.[3272] Thus, it is unclear what the scope of services of the two remaining law firms was to bill

[3266] Rejoinder, para. 1629.

[3267] Rejoinder, para. 1630; **RE-63**, Second Luycks Expert Report, para. 5.41.

[3268] Rejoinder, para. 1619.

[3269] Rejoinder, paras. 1619, 1621; **RE-63**, Second Luycks Expert Report, para. 5.17.

[3270] Rejoinder, paras. 1620, 1622.

[3271] Rejoinder, para. 1624.

[3272] Rejoinder, para. 1624; **RE-63**, Second Luycks Expert Report, para. 5.15.

extensive hours of work that are not duplicative of those already billed by counsel of record.[3273]

2017. Lastly, recalling that the Claimants seek to recover fees and costs from August 2010, the Respondent submits that there is no justification for running costs to defend against a proceeding that had yet to be initiated to set aside awards that did not even exist at that time.[3274]

3. The Tribunal's Analysis

2018. On 7 January 2014, the Respondent filed a petition in the District Court of The Hague – the legal seat of this Arbitration[3275] – seeking to set aside the First, Second, Third and Fourth Interim Awards.[3276] These awards were upheld by the District Court on 20 January 2016,[3277] by the Court of Appeals of The Hague on 18 July 2017,[3278] and by the Dutch Supreme Court on 12 April 2019.[3279]

2019. On 10 December 2018, the Respondent sought to set aside the Track II Award before the District Court of The Hague.[3280] The Track II Award was upheld by the District Court on

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3273 Rejoinder, paras. 1624-1625.

3274 Counter-Memorial, para. 923; Rejoinder, para. 1626.

3275 *See* para. 11 above.

3276 **C-2740**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, Writ of Summons, 7 January 2014.

3277 **C-2742**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, District Court of the Hague, Case No. C/09/477457 / HA ZA 14-1291, Judgment, 20 January 2016.

3278 **C-2545**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, The Hague Court of Appeals, Case No. 200.193.418/01, Decision, 18 July 2017.

3279 **C-2751**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, Supreme Court of the Netherlands, Case No. 17/04926, Decision, 12 April 2019.

3280 **C-2752**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, District Court of the Hague, Case No. C/09/570029, Writ of Summons, 10 December 2018.

16 September 2020,[3281] by the Court of Appeals of The Hague on 28 June 2022,[3282] and by the Dutch Supreme Court on 17 November 2023.[3283]

2020. The Claimants assert that they would not have incurred legal fees and expenses in connection with the Dutch Set-Aside Proceedings but for the Respondent's Treaty breaches, which led to the present Arbitration and the awards issued in it. According to the Claimants, "[i]t was natural and foreseeable that Ecuador's internationally wrongful acts would give rise to Claimants' costs in enforcing their legal rights, including in defending the awards rendered by this Tribunal against Ecuador's attempts to set them aside."[3284] In particular, the Claimants assert that the First, Second and Fourth Interim Awards on interim measures "were critical to maintaining the integrity of the arbitral process, and their setting aside would potentially have caused serious prejudice to Claimants' procedural and substantive rights."[3285]

2021. In response, the Respondent argues primarily that it has a well-established right to pursue set-aside proceedings before the Dutch courts.[3286] In the Respondent's view, its good faith pursuit of such remedies, regardless of the outcome, cannot be characterized as internationally wrongful conduct or a failure to arbitrate in good faith.[3287]

2022. A separate, but narratively relevant, set-aside proceeding was pursued by the Respondent in relation to a previous Treaty arbitration between the Parties concerning delays in relation to seven commercial cases brought by TexPet before the Ecuadorian courts (the *Chevron v. Ecuador I* arbitration).[3288] The *Chevron v. Ecuador I* set-aside proceedings ran from 1 January 2010 to 26 September 2014, when the Dutch Supreme Court

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[3281] **C-3147**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, District Court of The Hague, Case No. C/09/570029 / HA ZA 19-268, Judgment, 16 September 2020.

[3282] **C-3477**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, The Hague Court of Appeals, Case No. 200.288.128/01, Judgment, 28 June 2022.

[3283] **C-3640**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, Supreme Court of the Netherlands, Case No. 22/03577, Judgment, 17 November 2023.

[3284] Reply, para. 987.

[3285] Memorial, para. 419.

[3286] Counter-Memorial, para. 911.

[3287] Counter-Memorial, paras. 913, 918; Rejoinder, para. 539.

[3288] Memorial, Appendix 10.

ultimately dismissed the *Chevron v. Ecuador I* set-aside action.[3289] The Claimants assert that, while it is represented by the same counsel in the *Chevron v. Ecuador I* set-aside and the Dutch Set-Aside Proceedings concerning this Arbitration, they are solely claiming damages arising out of the latter proceedings.[3290] The Respondent contests this based on the period to which the Claimants' invoices underlying their claim under this category pertain.[3291]

2023. Following the methodology laid out in Section VII.G.5, the Tribunal finds that the legal fees and expenses incurred by the Claimants in connection with the Dutch Set-Aside Proceedings must be excluded in full from the final amount of compensation for want of a causal link with the Respondent's Treaty breaches.

