PCA CASE NO. 2009-23

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

BETWEEN:

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

The Claimants

- and -

THE REPUBLIC OF ECUADOR

The Respondent

FOURTH PARTIAL AWARD ON TRACK III

17 November 2025

The Arbitration Tribunal:

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

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

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EXECUTIVE SUMMARY OF THE FOURTH PARTIAL AWARD ON TRACK III*

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

Track II

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

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

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

Track III

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

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

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

General Matters and Legal Standards

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

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

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

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

Damages Categories concerning Legal Fees and Expenses

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

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

Other Damages Categories

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

Indemnification

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

Injunctive Relief

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

Track IV of the Arbitration

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

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

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ABBREVIATED TABLE OF CONTENTS

DETAILED TABLE OF CONTENTS

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.

Jones Day's work in developing evidence arising out of the Section 1782 Proceedings and the RICO Litigation for use in this Arbitration.[3302]

2034. The Claimants assert that they relied on the expertise of Gibson Dunn and Jones Day in connection with this Arbitration, including reviewing and revising written submissions, assisting with overlapping expert witnesses, and attending hearings.[3303] As to the legal fees and expenses they claim for those efforts, the Claimants clarify that that they are "separate, and not included in the US$ 164 million otherwise claimed under the Section 1782 and RICO proceedings";[3304] rather, those legal fees and expenses were incurred for the "sole purpose" of supporting and presenting the Claimants' case in this Arbitration.[3305] The Claimants also indicate that this category is a sub-set of the "legal assistance" fees they have previously included in their Track II Submission on Costs, made pursuant to paragraph 10.16 of the Tribunal's Track II Award and Procedural Order No. 52.[3306]

2035. The Claimants also seek to recover fees for the work done by ten other law firms under the present heading: Stern Kilcullen & Rufolo LLC; Gardere Wynne Sewell LLP; Boies Schiller & Flexner LLP; Perez, Bustamante & Ponce; Covington & Burling LLP; Three Crowns LLP; Rivero Mestre LLP; Asesorias Bofill Escobar; Holland & Knight; and NautaDutilh N.V.[3307] As evidenced by their invoices, the Claimants assert that the legal fees and expenses of these firms were incurred for the sole purpose of supporting and presenting the Claimants' case in this Arbitration.[3308]

2. The Respondent's Position

2036. According to the Respondent, despite its requests for clarification, the Claimants have "muddled the relationship" between this Treaty Arbitration Costs category and the "legal assistance" they seek in their Track II Submission on Costs, such that "it is impossible to

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3302 Reply, para. 977.

3303 Memorial, para. 414.

3304 Reply, para. 985.

3305 Reply, para. 979.

3306 Memorial, para. 414.

3307 Reply, paras. 977-978.

3308 Reply, para. 979.

understand the overlap or duplication between this category of damages and the 'legal assistance' component of Claimants' costs of arbitration claim."[3309]

2037. In particular, the Respondent refers to alleged inconsistencies in the Claimants' submissions, contending that in the Memorial, the Claimants state that the amount under this head of damages represents "a subset of the US$ 164 million" claimed as costs of arbitration, admitting that the amounts sought as damages and as costs overlap, whereas in their Reply they indicate the precise opposite, namely, that the USD 35 million is not included in the USD 164 million and that the USD 164 million amount includes the amounts incurred in Section 1782 Proceedings and RICO Litigation.[3310]

2038. Noting that the Claimants have not produced the invoices underlying their costs submission, and more specifically the USD 164 million component of that submission attributable to the "non-counsel of record", including Gibson Dunn and Jones Day, the Respondent argues that the Claimants have failed to demonstrate that this claim is in fact not duplicative.[3311]

2039. The Respondent does not consider the invoices produced by the Claimants in support of this claim component to be reliable evidence because, in its view, the Claimants have made multiple misrepresentations as to what services were actually included in this category.[3312] The Respondent disputes the Claimants' assertion that the costs were incurred "for the sole purpose" of supporting their case in this Arbitration, contending that the invoices include (i) fees that Gibson Dunn and Jones Day performed in a distinct, domestic lawsuit in the SDNY; (ii) those of NautaDutilh N.V., a Dutch firm that acted as Chevron's counsel of record in the Dutch Set-Aside Proceedings, instead of including them in the Dutch Set-Aside Proceedings category; and (iii) fees for "expert testimonies" prepared in 2008 that predate the commencement of this Arbitration.[3313]

3309 Rejoinder, para. 1570.

3310 Rejoinder, paras. 1577-1581; Memorial, para. 414, Reply, para. 985.

3311 Counter-Memorial, para. 908; Rejoinder, para. 1582.

3312 Rejoinder, para. 1588.

3313 Rejoinder, paras. 1584-1587.

2040. Relying on the approach taken in in *PSEG v. Turkey*, the Respondent takes the view that the Claimants' misrepresentations provide sufficient grounds to dismiss this category in its entirety, or severely reduce the amounts claimed.[3314]

2041. Insofar as the time entries for the costs claimed in this sub-category can be assessed, the Respondent argues that the Claimants over-lawyered this Arbitration by hiring twelve law firms with over 400 timekeepers, but failed to offer any explanation as to how the contributions from each law firm were unique or required in addition to those from the Claimants' counsel of record.[3315] The Respondent further highlights that the Claimants' lawyers spent considerable time on paralegal or administrative tasks that would ordinarily not be compensable under Chevron's Guidelines.[3316]

2042. Moreover, to the extent that Chevron pursued discovery in the RICO Litigation to obtain information for use in this Arbitration, the Respondent relies on Professor Strong's expert opinion that the Claimants are not entitled to recover the related costs because "a party cannot use a U.S. litigation as a stalking horse to pursue discovery for another case."[3317]

2043. According to the Respondent, the time entries underlying the Claimants' claimed legal fees and expenses also reflect the Claimants' intention to seek unrelated and unreasonable charges, including expenses for attending international conferences, fees incurred for legal strategies that were deemed "inappropriate, distracting, and irrelevant", as well as those for legal strategies that were ultimately abandoned in domestic actions that had no connection with this Arbitration.[3318]

3. The Tribunal's Analysis

2044. The Claimants describe the legal fees and expenses under this category as follows:

> As the Tribunal is aware, this BIT case, the § 1782 proceedings, and the RICO case took place in parallel. Chevron exhibited in this case substantial evidence that was initially developed in the § 1782 proceedings and/or the RICO case, and the Tribunal relied

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3314 Rejoinder, para. 1588; **CLA-226**, *PSEG Global Inc., and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 328.

3315 Rejoinder, paras. 1594-1595, 1597.

3316 Rejoinder, para. 1598.

3317 Rejoinder, para. 1591; **RE-44**, First Strong Expert Report, paras. 72-80.

3318 Rejoinder, paras. 1607-1610.

> extensively on that evidence in its Track II Award. Gibson Dunn and Jones Day were the primary law firms handling the § 1782 proceedings and the RICO case. In light of this, Chevron relied on the expertise of Gibson Dunn and Jones Day in connection with proceedings before this Tribunal, including reviewing and revising written submissions, assisting with overlapping expert witnesses, and attending hearings. Claimants have previously included Gibson Dunn and Jones Day's costs for assisting with the BIT, as well as developing evidence used in the BIT through the § 1782 and RICO proceedings, in their Track II submission on costs on the grounds that UNCITRAL Article 38's definition of "legal assistance" costs makes them recoverable. Those costs totaled some US$ 164 million. The US$ 35,813,735 in fees and costs claimed in this category is a subset of the US$ 164 million that excludes fees and costs for developing BIT-related evidence already captured in the § 1782 and RICO categories discussed above. While Claimants believe they are properly claimable as "costs for legal assistance" in this proceeding, to the extent they are not awarded as costs, they should be awarded as damages to Chevron.[3319]

2045. At the outset, the Tribunal recalls that the Claimants' primary position is that the legal fees and expenses under the present category should be reimbursed as "costs for legal assistance" under Article 38 of the UNCITRAL Arbitration Rules.[3320] In the alternative, the Claimants seek the legal fees and expenses under this heading as direct damages,[3321] and in the further alternative as incidental damages.[3322] The Respondent objects to the Claimants' claim under all three heads.

2046. The legal fees and expenses claimed as damages under the present heading, as characterized by the Claimants, were incurred "for the sole purpose of supporting and presenting Claimants' case in this BIT arbitration."[3323] This sets the present category apart from every other category in Track III involving legal fees and expenses as damages, which generally concern costs incurred in domestic proceedings *outside* of this Arbitration.[3324]

2047. By contrast, these proceedings are an international arbitration subject to the Treaty, the UNCITRAL Arbitration Rules and international law. Within this legal framework, the question of the reimbursement of legal fees and expenses incurred by the Parties in

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3319 Memorial, para. 414.

3320 Memorial, para. 414; Reply, para. 980.

3321 Reply, para. 981.

3322 Reply, para. 1002.

3323 Reply, para. 979.

3324 For a complete list of all categories *see* para. 558 above.

relation to this Arbitration is not addressed as such as a question of damages: it is governed specifically by Articles 38 and 40 of the UNCITRAL Arbitration Rules.

2048. Pursuant to Article 38 of the UNCITRAL Arbitration Rules, the term "costs" includes, inter alia, "[t]he costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable". With respect to these costs, Article 40(2) of the UNCITRAL Arbitration Rules provides that "the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable."

2049. The Tribunal recalls that, by its Procedural Order No. 84, the Tribunal assigned all issues relating to the allocation and assessment of costs and expenses (within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules), as claimed by the Claimants and the Respondent, for further submissions by the Parties to Track IV, following the issuance of this Award.[3325]

2050. Accordingly, the Tribunal defers to Track IV its determination as to whether the legal fees and expenses claimed by the Claimants as Treaty Arbitration Costs Incurred by Non-Counsel of Record amount to costs of arbitration under Article 38 of the UNCITRAL Arbitration Rules, and, if so, how they should be allocated under Article 40 of those Rules.

2051. However, for the avoidance of doubt, the Tribunal confirms that the legal fees and expenses claimed under the present heading are in any event *not* compensable either as direct or incidental damages. While legal fees and expenses incurred in mitigation by the Claimants may be compensable generally as incidental damages,[3326] the assessment and allocation of any costs for legal representation and assistance incurred by the Claimants in relation to *this Arbitration*, including those falling under the present category, is independent of the determination of full compensation under *Chorzów Factory* and is

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3325 Procedural Order No. 84, para. 13(i).

3326 *See* para. 327 above.

instead subject to a distinct standard and procedure under the UNCITRAL Arbitration Rules,[3327] as explained above.

2052. In sum, the Tribunal (i) rejects the Claimants' damages claim in respect of the category "Treaty Arbitration Costs Incurred by Non-Counsel of Record"; and (ii) defers to Track IV its determination of the Claimants' costs claim under Articles 38 and 40 of the UNCITRAL Arbitration Rules in respect of the legal fees and expenses falling under this same category.

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[3327] *See e.g.* Procedural Order No. 65, para. 72: "Pursuant to Article 38(e) of the UNCITRAL Rules, a party may recover its legal costs 'only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable'. Under Article 40(2) of the UNCITRAL Rules, the Tribunal has the discretion to 'determine which party shall bear such costs or [to] apportion such costs between the parties if it determines that apportionment is reasonable.' Arbitral tribunals do not exercise the same level of discretion in relation to parties' claims for damages."

N. CROSS-CUTTING ELEMENTS

1. Introduction

2053. In the preceding sections, the Tribunal has determined the extent to which each of the 13 categories of damages claimed by the Claimants comprising legal fees and expenses, as well as each particular component falling under each category, fulfils the requirements of causation and reasonableness for the compensation of incidental damages under international law. Such determinations, however, do not exhaust the inquiry in respect of those damages categories. As explained by the Tribunal in paragraphs 571-574 above, the Parties have identified a series of "elements" potentially impacting multiple categories. Because of their cross-cutting nature, these elements cannot be addressed in a self-standing manner as components of the Claimants' claims; rather, they affect to varying extents the global assessment of the amount of compensation. The Tribunal addresses these elements in this section.

2054. To recall, in its Procedural Order No. 83 the Tribunal defined the term "elements" as:

> any other cost subsets that may be present in several categories, and the recoverability of which is disputed on the basis of the nature of the expenditure, the observation of pathological or allegedly inadequate billing practices or other reasons (e.g., blocked billing, public relations, etc.)[3328]

2055. Based on this understanding, the Parties identified the following elements in their submissions in response to Procedural Order No. 83:

(i) (CLA) Fees That Allegedly Would Have Been Incurred But-For The Treaty Breaches / (RES) Fees That Would Have Been Incurred But-For The Treaty Breaches;

(ii) Claimants' Alleged Failure to Mitigate (Zambrano Recusal, Collusion Prosecution Act, Appeal Bond);

(iii) (CLA) Subsidiaries – PDF invoices addressed to Non-Claimant Chevron Corp. subsidiaries / (RES) Subsidiaries – PDF invoices addressed to Non-Claimants;

[3328] Procedural Order No. 83, 14 October 2022, para. 8(3). *See also* para. 552(iii) above.

(iv) (CLA) Activities allegedly relating to Media and Public Relations / (RES) Activities relating to Media and Public Relations;

(v) (CLA) Activities allegedly relating to Government Relations (including but not limited to USTR) / (RES) Activities relating to Government Relations (including but not limited to USTR);

(vi) (CLA) Allegedly Nondefense-Related Activities / (RES) Nondefense-Related Activities;

(vii) (CLA) Alleged Block Billing / (RES) Block Billing;

(viii) (CLA) Allegedly Vague Billing Entries / (RES) Vague Billing Entries;

(ix) (CLA) Alleged Administrative and Clerical Activities; (RES) Administrative and Clerical Activities;

(x) (CLA) Alleged Getting Up to Speed and Training / (RES) Getting Up to Speed and Training;

(xi) Multiple Attendance at Events;

(xii) (CLA) Alleged Excessively Long Billing Days and Excessive Time; (RES) Excessively Long Billing Days and Excessive Time;

(xiii) (CLA) Alleged Double Billing Entries; (RES) Double Billing Entries;

(xiv) Veiga / Perez Criminal Proceedings;

(xv) Cash Calls; and

(xvi) King & Spalding/Three Crowns Amounts Claimed as Damages.[3329]

[3329] Letter from the Respondent to the Tribunal, 21 October 2022; Letter from the Claimants to the Tribunal, 22 October 2022, Annex A.

2056. The Tribunal notes that it has already made certain determinations in respect of elements (i)-(iii) and (xiv) in the preceding list, such that it is unnecessary to address those elements any further:

(i) In respect of the element "(CLA) Fees That Allegedly Would Have Been Incurred But-For The Treaty Breaches / (RES) Fees That Would Have Been Incurred But-For The Treaty Breaches", the Tribunal has determined in paragraph 395 above that the Claimants' damages claim must be reduced by a portion of the amount of legal fees and expenses generated by local Ecuadorian counsel and international counsel in the real-world Lago Agrio Litigation to re-establish the situation which would, in all probability, have existed if the Respondent's Treaty breaches had not been committed. The precise percentage reduction was determined in paragraph 738 above.

(ii) In respect of the element "Claimants' Alleged Failure to Mitigate (Zambrano Recusal, Collusion Prosecution Act, Appeal Bond)", the Tribunal has dismissed in paragraph 477 above the Respondent's defences based on the Claimants' failure to mitigate (i) by failing to recuse Judge Zambrano; (ii) by failing to post a bond to suspend the enforceability of the Lago Agrio Judgment; (iii) by failing to file an action under the CPA; and (iv) by initiating the RICO Litigation.

(iii) In respect of the element "(CLA) Subsidiaries – PDF invoices addressed to Non-Claimant Chevron Corp. subsidiaries / (RES) Subsidiaries – PDF invoices addressed to Non-Claimants", the Tribunal has determined in paragraph 444 above that Chevron, as a matter of principle, is entitled to claim compensation in this Arbitration in its own right for the injuries to those of its subsidiaries listed in the 15 October 2012 Order of the Lago Agrio Court caused by the recognition and enforcement of the Lago Agrio Judgment.

(iv) In respect of the element "Veiga / Perez Criminal Proceedings", the Tribunal has rejected the Claimants' damages claim in respect of the Criminal Proceedings category of damages in paragraph 2001 above.

2057. Furthermore, the Parties' joint list of elements set out in paragraph 2055 above is not exhaustive. In their submissions, the Parties have addressed other issues affecting

multiple categories which shall also be addressed in this section, notably (i) the question whether the Claimants have proved that they paid the legal fees and expenses for which they claim compensation in this Arbitration; and (ii) the question whether date range limitations for the compensation of incidental damages should be based on the date on which the underlying services were performed, the date of issuance of the corresponding invoice, or the date of payment.[3330]

2058. In light of the foregoing, for purposes of the present analysis the Tribunal shall divide all elements pending determination into two separate groups. First, the Tribunal shall address those elements requiring an individualized analysis, which include:

(i) Whether the Claimants have proved that they paid the legal fees and expenses for which they claim compensation in this Arbitration;

(ii) Whether date range limitations for the compensation of incidental damages should be based on the date on which the underlying services were performed, the date of issuance of the corresponding invoice, or the date of payment;

(iii) King & Spalding/Three Crowns Amounts Claimed as Damages; and

(iv) Cash Calls.

2059. Second, the Tribunal shall address all remaining elements as an ensemble. As further explained below, this second group of elements is drawn from the report of the Respondent's expert on legal fee auditing, Mr John L. Trunko, where he refers to them as "problematic issues reflecting unreasonable fees and costs".[3331] In Mr Trunko's view, these purported deficiencies warrant "significant reductions" to the Claimants' claimed legal fees and expenses.[3332]

2060. For ease of reference, this second group of elements comprises the following:

3330 *See* para. 571 above.

3331 **RE-51**, Trunko Expert Report, para. 8.

3332 **RE-51**, Trunko Expert Report, para. 56.

(i) (CLA) Activities allegedly relating to Media and Public Relations / (RES) Activities relating to Media and Public Relations (item (iv) in paragraph 2055 above);

(ii) (CLA) Activities allegedly relating to Government Relations (including but not limited to USTR) / (RES) Activities relating to Government Relations (including but not limited to USTR) (item (v) in paragraph 2055 above);

(iii) (CLA) Allegedly Nondefense-Related Activities / (RES) Nondefense-Related Activities (item (vi) in paragraph 2055 above);

(iv) (CLA) Alleged Block Billing / (RES) Block Billing (item (vii) in paragraph 2055 above);

(v) (CLA) Allegedly Vague Billing Entries / (RES) Vague Billing Entries (item (viii) in paragraph 2055 above);

(vi) (CLA) Alleged Administrative and Clerical Activities / (RES) Administrative and Clerical Activities (item (ix) in paragraph 2055 above);

(vii) (CLA) Alleged Getting Up to Speed and Training / (RES) Getting Up to Speed and Training (item (x) in paragraph 2055 above);

(viii) Multiple Attendance at Events (item (xi) in paragraph 2055 above);

(ix) (CLA) Alleged Excessively Long Billing Days and Excessive Time / (RES) Excessively Long Billing Days and Excessive Time (item (xii) in paragraph 2055 above); and

(x) (CLA) Alleged Double Billing Entries / (RES) Double Billing Entries (item (xiii) in paragraph 2055 above).

2061. For ease of reference, the Tribunal shall hereinafter refer jointly to the 10 elements identified in the preceding paragraph as the "**Trunko Elements**".

2. Elements requiring an individualized analysis

(a) Whether the Claimants have proved that they paid the legal fees and expenses for which they claim compensation in this Arbitration

2062. The Claimants allege that Chevron, the First Claimant, paid all legal fees and expenses for which the Claimants claim compensation in this Arbitration.[3333] As support for this assertion, the Claimants rely on the testimony of four witnesses and the evidence of an expert:

(i) Ms Colleen Kent, a Senior Business Analyst at Chevron, describes Chevron's billing procedures and systems as regards the legal fees and expenses related to the so-called "Ecuador Dispute". She explains:

> Most invoices are submitted electronically from outside law firms and other vendors through the "Collaborati" e-billing software which transfers the invoice to the "TeamConnect" software used internally at Chevron for invoice review.
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> . . .
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> Collaborati will reject an invoice outright (and not even migrate it to TeamConnect) if the invoice contains incorrect information, such as unapproved timekeepers, unapproved billing rates, etc.
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> . . .
>
> TeamConnect is an electronic platform designed for electronic review, processing, and approval of invoices.
>
> . . .
>
> Chevron's legal analysts will review the invoices and may reject outright, or reduce appropriately, invoices for non-conforming items such as unapproved expenses, excessive hours by individual timekeepers, etc. The legal analyst will also review to ensure that tasks are performed at the appropriate level of seniority and may reject or adjust amounts accordingly. Chevron also typically will not pay for items such as administrative tasks. In addition, Chevron requires that all expenses be justified, and may reject payment of expenses if either element is missing.
>
> . . .
>
> Invoices may nonetheless undergo up to three additional levels of internal Chevron review
>
> . . .

3333 Track III Hearing Transcript, Day 3 (22 August 2022), p. 437 (Silbert).

> Chevron implemented cost-saving and cost-control measures for the Ecuador Dispute, including the negotiation of discounts.
>
> Once an invoice is approved for payment through TeamConnect, the invoice moves from TeamConnect to the SAP system (Chevron's electronic payment system) and is placed in line for payment.
>
> . . .
>
> All the amounts claimed by Chevron in this arbitration were actually paid by Chevron (or its subsidiaries).[3334]

(ii) Mr E.J. Rankin, an eDiscovery Specialist at Chevron, was instructed to collect the billing data for each outside vendor that billed Chevron for Ecuador-related work for export to FTI.[3335] This involved the collection of three types of data:

> Structured Data, which is maintained in Chevron's TeamConnect billing system. Mr. Rankin obtained access to this Structured Data from Chevron's Information Technology group then transferred it to an electronic file transfer ("EFT") site maintained by FTI
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> . . .
>
> Invoices. These include invoices that were not in Chevron's possession (for example, where a vendor sent the invoice to an outside law firm, the law firm paid the invoice, and then the law firm sought reimbursement from Chevron through the law firm's own bill). As with the Structured Data, Mr. Rankin transferred it to FTI's EFT site
>
> . . .
>
> Backup Data. Mr. Rankin also obtained all of the attachments to the invoices and transferred them to FTI's EFT site.[3336]

(iii) Mr David Turner, the leader of FTI's Data and Analytics Group for the Americas, describes the process of receiving the data described in Mr Rankin's witness statement, obtaining additional data directly from vendors, and compiling all that data into a report titled "Summary of Fees and Costs Report",[3337] which he updated before the Claimants submitted their Reply.[3338] He explains how FTI then loaded the data into a database accessible to the Claimants' outside counsel for their

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3334 Memorial, para. 193; Kent Witness Statement, paras. 10-11, 12, 14, 19, 23-26, 28, 33, 34, 36.

3335 Memorial, para. 195; Rankin Witness Statement, para. 7. *See also* First Turner Witness Statement.

3336 Memorial, para. 196; Rankin Witness Statement, paras. 9-14.

3337 Memorial, para. 197; First Turner Witness Statement, paras. 2-18; Memorial, Appendix 2.

3338 Second Turner Witness Statement, paras. 4-8; Reply, Updated Appendix 2.

review, following which FTI provided the information about the legal fees and expenses underlying the Claimants' claims to Deloitte.[3339]

(iv) Mr Steven Stanton of Deloitte describes how Deloitte validated and confirmed that Chevron, using the SAP electronic payment system (the "**SAP System**"), paid each outside law firm and vendor an amount that equals or exceeds the amount claimed by Chevron as damages in FTI's "Summary of Fees and Costs Report".[3340] Mr Stanton explains that approximately 93% of the invoices could be validated via electronic matching, while he manually matched the remaining 7%.[3341] In his Second Expert Report, Mr Stanton confirmed that all invoices were validated as regards the updated "Summary of Fees and Costs Report" enclosed with the Claimants' Reply.[3342]

(v) Mr Ricardo Reis Veiga, an in-house Chevron lawyer, explained at the Track III Hearing that the decision to have Chevron pay "all of the legal bills and costs for the Ecuador Disputes" stemmed from the fact that Chevron faced "an attack on the entire corporation. The subsidiaries were being used to target Chevron Corporation. Chevron Corporation was the sole judgment-debtor. Then, we treated that as a corporate matter, and it was just proper for Chevron Corp to pay and absorb all legal costs."[3343]

2063. The Claimants consider Ms Kent and Mr Stanton's evidence to remain unrebutted.[3344] They also note that whoever an invoice was originally sent to – a Chevron subsidiary or Chevron itself – does not reflect what entity ultimately covered the costs, which was always Chevron.[3345]

3339 Memorial, para. 198; First Turner Witness Statement, 14, 15, 18.

3340 Memorial, para. 199; First Stanton Expert Report, paras. 16-47.

3341 Memorial, para. 200; First Stanton Expert Report, paras. 38, 40.

3342 Second Stanton Expert Report, para. 12.

3343 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 461-462 (Kehoe/Veiga)

3344 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 437-438 (Silbert).

3345 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 440-441 (Silbert).

2064. In turn, the Respondent submits that the Claimants have failed to prove that they incurred and paid the legal fees and expenses for which they claim compensation in this Arbitration.[3346] Among other purported evidentiary deficiencies, the Respondent asserts that (i) multiple Chevron subsidiaries paid invoices for which compensation is claimed by the Claimants; (ii) there is no way to ascertain from such invoices that Chevron, and not one of its subsidiaries, was meant to be invoiced; (iii) many electronic invoices submitted by the Claimants contain no information on who incurred the payment or who paid them; and (iv) the Claimants also submitted PDF invoices, from which it is apparent that at least 19 different entities other than Chevron were invoiced.[3347] According to the Respondent, the Claimants were put on notice of these proof problems since at least the filing of the Respondent's Counter-Memorial and were also warned by the Tribunal in Procedural Orders Nos. 65 and 72.[3348]

2065. The Respondent notes that, instead of providing appropriate evidence of payment, the Claimants have only provided an "*ipse dixit*" witness statement from Ms Kent, who states that all fees claimed in this Arbitration were paid by Chevron. In the Respondent's view, Ms Kent's testimony is not credible, as she does not work in Chevron's finance or accounting departments and only started acting as a first-level approver of invoices related to the "Ecuador Dispute" in 2016.[3349] The Respondent is also critical of the expert evidence of Mr Stanton, who (i) claims to have gained an understanding of Chevron's controls and procedures for processing invoices by conducting interviews with Chevron personnel, but does not disclose who those individuals are; and (ii) provides no first-hand evidence that the claimed invoices were paid by Chevron.[3350]

2066. At the outset, the Tribunal recalls that the burden to prove every element of their damages claim falls on the Claimants.[3351] This would include proving their assertion that Chevron paid all legal fees and expenses for which they claim compensation in this Arbitration –

3346 Rejoinder, paras. 650-651, 653; Track III Hearing Transcript, Day 3 (22 August 2022), p. 442 (Maidman).

3347 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 442-444 (Maidman).

3348 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 445-447 (Maidman).

3349 Track III Hearing Transcript, Day 3 (22 August 2022), p. 448 (Maidman).

3350 Track III Hearing Transcript, Day 3 (22 August 2022), pp. 449-450 (Maidman).

3351 *See* para. 548 above.

that is, proving that they effectively suffered the damages they claim. Fundamentally, then, the question before the Tribunal is whether the evidence submitted by the Claimants is sufficient to establish this point of fact.

2067. The Tribunal understands that most invoices underlying the Claimants' claim for legal fees and expenses were uploaded at different points in time to TeamConnect, "an electronic platform designed for, among other things, electronic review, processing, and approval of invoices", after which they were subject to an internal review process.[3352] According to Ms Kent, "[c]ertain other invoices received via email in PDF format are sent directly to a second-level reviewer, rather than being uploaded to TeamConnect, for review and approval."[3353] Thereafter, "when an invoice is submitted outside of TeamConnect directly to a second-level reviewer and is ultimately approved, the invoice is moved to the SAP System and placed in line for payment."[3354] The SAP System, as described by Ms Kent, is "a software platform designed for managing the payment of invoices. It allows users to keep track of an invoice's payment status."[3355] As such, according to Ms Kent, all invoices underlying the Claimants' claims, regardless of their original format, were moved at some point to Chevron's internal SAP System for payment.

2068. The primary documentary evidence on which the Claimants rely thus includes three distinct elements: (i) electronic data on all invoices uploaded to the TeamConnect system;

[3352] Kent Witness Statement, para. 14.

[3353] Kent Witness Statement, para. 9. *See also* Kent Witness Statement, para. 13: "In some of instances, Chevron receives invoices in PDF files attached to emails directed to the relevant Chevron employee. In the Ecuador Dispute, Chevron has received the vast majority of invoices for outside counsel fees and expenses and vendor expenses through Collaborati, and a small minority of these fees and expenses via email in PDF format. For most invoices in PDF, the Law Finance Group at Chevron manually uploads key information contained in the invoice, along with a PDF copy of the invoice, directly into TeamConnect. Thus, with limited exceptions, all invoices are processed through and/or stored in TeamConnect."

[3354] Kent Witness Statement, para. 34.

[3355] Kent Witness Statement, para. 35.

(ii) PDF invoices that could not be uploaded to TeamConnect;[3356] and (iii) a certification of the payment status of this entire universe of invoices from Chevron's SAP System.[3357]

2069. Mr Rankin then gathered all of this billing information and provided it to FTI.[3358] After gathering certain additional missing invoices from Chevron and certain outside vendors,[3359] "FTI loaded it into a database so that outside counsel for Chevron could coordinate a task-by-task, line item review of every entry billed to Chevron for the relevant matters".[3360] Thereafter, FTI "reconciled the invoices with the amounts paid as reflected in TeamConnect so that Chevron would not claim any amount in excess of the amounts it had paid, as reflected in TeamConnect and/or SAP"[3361] and confirmed "that only amounts actually paid by Chevron, as reflected in TeamConnect and/or SAP, are included in its claims."[3362] FTI then "tabulated the amounts claimed and these amounts are set forth in the Summary of Chevron's Fees and Costs Claimed as Damages in Track III."[3363]

2070. Lastly, FTI provided Mr Stanton of Deloitte with the Summary of Chevron's Fees and Costs. Mr Stanton then reconciled a list of payments downloaded from the SAP System (the "**SAP Payments List**") with this summary.[3364] He notes that while the "vast majority of this matching exercise was conducted through electronic matching",[3365] this process only "resulted in payment matching for 93.1%" of the claimed amounts; accordingly, the

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3356 According to Mr Stanton, such "record keeping" invoices include: "1) invoices in a foreign currency, 2) invoices with US sales tax, 3) credit notes, 4) invoices submitted one year past the service date, 5) certain invoices relating to payments of recurring legal fees and expenses, and 6) invoices paid in country by the indirect Chevron subsidiary (which may or may not be in foreign currency) . . . After record keeping invoices are processed and paid to service providers, an employee in the corporate legal department generally manually enters the invoice into TeamConnect." *See* First Stanton Expert Report, para. 25. *See also* Second Stanton Expert Report, **SS-01**.

3357 Second Stanton Expert Report, **SS-02**.

3358 Rankin Witness Statement, paras. 7-14.

3359 First Turner Witness Statement, paras. 12-13.

3360 First Turner Witness Statement, para. 14.

3361 First Turner Witness Statement, para. 15.

3362 First Turner Witness Statement, para. 15; Second Turner Witness Statement, para. 4.

3363 First Turner Witness Statement, para. 17; Second Turner Witness Statement, para. 4; Memorial, Appendix 2; Reply, Updated Appendix 2.

3364 First Stanton Expert Report, para. 26.

3365 First Stanton Expert Report, para. 32.

remaining invoices were matched manually.[3366] Having completed this process,[3367] Mr Stanton confirmed that "the total dollar amount of Claimed Invoices matched to payments in SAP within 99.55%. The immaterial variance of 0.45% (i.e., less than one-half of one percent) is attributable to various unique circumstances. A primary factor is how credits and charges were allocated across invoices in the Claimed Invoices List, which differs from how they were processed in SAP."[3368] Having performed this exercise, Mr Stanton considers that FTI's Summary of Chevron's Fees and Costs "is an accurate basis for claiming damages."[3369]

2071. Having carefully assessed this evidence, the Tribunal is satisfied on a balance of probabilities[3370] that, regardless of which specific entity may have been invoiced, Chevron ultimately paid all legal fees and expenses for which the Claimants claim compensation in this Arbitration. All relevant primary documentary evidence, whether in the form of TeamConnect or SAP data or in PDF format, was provided by Chevron to FTI. FTI then reconciled all invoices with the information on payments contained in Chevron's SAP System. Mr Stanton, an expert in forensic accounting, conducted an additional electronic and manual matching analysis. In view of the large volume of billing information, comprising 6,800 invoices and 495,000 fee and expense entries,[3371] the Tribunal considers that partial electronic matching with Chevron's SAP System, supplemented with manual matching where necessary, and reviewed by a forensic accountant, is an appropriate verification method. While the Respondent has objected to discrete aspects of this exercise, it has not suggested that the Claimants should have followed an alternative method to confirm that Chevron was the ultimate payee of all invoices underlying the Claimants' claims.

3366 First Stanton Expert Report, para. 37.

3367 The Tribunal notes that Mr Stanton also performed certain "supplemental testing procedures", in particular manually tracing a sample of invoices to the SAP System. First Stanton Expert Report, para. 43; Second Stanton Expert Report, para. 24, **SS-03**.

3368 First Stanton Expert Report, para. 40.

3369 First Stanton Expert Report, para. 40.

3370 *See* para. 548 above.

3371 *See* para. 530 above.

2072. For these reasons, the Tribunal determines that the Claimants have established that the First Claimant, Chevron, paid all legal fees and expenses underlying their damages claims in this Arbitration.

2073. By contrast, there is no evidence that the Second Claimant, Texaco Petroleum Company, although having suffered an injury, paid any of the legal fees and expenses for which the Claimants seek compensation in this case. Accordingly, the Second Claimant is not entitled to any compensation.

(b) Whether date range limitations for the compensation of incidental damages should be based on the date on which the underlying services were performed, the date of issuance of the corresponding invoice, or the date of payment

2074. Many of the Tribunal's earlier determinations in this Award set cut-off dates for the compensation of multiple categories and components of the Claimants' damages claim. For instance, the Tribunal has determined that whatever harm the Claimants may have suffered by incurring legal fees and expenses prior to the date of issuance of the Lago Agrio Judgment (14 February 2011) was not caused by the Respondent's Treaty breaches and therefore falls outside the scope of the compensable injury in Track III.[3372] The Tribunal has also applied specific date ranges for the compensation of the legal fees and expenses incurred in connection with several of the Section 1782 Proceedings.[3373]

2075. Applying these date range limitations to the Parties' Damages Models requires the Tribunal to reach an additional determination as to whether such limitations should be based on the date on which the underlying services were performed, the date of issuance of the corresponding invoice, or the date of payment – a question on which the Parties were unable to agree.

2076. By way of Procedural Order No. 83, the Tribunal requested the Parties to add to their joint damages model "the option to use the dates work was performed, payment dates or invoice dates for purposes of implementing starting dates or date ranges".[3374] In view of

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3372 *See* paras. 362, 371, 397 above.

3373 *See* para. 1833(iii) above.

3374 Procedural Order No. 83, 14 October 2022, para. 4(iv). The inclusion of an option to use the dates work was performed was in reaction to a proposal made by the Respondent after the Track III Hearing. *See* Letter from

their inability to agree on a joint damages model, the Parties submitted separate Damages Models.[3375] Each Party's Damages Model addresses the question under the present heading in a different manner.

2077. The Claimants' Damages Model includes two options to implement date range limitations: "Invoice Date" and "Payment Date".[3376] The Claimants' expert, Mr Sequeira, would favour applying a date of payment.[3377] He did not consider it technically feasible to insert a switch into the Claimants' Damages Model based on the date work was performed,[3378] as this would require including each of the more than 600,000 relevant billing entries in the model, rendering it unstable.[3379] In addition, the Claimants consider unreliable the use of proxies for the dates the work was performed, as proposed by the Respondent, since they are based on unsupported assumptions about the length of billing cycles.[3380] The Claimants also note that the Respondent offered no data or analysis to support its date-of-services approach at the Track III Hearing; in their view, the Respondent "is asking the Tribunal to arbitrarily adjust Claimants' damage claim belatedly and without any evidentiary basis."[3381]

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the Tribunal to the Parties dated 14 October 2022, p. 2: "First, the Tribunal refers to the Respondent's proposal that the Joint Model should also enable using the dates on which legal work was performed for purposes of implementing the starting dates or date ranges. The Tribunal understands that neither the data nor the features corresponding to this function were included in the models of Mr. Sequeira and Dr. Flores, but it has tentatively adopted the Respondent's proposed revision to paragraph 4(iv) of the Draft PO. In order to clarify the background of this proposal, the Respondent is invited to indicate how it relates to its prior arguments together with the submission of the final list of components and elements pursuant to paragraph 9 of Procedural Order No. 83. The Claimants are likewise invited to provide, at the same time, any comments that they may have on the adoption of this switch."

[3375] *See* para. 544 above.

[3376] Letter from the Claimants to the Tribunal dated 2 November 2022, Claimants' Damages Model, Matter Switches, cell F12.

[3377] Track III Hearing Transcript, Day 7 (26 August 2022), p. 1667 (Sequeira).

[3378] Letter from the Claimants to the Tribunal dated 22 October 2022, p. 3.

[3379] Letter from the Claimants to the Tribunal dated 22 October 2022, p. 3; Second Quadrant Report, paras. 26-32, 36; Track III Hearing - Direct Presentation of Kiran Sequeira (26 August 2022), Slide 15.

[3380] Letter from the Claimants to the Tribunal dated 22 October 2022, p. 3.

[3381] Letter from the Claimants to the Tribunal dated 18 November 2022, p. 6. *See also* Letter from the Claimants to the Tribunal dated 22 October 2022, p. 3.

2078. The Respondent's Damages Model includes three options to implement date range limitations: "Date allegedly paid", "Invoice date", and "Date services performed".[3382] From among these options, the Respondent submits that the applicable cut-off date should be that on which legal services were performed, since "[t]here are typically time lags between when law firms, experts, and other vendors (a) perform services, (b) issue an invoice for the services performed, and (c) are paid for the invoiced services."[3383] In order to account for this lag, the Respondent's Damages Model factors billing cycles by applying a lag of 30, 45, 60, or 90 days, at the Tribunal's choice.[3384] In the Respondent's view, the Claimants' failure to include a date-of-services option in their Damages Model contravenes Procedural Order No. 83, in which the Tribunal ordered that the joint model contain this feature.[3385] Lastly, the Respondent's expert, Dr Flores, stated at the Track III Hearing that factoring date ranges on the basis of the date of payment is inappropriate, as payments made after a cut-off date could correspond to work done before the cut-off date.[3386]

2079. The Tribunal considers that legal fees and expenses should in principle be factored into the Parties' Damages Models based on the date on which the underlying services were performed, and not on the date of issuance of the corresponding invoice or the subsequent date of payment, which, in the Tribunal's view, are fortuitous. These later dates do not reflect the moment when the relevant mitigation measures were effectively taken, that being the critical date as of which causation and reasonableness are to be assessed under international law,[3387] and also when the legal obligation to pay these services arises, even if there is a delay in their invoicing or payment. By contrast, selecting an invoice or payment date would result in overcompensation, as it would include amounts charged for legal services provided before the relevant cut-off date.

3382 Letter from the Respondent to the Tribunal dated 2 November 2022, Respondent's Damages Model, Category Reductions, cell F14.

3383 Letter from the Respondent to the Tribunal dated 21 October 2022, p. 4; Track III Hearing - Direct Presentation of Daniel Flores (5 September 2022), Slide 7.

3384 Letter from the Respondent to the Tribunal dated 21 October 2022, p. 5.

3385 Respondent's Disclaimers to the Parties' Damages Models, 18 November 2022, para. 42.

3386 Track III Hearing Transcript, Day 13 (5 September 2022), p. 3053 (Flores).

3387 *See* para. 354 above.

2080. However, as already explained, the Parties' Damages Models are not equipped to calculate compensation for legal fees and expenses based on the date on which the underlying services were effectively performed. In the Claimants' Damages Model, any date restriction must be based on the date of issuance of the corresponding invoice or the subsequent date of payment. The Respondent's Damages Model contains an option to implement a date range for compensation based on the date on which services were performed, but applies a proxy of 30, 45, 60, or 90 days from the date of issuance of the corresponding invoice.

2081. The Tribunal is therefore left with no option but to devise an alternative approach that is consistent with its determination that in principle international law requires compensation to be calculated based on the date of rendering of legal services and which, to the extent possible, is also compatible with both Parties' Damages Models.

2082. The fact remains that there is a necessary delay between the rendering of a legal service and the date on which the corresponding invoice is prepared. The absence of evidence on the record regarding the length of billing cycles must not prevent the Tribunal from taking account of this delay in some form. As already noted, any other solution envisioned by the Parties would result in overcompensating the Claimants.

2083. Accordingly, the Tribunal assesses in its discretion that a reasonable approximation for this delay, bearing in mind the terms on which legal services are commonly provided, is an average of 30 days between the date on which a legal service was rendered and the date on which the corresponding invoice was issued. Among other factors that have guided the Tribunal's discretion, the Tribunal notes that this is the shortest possible delay from among the options proposed by the Respondent, none of which is otherwise supported by evidence on the record.

2084. The question remains as to how to implement this approach in both Parties' Damages Models, particularly in circumstances where the Claimants' Damages Model does not include a switch that would calculate damages based on the actual date work was performed, or a proxy for that date. The Tribunal would favour a uniform approach so as to minimize any discrepancies between the output of the models.

2085. Having regard to these considerations, the Tribunal shall apply the following approach. First, it will set the Parties' Damages Models to apply date range limitations based on the date of the underlying invoices. Second, when inserting a cut-off date in the Parties' Damages Models for the compensation of a particular category or component of damages, the Tribunal shall instead set a date 30 days subsequent to the actual cut-off date to account for the delay between the rendering of a service and the date on which the corresponding invoice was issued. This will have the effect of excluding from compensation any services that were rendered before the critical date but were only invoiced thereafter. For example, where the Tribunal has granted compensation for legal fees and expenses incurred under a particular category after 14 February 2011, the Tribunal shall instead insert 16 March 2011 as a cut-off date in the Parties' Damages Models.

(c) King & Spalding/Three Crowns Amounts Claimed as Damages

2086. The Tribunal has difficulty understanding the nature of the element "King & Spalding/Three Crowns Amounts Claimed as Damages". The Respondent first included this element in its 21 October 2022 submission in response to Procedural Order No. 83, where it identified all elements requiring a determination from the Tribunal. When identifying portions of the record of this Arbitration where this element "was 'disputed or identified in Respondent's submissions' and/or 'mentioned at the Track III hearing'",[3388] the Respondent referenced materials that address only the legal fees and expenses charged to the Claimants by Gibson Dunn and Jones Day, not by King & Spalding or Three Crowns LLP. In particular, in these materials the Respondent points to the risk of double recovery that arises as a result of the Claimants' decision to claim legal fees and expenses charged by Gibson Dunn and Jones Day both as damages and as costs of arbitration.[3389] No similar reference is made to the legal fees and expenses charged by

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[3388] Letter from the Respondent to the Tribunal dated 21 October 2022, p. 6.

[3389] Letter from the Respondent to the Tribunal dated 21 October 2022, p. 8; Rejoinder, paras. 1926-1927: "Respondent previously explained why Claimants' extraordinary request for US$ 258,804,126 as costs of legal representation and legal assistance in this arbitration must fail. This is because, among other reasons, Claimants' confused attempt to recover significant portions of their claimed fees and expenses either as costs of arbitration *or* damages creates an inherent risk of double recovery which Respondent cannot fully address without reviewing the invoices underlying the alleged costs of arbitration, which have not been made available (except incidentally to the indeterminate extent to which the alleged costs of this arbitration overlap the alleged damages). As explained

King & Spalding and Three Crowns, which act as Claimants' counsel of record in this Arbitration.

2087. The Claimants object to the inclusion of the element "King & Spalding/Three Crowns Amounts Claimed as Damages" in the list of disputed elements which require the Tribunal's assessment on the basis, among others, that "there are no references to these law firms in the citations provided by Ecuador" in its submission in response to Procedural Order No. 83.[3390] In any event, the Claimants also represent that "there is no overlap between the King & Spalding, Three Crowns, and James Crawford invoices included in the damage claim and those that will be included in the Cost Submission."[3391]

2088. Against this background, the Tribunal considers that the Respondent has failed sufficiently to particularize its objection in respect of King & Spalding/Three Crowns amounts claimed as damages and that this objection should be rejected on that basis alone.

2089. In any event, to the extent the Respondent raises concerns as to a possible double recovery of King & Spalding/Three Crowns as damages and costs of arbitration, such concerns would be moot in view of the Tribunal's rulings in this Award. The Tribunal recalls in this respect that the Claimants have claimed King & Spalding/Three Crowns fees and expenses under the following categories: (i) RICO Litigation;[3392] (ii) Costs of Planning

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above with respect to Claimants' perplexing 'BIT Costs Incurred By Non-Counsel Of Record' claim category, Claimants' Reply only heightens these concerns by creating more confusion resulting in part from internally inconsistent statements. Claimants now admit that there is 'some' undefined 'overlap' between the alleged costs of 'legal assistance' in this arbitration in the amount of US$ 164 million claimed as part of US$ 258,804,126 – which US$ 164 million is comprised of Jones Day's and Gibson Dunn's legal fees – and the hundreds of millions claimed as damages across three other categories comprising (1) the BIT costs incurred by non-counsel of record, (2) multiple unspecified Section 1782 proceedings, and (3) the RICO action. Those three other categories collectively include some US$ 420 million. Claimants then assert that *Respondent* has the burden of affirmatively proving any double-counting and 'has all the documents at its disposal to attempt to do so' and attempt to brush aside Respondents' undeniably legitimate concerns by saying they 'can be further addressed' after the Track III Award" (emphasis in the original); Track III Hearing Transcript, Day 15 (7 September 2022), p. 3651: "And we, Ecuador, also requests that Chevron submit with its costs submission detailed invoices for the firms whose fees are also sought as damages, and here in particular I'm referring to Gibson Dunn and Jones Day. These two firms, their costs submissions include 164 million in legal fees for these firms for the work that was related to RICO and 1782s. And the same firms, obviously, their invoices are sought for reimbursement in the damages categories for RICO and 1782s." The Tribunal recalls that the Claimants announced their decision not to seek as costs the fees and expenses incurred by Gibson Dunn and Jones Day after the Track III Hearing (Letter from the Claimants to the Tribunal, 14 October 2022).

3390 Letter from the Claimants to the Tribunal dated 22 October 2022, Annex A, p. 6.

3391 Letter from the Claimants to the Tribunal dated 14 October 2022, p. 2.

3392 Reply, Updated Appendix 2, p. 3.

Against Potential Enforcement;[3393] (iii) Argentina Enforcement Proceedings;[3394] (iv) Brazil Recognition Proceedings;[3395] (v) Dutch Set-Aside Proceedings;[3396] (vi) Gibraltar Proceedings;[3397] and (vii) Treaty Arbitration Costs Incurred by Non-Counsel of Record.[3398] The Tribunal has either declined to award compensation for several of these categories entirely[3399] or, where compensation was awarded, the Tribunal excluded specifically the legal fees and expenses charged by these two firms.[3400] In other words, no legal fees and expenses charged by King & Spalding and Three Crowns have been awarded as damages in Track III, thus precluding any form of double recovery of the same amounts as costs of arbitration.

2090. For these reasons, the Tribunal rejects the Respondent's objection in respect of "King & Spalding/Three Crowns Amounts Claimed as Damages".

(d) Cash Calls

2091. The Tribunal turns now to the so-called "cash calls". This term refers to 168 documents related to payments that the Claimants submit that Chevron made to the so-called "Ecuador Legal Team", which represented Chevron in the Lago Agrio Litigation and the Ecuador Enforcement Proceedings[3401] and was led by Mr Adolfo Callejas, Chevron's lead counsel in Ecuador.[3402] The Tribunal recalls that the 'Ecuador Legal Team' actually consisted of three different firms: Perez Rodrigo, Jaime Eduardo Borja Morejon, and Callejas, Adolfo).[3403] The Claimants state that the "cash calls" are invoices,[3404] while the

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3393 Reply, Updated Appendix 2, p. 322.

3394 Reply, Updated Appendix 2, p. 534.

3395 Reply, Updated Appendix 2, p. 627.

3396 Reply, Updated Appendix 2, p. 1298.

3397 Reply, Updated Appendix 2, p. 1129.

3398 Reply, Updated Appendix 2, p. 1181.

3399 *See* paras. 2030, 2052.

3400 *See* paras. 1523(ix); 974(vi); 1125(iii); 1523(ix); 1936(iii) above.

3401 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3259 (Coriell). *See* paras. 700-701, 770 above.

3402 **R-982**, *Chevron Corporation v. Steven Donziger*, Chevron Corporation's Notice of Filing of Witness Statement of Adolfo Callejas Ribadeneira, 21 October 2013, attaching Direct Testimony, 9 October 2013, para. 1.

3403 **RE-51**, Trunko Expert Report, para. 39.

3404 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 6.

Respondent asserts that they "appear to be monthly requests for advance payment to subsidize . . . the Ecuador Legal Team".[3405] For ease of reference, and without attributing any particular significance to the term at this stage, the Tribunal shall hereinafter refer to these documents collectively as the "**Cash Calls**".

2092. The Claimants have submitted 167 Cash Calls related to payments made to the Ecuador Legal Team between February 2004 and February 2019, with an additional payment dated 18 October 2010 withheld as privileged.[3406] In total, the Claimants claim damages of USD 49,309,562.75 for the legal fees and expenses charged by the Ecuador Legal Team.[3407]

2093. The Respondent asks the Tribunal to strike the Claimants' Cash Calls claim in its entirety because the underlying "documents upon which Claimants rely are woefully deficient proof of damages".[3408] In the Respondent's view, the Cash Calls on record have insufficient information to prove "that the expenses reflected therein were (1) actually incurred; (2) caused by the Treaty breaches; or (3) reasonable and necessary". [3409]

2094. In the alternative, the Respondent states that because the Claimants failed to preserve and produce either a retainer agreement or certain supporting copies of invoices referenced in the Cash Calls despite the Respondent's request and the Tribunal's document production order, in accordance with Article 9 of the IBA Rules, the Tribunal should draw the adverse inference that the documents would not support the damages claimed in connection with the Cash Calls.[3410]

3405 Letter from the Respondent to the Tribunal dated 2 September 2022, pp. 2-3.

3406 Claimants' Index of Claimed Invoices for Ecuador Legal Team, 2 September 2022.

3407 Letter from the Claimants to the Tribunal dated 2 November 2022, Claimants' Damages Model, Vendor Switches, cell F12; Claimants' Index of Claimed Invoices for Ecuador Legal Team, 2 September 2022.