2024. First, the Tribunal recalls the Claimants' position that all of their claimed legal fees and expenses claimed in connection with the Dutch Set-Aside Proceedings constitute direct damages and are recoverable in the alternative as incidental damages.[3292] 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 are *not* compensable in these proceedings.[3293]

2025. Second, 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

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[3289] Memorial, Appendix 10, paras. 1-3; Counter-Memorial, para. 920; **C-2420B**, *The Republic of Ecuador v. Chevron Corporation and Texaco Petroleum Company*, Supreme Court of the Netherlands, Case No. 13/04679, EV/LZ, Judgment, 26 September 2014.

[3290] Memorial, Appendix 10, para. 8; Reply, para. 997.

[3291] Counter-Memorial, para. 919; Rejoinder, para. 546. *See* paras. 2013-2014 above.

[3292] *See* para. 2008 above.

[3293] *See* para. 317 above.

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.

2026. By participating in the Dutch Set-Aside Proceedings, the Claimants sought to defend the First through Fourth Interim Awards and the Track II Award against the Respondent's attempts to have them set aside at the legal place of this Arbitration. In other words, the Claimants' legal spending in the Dutch Set-Aside Proceedings was incurred in reaction to the Respondent's set-aside actions against those awards and *not* in reaction to concrete efforts to render the Lago Agrio Judgment enforceable, defend its enforceability or actually seek to enforce it. This is indicative of remoteness between the injury flowing from the Respondent's Treaty breaches and the legal fees and expenses claimed under this heading.

2027. Furthermore, regardless of the ultimate outcome of the Dutch Set-Aside Proceedings, there was nothing improper in the Respondent's decision to seek to set aside the Tribunal's awards. This right is guaranteed under Dutch law[3294] and also flows from Article VI(5) of the Treaty, pursuant to which any arbitration under paragraph 3(a)(iii) of that Article – that is, under the UNCITRAL Arbitration Rules – shall be held in a State that is a party to the New York Convention. While the New York Convention does not govern *per se* the annulment of arbitral awards, Article V(1)(e) of the Convention recognizes the situation when the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" as a ground to deny the recognition and enforcement of an award.[3295]

2028. For these reasons, the Tribunal determines that the Respondent's legitimate exercise of its right to seek the set-aside of awards issued in this Arbitration did not give rise to injuries for which the Claimants can claim damages in these proceedings. A different

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[3294] **RLA-732**, Dutch Civil Code of Procedure, Art. 1065(1). *See also* Counter-Memorial, para. 912, fn 1820.

[3295] **RLA-64**, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL (New York, 1958), Art. V(1)(e).

conclusion would create a significant hurdle for set-aside actions, thus impairing the Respondent's right of access to justice under the law of the seat of this Arbitration.

2029. For the avoidance of doubt, the Tribunal confirms that there was also nothing improper in the Claimants' decision to oppose the Respondent's set-aside actions. However, this does not mean that the Claimants are entitled to recover the legal fees and expenses incurred in connection with the Dutch Set-Aside Proceedings as damages in this Arbitration simply because those proceedings would not have taken place if the Respondent had not breached the Treaty. The same proposition applies to *all* set-aside proceedings concerning an award in which a treaty breach is declared. The test for incidental damages under international law, as described in the preceding paragraphs, is narrower than an unrestricted analysis of factual causation.

2030. Accordingly, for the foregoing reasons, the Tribunal rejects the Claimants' damages claim in respect of the Dutch Set-Aside Proceedings.

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M. Treaty Arbitration Costs Incurred by Non-Counsel of Record

2031. The Claimants seek USD 34,653,249.61 in legal fees and expenses incurred between May 2008 and October 2018 by non-counsel of record as costs of this Arbitration under Article 38 of the UNCITRAL Arbitration Rules.[3296] To the extent that they are not awarded as costs, the Claimants seek reimbursement of these legal fees and expenses as direct damages.[3297] In the further alternative, the Claimants submit that they are entitled to compensation for these legal fees and expenses as incidental damages.[3298]

2032. According to the Respondent, the Claimants have "muddled" the relationship between the costs claimed under the present heading and the "legal assistance" costs they sought in their 2018 Submissions on Costs, such that it is impossible to understand the overlap or duplication between this category of damages and the "legal assistance" component of the Claimants' costs of arbitration claim.[3299] To the extent the amounts claimed in this category are characterized either as direct or incidental damages, the Respondent considers that the Claimants have failed to make the requisite showing of the reasonableness of the alleged fees and costs they seek.[3300] Consequently, the Respondent argues that none of the alleged expenses falling under the present heading are recoverable in this Arbitration.[3301]

1. The Claimants' Position

2033. According to the Claimants, their damages in this category comprise the legal fees and expenses of several law firms that assisted the Claimants in developing their strategy and evidence for their Treaty claims – including, notably, Gibson, Dunn & Crutcher LLP and

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3296 Memorial, para. 414. In their Reply, the Claimants adjusted the amount of legal fees and expenses claimed under this category to USD 34,653,249.61 (*see* Reply, para. 976).

3297 Memorial, para. 414; Reply, paras. 976, 981.

3298 Reply, paras. 976, 1002.

3299 Counter-Memorial, para. 908; Rejoinder, para. 1570.

3300 Rejoinder, para. 1572.

3301 Counter-Memorial, para. 909.