3408 Letter from the Respondent to the Tribunal dated 2 September 2022, pp. 1-2.

3409 Letter from the Respondent to the Tribunal dated 2 September 2022, p. 2.

3410 Letter from the Respondent to the Tribunal dated 2 September 2022, p. 2.

2095. In response, the Claimants submit that they only need to provide evidence that is sufficient for the Tribunal to estimate damages with "reasonable confidence", and that, as they have met this burden, the Tribunal should award the amounts supported by the Cash Calls.[3411]

2096. The Tribunal will divide its analysis of the Cash Calls claim into three parts. It will first provide a description of the Cash Calls and related documents based on the Parties' submissions. Second, it will assess whether the Claimants have satisfied their document production obligations in relation to the Cash Calls. Lastly, the Tribunal will determine whether the Claimants have substantiated their claim for damages arising from the Cash Calls.

1. Background

2097. According to the Claimants, the Cash Calls are invoices from the Ecuador Legal Team.[3412] They reflect payments made in accordance with a monthly retainer fee agreement[3413] that does not form part of the record of this Arbitration (the "**Cash Call Retainer**"). The Claimants assert that they conducted "a reasonable and diligent search" for the Cash Call Retainer but were unable to locate it. In the Claimants' view, this is "unsurprising as the arrangement with the law firm was made approximately twenty years ago".[3414]

2098. The Claimants explain that the Ecuador Legal Team maintained a working fund in an Ecuadorian bank account: the Claimants put in the deposits, and the Ecuador Legal Team withdrew funds to pay fees and expenses.[3415] According to the Claimants, "[e]ach month, the Ecuadorian Legal Team sent an invoice [*i.e.*, a Cash Call] to Claimants. The invoice set forth the current account balance, the actual expenses it incurred the prior month, its forecasted expenses for the following month, the requested cash advance it needed to cover the next month's projected expenses, and its anticipated account balance at the end of the next month."[3416] The Claimants state that all Cash Calls on record (even the one-

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3411 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 2.

3412 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 1.

3413 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 1.

3414 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 16.

3415 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 7.

3416 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 7.

page versions) contain this information, while the two-page versions "simply contained additional detail on forecasts and actual expenses for the prior month"[3417] in the form of "a table tracking itemized forecasts and actual expenses",[3418] which "merely provide corroborating, line-item detail".[3419]

2099. Moreover, the Claimants assert that when sending its monthly invoices to Chevron, the Ecuador Legal Team also mailed by DHL the paper copies of receipts showing its prior-month actual expenses. Every Cash Call thus contains a version of the following statement: "Today we sent to San Ramon [*i.e.*, Chevron's headquarters in California], by DHL, an [envelope] containing *copies of invoices*, corresponding to [month, year] for [amount in USD]."[3420] According to the Claimants, while using the word "invoices", this statement refers to receipts proving actual expenses incurred by the team the prior month, not separate "invoices" for additional payment by Chevron:[3421] the Cash Calls themselves were written by native Spanish-speakers, and that the Spanish word "*factura*" can indicate both "invoice" and "receipt".[3422] None of these "copies of invoices", to which the Tribunal shall refer henceforth as the "**Cash Call Enclosures**", have been placed into the record of this Arbitration.[3423]

2100. As already noted, the Respondent states that the Cash Calls "appear to be monthly requests for advance payment to subsidize . . . the Ecuador Legal Team".[3424] The Respondent also identifies the following purported evidentiary deficiencies in the Cash Calls:

(i) The majority of the Cash Calls include a first cover page followed by a second page which breaks down actual and forecasted expenses by categories with

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3417 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 7.

3418 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 9.

3419 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 13.

3420 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 13 (emphasis by the Tribunal).

3421 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 13.

3422 Track III Hearing Transcript, Day 8 (29 August 2022), pp. 1758, 1788 (Bishop).

3423 Rejoinder, para. 915; Letter from the Claimants to the Tribunal dated 4 September 2022, p. 14.

3424 Letter from the Respondent to the Tribunal dated 2 September 2022, pp. 2-3.

corresponding annex numbers.[3425] The second page is missing in 38 of the 167 Cash Calls on the record, and no annexes have been provided.[3426]

(ii) The Cash Calls do not disclose what persons did what work, which, in the Respondent's view, is required under Procedural Order No. 65.[3427]

(iii) The cover pages of the Cash Calls indicate that "copies of invoices" (*i.e.*, the Cash Call Enclosures) were sent to Chevron's headquarters in California, totalling at least 16,000 pages, but the Claimants have not produced them.[3428] The originals of these documents are in English and the language abilities of the drafters are unknown; accordingly, the Claimants' suggestion that native Spanish speakers mistranslated "*factura*" as "invoice" is "made up".[3429]

(iv) There is an annex number for each row of the second-page breakdown, including persons.[3430] The Respondent asserts that the missing documents listed in these annexes must be invoices for legal services, especially for the lawyers and legal assistants listed therein.[3431]

(v) The amounts paid to the lawyers vary. In the Respondent's view, this contradicts the Claimants' assertion that a fixed-fee retainer with the Ecuador Legal Team was in place.[3432]

(vi) The Claimants have failed to show how the amounts reflected in the Cash Calls reconcile with the claimed USD 49.3 million.[3433]

3425 Rejoinder, para. 916.

3426 Rejoinder, para. 916; Track III Hearing Transcript, Day 14 (6 September 2022), p. 3222 (Schwartz); Letter from the Respondent to the Tribunal dated 2 September 2022, p. 4.

3427 Rejoinder, para. 921.

3428 Rejoinder, para. 917; Track III Hearing Transcript, Day 14 (6 September 2022), p. 3241 (Schwartz).

3429 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3230 (Schwartz).

3430 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3211 (Coriell); *see* Track III Hearing Transcript, Day 3 (22 August 2022), p. 511 (Schwartz, Veiga).

3431 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3236-3238 (Schwartz).

3432 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3240 (Schwartz).

3433 Letter from the Respondent to the Tribunal dated 2 September 2022, pp. 9-10.

2. Whether the Claimants' have complied with the Tribunal's document production orders related to the Cash Calls

2101. The Respondent asserts that the Claimants failed to comply with the Tribunal's document production orders in Procedural Order No. 66 by failing to produce (i) the Cash Call Enclosures; and (ii) the Cash Call Retainer. For this reason, the Respondent requests the Tribunal to draw an inference that such documents would be adverse to the Claimants, "in particular, that they would not support the US$ 49.3 million Claimants are seeking as damages based solely on the Cash Calls".[3434]

2102. The Tribunal addresses the Parties' arguments in respect of each set of documents in turn.

i. Cash Call Enclosures

2103. Noting that the Cash Call Enclosures were generated from 2004 through 2019, the Respondent argues that these documents should have been retained at least since the Arbitration began in 2009.[3435] In the Respondent's view, the Claimants' failure to provide the Cash Call Enclosures violates the Tribunal's document production orders in Procedural Order No. 66, as the documents are covered by both Requests 25 and 64.[3436]

2104. The Claimants, in turn, explain that the Cash Call Enclosures are essentially receipts,[3437] and that it is standard to group them in a single invoice as was done in other instances in other related proceedings.[3438] The Claimants consider that they were not required to produce such "backup documentation and receipts".[3439]

2105. The Tribunal recalls that, in Procedural Order No. 65, it determined that the Claimants were "required to produce the invoices underlying their damages claims for legal fees and costs to the extent they had been relied upon by the Claimants, their witnesses, or their experts".[3440] As for the document production orders in Procedural Order No. 66,

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3434 Letter from the Respondent to the Tribunal dated 2 September 2022, p. 2.

3435 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3241-3242 (Schwartz).

3436 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3243-3244 (Schwartz).

3437 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 13.

3438 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3259 (Coriell).

3439 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3278-3279 (Coriell).

3440 *See* para. 526 above.

Respondent's Request 25, which the Tribunal granted subject to the production of a privilege log, reads as follows:

> To the extent not included in the scope of the preceding Document Requests[,] the invoices submitted for the payment of legal fees or costs related to any proceeding for which Claimants are claiming fees and costs.[3441]

2106. The question of whether the Claimants have complied with Request 25 turns essentially on the precise scope of Request 25 and the nature of the Cash Call Enclosures.

2107. First, when read in its proper context, the Tribunal understands Request 25 to refer, not to any and all "invoices submitted for the payment of legal fees", but rather to invoices specifically reflecting fees and costs the Claimants seek to recover in Track III. It is self-evident in the context of Procedural Order No. 66 that Request 25 should be understood with reference to the relevance of any responsive documents, as reflected in Respondent's indication in its Reply to the Claimants' Response to Request 25:

> The contemporaneous records that substantiate, or refute, *whether Claimants paid the fees and costs they seek to recover*, and whether it was reasonable and necessary to do so, are directly relevant to the issue of whether the fees and costs are compensable.[3442]

2108. Further, Request 25 referred only to "invoices": it did not refer to any underlying or associated documents. Thus, documents related to the invoices supporting the Claimants' damages claim would not necessarily fall within the scope of Request 25.

2109. Against this background, the Tribunal considers the Respondent's characterization of the Cash Call Enclosures as "invoices" warranting production under Request 25 to be unpersuasive. It is clear that the Cash Call Enclosures were documents supporting the Cash Calls themselves, describing expenses incurred before the issuance of each Cash Call. Since payments to Ecuadorian providers were made from the working fund in Ecuador established and replenished monthly by Chevron, it would make little sense for the Ecuador Legal Team to send the invoices of these providers to California by courier for payment.[3443] The better explanation is that the Cash Call Enclosures amount to

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3441 Procedural Order No. 66, 16 July 2020, Annex 2 – Respondent Redfern Schedule, Request No. 25, p. 208.

3442 Procedural Order No. 66, 16 July 2020, Annex 2 – Respondent Redfern Schedule, Request No. 25, p. 209 (emphasis by the Tribunal).

3443 *See* para. 2098 above.

"receipts" supporting expenses identified in the Cash Calls, as alleged by the Claimants. Therefore, the Tribunal does not consider that the Cash Call Enclosures should have been provided in response to Request 25.

2110. The Respondent also asserts that the Claimants' failure to provide the Cash Call Enclosures is in breach of the Tribunal's order in respect of Request 64,[3444] which reads:

> To the extent not produced in response to Respondent's other requests, all Documents showing payments of legal fees or costs, including amount, date, payer, and payee, related to any proceeding for which Claimants are claiming fees and costs.[3445]

2111. The Tribunal granted Request 64 "to the extent of documents consisting of either emails, billing records, paid invoices or comparable materials showing payments of legal fees or costs, including amount, date, payer and payee, to be satisfied with emails, billing records, paid invoices or comparable materials."[3446]

2112. The Respondent argues that the Cash Call Enclosures "are either 'billing records' or 'comparable materials showing payments of legal fees or costs,' which the Tribunal ordered Claimants to produce".[3447] The Claimants argue that "[r]eceipts for expenses do not fall into the ambit of Request 64" and have not been ordered to be produced.[3448]

2113. The Tribunal agrees with the Claimants: receipts for expenses are not billing documents and do not show payments of legal fees or costs by the Claimants. Therefore, they are not necessarily encompassed by Request 64.

2114. Accordingly, the Tribunal rejects the Respondent's argument that the Claimants failed to comply with the Tribunal's orders in respect of Requests 25 and 64 by failing to produce the Cash Call Enclosures.

3444 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3243-3244 (Schwartz).

3445 Procedural Order No. 66, 16 July 2020, Annex 2 – Respondent Redfern Schedule, Request No. 25, pp. 359-360.

3446 Procedural Order No. 66, 16 July 2020, Annex 2 – Respondent Redfern Schedule, Request No. 25, pp. 359-360.

3447 Letter from the Respondent to the Tribunal dated 2 September 2022, pp. 7-8.

3448 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 16.

ii. Cash Call Retainer

2115. The Respondent notes that the Claimants failed to produce the Cash Call Retainer,[3449] despite Procedural Order No. 66 requiring them to produce, per Respondent's Request 18,

> [T]he written retainer agreements, service agreements, contracts, and/or engagement letters or memoranda, including all amendments, supplements, or modifications thereto, between Chevron and each of the outside law firms, vendors, and experts relating to the "Ecuador Dispute" as that term is defined in the Witness Statement of Colleen Kent.[3450]

2116. The Respondent submits that Chevron would have surely established an agreement with the Ecuador Legal Team, and considers it a "foundational problem" that the Claimants have not produced one.[3451]

2117. The Claimants state that they have made "a reasonable and diligent search" but failed to locate the Cash Call Retainer.[3452] They consider this "unsurprising as the arrangement with the law firm was made approximately twenty years ago".[3453] The Claimants acknowledge, however, Mr Veiga's testimony that a written agreement existed.[3454]

2118. The Tribunal notes that it is undisputed that a written retainer agreement or letter of engagement between Chevron and the Ecuador Legal Team existed and would fall within the ambit of Request 18. It is likewise undisputed that the Claimants have not produced such document. The Tribunal must therefore determine what consequences, if any, should result from the Claimants' failure to produce the Cash Call Retainer in light of all relevant circumstances.

2119. In the Tribunal's view, the Claimants' inability to locate any engagement agreement between Chevron and the Ecuador Legal Team raises questions about the scope of Chevron's document retention policies. To recall, four of Chevron's accounting

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3449 Letter from the Respondent to the Tribunal dated 2 September 2022, pp. 5, 7-8.

3450 Letter from the Respondent to the Tribunal dated 2 September 2022, p. 5; Procedural Order No. 66, 16 July 2020, Annex 2 – Respondent Redfern Schedule, Request No. 18, p. 158.

3451 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3225-3226 (Schwartz).

3452 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 16.

3453 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 16.

3454 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3211 (Coriell).

document retention policies relating to "Accounts Payable – Invoices and Payments" are on the record in these proceedings, dating from 2002, 2004, 2009, and 2010.[3455] These policies require retaining documents for 6, 6, 8, and 10 years, respectively.[3456] The 2002, 2004, and 2009 policies include "Fees and Retainers" as examples of documents that they cover.[3457] Mr Veiga explains that following the Lago Agrio Complaint in October 2003, he "helped assemble the legal team", including "recommend[ing] that Chevron hire" the Ecuador Legal Team.[3458] While the record does not establish whether Chevron had or has any litigation hold policies,[3459] the Tribunal notes that the Ecuador Legal Team was retained at earliest in October 2003, within 6 years of the filing of the Notice of Arbitration on 23 September 2009.[3460]

2120. It is further unclear to the Tribunal whether the document retention policies on record pertained to ongoing contracts. The Tribunal notes that the Ecuador Legal Team was retained in late 2003, and, as evidenced by the Cash Calls, worked for Chevron at least through February 2019.[3461] The Tribunal would not expect active contracts and agreements, no matter their date of initial execution, to be destroyed pursuant to the aforementioned document retention policies. The Tribunal also questions whether Chevron has any updated or additional agreements with the Ecuador Legal Team. Mr Veiga notes that "[a]s the case progressed, *and with Chevron's approval*, Dr Callejas expanded his team to meet the growing needs of the case".[3462] In this connection, the Tribunal notes that both the categories and amounts in the first cash call to contain a second page, dated 1 October 2004, differ from those in the final cash call dated 27 February 2019.[3463] These differences further raise the question of whether the purported

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3455 Chevron's 2010 policy is for "Accounts Payable – Accounts Payables Package". Letter from the Respondent to the Tribunal dated 2 September 2022, Attachments F, G.

3456 Letter from the Respondent to the Tribunal dated 2 September 2022, Attachments F, G.

3457 Letter from the Respondent to the Tribunal dated 2 September 2022, Attachment F.

3458 Fourth Veiga Witness Statement, paras. 25, 103.

3459 Letter from the Respondent to the Tribunal dated 2 September 2022, p. 13.

3460 Letter from the Respondent to the Tribunal dated 2 September 2022, p. 13.

3461 The Tribunal notes that the latest cash call's expected cash balance at the end of the subsequent month, March 2019, implies that the law firm remained engaged by Chevron until then. **C-3395**, CVX-Track III-20008848; Fourth Veiga Witness Statement, 29 July 2021, para. 25.

3462 Fourth Veiga Witness Statement, 29 July 2021, para. 104 (emphasis by the Tribunal).

3463 *See* **C-3418**, CVX-Track III-20014634; **C-3395** CVX-Track III-20008848.

2003 Cash Call Retainer has been updated in the interim. In addition, the Tribunal takes note that, while the Claimants consider it "unsurprising" that the agreement has been lost over time, the Claimants have succeeded in locating and producing invoices dating as far back as 2004.[3464] In contrast, the Claimants were apparently unable to find many of their law firm engagement letters,[3465] although they have produced over 75 retainer agreements, contracts, and engagement letters.[3466]

2121. While, in view of the above, the Tribunal finds the non-production of a retainer, letter of engagement, or other agreement between Chevron and the Ecuador Legal Team to be surprising, other surrounding circumstances may explain the retainer's absence, particularly the passage of time since the document was presumably created. The Tribunal takes notes that in spite of producing upwards of 75 agreements of this nature, the Claimants were also unable to locate numerous other documents of this type.[3467] In the circumstances, and in view of the Claimants' representation that they could not locate the Cash Call Retainer, the Tribunal considers that the Retainer is not within the possession, custody or control of the Claimants and therefore declines to conclude that the Claimants have violated Procedural Order No. 66; accordingly the Tribunal draws no adverse inference as requested by the Respondent.

2122. That said, the Tribunal recalls that a distinction is to be drawn between the Claimants' obligation to produce documents as ordered by the Tribunal and the Claimants' burden to prove their claims. To this point, the Tribunal recalls its finding in Procedural Order No. 72 that

> Documents that the Claimants are not legally obliged to produce for the Tribunal may nonetheless be essential to establish a claim for damages or for costs; and conversely the Claimants may produce documents in order to establish a claim for damages or for costs, that they have no obligation to produce in response to a request from the Respondent for document production at this stage.[3468]

3464 **C-3246**, Claimed Invoices List with Exhibit Numbers.

3465 Rejoinder, para. 631.

3466 **R-2129**, Claimant's Letter to Ecuador, 4 November 2021.

3467 *See* **R-2129**, Claimant's Letter to Ecuador, 4 November 2021.

3468 Procedural Order No. 72, 8 February 2021, para. 12.

2123. Accordingly, while the Tribunal has found that the Claimants did not breach Procedural Order No. 66, the absence of the Cash Call Enclosures of the Cash Call Retainer from the record may affect the Tribunal's assessment of the substance of the Cash Calls claim, an issue to which the Tribunal now turns.

3. Have the Claimants substantiated their Cash Calls claim?

i. The Parties' Positions

2124. The Respondent asserts that the Cash Calls do not contain the information required for the Tribunal to conclude that Chevron's payments to the Ecuador Legal Team were reasonable, necessary, and related to the Treaty breaches.[3469]

2125. First, the Respondent notes that, when describing the Cash Call Retainer, Mr Veiga describes an agreement between Chevron and the Ecuador Legal Team in which Chevron would pay the Team on a monthly basis without requiring time entries.[3470] In the Respondent's view, the lack of time entries means that the Cash Calls are insufficient proof of damages, and Mr Veiga's decision to approve payments "without requiring detailed backup is a sufficiently egregious lapse in oversight for which the Respondent cannot be made to pay".[3471]

2126. Second, the Respondent is critical of the Claimants' failure to provide the Cash Call Enclosures.[3472] It recalls in this connection that Mr Lea, the Claimants' expert, states that such an agreement to advance funds can be proper when it is backed by "properly itemized and supporting documentation".[3473] In contrast, the Respondent contends that the Claimants have failed to explain the amounts claimed in the Cash Calls, and states that the amounts requested do not equal the actual amounts of expenses.[3474] Further, the Respondent notes that there is no evidence of what happened to the materials paid for by Chevron for the Ecuador Legal Team, including office supplies, a vehicle, and various

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3469 Rejoinder, paras. 905-907.

3470 Rejoinder, para. 942.

3471 Rejoinder, para. 943.

3472 Rejoinder, para. 948.

3473 Rejoinder, para. 948.

3474 Rejoinder, para. 949.

insurances.[3475] The Respondent also questions why the Claimants reduced the amounts claimed by the Ecuador Legal Team after being ordered to produce underlying invoices.[3476] Additionally, the Respondent notes that the Claimants have not provided witnesses to explain what the Cash Calls "purport to represent financially from an accounting standpoint."[3477]

2127. Third, the Respondent distinguishes Chevron's decision to accept such "threadbare documentation" as a basis to make payments from the question of the Cash Calls' evidentiary sufficiency for the purposes of proving damages.[3478] In this connection, the Respondent rejects the Claimants assertion that the fees must be deemed to be reasonable because they were approved by Chevron's internal controls: in its view, the Cash Calls fail to meet the standards established in Chevron's guidelines for outside counsel.[3479]

2128. Fourth, the Respondent notes that several Cash Calls indicate that the Ecuador Legal Team did work on other matters than the Lago Agrio Litigation and the Ecuador Enforcement Proceedings.[3480] It further notes that the second-page breakdowns in the Cash Calls differentiate, without explanation, between "Litigation" and "Texaco Petroleum Co."[3481]

2129. Fifth, the Respondent questions how the Claimants determined to allocate 90% of the payments (after removing the fees of Chevron's legal representative in Ecuador) to the Lago Agrio Litigation and Ecuador Enforcement Proceedings damages categories.[3482] The Respondent likewise questions whether and how the 10% discount was applied,

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3475 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3228 (Schwartz).

3476 Rejoinder, para. 950.

3477 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3221 (Schwartz).

3478 Rejoinder, para. 946.

3479 Rejoinder, para. 930.

3480 Rejoinder, para. 939.

3481 Rejoinder, para. 940.

3482 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3244-3245 (Schwartz).

asserting that the amount reflected in certain Cash Calls equals the amount finally claimed as damages.[3483]

2130. Lastly, the Respondent argues that (i) the Cash Calls are not valid invoices under Ecuadorian law, which they argue governs the validity of the invoices;[3484] and (ii) the Claimants cannot show that the monthly retainer would not have been incurred but-for the Treaty breaches.[3485]

2131. In response, the Claimants explain that the Ecuador Legal Team was "[f]unctionally the same as being in-house", working for only Chevron.[3486] They explain it was therefore logical to pay the Ecuador Legal Team on a fixed-fee retainer basis, which they state is a normal practice in Ecuador.[3487] The Claimants explain that the Cash Calls are invoices deriving from the retainer:[3488] each document includes the amounts spent the previous month and expected to be spent during the following month, and the documents in the record constitute "all of the invoices for the Ecuador Legal team".[3489] The Claimants further assert that the amounts relating to the attorneys' salaries remained the same month-to-month, while expenses varied.[3490]

2132. According to the Claimants, each Cash Call was sent to Chevron's Law Department and was paid, as evidenced by the stamps on the exhibits and confirmed by Mr Stanton's expert confirmation.[3491] Moreover, the testimonies and witness statements of Ms Kent, Mr Veiga, and Mr Mittelstaedt, as well as the Lago Agrio Litigation record prove, in the Claimants' view, that the Ecuador Legal Team's services were reflected in the Cash

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3483 Letter from the Respondent to the Tribunal dated 2 September 2022, pp. 9-10.

3484 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3301, 3303 (Salgado Levy).

3485 Rejoinder, para. 929.

3486 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3273 (Coriell).

3487 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3273-3274 (Coriell).

3488 Track III Hearing Transcript, Day 8 (29 August 2022), p. 1757 (Bishop); *see also* Day 14 (6 September 2022), p. 3267 (Coriell).

3489 Track III Hearing Transcript, Day 8 (29 August 2022), p. 1757 (Bishop).

3490 Track III Hearing Transcript, Day 8 (29 August 2022), p. 1758-1759 (Bishop).

3491 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3258-3260 (Coriell).

Calls[3492] and were paid in full.[3493] In the Claimants' view, the fact that Chevron paid these fees and costs demonstrates their reasonableness.[3494]

2133. The Claimants contend that the Cash Calls are sufficient to demonstrate payment under Ecuadorian law, as they include a general description of the services that were rendered.[3495]

2134. Lastly, the Claimants explain that they conservatively discounted their claims under the Cash Calls by 10%, an admittedly subjective number, to capture only the amount attributable to matters compensable as damages in this Arbitration, to ensure that they did not overstate their claim, and to reduce interest due.[3496] They add that they took care to claim the legal fees and expenses, not when advanced by Chevron, but when "actually incurred".[3497]

ii. The Tribunal's Analysis

2135. The Tribunal recalls that the Cash Calls support the Claimants' claim for the legal fees and expenses charged by the law firms that constituted the Ecuador Legal Team in the context of the Lago Agrio Litigation and the Ecuador Enforcement Proceedings.[3498] The Tribunal has also determined that these two damages categories meet the requirements of causation and reasonableness for the compensation of incidental damages under international law.[3499] In the circumstances, the Tribunal shall address the Cash Calls claim as a joint component of both of those damages categories following the methodology laid out in Section VII.G.5.

2136. At the outset, the Tribunal notes that 78 of the 168 Cash Calls were issued prior to the issuance of the Lago Agrio Judgment on 14 February 2011, including a 18 October 2010

3492 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3261 (Coriell).

3493 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3261-3262 (Coriell).

3494 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3269 (Coriell).

3495 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3319 (Coriell).

3496 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3286, 3317-3319 (Coriell).

3497 Track III Hearing Transcript, Day 14 (6 September 2022), p. 3286 (Coriell).

3498 *See* para. 769 above.

3499 *See* paras. 653, 762 above.

Cash Call the Claimants withheld as privileged.[3500] In line with the Tribunal's previous findings, since the legal fees and expenses underlying those 78 Cash Calls could not have been incurred in response to the injury arising from the recognition and enforcement of the Lago Agrio Judgment, they fall outside the scope of the compensable injury in these proceedings.[3501] The Tribunal's subsequent analysis shall therefore focus on the remaining 90 Cash Calls sent to Chevron by the Ecuador Legal Team after 14 February 2011.

2137. As a threshold issue, the Respondent asserts that the Cash Calls do not comply with Ecuadorian law and that, accordingly, they cannot support the Claimants' damages claim.[3502] In the Tribunal's view, whether the Cash Calls comply with Ecuadorian law is not *per se* dispositive of the Claimants' claim for the reimbursement of the legal fees and expenses underlying those documents. The proper question before this Tribunal is whether the Claimants have satisfied their burden under international law, rather than domestic law, to prove their claims for the reimbursement of legal fees and expenses as incidental damages. From this viewpoint, the Tribunal is not tasked with assessing the compliance of the Cash Calls with Ecuadorian law, but must rather assess the sufficiency of the evidence on record to establish the requirements for this component to qualify as incidental damage (*i.e.*, causation and reasonableness).

2138. Similarly, whether the Cash Calls were paid by Chevron – and the Tribunal has already concluded that they were[3503] – is not determinative of the requirements of causation and reasonableness. Indeed, the fact of payment does not *per se* establish that, by incurring legal fees and expenses, the Claimants sought to mitigate the injury arising from the recognition and enforcement of the unremedied Lago Agrio Judgment by (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,

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3500 Respondent's Index of Cash Calls for the Ecuador Legal Team, 2 September 2022, Items 1-78; Claimants' Index of Claimed Legal Invoices for Ecuador Legal Team, 2 September 2022, Items 1-78.

3501 *See* paras. 362, 373, 397 above.

3502 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3301, 3303 (Salgado Levy).

3503 *See* para. 2072 above.

whether by attachment, arrest, interim injunction, execution or howsoever otherwise. The fact of payment is also not indicative of whether the legal fees and expenses underlying the Cash Calls were reasonably incurred in furtherance of these mitigation goals.[3504]

2139. The Tribunal turns now to assessing the requirements of causation and reasonableness in respect of the Cash Calls claim.

2140. As regards causation, the Tribunal recalls that the required causal link must be established clearly and in an itemized fashion for each mitigation measure to warrant reparation.[3505] In this connection, the Tribunal is satisfied that the Ecuador Legal Team, which served as lead local counsel to Chevron in the Lago Agrio Litigation and Ecuador Enforcement Proceedings, played a central role in those proceedings and, thus, supported the Claimants' efforts to mitigate the injury arising from the recognition and enforcement of the Lago Agrio Judgment. Therefore, the Cash Calls claim meets the requirement of causation.

2141. Whether the requirement of reasonableness is met as regards the legal fees and expenses claimed in connection with the Cash Calls is a separate question. In particular, the Tribunal's ability fully to assess the reasonableness of the amounts charged for the Ecuador Legal Team's services is constrained by the limited information provided regarding the precise nature of the work performed by this team and the manner in which it was billed. This issue is especially significant in light of the considerable amount claimed in relation to the Cash Calls, totalling approximately USD 49 million.

2142. First, the absence of the Cash Call Retainer (or retainers, as the case may be) in the record raises questions about the precise scope of the assignment of the Ecuador Legal Team. In particular, this gap in the evidence hinders the Tribunal's assessment of whether, by engaging the Ecuador Legal Team, the Claimants pursued other goals beyond mitigating the injury arising from the recognition and enforcement of the Lago Agrio Judgment. The Claimants themselves acknowledge that they did, which is why they applied a 10% discount to the Cash Calls claim.[3506] However, without access to the Cash Call Retainer,

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3504 *See* paras. 555-556, 559 above.

3505 *See* para. 330 above.

3506 Letter from the Claimants to the Tribunal dated 4 September 2022, pp. 18-19, Annex A.

the Tribunal lacks sufficient information to determine the appropriateness of this discount. The Tribunal is also unable to assess whether the legal fees and expenses charged by the Ecuador Legal Team complied with the Cash Call Retainer, or whether there were any deviations.

2143. Second, the limited level of detail contained in the Cash Calls likewise hinders the Tribunal's ability to conduct a full assessment of the reasonableness of the amounts charged by the Ecuador Legal Team:

(i) The Tribunal notes that 88 of the 90 Cash Calls generated after 14 February 2011 have two pages:[3507] the first page indicates the existing cash balance in the Ecuador Legal Team's "working fund" and the amount requested to replenish the fund, while the second page contains a breakdown of the amounts incurred and expected to be incurred in connection with vaguely described items such as "attorney", "technical advisor", "accountant", "materials", "room and board", "insurance", "publications in newspapers", or "public relations".[3508] The Cash Call Enclosures, which may have shed light on the precise nature of these expenses, are not on record.

(ii) The two remaining Cash Calls generated after 14 February 2011 are (i) a Cash Call dated 4 September 2014, which includes a third page including a forecast for a 3-month period in addition to the forecast indicated in the second page;[3509] and (ii) a Cash Call dated 8 July 2014, which includes only a first page as just described.[3510] As such, these two Cash Calls do not offer additional insight into the nature of the legal fees and expenses charged by the Ecuador Legal Team.

(iii) Some of the Cash Calls note that the Ecuador Legal Team charged Chevron for "media related expenses", "publications in newspapers", and "public relations"[3511]

3507 *See* Respondent's Index of Cash Calls for the Ecuador Legal Team, 2 September 2022, pp. 5-10.

3508 *See, e.g.*, **C-3395**, CVX-Track III- 20008764.

3509 **C-3395**, CVX-Track III- 20008739.

3510 **C-3395**, CVX-Track III- 20001682.

3511 *See, e.g.*, **C-3395**, CVX-Track III- 20008826, p. 2, **C-3395**, CVX-Track III- 20008754, p. 2.

– activities which, as further explained below, are in principle not compensable in this Arbitration.[3512]

2144. The Tribunal thus lacks critical information required to assess the reasonableness of the amounts charged by the Ecuador Legal Team. Among other evidentiary deficiencies, there is no information in the Cash Calls regarding the identity or seniority of the attorneys and other persons for whom expenses were incurred, their precise activities or assignments, how the overhead costs for which reimbursement was claimed supported such activities, or how any of these legal fees and expenses were priced.

2145. Overall, while the evidence on record suffices for the Tribunal to infer that the work of the Ecuador Legal Team contributed to the Claimants' reasonable measures to mitigate the injury flowing from the recognition and enforcement of the Lago Agrio Judgment, it is insufficient to allow the Tribunal to conduct an assessment on the reasonableness of the *amounts* charged by the Ecuador Legal Team.

2146. In view of the uncertainty surrounding the reasonableness of the amounts spent by the Claimants on the Ecuador Legal Team as a way of mitigating the injury flowing from the recognition and enforcement of the Lago Agrio Judgment, and in the light of the methodological problem addressed in the following paragraphs, the Tribunal assesses that 50% of the legal fees and expenses claimed by the Claimants in connection with the Ecuador Legal Team by way of the Cash Calls after 14 February 2011 should be excluded from compensation. It makes this assessment in light of the fact that no evidence or submission in the record points to any significant body of work by the Claimants' lawyers in Ecuador that was not related to the Lago Agrio Litigation and Ecuador Enforcement Proceedings, and the consequent probability that the great majority of the legal fees and expenses charged were, in broad terms, related to those proceedings even if the record does not evidence the specific purpose for which individual sums were spent.

2147. In reaching this determination, the Tribunal has duly noted the Respondent's criticism of Chevron's methodology in calculating the claimed amounts for the Ecuador Legal Team – a method that accounts for the fact that the Cash Calls generally contain the amounts

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3512 *See* para. 2169 below.

previously forecasted and actually spent for the invoices month, as well as the amount requested from Chevron to maintain the working fund. The Claimants explain that they calculated a "base claim" by (i) taking the amount of actual expenses; (ii) subtracting the amount paid to the legal representative, which is not claimed in this Arbitration; and (iii) discounting the remaining sum by 10% to account for work that potentially related to other matters.[3513] The Claimants then compared this "base claim" to the amount transferred to the Ecuador Legal Team the previous month as reflected in the SAP Payments List. If the base claim was more than the amount actually paid, the Claimants claimed the amount paid, and carried forward the amount remaining until a future month where the base claim was less than the amount actually paid. In the Respondent's view, the Claimants' calculations are both unsupported by a demonstrable analysis and unreconcilable with the actual claims.[3514]

2148. The Tribunal agrees that the Claimants should be compensated for the costs actually incurred in the invoiced month, as opposed to the amount transferred by Chevron to cover future expenses. To the extent that any uncertainty may remain regarding the correction of the calculations performed by the Claimants, it is addressed by the Tribunal's above assessment that 50% of the legal fees and expenses charged by the Ecuador Legal Team by way of the Cash Calls after 14 February 2011 should be excluded from compensation.[3515]

3. Trunko Elements

2149. The Tribunal shall now address as an ensemble the elements identified in the Trunko Expert Report, which were described in paragraphs 2059-2060 above. For ease of reference, the Tribunal recalls that the Trunko Elements comprise:

(i) (CLA) Activities allegedly relating to Media and Public Relations / (RES) Activities relating to Media and Public Relations;

3513 Letter from the Claimants to the Tribunal dated 4 September 2022, p. 19, Annex A.

3514 Track III Hearing Transcript, Day 14 (6 September 2022), pp. 3248-3254 (Schwartz).

3515 *See* para. 2146 above.

(ii) (CLA) Activities allegedly relating to Government Relations (including but not limited to USTR) / (RES) Activities relating to Government Relations (including but not limited to USTR);

(iii) (CLA) Allegedly Nondefense-Related Activities / (RES) Nondefense-Related Activities;

(iv) (CLA) Alleged Block Billing / (RES) Block Billing;

(v) (CLA) Allegedly Vague Billing Entries / (RES) Vague Billing Entries;

(vi) (CLA) Alleged Administrative and Clerical Activities / (RES) Administrative and Clerical Activities;

(vii) (CLA) Alleged Getting Up to Speed and Training / (RES) Getting Up to Speed and Training;

(viii) Multiple Attendance at Events;

(ix) (CLA) Alleged Excessively Long Billing Days and Excessive Time / (RES) Excessively Long Billing Days and Excessive Time; and

(x) (CLA) Alleged Double Billing Entries / (RES) Double Billing Entries.

2150. The Tribunal shall first provide an overview of the evidence of Mr Trunko, expert for the Respondent, and Mr McGrath, expert for the Claimants, concerning the matters falling under the present heading. Thereafter, the Tribunal shall determine the approach it will apply to address the Trunko Elements.

(a) Mr Trunko's Expert Evidence

2151. Mr Trunko is a U.S. attorney specializing in legal fee auditing.[3516] At the Respondent's request, his firm, Stuart Mae, performed "an independent evaluation and review of the legal fees and costs claimed by Claimants in this Arbitration".[3517] Stuart Mae's methodology "is based on generally accepted principles regarding reasonable attorney fee

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3516 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2316 (Trunko).

3517 Track III Hearing Transcript, Day 10 (31 August 2022), pp. 2317-2318 (Trunko).

billing as reflected in case authorities, ethical rules, scholarly articles, and client billing guidelines",[3518] including for the most part U.S. authorities.[3519]

2152. Mr Trunko describes his analysis of the billing information provided by the Claimants as follows:

> The Crosswalk billing data submitted by Claimants in excel format contains no less than 496,000 separate rows of fee and expense entries. To facilitate the review and analysis of the fees and expenses claimed by Claimants, we created a computer database of the law firm billing entries by loading the itemized law firm fee and expense entries from the billing data and invoices provided. In addition to the "Crosswalk" data, Claimants submitted law firm invoices in the form of hard copy pdf documents from which the itemized entries had to be manually loaded into the database using OCR software. The database was then reconciled with the amounts claimed by Claimants in Appendix 2 [to the Claimants' Reply] to ensure accuracy. Our analysis is based on a review of all the fee and expense entries billed by the firms.[3520]

2153. When performing his analysis, Mr Trunko identified "numerous problematic issues reflecting unreasonable fees and costs" corresponding broadly with the elements addressed under the present heading (as well as the Cash Calls, which the Tribunal already addressed in the preceding section).[3521] He identified multiple time entries in the billing records provided by the Claimant, grouping them according to each distinct type of billing irregularity he identified and quantifying each group. For instance, Mr Trunko identified a total of USD 52,327,651.11 for alleged block billing[3522] and USD 2,409,906.40 for alleged vague billing.[3523]

3518 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2318 (Trunko).

3519 **RE-51**, Trunko Expert Report, para. 10: "In reviewing and classifying the categories of fees and costs set forth herein, I employed the standard legal fee auditing methodology used by Stuart Maue in auditing billings for legal fees and costs, which is based on generally accepted principles regarding reasonable attorneys' fee billing as reflected in case authorities, ethical rules and opinions, scholarly articles, and client billing guidelines (see, e.g., Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933 (1983) . . . American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-379 (1993) . . . The Honest Hour, The Ethics of Time Based Billing by Attorneys, William G. Ross, Carolina Academic Press (1996)). These generally accepted principles have been applied by many courts when awarding attorneys' fees, and the categories of fees identified herein are consistent with these standards."

3520 **RE-51**, Trunko Expert Report, para. 9.

3521 **RE-51**, Trunko Expert Report, para. 8. The issues identified by Mr Trunko are blocked billing, vague billing, administrative and clerical activities, getting up to speed and training, media and public relations activities, nondefense related activities, multiple attendance, duplicative activities, long billing days and excessive time, double billings, and inadequately documented fees.

3522 **RE-51**, Trunko Expert Report, **SM-C-1**, p. 3645.

3523 **RE-51**, Trunko Expert Report, **SM-C-2**, p. 402.

2154. Based on these purported billing irregularities, Mr Trunko opines that "significant reductions are warranted to Claimants' claimed fees and costs."[3524] He does not quantify such reduction, but notes that similar reductions performed by U.S. courts are often "in the neighbourhood of 30 per cent".[3525] At the Track III Hearing, Mr Trunko clarified that he does not propose that the Tribunal exclude from compensation the full amounts corresponding to each group of entries allegedly exhibiting billing irregularities as described in the preceding paragraph: his view is that such irregularities support the conclusion that a percentage reduction to the amount of compensation due to the Claimants is warranted.[3526]

(b) Mr McGrath's Expert Evidence

2155. Mr McGrath is a certified public accountant and is also certified in financial forensics and fraud examination.[3527] He is a Senior Managing Director in the Risk, Forensics and Compliance practice of Ankura Consulting Group LLC.[3528]

2156. At the Claimants' request, Mr McGrath applied data analytics to the same set of billing data reviewed by Mr Trunko[3529] to "identify metrics, trends, and patterns" in the legal fees and expenses claimed by the Claimants in this Arbitration[3530] so as "to gain insight into the nature of the expenses incurred and claimed by Claimants, invoices rejections, discounts and adjustments recorded by Chevron, certain evaluable parameters contained within the [Chevron Guidelines for Outside Counsel], specific attributes relating to individual timekeepers, and timing of the legal spend relative to activity in the underlying Damage Categories".[3531]

3524 **RE-51**, Trunko Expert Report, para. 56.

3525 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2344 (Trunko).

3526 Track III Hearing Transcript, Day 10 (31 August 2022), pp. 2344-2345 (Trunko).

3527 McGrath Expert Report, para. 4.

3528 McGrath Expert Report, para. 2.

3529 Track III Hearing Transcript, Day 11 (1 September 2022), p. 2548 (McGrath).

3530 McGrath Expert Report, para. 13.

3531 McGrath Expert Report, para. 21.

2157. According to Mr McGrath, his examination of the billing information provided by the Claimants yields, *inter alia*, the following conclusions:

(i) "[The] analysis of the Invoice Data indicates that Chevron's outside firms and vendors generally staffed matters and leveraged work in a valuable and cost-efficient manner."[3532]

(ii) "Chevron's Outside Counsel Guidelines and the Invoice Data demonstrate that Chevron effectively designed and managed the process to control and negotiate timekeeper rate increases."[3533]

(iii) "Chevron utilized discount negotiations as one method of managing and controlling external legal costs in the Ecuador Dispute, which resulted in at least $62.4M in discounts savings (or 8.4% of Claimed Fees)."[3534]

(iv) "The Invoice Data, when analyzed in aggregate as well as for individual Damage Categories, exhibits a pattern of increased Claimed Amounts coinciding with increased activity in the underlying Damage Categories, often coinciding with key milestones and relevant dates referenced in the Track III Memorial Damage Category appendices."[3535]

(v) "When advising corporate legal departments and in-house counsel, I apply data analytics to legal invoice datasets to identify metrics, trends, patterns and/or anomalies, which I then present to in-house counsel to consider and evaluate for possible cost-savings action or other improvements, based on their knowledge and experience of the applicable firms and matters. I applied various data analytics aimed at identifying such metrics, trends, patterns, or anomalies in the Invoice Data related to the Ecuador Dispute and did not identify a pattern of significant outliers."[3536]

3532 McGrath Expert Report, para. 26(1).

3533 McGrath Expert Report, para. 26(2).

3534 McGrath Expert Report, para. 26(3).

3535 McGrath Expert Report, para. 26(4).

3536 McGrath Expert Report, para. 26(5).

(vi) "The documents and data I reviewed provide evidence of diligent, coordinated review of outside law firms' and other vendors' invoices by Chevron that is consistent with best practice invoice review processes. Further, the Invoice Data indicates that invoice adjustments were processed for more than a dozen unique reasons (e.g., efficiency adjustment; insufficient time description) demonstrating that Chevron invoice reviewers were monitoring invoices for a wide range of possible guideline violations."[3537]

(vii) "Chevron's outside law firms and vendors generally exercised care and diligence in their billing practices, as evidenced by high levels of adherence to key and evaluable Guidelines, which is an important consideration when evaluating a company's commitment to legal spend management."[3538]

(viii) "The e-billing software and written Outside Counsel Guidelines that Chevron had in place during the period of the Ecuador Dispute are consistent with what I would consider widely recognized methods and best practices in litigation management and are evidence of tangible actions taken by Chevron to proactively manage and control external legal costs."[3539]

2158. The Tribunal recalls that the Claimants filed the McGrath Expert Report together with their Reply – that is, before the Respondent submitted the Trunko Expert Report with the Rejoinder. Therefore, while both expert reports address similar issues (while applying different methodologies) the McGrath Expert Report does not respond to the issues raised in the Trunko Report. The Respondent also did not call Mr McGrath to testify at the Track III Hearing.[3540] The Tribunal, however, called on him to address a series of discrete questions concerning the methodology he applied in his report.[3541]

3537 McGrath Expert Report, para. 26(6).

3538 McGrath Expert Report, para. 26(7).

3539 McGrath Expert Report, para. 26(8).

3540 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2479 (Finsterwald).

3541 Track III Hearing Transcript, Day 11 (1 September 2022), pp. 2547-2563 (Van den Berg/McGrath).

(c) The Tribunal's Approach

2159. The Tribunal observes that all of the Trunko Elements concern, at their core, alleged deficiencies in the billing information supporting the legal fees and expenses for which the Claimants seek reimbursement in this Arbitration. Mr Trunko draws essentially on U.S. case law to illustrate how U.S. courts have approached similar billing deficiencies when addressing requests from litigants to recover the costs of litigation from the opposing party.[3542] Mr McGrath, in turn, applies an entirely different approach than Mr Trunko – data analytics, as opposed to fee auditing – to ascertain whether any deficiencies exist in the universe of billing information provided by the Claimants to support their damages claim for legal fees and expenses.

2160. While the Tribunal has found the evidence of Mr McGrath and Mr Trunko to be useful in gaining insight into how domestic courts approach billing deficiencies in the context of claims for the reimbursement of litigation costs, as well as in identifying patterns in the billing data underlying the Claimants' claims, the Tribunal is in no way constrained by the experts' conclusions. Rather, the Tribunal must perform an independent analysis of the Trunko Elements through the purview of (i) international law; and (ii) the methodology for the assessment of the Claimants' damages claims for the reimbursement of legal fees and expenses established earlier in this Award.[3543] The Tribunal addresses each aspect of this analysis in turn.

1. The Trunko Elements through the purview of International Law

2161. The Tribunal recalls that it is not concerned with assessing the reasonableness of legal fees and expenses in the context of domestic proceedings, where a range of considerations of taxation, insurance and the provision of public services may be relevant.[3544] Rather, the Tribunal is called upon to determine whether the Claimants' claim for the reimbursement of legal fees and expenses meets the requirements of causation and reasonableness for the compensation of incidental damages under international law.[3545]

[3542] Track III Hearing - Direct Presentation of John L. Trunko (31 August 2022), slides 7, 16, 20, 28, 37, 42, 46, 52, 53, 60.

[3543] *See* paras. 545-551 above.

[3544] *See* paras. 480-482 above.

[3545] *See* paras. 327, 331, 362 above.

Accordingly, having found that nine of the incidental damages categories claimed by the Claimants are in principle compensable, the question the Tribunal must address in respect of the Trunko Elements is whether any deficiencies that may exist in the billing information underlying the Claimants' claims preclude a finding that the legal fees and expenses claimed by the Claimants were "reasonably incurred to repair damage and otherwise mitigate loss" arising from the recognition and enforcement of the Lago Agrio Judgment, and, if so, in what measure.[3546]

2162. The Parties, however, have not provided any materials to the Tribunal illustrating how billing deficiencies such as those falling under the Trunko Elements must be addressed in the context of a claim for legal fees and expenses as damages under international law. In the circumstances, while the Tribunal's determinations shall be made through the lens of international law, the Tribunal may draw guidance from domestic authorities provided by the Parties to the extent they align with the Tribunal's understanding of the requirements of causation and reasonableness.

2163. Against this background, the Tribunal shall now assess whether each of the billing deficiencies identified as Trunko Elements may, under international law, affect its previous determinations on whether each of the 13 damages categories comprising legal fees and expenses, as well as the components falling thereunder, meet the requirements of causation and reasonableness for the compensation of incidental damages.

2164. In the course of the assessment that follows, the Tribunal shall refrain from addressing the incidence or prevalence of these deficiencies in the billing information provided by the Claimants or the extent to which any such deficiencies should affect the final amount of compensation. Such matters will be addressed in Section VIII.N.3(c)2 below. The Tribunal's present analysis is confined to determining whether these billing deficiencies, as characterized by the Respondent and Mr Trunko, would – if established – in principle warrant a reduction in the final amount of compensation under international law.

[3546] **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (34).

i. (CLA) Activities allegedly relating to Media and Public Relations / (RES) Activities relating to Media and Public Relations

2165. The Respondent takes issue with the non-legal work performed by the Claimants' lawyers – in particular media and public relations work – and argues that any legal fees and expenses charged in connection with such activities should not be recoverable.[3547] According to Mr Trunko, these activities include, *inter alia*, monitoring media coverage, reviewing press reports, and preparing press releases and interviews.[3548] Mr Trunko identified USD 10,634,481.63 billed for public and media related tasks.[3549] Examples of these entries include "prepare for speech at Pepperdine Global Forum Shopping Symposium", "draft outline of Crude clips for New York Times interview", and "participate in daily media review committee telephone conference".[3550]

2166. In the Claimants' view, measures taken in the "court of public opinion" were required to respond to Ecuador and the LAPs' extraordinary efforts to tarnish Chevron's reputation.[3551] They submit that "Chevron's response was in support of its general defense against the fraudulent Lago Agrio Litigation and resulting Judgment."[3552]

2167. Moreover, the Claimants assert that case law such as *Prison Legal News v. Schwarzenegger* has recognised that public relations work can be subject to compensation when the work is "directly and intimately related to the successful representation of a client".[3553] In addition, the Claimants criticise Mr Trunko's approach in the identification of impacted entries, as he admitted at the Track III Hearing that he did not analyse whether these billing records were in fact related to litigation work.[3554]

3547 Rejoinder, paras. 1010-1021.

3548 **RE-51**, Trunko Expert Report, para. 27.

3549 **RE-51**, Trunko Expert Report, para. 27, **SM C-7**.

3550 Track III Hearing - Direct Presentation of John L. Trunko (31 August 2022), Slides 38-39.

3551 Memorial, paras. 426-427.

3552 Memorial, para. 427.

3553 Track III Hearing - Claimants' Closing Presentation (7 September 2022), Slide 107; **C-3478**, *Prison Legal News v. Schwarzenegger*, 561 F. Supp. 2d 1095, 1101 (N.D. Cal. 2008).

3554 Track III Hearing - Claimants' Closing Presentation (7 September 2022), Slide 108; Track III Hearing Transcript, Day 10 (31 August 2022), pp. 2371-2372 (Trunko); Track III Hearing Transcript, Day 15 (7 September 2022), p. 3461 (Silbert).

2168. In the Tribunal's view, the reasoning it applied in connection with public and media work carried out by public relations firms claimed under the General Defence category of damages applies with equal force in connection with any activities relating to media and public relations, regardless of their connection with an ongoing litigation. Whatever harm the Claimants sought to address through 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. The Claimants could only accomplish these three mitigation goals by participating in legal proceedings, not in the court of public opinion.[3555]

2169. Accordingly, the Tribunal considers that any legal fees and expenses incurred in connection with "Activities relating to Media and Public Relations" must, as a matter of international law, be excluded from compensation in this case.

ii. (CLA) Activities allegedly relating to Government Relations (including but not limited to USTR) / (RES) Activities relating to Government Relations (including but not limited to USTR)

2170. The Respondent also criticises the Claimants for seeking compensation for non-legal counsel work related to government relations activities, such as monitoring legislative and political activity, lobbying, preparing, and reviewing profiles of politicians and government representatives, among others.[3556] According to Mr Trunko, the Claimants incurred USD 1,842,005.20 for work related to government relations.[3557]

2171. Furthermore, the Respondent singles out a series of time entries billed for work related to Chevron's petition to the U.S. Trade Representative to deny Ecuador trade

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3555 *See* para. 1978 above.

3556 **RE-51**, Trunko Expert Report, para. 29, **SM C-10**; Track III Hearing - Direct Presentation John L. Trunko (31 August 2022), slide 44.

3557 **RE-51**, Trunko Expert Report, **SM C-10**, p. 239.

preferences.[3558] In the Respondent's view, these invoices are not compensable, as the Claimants "have not proven that petitioning the U.S. Trade Representative was a reasonable or necessary means of defending itself against the Lago Agrio Judgment."[3559]

2172. The Respondent likewise contends that the Claimants are not entitled to recover expenses for work related to Freedom of Information Act ("**FOIA**") requests in the United States.[3560] In particular, the Respondent takes issue with entries referring to "FOIA Request(s)", which, it says, do not provide any further information on what those requests concerned and, as such, they do not prove that these activities gave rise to compensable damages.[3561] This also applies to certain FOIA requests directed by the Claimants to the New York State Comptroller and Right to Know requests directed to the Pennsylvania Treasury.[3562]

2173. While the Claimants do not distinctly address the Respondent's arguments in connection with this element, they note, among other things, that throughout the Lago Agrio Litigation Mr Donziger, the LAPs, and/or Ecuador all sought to conscript various government officials to join their "extortionate" pressure campaign against Chevron – including the President of Ecuador, who supported the LAPs' efforts to enforce the Lago Agrio Judgment.[3563] In response, the Claimants "repeatedly presented evidence of fraud and corruption to Ecuadorian officials and they repeatedly looked the other way".[3564] Similarly, the Claimants note that they submitted FOIA requests to various authorities "to uncover evidence of collusion between the LAPs/Donziger and public government officials, and other actions taken in order to penetrate the cover-up orchestrated by Ecuador and the LAPs to prevent Chevron from uncovering their fraudulent conduct."[3565]

3558 Rejoinder, para. 1363, Annex I-27, entries 1-3.

3559 Rejoinder, para. 1363.

3560 Rejoinder, para. 1644.

3561 Rejoinder, para. 1644; **RE-51**, Trunko Expert Report, **SM Q-3**, p. 138.

3562 Rejoinder, para. 1645.

3563 Memorial, para. 428; Reply, para. 254.

3564 Reply, para. 332.

3565 Reply, para. 1018.

2174. As a matter of principle, the Tribunal considers that any efforts directed towards furnishing the Respondent's prosecutorial authorities with evidence of fraud and corruption in the Lago Agrio Litigation would constitute a valid measure of mitigation. However, none of the activities identified by the Respondent as falling under the element of Government Relations – petitioning the U.S. Trade Representative, submitting FOIA requests to U.S. authorities, monitoring legislative and political activity, lobbying, preparing, and reviewing profiles of politicians and government representatives, etc. – have been shown to involve submissions to the Respondent's prosecutorial authorities.

2175. As such, in the Tribunal's view, none of the activities falling under the present heading bear any relation with the injury arising specifically from the recognition and enforcement of the unremedied Lago Agrio Judgment. As already noted in respect of activities relating to media relations, the Claimants could only mitigate such injury by participating in legal proceedings.[3566] Prompting governments, especially those other than Ecuador's, to take or abstain from particular actions cannot, in the circumstances of this case, be regarded as an appropriate form of mitigation.

2176. Accordingly, the Tribunal considers that any legal fees and expenses incurred in connection with "Activities relating to Government Relations (including but not limited to USTR)" must, as a matter of international law, be excluded from compensation in this case.

iii. (CLA) Allegedly Nondefense-Related Activities / (RES) Nondefense-Related Activities

2177. The Respondent also challenges invoices billed for "nondefense-related activities" totalling USD 227,791.39 in fees, as calculated by Mr Trunko.[3567] In particular, Mr Trunko asserts that the invoices underlying the Claimants' claims "contain billing for other nondefense-related activities such as preparing audit letters, shareholder activities, securities issues, and other corporate matters" and further asserts that the fees and costs that were "incurred in non-defense activities such as corporate and tax advice, public relations, and any fees and costs arising from providing insurance coverage advice, are

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3566 *See* para. 2168 above.

3567 **RE-51**, Trunko Expert Report, para. 28; **SM C-9**.

generally considered to be outside the scope of the defense."[3568] Editing a draft video script for a shareholders' meeting, or working on responses to audit letters and audit inquiries are some other instances of nondefense-related tasks identified by Mr Trunko.[3569]

2178. The Tribunal understands that most if not all of the activities characterized by the Respondent as "non-defence-related activities", though connected to the Lago Agrio Litigation and related proceedings, were conducted by Chevron as part of its general corporate activities. Being a publicly-traded company, Chevron may even have been required by law to conduct several of those activities, such as having external counsel respond to audit queries, or informing its shareholders periodically of the status of an ongoing litigation.[3570]

2179. However, none of these activities are directed at mitigating the injury arising specifically from the recognition and enforcement of the unremedied Lago Agrio Judgment. As already noted in respect of activities relating to media relations, the Claimants could only mitigate such injury by participating in legal proceedings.[3571] The mere fact that the company may have been required to conduct the activities falling under the present heading as an incidental consequence of ongoing litigation does not, in itself, render such activities acts of mitigation; they were not directed at mitigating the injury arising from the Respondent's Treaty breaches, but at satisfying internal corporate requirements.

2180. Accordingly, the Tribunal considers that any legal fees and expenses incurred in connection with "Nondefense-Related Activities" must, as a matter of international law, be excluded from compensation in this case.

iv. (CLA) Alleged Block Billing / (RES) Block Billing

2181. Another billing deficiency identified by the Respondent in the evidence supporting the Claimants' damages claim for legal fees and expenses is block billing. This practice, as

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3568 **RE-51**, Trunko Expert Report, para. 28; Track III Hearing - Direct Presentation John L. Trunko (31 August 2022), slide 42. *See also* Rejoinder, para. 869, Annex D-1.

3569 Track III Hearing - Direct Presentation John L. Trunko (31 August 2022), slide 43.

3570 Track III Hearing Transcript, Day 10 (31 August 2022), pp. 2462-2467 (White/Trunko).

3571 *See* para. 2168 above.

characterized by Mr Trunko, consists in "billing more than one task with a single time amount."[3572] Mr McGrath, in turn, defines it as "the practice of listing a group of disparate tasks together (in a block) under a single time entry, without specifying how much time was spent on each individual task."[3573]

2182. Mr Trunko has identified more than 91,000 legal hours purportedly impacted by block billing – amounting to a total of USD 52,327,651.11 in legal fees – and suggests that a significant percentage reduction should be applied,[3574] as commonly done by U.S. courts in similar instances.[3575] Examples of block billing identified by Mr Trunko include 7.20 hours for "[r]eview of e-mail re: evidence, revised version of the draft pleading",[3576] and 15 hours for "[m]eet with RICO team regarding various issues, and research and draft multiple memos on predicate acts, namely mail and wire fraud, deprivation of honest services, travel act and foreign corrupt practices act, and review factual materials as well as assist with preparation of detailed outline of RICO claims".[3577]

2183. Mr Trunko opines that block billing generates uncertainty in the assessment of legal fees because: (i) it obstructs the proper evaluation of the amount of time spent on each separate task; (ii) renders billing descriptions less accurate; and (iii) its use tends to inflate fees artificially.[3578] According to Mr Trunko, the approach taken by U.S. courts when assessing compensation for block billing entries has been to apply a significant percentage reduction, ranging from 10% to 30%.[3579]

3572 **RE-51**, Trunko Expert Report, para. 12.

3573 McGrath Expert Report, Appendix 17, para. 239.

3574 **RE-51**, Trunko Expert Report, paras. 14, 16; **SM C-1**, p. 3645.

3575 **RE-61**, Second Leigh Expert Report, p. 24, fn 52.

3576 **RE-51**, Trunko Expert Report, para. 15-16; **SM C-1**, p. 759.

3577 **RE-51**, Trunko Expert Report, para. 15-16; **SM C-1**, p. 34.

3578 **RE-51**, Trunko Expert Report, para. 13. *See also* **RLA-976**, The Honest Hour, The Ethics of Time-Based Billing by Attorneys, William G. Ross, Carolina Academic Press (1996), p. 65.

3579 **RE-51**, Trunko Expert Report, para. 14; Track III Hearing - Direct Presentation John L. Trunko (31 August 2022), slide 16; Track III Hearing Transcript, Day 10 (31 August 2022), p. 2411 (Trunko).

2184. While the Claimants recognize that block billing is "generally disfavoured" and that reductions are often applied when block billing is identified,[3580] Mr McGrath considers that time entries displaying block billing should not be assessed by themselves in a vacuum but rather in tandem with other factors, such as the nature of work performed, the state of the events within the matter, key deadlines, and workflow progress.[3581] As a result, some block billed entries might be deemed acceptable by the invoice reviewer when analysed together with particular knowledge of the project at hand.[3582]

2185. According to Mr McGrath, the invoice data supporting the Claimants' damages claim shows that potentially block billed time represents a 10.3% of the measurable claimed fees, which in Mr McGrath's opinion, demonstrates that Chevron's law firms and vendors "generally exercised care and diligence in their billing practices".[3583]

2186. The Tribunal notes that, for present purposes, the fact that Chevron's internal review processes may have permitted block billing to a certain extent is not determinative. Rather, it is for the Tribunal to determine whether the presence of block billing in the billing data underlying the Claimants' damages claims warrants a deduction in the amount of compensation.

2187. In this connection, the Tribunal agrees with the Respondent that the practice of block billing creates uncertainty when attempting to evaluate the reasonableness of legal fees. It is also persuaded that block billing can inflate legal fees, sometimes by a significant amount.[3584] In the Tribunal's view, to the extent any legal fees incurred by the Claimants

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[3580] Reply, para. 689: "In the U.S., block billing is understood to refer to 'a time-keeping method where an attorney enters the total daily time spent working on a case, rather than itemizing the time spent on a specific task.' While the practice of block billing is generally disfavored, it 'is permissible where it involves the grouping of highly related tasks that rarely cover more than a few hours.' Moreover, in the U.S., courts 'need not reduce hours where entries are detailed enough for the Court to assess the reasonableness of the hours.' When a court does identify block billing that lacks sufficient detail for the court to assess the reasonableness of the hours billed, then courts are authorized to reduce the value of the time by between 10% and 30%, though 'courts generally impose only a 5% to 20% reduction.' A reduction, if any, will only be applied to the block billed time entries, not the total fee application."

[3581] McGrath Expert Report, Appendix 17, para. 240.

[3582] McGrath Expert Report, Appendix 17, para. 240.

[3583] McGrath Expert Report, Appendix 17, para. 249.

[3584] **RE-61**, Second Leigh Expert Report, **MHL-284**, Committee on Mandatory Fee Arbitration of The State Bar of California, Arbitration Advisory 2016-02, Analysis of Potential Bill Padding and other Billing Issues, 25

may have been inflated artificially as a result of block billing, they would not meet the requirement of reasonableness for the compensation of incidental damages under international law. It follows that any fees that surpass what would have been reasonably charged absent the use of block billing must be deducted from compensation.

2188. Accordingly, the Tribunal considers that, as a matter of international law, the use of block billing should result in a reduction of the final amount of compensation to the extent that its use is established and the reasonableness of the underlying fees cannot be reliably evaluated by any other means.

v. (CLA) Allegedly Vague Billing Entries / (RES) Vague Billing Entries

2189. Mr Trunko has also identified "vague billing entries" in the billing information underlying the Claimants' damages claims.[3585] In Mr Trunko's opinion:

> Time entries should be recorded contemporaneously in sufficient detail so that the work performed or the task accomplished is clearly described or precisely communicated in a meaningful way. Attorneys, by virtue of their education and training, should be capable of precise articulation. Billing guidelines promulgated by sophisticated consumers of legal services require such detail, and courts evaluating the reasonableness of fees require such precision in evaluating the reasonableness of fees billed by counsel. Sufficiently detailed time entries give the fee-paying party an opportunity to identify the specific task that has been performed and to determine from each entry the nature and scope of the activity, the benefit of the activity to the litigation, whether that time entry is appropriately billed to that file, and the reasonableness of the time spent by the timekeeper in performing that activity. Courts often question entire entries that include vague tasks that make it impossible to determine whether reimbursable work has been performed.[3586]

2190. According to Mr Trunko, these "vague billing entries" in the billing data underlying the Claimants' damages claims total USD 2,409,906.40 in legal fees.[3587] Some of these

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March 2016, pp. 9-10: "Block billing may also inadvertently or intentionally inflate the actual time a lawyer takes to complete the listed tasks. For example, if a lawyer bills a client 8.0 hours on a given day to 'prepare for trial', that block of time would most likely include, among other things, time for coffee and restroom breaks, personal calls and non-compensable administrative/managerial tasks. Since block billing has the potential of, among others, camouflaging non-compensable tasks, many judges, fee arbitrators, and commentators regard its persistent and egregious use with suspicion . . . In our prior version of this arbitration advisory . . . the [Committee] opined that block billing 'hides accountability and may increase time by 10% to 30%'. However, the arbitrator's discretion is not limited to the 10% to 30% range. Rather, as noted above, an arbitrator may consider all evidence to determine the propriety of any block billed entry and may conclude, upon due consideration of all such evidence, that the entire time billed is appropriate or some portion is not."

3585 **RE-51**, Trunko Expert Report, paras. 18-20.

3586 **RE-51**, Trunko Expert Report, para. 18.

3587 **RE-51**, Trunko Expert Report, para. 20, **SM C-2**, p. 402.

instances of vague billing include entries with the following descriptions: "review of e-mails", "attention to case management", "emails", "telephone conferences", "review papers", among others.[3588]

2191. In turn, the Claimants consider that Mr Trunko's categorisation of time entries as "vague" is flawed, as he failed to consider the surrounding context that would have clarified these entries.[3589] Furthermore, the Claimants highlight that Mr Trunko does not advocate to exclude wholesale the affected fees, as they cannot be taken at face value, but rather a percentage reduction should be applied.[3590]

2192. In the Tribunal's view, time entries lacking sufficient detail to enable a meaningful assessment of the hours claimed or the necessity and nature of the service rendered impede the Tribunal's ability to determine whether they satisfy the requirement of reasonableness for the compensation of incidental damages under international law – and, in particular, whether the requested amounts are reasonable. Thus, where vague billing entries are shown to exist and create uncertainty as to the satisfaction of the requirement of reasonableness, a corresponding reduction in compensation is warranted.

2193. Accordingly, the Tribunal considers that, as a matter of international law, the existence of vague billing entries must result in a reduction of the final amount of compensation to the extent that their use is established and the reasonableness of the underlying fees cannot be reliably evaluated by any other means.

vi. (CLA) Alleged Administrative and Clerical Activities / (RES) Administrative and Clerical Activities

2194. Another alleged deficiency identified by Mr Trunko in the Claimants' billing practices is billing legal fees for administrative and clerical activities. Clerical work is defined by Mr Trunko as tasks that "do not require legal acumen" and can be performed by non-professional staff, including word processing and data entry, organizing or filing

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3588 **RE-51**, Trunko Expert Report, para. 20; **SM C-2**, pp. 25, 36, 68.

3589 Claimants' Track III Closing Presentation (7 September 2022), Slide 160; Track III Hearing Transcript, Day 15 (7 September 2022), p. 3490-3491 (Kehoe).

3590 Claimants' Track III Closing Presentation (7 September 2022), Slides 161-162.

documents, making photocopies, or making travel arrangements.[3591] Furthermore, activities said to be administrative in nature by Mr Trunko include tasks that are part of the day-to-day operation of a law firm, such as arranging staffing, preparing invoices, and assigning work.[3592] Examples of such time entries include "attend to staffing issues", "prepared labels to ship binders . . .", or "make hotel arrangements . . . ".[3593]

2195. According to Mr Trunko, the time entries on record comprising administrative and clerical work amount to USD 11,614,213.27 in fees and total around 41,892.69 hours.[3594]

2196. In Mr Trunko's opinion, administrative and clerical activities should not be charged and billed as legal work. Instead, these sorts of activities are generally included as part of the law firm overhead and already contemplated in the firm's hourly rates.[3595] Mr Trunko notes that Chevron's own Billing Guidelines consider billing for non-professional tasks related to law firm management to be "inappropriate" and instead, are deemed to be part of the firm's "normal overhead costs".[3596]

2197. In the Claimants' view, the Tribunal should apply no reductions in respect of administrative and clerical activities, as "percentage efficiency reductions" have already been applied by Chevron's billing analysts and reviewers as part of their invoice review process.[3597] Moreover, the Claimants submit that clerical and administrative work can be compensable if it is customary for it to be billed separately.[3598] The Claimants also note that Mr Trunko did not familiarize himself with the billing customs and practices of non-US legal markets involved in his analysis.[3599]

3591 **RE-51**, Trunko Expert Report, para. 21.

3592 **RE-51**, Trunko Expert Report, para. 21.

3593 **RE-51**, Trunko Expert Report, para. 21; Track III Hearing - Direct Presentation John L. Trunko (31 August 2022), Slides 29-31.

3594 **RE-51**, Trunko Expert Report, para. 22; **SM C-3**, p. 2852.

3595 **RE-51**, Trunko Expert Report, para. 21.

3596 **RE-51**, Trunko Expert Report, para. 21; **C-3236**, Chevron's Guidelines for Outside Counsel, 21 December 2012, para. 2.2.

3597 Kent Witness Statement, para. 25; McGrath Expert Report, Appendix 14, para. 208.

3598 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2388 (Trunko).

3599 Claimants' Post-Hearing Index, p. 53; Track III Hearing Transcript, Day 10 (31 August 2022), 2388-2389 (Trunko).

2198. The Tribunal is not persuaded that administrative and clerical activities should be excluded from compensation without more. Whether such work – which clearly has value – is already covered by the fees invoiced by lawyers and deemed law firm overhead costs is a matter of local custom and may also be dictated by the circumstances. As rightly noted by the Claimants, it is customary in certain jurisdictions to bill separately for legal fees and administrative work carried out in support of legal work.

2199. Even more to the point, this is a matter regulated by Chevron's letters of engagement with each law firm, rather than being apt for second-guessing in accordance with a purported global standard. To the extent that Chevron or its subsidiaries agreed to pay separately for administrative and clerical activities, and subjected these bills to the normal processes for scrutiny in accordance with its Billing Guidelines, the Tribunal does not feel that it is required to subject these to further scrutiny for causation and reasonableness.

2200. The Tribunal can conceive of circumstances where the foregoing would still be insufficient to justify an inference of causation and reasonableness. However, having reviewed the examples put forward by Mr Trunko, the Tribunal finds no need to parse out and exclude any particular expenses in connection with this Trunko Element.

2201. Accordingly, the Tribunal is not persuaded that any legal fees and expenses incurred in connection with "Administrative and Clerical Activities" must, as a matter of international law, be excluded from compensation in this case.

vii. (CLA) Alleged Getting Up to Speed and Training / (RES) Getting Up to Speed and Training

2202. Mr Trunko identified approximately USD 2,327,225.94 billed for activities related to orientation, getting up to speed and training of personnel.[3600] According to Mr Trunko, "[s]uch activities are generally considered to be administrative overhead and non-billable".[3601] Examples of such entries include "training of new associates joining team", "training newcomers to doc review team", "familiarize self with [CaseMap] system in the

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3600 **RE-51**, Trunko Expert Report, paras. 24-25, **SM C-5**, p. 699.

3601 **RE-51**, Trunko Expert Report, paras. 24-26.

process", "reviewed and analyzed background materials in preparation for the review of documents in the Chevron matter" and "attending document review training".[3602]

2203. On the other hand, Mr McGrath identified USD 1,089,963 worth of legal fees and expenses for background and/or training activities.[3603] He notes, however, that a "significant" number of these legal fees and expenses relate to case-specific training required to use software such as Virtual Case Room, Introspect and VideoSense.[3604] In Mr McGrath's opinion, "training required to operate specialized software that is necessary to complete assigned tasks typically qualifies as billable time."[3605] The Claimants also consider that case-specific training includes sessions amongst the members of the team regarding new issues or to accommodate particular client requests.[3606]

2204. Both Mr McGrath and Mr Trunko note that, as per Chevron's Billing Guidelines, time spent by new personnel acquiring background knowledge and training activities is generally deemed to be non-billable.[3607]

2205. In the Tribunal's view, the element "Getting Up to Speed and Training" is imprecisely delineated and would appear to include a variety of disparate activities.[3608]

2206. First, "Getting Up to Speed and Training" would appear to include instances where a lawyer, already assigned to a matter, must acquaint themselves with a newly emerged aspect of the case. This form of preparation is necessary for the proper defence of a client and therefore amounts to a reasonable mitigation measure. The same rationale holds when the legal team is expanded and newly added lawyers require training to address aspects of a case that were not previously assigned to other lawyers.

3602 **RE-51**, Trunko Expert Report, para. 24.

3603 McGrath Expert Report, Appendix 19, para. 268.

3604 McGrath Expert Report, Appendix 19, para. 268; Track III Hearing Transcript, Day 10 (31 August 2022), pp. 2457-2462 (Trunko).

3605 McGrath Expert Report, Appendix 19, para. 268.

3606 Track III Hearing Transcript, Day 10 (31 August 2022), pp 2457-2459 (Trunko).

3607 **RE-51**, Trunko Expert Report, para. 24; McGrath Expert Report, Appendix 19, para. 266.

3608 *See generally* Track III Hearing Transcript, Day 10 (31 August 2022), pp. 2457-2462 (White/Trunko).

2207. Second, "Getting Up to Speed and Training" would appear to involve the onboarding of a new lawyer brought in to replace a departing colleague who possessed critical institutional knowledge of the case. In the Tribunal's view, the costs of such onboarding should not be compensated in this case, as they were not directed at mitigating the injury arising from the Respondent's Treaty breaches; rather, they are an incidental consequence of the continuing operation of a law firm. The Tribunal notes that this is the type of training costs for which Chevron's Guidelines foresee no compensation.[3609]

2208. Third, "Getting Up to Speed and Training" would also seem to involve training lawyers in the use of specialized software to perform case-related tasks. To the extent it is established that the use of such specialized software is required because of specific and unusual characteristics of an ongoing case, the Tribunal believes that the training in the use of the software would amount to a reasonable mitigation measure and would deserve compensation. By contrast, training in the use of software meant for general use within a law firm is an incidental consequence of the continuing operation of a law firm and should therefore not be compensated.

2209. For these reasons, the Tribunal considers that legal fees and expenses incurred in connection with "Getting Up to Speed and Training" should be excluded from compensation only insofar as they result from the routine, incidental functioning of a law firm, and not when such efforts are necessary to address a newly emerged issue requiring additional personnel, to engage with an unusual or characteristic aspect of the case, or to develop specialized expertise necessary for the effective defence of a client.

viii. Multiple Attendance at Events

2210. Another alleged deficiency identified by Mr Trunko in the billing practices of Claimants' counsel concerns multiple timekeepers recording time for attending the same event (*e.g.*,

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[3609] *See* **C-3236**, Chevron Corporation and Affiliate Guidelines for Outside Counsel (CVX-Track III-00017226—CVX-Track III-00017288), 2013, Section 2.1: ". . . Once staffing is agreed upon, changes will not be permitted without advance written approval of the Chevron Managing Attorney. When staffing changes are approved, Chevron will not pay for time spent by the new personnel acquiring basic or background knowledge or training required to support the matter."

hearings, meetings, conferences) or performing the same task (*e.g.*, reviewing the same document).[3610]

2211. As already addressed in Section VIII.G above, concerning the RICO Litigation, the Respondent points to the RICO trial as one example of billing for multiple attendance at events, where 15 to 20 timekeepers were present for each day of the hearing.[3611] According to Mr Trunko, several other damages categories were also affected by overstaffing and excessive attendance at events, such as the Donziger 1782, where the Claimants engaged 255 timekeepers, or the Gibraltar Proceedings, where 7 to 9 senior legal practitioners usually attended the hearings.[3612]

2212. As to duplicative activities – where multiple timekeepers billed to review the same pleading or document – Mr Trunko singles out again examples from the RICO Litigation, where nearly 60 timekeepers from Gibson Dunn and Jones Day billed for their review of the Second Circuit's Opinion of 26 January 2012.[3613] Mr Trunko also notes that 40 timekeepers from the same law firms reviewed Judge Kaplan's 14 May 2012 rulings.[3614] However, Mr Trunko clarifies that while he has identified billing for multiple attendance in Exhibits SM D-12, and SM D-13, and duplicative billing in Exhibits SM E-1 and SM E-2, he could not quantify all of the impacted entries due to their large volume.[3615]

2213. According to Mr Trunko, clients usually do not pay for more than one person to attend these events "unless there is a demonstrated need for multiple attendees."[3616] He notes that Chevron's Billing Guidelines state that the integration of trial teams should be approved in advance, including for any event that might require the attendance of more

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3610 **RE-51**, Trunko Expert Report, paras. 30, 35.

3611 **RE-51**, Trunko Expert Report, para. 31, **SM D-1**.

3612 *See* paras. 1831, 1932 above; Rejoinder, paras. 1554-1558; **RE-51**, Trunko Expert Report, paras. 31-34.

3613 **RE-51**, Trunko Expert Report, para. 35, citing **SM E-1**; Track III Hearing - Direct Presentation John L. Trunko (31 August 2022), slide 52.

3614 **RE-51**, Trunko Expert Report, para. 35, citing **SM E-2**; Track III Hearing - Direct Presentation John L. Trunko (31 August 2022), slide 52.

3615 Trunko Expert Report, paras. 34-35.

3616 **RE-51**, Trunko Expert Report, para. 30.

than one attorney.[3617] In sum, Mr Trunko considers that "hours that are excessive, redundant or otherwise unnecessary" should be excluded from compensation.[3618]

2214. During his cross examination, Mr Trunko accepted that the attendance of multiple timekeepers at the same event could be justified under the circumstances of a particular case, when there is a reason for the participation of "extra lawyers".[3619] The Claimants' witness and partner at Gibson & Dunn, Mr Peter Seley, added that for Gibson Dunn's work in Chevron matters, all timekeepers had to be approved, while if a partner wished to add a new timekeeper to a matter, they were required to explain "the rationale for a new timekeeper, their billing rate, and what their role would be."[3620]

2215. 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, including legal strategy, task allocation and the staffing of their legal teams.[3621] The Tribunal also considers that the question of how many timekeepers may reasonably be assigned to a given task is inherently case-specific and cannot be addressed in the abstract, much less in the context of a long-running, high-stakes litigation such as the Lago Agrio Litigation and related proceedings.

2216. However, if overstaffing on a particular task is established, the legal fees and expenses charged in connection with such tasks will in principle fail to meet the requirement of reasonableness for the compensation with incidental damages – and, in particular, the requirement that the amounts for which compensation is sought must be reasonable. This is due to the fact that overstaffing signals redundancy and inefficiency in case management, leading to inflated costs.

2217. Accordingly, the Tribunal considers that any legal fees and expenses charged for "Multiple Attendance[s] at Events", insofar as they were excessive in the circumstances,

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3617 **RE-51**, Trunko Expert Report, para. 30; **C-3236**, Chevron's Guidelines for Outside Counsel, 21 December 2012, p. 12, para. 4.5.

3618 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2334 (Trunko).

3619 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2406 (Trunko).

3620 Seley Witness Statement, para. 21.

3621 *See* para. 341 above.

were not reasonably incurred to mitigate the injury arising from the Respondent's Treaty breaches and thus warrant a reduction in the final amount of compensation.

ix. (CLA) Alleged Excessively Long Billing Days and Excessive Time / (RES) Excessively Long Billing Days and Excessive Time

2218. Mr Trunko also identified certain alleged inconsistencies concerning the number of hours billed per day by Claimants' counsel, such as instances where 16 to 24 hours were billed by one timekeeper per day, even on consecutive days.[3622] Mr Trunko questions the credibility of these entries with excessive time and concludes that "a series of consecutive long days with little time for sleep, commute, or personal life, suggests inflated time."[3623] Among other examples, Mr Trunko identified: (i) USD 6,238,965.58 billed for days exceeding 16 hours;[3624] (ii) USD 1,664,171.46 billed for days exceeding 18 hours;[3625] (iii) USD 396,910.25 billed for days exceeding 20 hours;[3626] (iv) USD 283,310.93 billed for "consecutive long days";[3627] and (v) USD 20,335.12 for a day exceeding 24 hours.[3628]

2219. Mr McGrath, in turn, asserts that only 10.5 % of the measurable claimed fees, amounting to USD 57.5 million, were billed daily for 12 hours or more.[3629] While Mr McGrath recognizes the existence of these entries, he also considers that billing for long days is "common and expected . . . especially in complex litigation proceedings."[3630] This is also supported by Mr Ryan, who stated in his expert report that "given the magnitude of the effort undertaken to defend against a massive fraud, a reasonable General Counsel would find that there are surprisingly few instances of excessive hours billed in a given day . . .".[3631] Similarly, Mr McGrath asserts that the billing information underlying the

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3622 **RE-51**, Trunko Expert Report, para. 37; Track III Hearing - Direct Presentation of John L. Trunko, 31 August 2022, slides 54-58.

3623 **RE-51**, Trunko Expert Report, para. 37.

3624 **RE-51**, Trunko Expert Report, **SM F-1**, p. 199.

3625 **RE-51**, Trunko Expert Report, **SM F-2**, p. 54.

3626 **RE-51**, Trunko Expert Report, **SM F-3**, p. 18.

3627 **RE-51**, Trunko Expert Report, **SM F-4**, p. 11.

3628 **RE-51**, Trunko Expert Report, **SM F-5**, p. 3.

3629 McGrath Expert Report, Appendix 24, para. 322.

3630 McGrath Expert Report, Appendix 24, para. 330.

3631 Expert Report of Joseph Ryan, para. 85(b).

Claimants' damages claims "exhibits a pattern of increased Claimed Amounts coinciding with increased activity in the underlying Damage Categories, often coinciding with key milestones and relevant dates".[3632]

2220. The Tribunal reiterates that it is prepared to grant a certain level of deference to the Claimants' decisions as to which specific mitigation measures to undertake in real time, including the amount of time individual lawyers should work in a given day.[3633] The Tribunal also considers that the question of how many hours may reasonably be billed in a single day is inherently case-specific and cannot be addressed in the abstract, much less in the context of a long-running, high-stakes litigation such as the Lago Agrio Litigation and other related proceedings.

2221. However, without reaching a definitive conclusion on the extent to which billing deficiencies have been established under the present heading, the Tribunal notes that some of the instances of "Excessively Long Billing Days and Excessive Time" described earlier in this Section – such as billing more than 16 hours per day for consecutive days, or billing more than 20 hours in one day – would suggest, on their face, inflated time. To the extent that similar instances exist in the pool of billing information supporting the Claimants' claim, and no explanation has been provided for such exceptional billed hours, the Tribunal considers them to be excessive. These may not be regarded as having been reasonably incurred to mitigate the injury arising from the Respondent's Treaty breaches, and thus warrant a reduction in the final amount of compensation.

x. (CLA) Alleged Double Billing Entries / (RES) Double Billing Entries

2222. In Exhibit SM G, Mr Trunko identifies several entries that appear to have been mistakenly billed twice by Claimants' counsel on the same days.[3634] Following an analysis identifying invoices containing identical data regarding timekeepers, dates, descriptions,

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3632 McGrath Expert Report, para. 26(4).

3633 *See* para. 341 above.

3634 **RE-51**, Trunko Expert Report, para. 38, **SM G**.

claimed amounts and vendors, Mr McGrath also acknowledges the existence of "potentially duplicate entries" totalling USD 167,600.[3635]

2223. Whether arising from error or intent, charging twice for the same substantive item constitutes an unjustifiable billing practice. Accordingly, any legal fees and expenses reflecting double billing would fail to meet the requirement of reasonableness for the compensation of incidental damages under international law and must be excluded from compensation. For the avoidance of doubt, the Tribunal confirms that the legitimate original charges, prior to the duplicate billing, remain eligible for compensation.

2. The Impact of the Trunko Elements on the Tribunal's Assessment of Incidental Damages

2224. In the preceding section, the Tribunal has addressed the extent to which the billing deficiencies identified as Trunko Elements, if established, would affect the final amount of compensation. In this section, the Tribunal shall determine the extent to which such billing deficiencies have in fact been established and the impact, if any, of such determination on the final amount of compensation.

2225. Before turning to such analysis, the Tribunal must recall that when addressing each of the 13 damages categories and corresponding components comprising legal fees and expenses earlier in this Award, it deferred its determination of multiple questions to this Section.[3636] The Tribunal's determinations in the preceding Section have disposed of several of those questions. In particular, the Tribunal has determined that all legal fees and expenses relating to "Activities relating to Media and Public Relations",[3637] "Government Relations (including but not limited to USTR)",[3638] and "Nondefense-Related Activities"[3639] must be excluded from compensation. Accordingly, all

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3635 McGrath Expert Report, Appendix 5, para. 69.

3636 *See* paras. 660, 662, 686, 695, 701, 713, 716, 726, 730, 770,830, 870, 871, 926, 928, 930, 947, 1039, 1124, 1484, 1486, 1492, 1495, 1498, 1500, 1504, 1832, 1933, 1979 above.

3637 *See* para. 2169 above.

3638 *See* para. 2176 above.

3639 *See* para. 2180 above.

components and other sets of legal fees and expenses corresponding to those activities still pending determination must also be excluded from compensation.[3640]

2226. In turn, the Tribunal notes that multiple other issues arising in connection with the Trunko Elements have already been addressed and decided earlier in this Award. For instance, in Section VIII.G above, concerning the RICO Litigation, the Tribunal decided to exclude all fees and costs incurred by the Claimants in relation to Chevron's ethics complaint against New York State Comptroller Mr Thomas DiNapoli.[3641] Work performed in connection with such ethics complaint was also identified by Mr Trunko as falling under the element "Government Relations (including but not limited to USTR)".[3642] Also by way of example, the Tribunal has declined to award any compensation for the damages category "General Defence", which encompasses legal fees and expenses corresponding, among others, to public relations work.[3643]

2227. In light of the foregoing, the Tribunal's ensuing analysis shall be confined to cross-cutting issues which remain unresolved.

2228. In order to evaluate the extent to which the multiple billing deficiencies categorised as Trunko Elements have been established by the Respondent, the Tribunal shall apply the methodology for the assessment of the Claimants' claims for incidental damages set out in Section VII.G.5 above.

2229. As there noted by the Tribunal, the Claimants are not required to prove their damages with absolute precision: it is sufficient for the Claimants to show that it is more likely than not that they suffered the damages they claim and that such damages are not speculative or uncertain. By the same token, the Tribunal is only required to exercise reasonable precision in the assessment of damages, particularly if achieving absolute

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3640 *See* paras. 660, 662, 713, 716, 726, 830, 870, 872(iv), 926, 928, 930, 947, 971, 974(iii), 974(iv), 974(v), 1039, 1040(v), 1124, 1125(iv) 1492, 1523(xi), 1979 above.

3641 *See* para. 1348 above.

3642 *See* para. 2172 above.

3643 *See* para. 1979 above.

precision would be disproportionately burdensome when compared with the margin of error.[3644]

2230. In this case, the Tribunal is also constrained to apply reasonable precision in assessing the extent to which the billing deficiencies identified as Trunko Elements are present in the billing information supporting the Claimants' damages claims. It notes in particular the following difficulties:

(i) In view of the large volume of billing data, the Parties' experts themselves were unable to identify in a precise manner all time entries affected by billing deficiencies.[3645]

(ii) As already explained, some of these billing deficiencies require a contextual analysis to determine whether the underlying legal fees and expenses should actually be excluded from compensation.[3646]

(iii) Multiple entries are simultaneously impacted by different billing deficiencies, generating a risk of double deduction. This overlap was acknowledged by Mr Trunko at the Track III Hearing, where he noted that some time entries might appear in more than one category of the billing deficiencies identified as Trunko Elements.[3647]

(iv) Earlier in this Award, the Tribunal has excluded from compensation multiple damages categories, components and other sets of legal fees and expenses. The Tribunal is not equipped to ascertain the precise extent to which the pool of billing information supporting the Claimants' surviving claims presents the billing deficiencies identified as Trunko Elements.

3644 *See* para. 548 above.

3645 *See*, *e.g.*, McGrath Expert Report, Appendix 5, para. 70: "I was unable to determine whether these time entries were in fact duplicative." **RE-51**, Trunko Expert Report, para. 34: "The identification of multiple attendance at conferences and meetings is made difficult in this case by time constraints and the sheer volume of the entries and the number of firms involved. Billing for multiple attendance at conferences and meetings is so pervasive that we were not able to quantify all of it."

3646 *See, e.g.*, paras. 2188, 2206-2208, 2215, 2220 above.

3647 Track III Hearing Transcript, Day 10 (31 August 2022), pp. 2410-2413 (Trunko). *See also* Track III Hearing – Claimants' Closing Presentation, Slide 162.

2231. In spite of these difficulties, the Tribunal is persuaded, upon a global review of the evidence in the record, that each of the billing deficiencies identified as Trunko Elements is present to varying extents in the billing data supporting the Claimants' damages claims relating to legal fees and expenses. It is also persuaded that the prevalence of such deficiencies is material. This circumstance introduces a degree of uncertainty as to the extent to which the Claimants' surviving claims for damages satisfy the requirements of causation and reasonableness for the compensation of incidental damages under international law. For the reasons stated in the preceding Section in respect of each of the Trunko Elements, the existence and pervasiveness of such deficiencies must result some form of reduction in the final amount of compensation.[3648]

2232. Mr Trunko proposes that the Tribunal apply a global percentage reduction to the final amount of compensation to account for these pervasive billing deficiencies.[3649] He states that U.S. case law supports an across-the-board percentage approach.[3650]

2233. For instance, Mr Trunko cites to *Benihana v. Benihana of Tokyo*, a case in which the SDNY addressed a request to recover the fees and costs the plaintiff reasonably incurred in attempting to enforce a permanent injunction.[3651] To determine a reasonable attorneys' fee, the court used the "lodestar approach, in which the court determines a 'presumptively reasonable fee' by calculating the number of hours reasonably expended by counsel on the litigation and multiplies that number of hours by a reasonable hourly rate."[3652] In turn, as part of the process of determining whether the hours expended by counsel were reasonable, the SDNY noted that "[w]here it is difficult to make line-item reductions that adjust for excessive billing, 'the court has discretion simply to deduct a reasonable percentage of the number of hours claimed as a practical means of trimming fat from a fee application.'"[3653] The SDNY also noted that "[f]ee reductions around 30% are . . .

3648 *See* paras. 2169, 2176, 2180, 2188, 2193, 2209, 2217, 2221 above.

3649 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2413 (Trunko).

3650 Track III Hearing - Direct Presentation of John L. Trunko (31 August 2022), Slide 60.

3651 **RE-61**, Second Leigh Expert Report, **MHL-263**, *Benihana, Inc. v. Benihana of Tokyo, LLC*, No. 15-cv-7428 (PAE), 2017 U.S. Dist. LEXIS 211047, p. 1.

3652 **RE-61**, Second Leigh Expert Report, **MHL-263**, *Benihana, Inc. v. Benihana of Tokyo, LLC*, No. 15-cv-7428 (PAE), 2017 U.S. Dist. LEXIS 211047, p. 6.

3653 **RE-61**, Second Leigh Expert Report, **MHL-263**, *Benihana, Inc. v. Benihana of Tokyo, LLC*, No. 15-cv-7428 (PAE), 2017 U.S. Dist. LEXIS 211047, p. 8.

common in this District to reflect considerations of whether work performed was necessary, leanly staffed, or properly billed."[3654] Other U.S. precedent on record supports the same approach when applying the lodestar method.[3655]

2234. The Tribunal takes care to note that the lodestar approach – originally devised to determine reasonable attorney's fees in U.S. litigation – is not applicable as such to the determination of the Claimants' claims for the reimbursement of legal fees and expenses as incidental damages. However, the Tribunal observes that the application by U.S. courts of percentage reductions to claims for attorney's fees is applied in a discretionary manner and is rooted, fundamentally, in considerations of practical necessity. In particular, percentage reductions appear to be applied when applying line-item reductions is difficult, or when the time entries under scrutiny are too numerous.

2235. As already explained, the Tribunal faces these same challenges in this case. In turn, given the impracticability of a line-by-line review of each claimed cost owing to the sheer volume of billing information, the Parties have agreed that the Tribunal may adopt a practical approach to the determination of damages.[3656]

2236. Accordingly, the Tribunal determines, in the exercise of its broad discretion on all evidentiary matters under Article 25(6) of the UNCITRAL Arbitration Rules, that it shall apply a 15% reduction to the global amount of compensation resulting from the application of the Tribunal's rulings on each of the 13 damages categories comprising legal fees and expenses.[3657]

3654 **RE-61**, Second Leigh Expert Report, **MHL-263**, *Benihana, Inc. v. Benihana of Tokyo, LLC*, No. 15-cv-7428 (PAE), 2017 U.S. Dist. LEXIS 211047, p. 20.

3655 *See*, *e.g.*, **R-2135**, *Charles v. Seinfeld*, S.D.N.Y. Case 1:18-cv-01196-AJN, D.E.162, Memorandum Opinion & Order (25 March 2022), p. 13: "The Court has broad authority to make across-the-board percentage cuts in hours, as opposed to an item-by-item approach, to arrive at the reasonable hours expended . . . Courts in this district have applied percentage reductions of up to fifty percent to address overbilling issues, driven by case and billing specifics"; **RE-61**, Second Leigh Expert Report, **MHL-265**, *Essex Builders Grp., Inc. v. Amerisure Ins. Co*, No. 6:04-cv-1838-Orl-22jGG, 2007 U.S. Dist. LEXIS 104118, p. 6: "The Court finds that the use of multiple law firms resulted in duplication of effort and excessive billings. As the redundant time entries are so numerous so as to make an itemization impractical, the Court will deduct an additional 30% from the fees sought."

3656 *See* paras. 533, 535, 546-547 above.

3657 *See* Section VIII.O.2 below.

2237. In ascertaining the appropriate percentage reduction to be applied, the Tribunal has taken into account, *inter alia*, the following factors:

(i) Mr Trunko identified a total of USD 159,262,215.40 in fees potentially affected by billing deficiencies, comprising approximately 20% of the total amount of legal fees and expenses for which the Claimants seek reimbursement (approximately USD 793 million).[3658] He did not suggest, however, that this entire amount should be excluded from compensation.[3659]

(ii) A significant portion of the amount identified in the preceding sub-paragraph concerns legal fees and expenses that have been addressed earlier in this Award – including, for example, the Cash Calls or the legal fees and expenses charged by Arslanian & Asociados in the context of the Argentina Enforcement Proceedings.[3660]

(iii) After identifying and addressing potential errors in Mr Trunko's analysis, including the potential duplication of invoices across multiple categories of billing deficiencies, the Claimants suggested that the maximum amount of fee entries that could be questioned if Mr Trunko's approach was applied properly amounts to approximately USD 56.2 million, *i.e.*, approximately 7% of the Claimants' overall claim for legal fees and expenses as damages.[3661]

(iv) As already explained, the onus is on the Claimants to prove every element of their damages claim.[3662] By failing to remove the uncertainty surrounding the existence of billing deficiencies in the evidence supporting their surviving incidental damages claims, they have also failed – to a certain extent – to meet their evidentiary burden.

(v) The 15% percentage reduction that shall be applied by the Tribunal does not only account for the existence of deficiencies in the billing records supporting the

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3658 Track III Hearing – Respondent's Closing Presentation (7 September 2022), Slide 191.

3659 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2334 (White/Trunko).

3660 *See* paras. 828, 2146 above.

3661 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3489-3494 (Kehoe); Track III Hearing – Claimants' Closing Presentation, Slide 162.

3662 *See* para. 548 above.

Claimants' surviving damages claims. It also incorporates a margin of error intended to account for potential inaccuracies or inconsistencies in the Tribunal's global assessment of incidental damages. The Tribunal considers this margin necessary in light of the complexity of the evaluations undertaken earlier in this Award and the practical difficulties involved in calculating the final amount of compensation for incidental damages using the Parties' Damages Models, as further explained below.[3663]

4. Conclusion on Cross-Cutting Elements

2238. For the foregoing reasons, the Tribunal:

(i) Determines that Chevron, the First Claimant, paid all legal fees and expenses underlying the Claimants' damages claims in this Arbitration;

(ii) Determines that Texaco Petroleum Company, the Second Claimant, is not entitled to any compensation in respect of the Claimants' claims for damages relating to legal fees and expenses;

(iii) Determines that, when inserting a cut-off date in the Parties' Damages Models for the compensation of a particular category or component of damages, the Tribunal shall (1) set the Parties' Damages Models to apply date range limitations based on the date of the underlying invoices; and (2) set a date 30 days subsequent to the actual cut-off date to account for the delay between the rendering of a service and the date on which the corresponding invoice was issued;

(iv) Rejects the Respondent's objection in respect of the element "King & Spalding/Three Crowns Amounts Claimed as Damages";

(v) Excludes from compensation (1) 100% of the legal fees and expenses corresponding to services rendered by the Ecuador Legal Team before 14 February 2011; and (2) 50% the legal fees and expenses corresponding to services rendered by the Ecuador Legal Team after 14 February 2011;

3663 *See* Section VIII.O below.

(vi) Excludes from compensation all legal fees and expenses corresponding to components and other matters identified in paragraph 2225 above; and

(vii) Determines that it shall apply a 15% percentage reduction to the global amount of compensation resulting from the application of the Tribunal's rulings on each of the 13 damages categories comprising legal fees and expenses.

* * *

O. GLOBAL CONCLUSIONS ON THE CLAIMANTS' DAMAGES CLAIMS CONCERNING LEGAL FEES AND EXPENSES

2239. Sections VIII.A-VIII.M above set out the Tribunal's conclusions on the first and second steps of its methodology for the assessment of incidental damages in this case described in Section VII.G.5 above, namely, its determinations on whether each of the 13 damages categories comprising fees and expenses at issue in Track III, as well as the components and other issues falling thereunder, meet the requirements of causation and reasonableness for the compensation of incidental damages under international law. In turn, Section VIII.N above concerns the third step of the Tribunal's methodology: its assessment and determinations on certain cross-cutting elements impacting multiple categories of incidental damages.

2240. This Section addresses the fourth and final step of the Tribunal's methodology for the assessment of incidental damages in this case. Here, the Tribunal shall convert its earlier substantive determinations on the 13 damages categories concerning legal fees and expenses, as well as on cross-cutting elements impacting multiple categories, into a quantitative result, representing the principal amount of compensation due to Chevron in respect of those damages categories.

2241. In performing this assessment, the Tribunal shall draw guidance from the Damages Models provided by the Parties and their experts. As already explained, by its Procedural Order No. 83 the Tribunal directed the Parties to submit a joint damages model for the calculation of damages and interest. Among other things, the Parties were requested to include certain "switches" in the joint model to enable the Tribunal to set parameters for the calculation of the amount of compensation.[3664]

2242. Ultimately, however, the Parties were unable to agree upon a joint model. Each side submitted instead a model prepared on the basis of the Tribunal's instructions set out in Procedural Order No. 83, with accompanying disclaimers and video tutorials (as previously defined, the "**Claimants' Damages Model**" and the "**Respondent's Damages Model**").[3665] As foreseen under paragraph 5 of Procedural Order No. 83, starting on

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3664 *See* para. 543 above.

3665 *See* para. 544 above.

2 November 2022 the Parties filed monthly updates of their Damages Models. The last versions of the Damages Models were filed by the Claimants on 14 October 2025 and by the Respondent on 15 October 2025. In conducting its analysis, the Tribunal shall take into account the latest version of each side's Damages Model.

2243. The Tribunal will proceed with its calculation as follows: first, in Section 1 below, the Tribunal will, for ease of reference, restate its determinations for each of the 13 damages categories and cross-cutting elements addressed in Sections VIII.A-VIII.N above. In Section 2, the Tribunal will incorporate each of these determinations into the Damages Models in order to calculate Chevron's damages. In doing so, the Tribunal will consider the Parties' submissions on the Damages Models, as well as the requirements set forth in Procedural Order No. 83. Lastly, in Section VIII.O.3, the Tribunal will summarize its calculations, address the existing discrepancies between the methodology and output of the Damages Models, and determine the final amount of compensation due in connection with the Claimants' damages claims concerning legal fees and expenses.

2244. For the avoidance of doubt, the Tribunal recalls that its determinations in this Section do not concern the Claimants' claims in respect of the damages categories Embargo Losses in Argentina, Intellectual Property Losses in Ecuador, and Moral Damages. Such categories are addressed separately in Section IX below. In turn, the interest applicable to the principal amount of compensation due to Chevron is determined in Section X below.

1. The Tribunal's Earlier Determinations on the Claimants' Damages Claims concerning Legal Fees and Expenses

(a) Conclusions on Lago Agrio Litigation

2245. Paragraph 739 above provides:

> For the foregoing reasons, the Tribunal:
>
> ***(i)*** Declines to exclude from compensation the Lago Agrio Litigation category of damages as a whole;
>
> ***(ii)*** Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to services rendered before 14 February 2011;
>
> ***(iii)*** Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to

services provided by the firm Benjamin Ortiz Brennan, and otherwise defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "PR Firms (Creative Response Concepts; Benjamin Ortiz Brennan)", as well as the legal fees and expenses identified in paragraph 661 above, to its analysis of cross-cutting elements set out in Section VIII.N below;

(iv) Excludes from compensation 50% of the legal fees and expenses charged by all relevant experts and vendors after 14 February 2011 (GSI Environmental Inc.; AMEC Geomatrix; CH2M Hill; Cardno Entrix; URS Corporation; Newfields Companies LLC; Ellis GeoSpatial; Exponent, Inc.; Gus R Lesnevich Inc; RICOH USA Inc/Formerly IKON; Autonomy – Introspect; Integrated Science & Technology, Inc.; Harris Corp Government Communication System; Di Paolo Consulting; Fernando Morales; Hargis + Associates, Inc.; Jan Paulsson (billed through Freshfields); Adrian Briggs; Audio Forensic Center; Aninat Schwencke y Cia, Ltda; Pedro J. Alvarez; and Guthrie T. Abbott);

(v) Excludes from compensation 60% of the legal fees and expenses corresponding to the component "Lago Agrio WestLaw/Lexis charges";

(vi) Defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "(CLA) Lago Agrio fees and costs allegedly relating to administrative and clerical activities / (RES) Lago Agrio fees and costs relating to administrative and clerical activities" to its analysis of cross-cutting elements set out in Section VIII.N below;

(vii) Defers its determination regarding the compensation of the legal fees and expenses charged by the "Ecuador Legal Team" to its analysis of cross-cutting elements set out in Section VIII.N below;

(viii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to services provided by the firms Rivero Mestre LLP, Gardere Wynne Sewell LLP, Holland & Knight, Boies Schiller & Flexner, Covington & Burling, and Stern Kilcullen & Rufolo;

(ix) Defers its determination regarding the compensation of the legal fees and expenses identified in paragraphs 695, 712, 714, 725, and 727 above (except as provided in paragraphs 715 and 729 above) to its analysis of cross-cutting elements set out in Section VIII.N below;

(x) Defers its determination regarding the compensation of the legal fees and expenses identified in paragraph 715 above to its analysis of the Criminal Proceedings category of damages in Section VIII.K below;

(xi) Excludes from compensation USD 8,697.07 of the fees incurred by the Claimants in connection with the Lago Agrio Litigation corresponding to services provided by Dr Santiago Andrade Ubidia;

(xii) On account of the Tribunal's conclusions regarding the but-for scenario, set out in paragraphs 731-738 above, deducts from the global amount of compensation to be awarded to the Claimants for damages arising from the Respondent's Treaty breaches an amount equal to (1) 60% of the total fees

and expenses charged by the "Ecuador Legal Team" after 14 February 2011; (2) 15% of the legal fees and expenses incurred by the Claimants after 14 February 2011 corresponding to services provided by Jones Day; and (3) 35% of the legal fees and expenses charged, after 14 February 2011, by GSI Environmental Inc.; AMEC Geomatrix; CH2M Hill; Cardno Entrix; URS Corporation; Newfields Companies LLC; Ellis GeoSpatial; Exponent, Inc.; Gus R Lesnevich Inc; RICOH USA Inc/Formerly IKON; Autonomy – Introspect; Integrated Science & Technology, Inc.; Harris Corp Government Communication System; Di Paolo Consulting; Fernando Morales; Hargis + Associates, Inc.; Jan Paulsson (billed through Freshfields); Adrian Briggs; Audio Forensic Center; Aninat Schwencke y Cia, Ltda; Pedro J. Alvarez; and Guthrie T. Abbott;

(xiii) Defers its final determination on the reasonableness of the amounts claimed by the Claimants in connection with the Lago Agrio Litigation, to the extent not already addressed in this Section, to its analysis of cross-cutting elements set out in Section VIII.N below; and

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

(b) Conclusions on Ecuador Enforcement Proceedings

2246. Paragraph 778 above provides:

For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Ecuador Enforcement Proceedings category of damages as a whole;

(ii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Ecuador Enforcement Proceedings corresponding to services rendered before 14 February 2011;

(iii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Ecuador Enforcement Proceedings corresponding to services provided by the firms Holland & Knight, Gardere Wynne Sewell LLP, Gibson, Dunn & Crutcher LLP, Boies Schiller & Flexner LLP, Mateha Associates Corp., Stern Kilcullen & Rufolo LLC and Asesorias Bofill Escobar;

(iv) Defers its determination regarding the compensation of the legal fees and expenses charged by the "Ecuador Legal Team" to its analysis of cross-cutting elements set out in Section VIII.N below;

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

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

(c) Conclusions on Argentina Enforcement Proceedings

2247. Paragraph 872 above provides:

For the foregoing reasons, the Tribunal:

(i) Declines to exclude from compensation the Argentina Enforcement Proceedings category of damages as a whole;

(ii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Argentina Enforcement Proceedings corresponding to services rendered before 14 February 2011;

(iii) Excludes from compensation 95% of the fees charged by Arslanian & Asociados;

(iv) Defers its determination regarding the compensation of the legal fees and expenses corresponding to the component "(CLA) Fees solely related to media and public relations / (RES) Fees for media and public relations" to its analysis of cross-cutting elements set out in Section VIII.N below; and

(v) Excludes from compensation 66% of the legal fees and expenses corresponding to the component "(CLA) Fees incurred solely for monitoring service, dockets, and service refusal activities / (RES) Fees for monitoring service, dockets, and service refusal activities";

(vi) Excludes from compensation 100% of the legal fees and expenses corresponding to the component "(CLA) Fees incurred solely in connection with the challenge to the LAPs' *in forma pauperis* status / (RES) Fees incurred in connection with the challenge to the LAPs' *in forma pauperis* status";

(vii) Excludes from compensation 100% of the legal fees and expenses corresponding to the component "Fees incurred in carrying out activities alleged to be prohibited under Argentine law";

(viii) Excludes from compensation 100% of the legal fees and expenses incurred by the Claimants in connection with the Argentina Enforcement Proceedings corresponding to services provided by the firms King & Spalding, Boies Schiller & Flexner LLP, Asesorias Bofill Escobar, Stern Kilcullen & Rufolo LLC, Gardere Wynne Sewell LLP, Rivero Mestre LLP, Holland & Knight, and Covington & Burling LLP;

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

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

(d) Conclusions on Brazil Recognition Proceedings

2248. Paragraph 974 above provides:

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;

(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; 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.

(e) Conclusions on Canada Enforcement Proceedings

2249. Paragraph 1040 above provides:

> 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 [or (*i.e.*, USD 209,734.30)]);[3666]
>
> ***(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 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; 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.

(f) Conclusions on Costs of Planning Against Potential Enforcement in Other Jurisdictions

2250. Paragraph 1125 above provides:

> 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;

[3666] Conversion made using ofx.com. Currency conversions made as of date of relevant orders by the Canadian courts.

(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 this Section, to its analysis of cross-cutting elements set out in Section VIII.N below; 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.

(g) Conclusions on RICO Litigation

2251. Paragraph 1523 above provides:

> For the foregoing reasons, the Tribunal, subject to co-arbitrator Horacio A. Grigera Naon's separate dissenting opinion:
>
> ***(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; 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.

(h) Conclusions on Section 1782 Proceedings

2252. Paragraph 1833 above provides:

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 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; 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.

(i) Conclusions on Gibraltar Proceedings

2253. Paragraph 1936 above provides:

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; 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.

(j) Conclusions on General Defence

2254. Paragraph 1980 above provides:

> In sum, for the above reasons, the Tribunal rejects the Claimants' damages claim in respect of the General Defence category of damages.

(k) Conclusions on Criminal Proceedings

2255. Paragraph 2001 above provides:

> In sum, for the above reasons, the Tribunal rejects the Claimants' damages claim in respect of the Criminal Proceedings.

(l) Conclusions on Dutch Set-Aside Proceedings

2256. Paragraph 2030 above provides:

> Accordingly, for the foregoing reasons, the Tribunal rejects the Claimants' damages claim in respect of the Dutch Set-Aside Proceedings.

(m) Conclusions on Treaty Arbitration Costs Incurred by Non-Counsel of Record

2257. Paragraph 2052 above provides:

> In sum, for the above reasons, the Tribunal (i) rejects the Claimants' damages claim in respect of the category "Treaty Arbitration Costs Incurred by Non-Counsel of Record"; and (ii) defers to Track IV its determination of the Claimants' costs claim under Articles 38 and 40 of the UNCITRAL Rules in respect of the legal fees and expenses falling under this same category.

(n) Conclusions on Cross-Cutting Elements

2258. Paragraph 2238 above provides:

> For the foregoing reasons, the Tribunal:
>
> ***(i)*** Determines that Chevron, the First Claimant, paid all legal fees and expenses underlying the Claimants' damages claims in this Arbitration;
>
> ***(ii)*** Determines that Texaco Petroleum Company, the Second Claimant, is not entitled to any compensation in respect of the Claimants' claims for damages relating to legal fees and expenses;
>
> ***(iii)*** Determines that, when inserting a cut-off date in the Parties' Damages Models for the compensation of a particular category or component of damages, the Tribunal shall (1) set the Parties' Damages Models to apply date range limitations based on the date of the underlying invoices; and (2) set a date 30 days subsequent to the actual cut-off date to account for the delay between the rendering of a service and the date on which the corresponding invoice was issued;
>
> ***(iv)*** Rejects the Respondent's objection in respect of the element "King & Spalding/Three Crowns Amounts Claimed as Damages";
>
> ***(v)*** Excludes from compensation (1) all legal fees and expenses corresponding to services rendered by the Ecuador Legal Team before 14 February 2011; and (2) 50% the legal fees and expenses corresponding to services rendered by the Ecuador Legal Team after 14 February 2011;
>
> ***(vi)*** Excludes from compensation all legal fees and expenses correspondent to components and other matters identified in paragraph 2225 above; and

(vii) Determines that it shall apply a 15% percentage reduction to the global amount of compensation resulting from the application of the Tribunal's rulings on each of the 13 damages categories comprising legal fees and expenses.

2. The Parties' Damages Models

2259. In the preceding Section, the Tribunal has laid out the conclusions it must incorporate into the Parties' respective Damages Models. In this Section, the Tribunal provides an account of how it has incorporated such conclusions into the Parties' Damages Models.

2260. At the outset, the Tribunal observes that both Parties' Damages Models, in large part, align with the Tribunal's directions in Procedural Order No. 83. However, neither Damages Model includes all the features necessary for an exact reflection of the Tribunal's determinations.[3667] In addition, the Tribunal has taken due note of all of the Parties' respective criticisms and assertions regarding the extent to which the opposing Party's model is deficient.[3668]

2261. The Tribunal discusses below the limitations it has encountered in its application of its determinations to the Damages Models, taking note of the Parties' objections where appropriate. In doing so, the Tribunal does not address objections that are ultimately irrelevant to the Tribunal's ultimate calculations (*e.g.*, an objection to a switch that is not required to incorporate the Tribunal's conclusions into the Damages Models).

2262. As explained above in paragraph 2237(v), the existing shortcomings in the Damages Models, as well as the practical difficulties encountered by the Tribunal when incorporating its conclusions into the Damages Models, are some of the factors underlying the Tribunal's determination of a margin of error for its damages calculations. In the Tribunal's view, such shortcomings are inevitable in an exercise of this complexity and in no way render the Damages Models unfit for purpose. To this point, the Tribunal recalls, as stated in paragraph 570 above, that it is only required to exercise *reasonable* precision in the assessment of damages, particularly if achieving absolute precision would

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3667 *See, e.g.*, Letter from the Respondent to the Tribunal dated 18 November 2022, para. 12.

3668 *See* Letter from the Claimants to the Tribunal dated 18 November 2022; Letter from the Respondent to the Tribunal dated 24 November 2022.

be disproportionately burdensome. In the Tribunal's view, the Damages Models are adequate to achieve such reasonable precision.

(a) General Matters

2263. The Tribunal has incorporated its determinations into the Damages Models in the order in which it has considered them in this Award. Accordingly, to the extent applicable, the Tribunal has begun by incorporating its conclusions on General Matters and Legal Standards, as set out in Section VII above.

2264. First, the Tribunal has determined in paragraph 397 above that all legal fees and expenses claimed by the Claimants as damages before 14 February 2011 must be excluded from compensation. The Tribunal has already explained how it shall input its determinations relating to the compensable date range in paragraph 2085. The Tribunal has set first the Damages Models to apply date range limitations based on the date of the invoices supporting the Claimants' claims. Thereafter, the Tribunal has fixed 16 March 2011 – 30 days after the critical date of 14 February 2011 – as the commencement date for the calculation of damages.

2265. The Tribunal has also set the Respondent's Damages Model to include all invoices addressed to Chevron's subsidiaries.[3669] Lastly, the Tribunal has adjusted the Tax Switch to reflect its rejection of the Respondent's request that the Tribunal reduce its damages award to account for the impact of tax deductions.[3670]

(b) Specific Categories

2266. Second, the Tribunal has incorporated its category-level conclusions into the Damages Models – that is, its determinations regarding the extent to which individual damages categories, when considered as a whole, warrant limitation or exclusion from further analysis.[3671] In doing so, it has faced, among others, the following difficulties.

[3669] *See* para. 444 above. The Claimants' Damages Model provides no switch to remove amounts corresponding to invoices addressed to Chevron's subsidiaries.

[3670] *See* para. 519 above. This switch is termed "Nominal Losses Adjusted for Tax Rates" in the Claimants' Damages Model and "Impact of Tax Deductions" in the Respondent's Damages Model.

[3671] *See* para. 554 above.

2267. Paragraphs 4(i) and (ii) of Procedural Order No. 83 direct that the joint model include both:

> (i) a switch to apply a nominal amount discount to any given category of damages;
>
> (ii) a switch to apply a percentage discount to any given category of damages.[3672]

2268. The Claimants' Damages Model, however, includes a single switch that can apply either a nominal discount or a percentage discount to any given category of damages, but not both. In particular, the Claimants' Damages Model does not permit the Tribunal to apply an 85% reduction to the legal fees and expenses claimed in connection with the RICO Litigation and, in addition, exclude from compensation certain costs collected by Chevron in the same litigation.[3673] The Claimants explain that they "do not understand that the Tribunal intends to make both a nominal adjustment and a percentage adjustment to the same Category".[3674] The Claimants object to the simultaneous operation of nominal and percentage discount switches within one category, asserting that "such a function would create the potential for confusion and double-counting of adjustments and would contribute to the instability of any Joint Model".[3675]

2269. The Tribunal does not consider that there is a significant risk of confusion and/or double counting, or that any possible confusion and instability of a model could outweigh the need for separate nominal and percentage discount switches. Regarding double-counting, the Tribunal's view is that to the extent that this concern might exist it can be, and is, accounted for as part of the margin of error discussed in paragraph 2237(v) above. As for the potential instability of the model, the Tribunal notes that the Respondent's Damages Model is functional while including both switches.

2270. The Tribunal has thus been required to apply workarounds where it applies both nominal and percentage discounts at the category level. The Tribunal further notes that the Respondent's Damages Model operates its switches in the order presented by paragraphs 4(i) and (ii) of Procedural Order No. 83; namely, the Model applies a nominal discount

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3672 Procedural Order No. 83, 14 October 2022, paras. 4(i)-(ii).

3673 Letter from the Claimants to the Tribunal dated 2 November 2022, p. 6.

3674 Letter from the Claimants to the Tribunal dated 2 November 2022, p. 6.

3675 Letter from the Claimants to the Tribunal dated 2 November 2022, p. 6.

to categories before a percentage discount.[3676] Accordingly, where the Tribunal has determined to apply a percentage discount first, followed by a nominal discount, it has employed alternative methods of achieving this result, as detailed below in paragraph 2291.

(c) Components

2271. Third, the Tribunal has incorporated its determinations regarding individual components into the Damages Models.

2272. The Parties' Damages Models differ in their inclusion of components. In the Claimants' view, the Respondent's Damages Model includes 14 unnecessarily duplicative component switches which could instead be implemented through nominal or percentage reductions at the category level. The Claimants contend that the inclusion of these component switches violates the Tribunal's instruction in Procedural Order No. 83 that the joint model not include duplicative switches. Accordingly, the Claimants' Damages Model does not include these 14 component switches.[3677]

2273. The Tribunal recalls its direction in paragraph 4(vii) of Procedural Order No. 83 that the joint model should include:

> switches that would permit the Tribunal, insofar as possible, to itemize and apply percentage discounts corresponding to the principal amounts of each additional discrete component or element that is contested by the Respondent.[3678]

2274. The Tribunal further recalls its direction in its letter to the Parties dated 14 October 2022 that:

> [s]pecifically, the Joint Model should not include multiple switches where one switch suffices to achieve the same result, and the Joint Model should not include, as the Respondent appears to suggest, a discrete labeled switch for each and every discrete

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[3676] Respondent's Proposed Model Instruction Manual, 2 November 2022, p. 8.

[3677] Letter from Claimant dated 18 November 2022, pp. 11-12. For example, in respect of the component "Argentina Fees for Monitoring service, dockets, and service refusal activities" under the Argentina Enforcement Proceedings damages category, the Claimants assert that an "adjustment can be implemented using the existing functionality to make nominal or percentage reductions to the Argentina Category."

[3678] Procedural Order No. 83, 14 October 2022, para. 4(vii). For example, the Tribunal has decided to apply a percentage discount in respect of the component "(C) Fees incurred solely for monitoring service, dockets, and service refusal activities / (R) Fees for monitoring service, dockets, and service refusal activities" under the Argentina Enforcement Proceedings damages category (*see* para. 2247(v) above).

> component and element that is contested by the Respondent, unless indispensably required.[3679]

2275. While mindful of its instruction to avoid duplicative switches, the Tribunal disagrees that component-level changes can in every instance be effected by making additional "nominal or percentage" reductions at the category level, as suggested by the Claimants. The Tribunal notes that the components, as defined in Procedural Order No. 83, "refer to distinguishable subcategories of costs or actions . . . for which damages are claimed."[3680] In the Tribunal's view, to adjust multiple "distinguishable subcategories", as well as the category itself, through a single switch, would invite confusion, especially in the case of the Claimants' Damages Model, which does not allow for both nominal and percentage reductions for a single category.[3681] In addition, the Tribunal notes that the Claimants have included in their Damages Model some, but not all, of the components identified by the Parties in their agreed lists of components.[3682] It is unclear to the Tribunal why the Claimants considered that certain components merit their own switches, but the other components excluded in the Claimants' Model do not.

2276. Accordingly, where the Tribunal has determined to exclude from compensation or apply reductions to a component which is not found in either Damages Model, it has ascertained the value of such component for the relevant time frame from other materials in the record. Where this proved to be impracticable, the Tribunal incorporated into the Claimants' Damages Model the nominal value assigned to the same component in the Respondent's Damages Model.[3683]

3679 Letter from the Tribunal to the Parties dated 22 October 2022, p. 3. For example, when commenting on a draft of Procedural Order No. 83 circulated by the Tribunal on 23 September 2022, the Claimants stated: "For example, Respondent proffers at least 10 switches based on various RICO sub-topics like "Count IX," "Second Amended Complaint," and "Withdrawn Claims for Money Damages," that can be addressed by a single, neutrally worded nominal or percentage reduction switch allowing the Tribunal to adjust the damages awarded for RICO. This capability is described in Paragraph Nos. 4(i-ii) of draft Procedural Order No. 83, which call for switches that would allow the Tribunal to award 100% of the damages claimed in a particular category, apply discounts in any given category, or eliminate a category altogether." *See* Letter from the Claimants to the Tribunal dated 4 October 2022, p. 3.

3680 Procedural Order No. 83, para. 8(ii).

3681 *See* para. 2268 above.

3682 Letter from the Respondent to the Tribunal dated 21 October 2022; Letter from the Claimants to the Tribunal dated 22 October 2022, Attachment A.

3683 *See* para. 2291 below.

(d) Vendors

2277. Fourth, the Tribunal has incorporated into the Damages Models its determinations regarding exclusions or reductions pertaining to individual vendors. Both Parties' Damages Models include a worksheet listing vendors, for which nominal or percentage reductions may be made.

2278. The Tribunal observes that the Parties' Damages Models omit a number of vendors. In particular, the Claimants' Damages Model omits the following 10 vendors:

(i) Asesorias Bofill Escobar;

(ii) Mateha Associates Corp.;

(iii) Dr Santiago Andrade Ubidia;

(iv) Hargis + Associates;

(v) Adrian Briggs;

(vi) Audio Forensic Center;

(vii) Aninat Schwencke y Cia, Ltda;

(viii) Pedro J. Alvarez;

(ix) Guthrie T. Abbott; and

(x) Jan Paulsson (billed through Freshfields) (under Lago Agrio Litigation).[3684]

2279. In turn, the Respondent's vendor list omits eight vendors:

(i) Mateha Associates Corp.;

(ii) Hargis + Associates;

[3684] The Claimants' Damages Model lists Jan Paulsson (billed through Freshfields) under the BIT category, but omits him from the Lago Agrio Litigation category.

(iii) Audio Forensic Center;

(iv) Aninat Schwencke y Cia, Ltda;

(v) Pedro J. Alvarez;

(vi) Guthrie T. Abbott;

(vii) Dr Santiago Andrade Ubidia; and

(viii) Asesorias Bofill Escobar (from the Argentina Enforcement Proceedings and Brazil Recognition Proceedings categories).[3685]

2280. The Tribunal recalls that paragraph 4(v) of Procedural Order No. 83 directed that the joint model include a switch to "include/exclude and/or apply nominal amount or percentage discounts to *any* particular law firm or vendor".[3686] The Tribunal notes that the Claimants have submitted costs claimed for the aforementioned vendors in their Updated Appendix 2 to their Reply,[3687] and each vendor is listed in the exhibits accompanying the expert report of Mr Trunko, the Respondent's fee auditing expert.[3688] Accordingly, the Tribunal considers that all of these law firms and vendors should have been included in the Damages Models.

2281. As such, the Tribunal is left with only two sources from which to measure damages relating to the omitted vendors: the Claimants' Updated Appendix 2 and Mr Trunko's Expert Report. However, neither source is fully fit for purpose. The Claimants' Updated Appendix 2 provides a list of fees by category and month.[3689] Mr Trunko's Expert Report includes exhibits providing the total fees and expenses for each vendor organized by category, but the data does not include a breakdown of vendor by date. In neither document does the data allow for adjustments, nor do the sums reference the underlying

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[3685] The Respondent's Damages Model only lists Asesorias Bofill Escobar as a vendor under the RICO category.

[3686] Emphasis by the Tribunal.

[3687] *See* para. 2278 above.

[3688] Reply, Updated Appendix 2; **RE-51**, Trunko Expert Report, **SM J-1 – SM J-13**.

[3689] Reply, Updated Appendix 2.

invoices.[3690] In the circumstances, these sources do not allow the Tribunal to calculate the legal fees and expenses of the vendors omitted from the Damages Models, nor to adjust the claimed amounts in accordance with the Tribunal's determinations in Sections VIII.A-VIII.M above – such as date range reductions – or to apply other adjustments at the category and element levels. Furthermore, as these vendors are not included in the Damages Models, even if the Tribunal could identify the legal fees and expenses each has charged, a further step would be required to adjust the Damages Models' calculations before calculating interest for damages related to these vendors.

2282. As a consequence of these omissions, the Tribunal has instead chosen to factor these reductions for omitted vendors as part of its determination on a 15% global reduction to the Claimants' damages claim for legal fees and expenses – in other words, these shortcomings are one of the multiple reasons justifying the application of a 15% global reduction.[3691]

2283. In addition, the Claimants object to the Respondent's inclusion in their Damages Model of the following eight passthrough vendors:

(i) Bullard, Falla & Ezcurra (under RICO Litigation);

(ii) Anil Shivdasani (under RICO Litigation);

(iii) Daniel Cooperman (under RICO Litigation);

(iv) Jan Paulsson (under RICO Litigation);

(v) Adrian Briggs (under Lago Agrio Litigation);

(vi) Jan Paulsson [Jones Day] (under Lago Agrio Litigation);

(vii) Asesorias Bofill Escobar (under RICO Litigation); and

(viii) Jan Paulsson [Gibson Dunn] (under Lago Agrio Litigation).

3690 Reply, Updated Appendix 2; **RE-51**, Trunko Expert Report, **SM J-1 – SM J-13**.

3691 *See* para. 2262 above.

2284. The Claimants assert that the Respondent "did not identify and quantify these invoices before or during the Track III Hearing".[3692] Thus, they object that these switches rely on new analysis performed by the Respondent after the conclusion of the Track III Hearing and amount to introduction of new factual or expert evidence in violation of Procedural Order No. 83.[3693]

2285. The Tribunal disagrees with the Claimants. Mr Trunko quantified each of these vendor's fees and expenses in his expert report and exhibits.[3694] The total amounts identified by Mr Trunko for each vendor within each category match the amounts represented in the Respondent's Damages Model, with the sole exception of one vendor.[3695] The Tribunal considers that this discrepancy is also accounted for as part of the margin of error discussed in paragraph 2262 above. Otherwise, the Tribunal finds no reason to exclude from consideration the invoices of these pass-through vendors.

(e) Elements

2286. Lastly, the Tribunal has incorporated its determinations relating to cross-cutting elements, where applicable.[3696] In particular, the Tribunal has applied a 15% global reduction at this stage.[3697]

2287. The Claimants object to the Respondent's inclusion of a "global reduction" switch in its Damages Model, which they state applies an "across-the-board reduction to Claimants' damages" on top of reductions at the category, component, and element levels.[3698] They assert that this reduction "would not be tied to any specific argument or defense that

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3692 Letter from the Claimants to the Tribunal dated 18 November 2022, p. 7.

3693 Letter from the Claimants to the Tribunal dated 18 November 2022, p. 7.

3694 Jan Paulsson's costs and fees were not divided by law firm. *See* **RE-51**, Trunko Expert Report, **SM J-1** (RICO), **SM J-2** (Lago Agrio Litigation).

3695 Mr Trunko's breakdown represents that the Claimants claim USD 77,139.46 for Adrian Briggs work in the Lago Agrio Litigation. **RE-51**, Trunko Expert Report, **SM J-2**, p. 2. However, the Respondent's Damages Model identifies USD 106,546.15 claimed for Adrian Briggs as a passthrough vendor for the Lago Agrio Litigation. Respondent's Damages Model, Tab "Vendor Reductions", cell H131 (when Commencement Date is set to 1 January 2004). Mr Trunko does not breakdown Mr Paulsson's costs and fees by law firm. **RE-51**, Trunko Expert Report, **SM J-2**, p. 2.

3696 *See* para. 2238 above.

3697 *See* para. 2237 above.

3698 Letter from the Claimants to the Tribunal dated 2 November 2022, pp. 5-6.

Ecuador has raised", is inconsistent with Procedural Order No. 83, contributes to instability in the Model, and was not identified in the Respondent's 21 October 2022 list of components and elements.[3699] Accordingly, the Claimants' Damages Model does not provide for a "global reduction" switch.[3700]

2288. For its part, the Respondent states that "Mr. Trunko opined that pervasive billing issues may result in a global reduction on all claimed fees" and, accordingly, a global reduction switch is required.[3701]

2289. The Tribunal has addressed Mr Trunko's proposed global reduction in paragraphs 2232 to 2237 above. Consistent with such determinations, the Tribunal considers a global reduction switch necessary and responsive to the directions found in paragraphs 4(vi) and (vii) of Procedural Order No. 83, pursuant to which the joint model was meant to allow percentage reductions based the billing irregularities Mr Trunko identified as elements, as well as other elements identified by the Respondent. As already explained, at the Track III Hearing Mr Trunko opined that the elements he identified support the conclusion that a percentage reduction to the total amount of compensation due to the Claimants is warranted.[3702] A global reduction switch is thus required to implement the core conclusion of Mr Trunko's analysis. The Tribunal has thus applied this 15% global reduction in the Respondent's Damages Model.

3. Conclusion

2290. Having analysed the Parties' Damages Models in the previous section, the Tribunal here summarises the principal ways in which the Damages Models deviate from the directions provided in Procedural Order No. 83:

(i) The Claimants' Model (i) does not permit for both nominal and percentage reductions at the category level; (ii) does not include 14 component switches;

3699 Letter from the Claimants to the Tribunal dated 2 November 2022, p. 6.

3700 Claimants' Damages Model.

3701 Letter from the Respondent to the Tribunal dated 19 November 2022, p. 23.

3702 Track III Hearing Transcript, Day 10 (31 August 2022), p. 2344 (Trunko).

(iii) omits 10 vendors; and (iv) does not allow for the application of a global reduction.

(ii) The Respondent's Model omits eight vendors.

2291. The Tribunal has incorporated its determinations in both Damages Models to the extent allowed by each Damages Model. To do so in the Claimants' Damages Model requires, *inter alia*, the following workarounds:

(i) The Claimants' Damages Model does not allow for both nominal and percentage reductions at the category level. Accordingly, the Tribunal has applied percentage reductions at the category level, and nominal reductions to the implicated vendor's fees and costs for that category . As already explained, this procedure was necessary to incorporate the determinations by the majority of the Tribunal as set out in sub-paragraph (iii) of the operative part of Section VIII.G (RICO Litigation), both of which were then nominally reduced from Gibson Dunn's legal fees and expenses claimed in connection with that category.[3703]

(ii) The Claimants' Damages Model automatically applies reductions to the sums allocated to each vendor in a specific category when applying nominal reductions at the category level. This creates difficulties when applying the nominal reduction required in relation to the but-for scenario, as set out in subparagraph (xii) of Section VIII.A (Lago Agrio Litigation), which must be applied as a reduction to the global amount of compensation. The Tribunal has thus nominally reduced this amount after factoring in all other exclusions and reductions, and has distributed the but-for reduction across all granted categories, as done in the Respondent's Damages Model when applying a nominal reduction in the "Global Reduction – Damages Cap" tab.[3704] To calculate the deduction, the Tribunal incorporated the necessary vendor reductions into a separate copy of the Claimants' Damages Model, after having incorporated its conclusions on General Matters as detailed in

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[3703] *See* para. 2251 above.

[3704] *See* para. 2289 above.

paragraphs 2263-2265 above. The resulting reduction, *i.e.*, USD 22,661,660.53, was then deducted as the but-for amount.

(iii) The Tribunal has determined that certain deductions corresponding to costs collected in local proceedings must be applied to the total amount of compensation granted in respect two categories: Canada Enforcement Proceedings and Gibraltar Proceedings. However, the Claimants' Damages Model automatically applies reductions to the sums allocated to each vendor in a specific category when applying nominal reductions at the category level. Thus, if the Tribunal were to apply nominal reductions corresponding to costs collected at the category level, and then exclude from compensation 100% of the legal fees and expenses corresponding to select vendors, the deduction corresponding to costs collected in local proceedings would not be applied in full. As a workaround, the Tribunal has applied these nominal reductions in the "Vendor Switches" tab of the Claimants' Damages Model to the legal fees and expenses incurred by law firms within that category that the Tribunal has not excluded from compensation. In particular, the Tribunal has applied the nominal reduction in subparagraph (iii) of the operative part of Section VIII.E from Norton Rose Fullbright Canada LLP's legal fees and expenses claimed in connection with that category, and the nominal reduction set out in subparagraph (vi) of Section VIII.I from Attias & Levy Barristers and Solicitors' legal fees and expenses claimed in connection with that category.

(iv) The Claimants' Damages Model does not include switches for certain components. In order to incorporate the determination set out in subparagraph (vi) of the operative part of Section VIII.H (Section 1782 Proceedings), the amount excluded is taken from the Respondent's Damages Model, which reflects that a reduced amount of the total assigned to this component remained to be excluded after the Tribunal's adjustment to the date range, *i.e.*, USD 111,965.50.[3705] The Tribunal excluded this amount from the "1782s – Donziger" component in the Claimants' Damages Model. For the amounts in subparagraph (vii) of the operative part of Section VIII.H (Section 1782 Proceedings), the Tribunal has excluded 100% of the

[3705] *See* para. 2252 above. The Tribunal notes that the Respondent's Model separates this component across four separate 1782 actions. The Tribunal has added these four reductions to arrive at the above number.

fees and costs charged by Rivero Mestre and Covington & Burling in connection with the Section 1782 Proceedings, as these firms' work was entirely in connection with their representation of Mr Pérez and Dr Veiga.[3706] For completeness, the Tribunal also notes that while the Claimants' Damages Model does not separate the Stratus Section 1782 Action into affirmative and defensive actions, the defensive 1782 work occurred solely after the cut-off date in the Tribunal's determination as set out in subparagraph (iii) of Section VIII.H (Section 1782 Proceedings). Accordingly, no workaround was necessary to exclude the defensive Stratus 1782 from compensation as per subparagraph (iv) of the operative part of the same Section.

(v) Because the Claimants' Damages Model does not allow a percentage reduction to be applied to a component for only a certain date range, the Tribunal has calculated the necessary amount to be reduced in accordance with the determination by the majority of the Tribunal as set out in subparagraph (vii) of the operative part of Section VIII.G (RICO Litigation) based on the invoices in the "Trunko Calcs" tab of the Claimants' Damages Model.[3707]

(vi) Because the Claimants' Damages Model does not include components for Argentina Enforcement Proceedings, the Tribunal has excluded at the category level the amounts indicated in the Respondent's Damages Model as remaining after applying the Tribunal's determined date range for subparagraphs (v), (vi), and (vii) of the operative part of Section VIII.C (Argentina Enforcement Proceedings), *i.e.*, USD 1,060,409.82.[3708]

(vii) Because the Claimants' Damages Model does not include a global reduction switch, the Tribunal has applied the 15% global reduction after factoring in all other exclusions and reductions. First, the Tribunal determined in a separate document the amount of compensation granted per category by (i) implementing all applicable reductions in the "Matter Switches" and "Vendor Switches" of the Claimants'

3706 *See* para. 1827 above.

3707 *See* para. 2251 above.

3708 *See* para. 2247 above.

Damages Model; and (ii) adding up the amounts indicated in the column "Damages After Vendor Adjustments (USD)" in the "Vendor Switches" tab of the Claimants' Damages Model for all vendors falling under that category (*see* column "Matter" in the same tab). Second, the Tribunal applied the but-for reduction in the manner described in paragraph 2291(ii) above. Third, the Tribunal applied the 15% global reduction to the resulting sums corresponding to each category.

2292. The Respondent's Damages Model likewise requires certain workarounds:

(i) Because the Respondent's Damages Model applies nominal reductions before percentage reductions, in order to incorporate the determination by the majority of the Tribunal in subparagraph (ii) of the operative part of Section VIII.G (RICO Litigation) to apply an 85% percentage reduction at the category level first before applying the nominal reduction in subparagraph (iii), as a workaround the Tribunal has applied the nominal reduction in subparagraph (iii) to Gibson Dunn's RICO Litigation fees and expenses, rather than at the category level.[3709]

(ii) Because the Respondent's Damages Model does not allow a percentage reduction to be applied to a component for only a certain date range, and the Respondent's "Trunko" tab does not include dates for invoices, the Tribunal has calculated the necessary amount to be reduced in accordance with the determination by the majority of the Tribunal set out in subparagraph (vii) of the operative part of Section VIII.G (RICO Litigation) based on the invoices in the "Trunko Calcs" tab of the Claimants' Damages Model, *i.e.*, USD 598,449.33.[3710]

(iii) As in the case of the Claimants' Damages Model, the Respondent's Damages Model automatically applies reductions to the sums allocated to each vendor in a specific category when applying nominal reductions at the category level. The Tribunal has determined the nominal reduction made in relation to the but-for scenario, as set out in subparagraph (xii) of Section VIII.A (Lago Agrio Litigation), must be applied as a reduction to the global amount of compensation. Accordingly,

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3709 *See* para. 2251 above.

3710 *See* para. 2251 above.

the Tribunal has nominally reduced this amount in the "Global Reduction – Damages Cap" tab. To calculate the deduction, the Tribunal incorporated the necessary vendor reductions into a separate copy of the Respondent's Damages Model, after having input its conclusions on General Matters as detailed in paragraphs 2263-2265 above. The resulting reduction, *i.e.*, USD 22,791,546.48, was then deducted as the but-for amount.

(iv) The Tribunal recalls, as indicated in paragraph 2291(iii) above, that certain deductions corresponding to costs collected in local proceedings must be applied to the global amount of compensation granted in respect two categories: Canada Enforcement Proceedings and Gibraltar Proceedings. The Respondent's Damages Model, as the Claimants' Damages Model, automatically applies reductions to the sums allocated to each vendor in a specific category when applying nominal reductions at the category level. Thus, if the Tribunal were to apply nominal reductions corresponding to costs collected at the category level, and then exclude from compensation 100% of the legal fees and expenses corresponding to select vendors, the deduction corresponding to costs collected in local proceedings would not be applied in full. As a workaround, the Tribunal has applied these nominal reductions in the "Vendor Reductions" tab of the Respondent's Damages Model to the legal fees and expenses incurred by law firms within that category that the Tribunal has not excluded from compensation. In particular, the Tribunal has applied the nominal reduction in subparagraph (iii) of the operative part of Section VIII.E from Norton Rose Fullbright Canada LLP's legal fees and expenses claimed in connection with that category, and the nominal reduction set out in subparagraph (vi) of Section VIII.I from Attias & Levy Barristers and Solicitors' legal fees and expenses claimed in connection with that category.

(v) For completeness, the Tribunal notes that while the Respondent's Damages Model does not separate the Stratus Section 1782 Action into affirmative and defensive actions, the Defensive 1782 work occurred solely after the cut-off date in the Tribunal's determination as set out in subparagraph (iii) of Section VIII.H (Section 1782 Proceedings). Accordingly, no workaround was necessary to exclude the defensive Stratus 1782 from the Claimants' compensation as per subparagraph (iv) of the same Section.

2293. Having completed the dual exercise of incorporating its determinations into the Parties' respective Damages Models, the Tribunal has decided that it shall determine the final amount of compensation to be awarded to Chevron under the present heading on the basis of the Respondent's Damages Model – not the Claimants' Damages Model. The Tribunal does so for two interrelated reasons.

2294. First, as explained in paragraph 2290 above, the Respondent's Damages Model satisfies the instructions provided for in Procedural Order No. 83 to a greater extent than the Claimants' Damages Model. In particular, the Respondent's Damages Model omits fewer vendors than the Claimants' Damages Model, permits for both nominal and percentage reductions at the category level, includes a greater number of the requested component switches, and allows for the application of a global percentage reduction.

2295. Second, as noted in paragraphs 2291 and 2292 above, the Respondent's Damages Model allows a more straightforward incorporation of the Tribunal's determinations when compared to the Claimants' Damages Model. While the Tribunal is able to input the full extent of its determinations into the Claimants' Damages Model, the Claimants' Damages Model necessitates a larger number of workarounds to derive the final figures. Several of these workarounds are required due to the ways in which the Claimants' Damages Model departed from the Tribunal's instructions in Procedural Order No. 83.

2296. For these reasons, the Tribunal has greater confidence in the capacity of the Respondent's Damages Model to implement the Tribunal's decisions regarding damages and decides to rely only upon it to determine the principal amount of compensation due to Chevron. However, the Tribunal has also performed, and taken into account, all necessary calculations in the Claimants' Damages Model to offer a measure against which to check the accuracy of the output derived from the Respondent's Damages Model. As shown in the table below, while the results corresponding to certain individual categories differ to a non-negligible extent between the Damages Models, the global outputs derived from each of the Parties' Damages Models differ by USD 528,887.15, which is less than 0.5%.

§	Category	Amount Claimed (USD)	Claimants' Damages Model[3711] (USD)	Respondent's Damages Model[3712] (USD)
A.	Lago Agrio Litigation	161,525,161.89	41,721,175.36	41,587,664.54
B.	Ecuador Enforcement Proceedings	3,582,889.44	1,262,368.32	1,261,521.19
C.	Argentina Enforcement Proceedings	25,695,438.12	10,767,920.82	10,469,299.38
D.	Brazil Recognition Proceedings	20,668,398.44	14,145,756.33	14,136,263.73
E.	Canada Enforcement Proceedings	39,798,158.90	30,067,303.99	30,047,127.12
F.	Costs of Planning Against Potential Enforcement in Other Jurisdictions	26,166,897.09	14,292,500.89	14,282,909.81
G.	RICO Litigation	323,180,099.51	33,347,889.14	33,322,257.24
H.	Section 1782 Proceedings	62,363,592.93	8,741,893.08	8,728,717.69
I.	Gibraltar Proceedings	38,421,547.26	26,584,770.64	26,566,930.75
J.	General Defence	47,213,917.33	0.00	0.00
K.	Criminal Proceedings	6,933,905.69	0.00	0.00
L.	Dutch Set-Aside Proceedings	3,676,711.53	0.00	0.00
M.	Treaty Arbitration Costs Incurred by Non-Counsel of Record	34,653,249.61	0.00	0.00
Grand Total		**793,879,967.74**	**180,931,578.58**	**180,402,691.43**

2297. Consequently, the Tribunal determines that the global amount of compensation due to Chevron in connection with the 13 damages categories concerning legal fees and

[3711] The Tribunal recalls that the Claimants' Damages Model does not provide a per-category damages amount following category, component, element, and global reductions. The Tribunal has determined the amounts per category by taking the sum of the "Damages After Vendor Adjustments (USD)" per category, and subsequently (i) distributed the but-for reduction across categories as done in the Respondent's Damages Model, and then (ii) applied a 15% reduction. *See* Claimants' Damages Model, "2) Vendor Switches" Tab, columns E, I.

[3712] The Respondent's Damages Model provides damage amounts for each category following the application of category, component, vendor, and (nominal and percentage) global reductions in the "Global Reduction – Damages Cap" tab. with the exception of the Section 1782 Proceedings, which are listed individually. For the Section 1782 Proceedings amount, the Tribunal has added together the listed 1782 Actions on the same tab. *See* Respondent's Damages Model, "Global Reduction – Damages Cap" Tab.

expenses addressed in this Section VIII, as derived from the Respondent's Damages Model, amounts to **USD 180,402,691.43**.[3713] As further explained in Section X below, the interest due on this amount shall also be determined on the basis of the Respondent's Damages Model.

2298. For the avoidance of doubt, the Tribunal notes that, unless otherwise expressly indicated, the determinations in this Section VIII pertain only to the Claimants' claim for damages arising from the Respondent's Treaty breaches. They are without prejudice to any costs claim the Claimants might bring in Track IV of the Arbitration under Articles 38 and 40 of the UNCITRAL Arbitration Rules.[3714]

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[3713] The Tribunal's decision with respect to the compensation due to Chevron in connection with the RICO Litigation claim is rendered by majority.

[3714] Procedural Order No. 84, para. 13(i).

IX. OTHER DAMAGES CATEGORIES

2299. In this Section, the Tribunal shall address three categories of damages claimed by the Claimants which, unlike the 13 categories addressed in Section VIII above, do not concern legal fees and expenses. As further elaborated below, the losses claimed in connection with each of these categories must be examined under the framework of direct damages arising from the Respondent's Treaty breaches as understood in international law. They do not qualify as incidential damages "reasonably incurred to repair damage and otherwise mitigate loss" arising from the Respondent's Treaty breaches.[3715]

2300. For ease of reference, the Tribunal indicates in the table below the order in which it will address these categories, as well as the amount requested by the Claimants in connection with each category, excluding interest.

§	Category	Amount Claimed
A.	Embargo Losses in Argentina	USD 13,000,000
B.	Intellectual Property Losses in Ecuador	USD 85,315,652
C.	Moral Damages	The amount that the Tribunal deems just and proper

[*see Reply, para. 1212(3)*]

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[3715] **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (34). *See also* para. 327 above.

A. EMBARGO LOSSES IN ARGENTINA

2301. The Claimants seek USD 13,000,000 as direct damages, or alternatively as incidental damages, for the losses allegedly suffered by one of their Argentine subsidiaries – Chevron Argentina – in the Argentina Embargo Proceedings as a result of the 6 November 2012 *ex parte* embargo order obtained by the LAPs from the Argentine courts, whereby certain assets of owned by Chevron's Argentine and Danish subsidiaries were attached (defined earlier as the "Argentina Embargo Order").[3716] The Argentina Embargo Order was lifted on 28 June 2013.[3717] Relying on Mr Kiran Sequeira's expert report, the Claimants argue that they have adequately proven such a loss.[3718]

2302. In the Respondent's view, the Claimants' purported embargo losses in Argentina are not recoverable either as direct or incidental damages.[3719] The Respondent further argues that the expert evidence of loss proffered by the Claimants is speculative and unsupported by contemporaneous evidence; accordingly, the Tribunal should reject the Claimants' claim under this heading.[3720]

1. The Claimants' Position

2303. As stated above,[3721] the Claimants argue that there is no legal impediment for Chevron to claim the losses suffered by its international subsidiaries as the natural and foreseeable consequence of the Respondent's Treaty breaches.[3722]

2304. Recalling the Tribunal's determination that the Respondent violated the Tribunal's Interim Orders on 1 March 2012 by making the Lago Agrio Judgment "final, enforceable and subject to execution", the Claimants argue that the Respondent's violation of international law "directly led" to the LAPs' attempts to attach the assets of Chevron's

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3716 **C-2349**, Order issued by the National Civil Trial Court No. 61 of Argentina in Aguinda Salazar Maria vs. Chevron Corporation on Preventive Measures, 6 November 2012.

3717 **C-2665**, Court Order, 28 June 2013.

3718 Memorial, para. 437; Reply, para. 1093.

3719 Counter-Memorial, para. 1272; Rejoinder, para. 1786.

3720 Counter-Memorial, para. 1271; Reply, para. 1760.

3721 *See* Section VII.C.1 above.

3722 Reply, paras. 1090-1092.

subsidiaries in Argentina.[3723] Consequently, in the Claimants' view, the Respondent must compensate Chevron for the losses it suffered as a result of the embargo of its Argentine subsidiary's funds.[3724]

2305. In circumstances where the 15 October 2012 Order of the Lago Agrio Court treats Chevron and its subsidiaries as one and the same, the Claimants submit that the Respondent should be estopped from claiming that Chevron cannot also claim damages for the losses suffered by the Argentine subsidiary targeted by the Argentina Embargo Order.[3725] The Claimants further highlight the conduct of both Ecuador's courts and the executive branch between August 2012 and April 2013, which they say either enabled or aided the LAPs in enforcing the 15 October 2012 Order of the Lago Agrio Court on the assets of Chevron's international subsidiaries, in violation of the Tribunal's Interim Awards.[3726]

2306. To prove their embargo losses, the Claimants rely on Mr Sequeira's calculation of damages, which analyses the balance of the bank accounts that were frozen and the underlying bank statements.[3727] Contrary to what the Respondent alleges, the Claimants assert that the underlying data and source documents Mr Sequeira relies upon have been produced in this Arbitration – the Respondent, they say, has also had access to those documents since 2013.[3728]

3723 Reply, paras. 1084-1085, 1087; Fourth Interim Award, para. 79.

3724 Reply, para. 1085.

3725 Reply, para. 1091.

3726 Reply, paras. 1088-1089; **C-1532**, *Maria Aguinda et al. v. Chevron Corp*., Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Execution Order, 15 October 2012 at 4:53 p.m.; **C-1589**, Power of Attorney Issued by the Canton of Lago Agrio, apostilled by the Minister of Exterior Relations, 9 August 2012; **C-1590**, Letters rogatory Certified by the Lago Agrio Court and requested by the National Judicial Council, 31 October 2012; **C-1598**, Correa says he will ask Cristina to "comply with the judgment" against Chevron, LA NACIÓN, 4 December 2012; **C-1599**, *Ecuador's President Says Chevron Needs to Abide by Court Ruling*, DOW JONES NEWSWIRES, 4 December 2012; **C-1608**, Ecuador/Chevron dispute enters a new chapter: Correa calls for Latam support, MERCOPRESS, 26 February 2013; **C-1609**, Correa Defended Ecuadorian Sovereignty Against Chevron, PRENSA LATINA, 27 February 2013; **C-1610**, Interview with Minister of Foreign Affairs, Ricardo Patiño. RTU TV, 25 February 2013; **C-1623**, Public Defender's Office of Ecuador appears before Argentinean Court in relation to the Chevron-Texaco case, ANDES, 26 April 2013.

3727 Reply, paras. 1093-1096.

3728 Reply, paras. 1095-1096; First Sequeira Expert Report, para. 109; **C-1626**, Expert Report of Anil Shivdasani submitted in RICO proceedings, 1 March 2013; **C-1928**, Mr Shivdasani's underlying data and source documents; **C-3463**, Argentina Bank Statements (CVX-Track III-30000000 - CVX-Track III-30006454).

2307. Based on Mr Sequeira's expert opinion, the Claimants assert that the funds held in the bank accounts that were frozen would have either (i) accrued interest at the BADLAR rate (*i.e.*, the 30- to 35-day interest rate on deposits in excess of 1 million pesos that is published by the Central Bank of Argentina); or (ii) been converted to U.S. dollars immediately upon deposit at the prevailing exchange rate on the dates of deposit.[3729]

2308. First, Mr Sequeira considers that applying the BADLAR rate, which ranged from 14% to 17% during the relevant period, evinces a reasonable and conservative approach to quantifying the loss of use of funds because "time deposit rates are generally some of the lowest returns that are earned by companies".[3730] By contrast, Mr Sequeira notes that the ARS-denominated WACC for a petroleum company would have exceeded 36% during the same period.[3731]

2309. Second, in Mr Sequeira's view, the conversion of funds from Argentine pesos to U.S. dollars "is essentially an inflationary adjustment" and is "a reasonable proxy for calculating the loss suffered as a result of the funds having been frozen".[3732] Alternatively, applying ARS inflation during the same period "would yield losses that are very similar to the damages calculated based on converting the funds to USD at the prevailing exchange rates".[3733]

2310. In light of the above, Mr Sequeira states that the total losses suffered by Chevron Argentina before interest amount to USD 4.3 million using the BADLAR rate and USD 6 million based on the depreciation of the Argentine peso.[3734] Using four potential pre-award interest rates, Mr Sequeira concludes that the total losses – including interest – up to 20 August 2021 range from USD 6.5 million to USD 13 million.[3735]

3729 Memorial, paras. 436-437; First Sequeira Expert Report, paras. 112-114.

3730 Reply, para. 1098; First Sequeira Expert Report, Figure 14; Second Sequeira Expert Report, para. 129.

3731 Reply, para. 1098; Second Sequeira Expert Report, paras. 131-132.

3732 Reply, para. 1100; Second Sequeira Expert Report, para. 134.

3733 Reply, para. 1100; Second Sequeira Expert Report, para. 134.

3734 Reply, para. 1102; Second Sequeira Expert Report, para. 137.

3735 Reply, para. 1102; Second Sequeira Expert Report, para. 138.

2311. In response to the Respondent's argument that they failed to mitigate damages, the Claimants posit that it is actually the Respondent who has failed to provide compelling evidence, consistent with international practice, that Chevron's subsidiaries could have reasonably avoided the loss.[3736] In addition, the Claimants take the view that the Respondent's proposed mitigation scenarios "clearly rely on hindsight, and must be rejected" because none of them were detailed in the Respondent's letter of 22 January 2013 to the Tribunal, in which it described ways in which the Claimants could (allegedly) mitigate any damage arising from the embargo.[3737] In any event, Chevron and its subsidiaries, the Claimants submit, complied with their duty to mitigate losses when they contested the Argentina Embargo Order, which was "the most direct means of challenging the attachment under Argentine law".[3738]

2. The Respondent's Position

2312. According to the Respondent, the Claimants cannot simply claim for themselves the damages allegedly suffered by Chevron's international subsidiaries, in violation of established international law, on the basis that the Lago Agrio Court made the Lago Agrio Judgment enforceable against Chevron and its subsidiaries.[3739] Further, the Ecuadorian government, the Respondent contends, was not in a position to suspend or annul a judgment of Ecuador's independent judiciary.[3740] The Respondent maintains that it is not responsible for the legal strategies undertaken by the LAPs in a foreign jurisdiction, such as Argentina, or for the mechanics of the Argentine judicial system, which allow for prejudgment freezes on assets in certain cases.[3741] As such, the Respondent denies that the Argentina Enforcement Proceedings were foreseeable.[3742]

3736 Reply, paras. 1104-1108.

3737 Reply, paras. 1109-1110; Respondent's Letter to the Tribunal, 22 January 2013, p. 4.

3738 Reply, paras. 1111-1112.

3739 Rejoinder, paras. 1775, 1778.

3740 Rejoinder, para. 1777.

3741 Counter-Memorial, para. 1277; Rejoinder, para. 1776.

3742 Rejoinder, para. 1776.

2313. Even assuming that the Claimants could bring a claim for third-party losses, the Respondent submits that the Claimants have presented no proof of loss.[3743] Instead, the Claimants rely upon the expert opinion of Mr Sequeira, which, in the Respondent's view, is not credible.[3744] In this respect, the Respondent contends that it was only after it pointed out the insufficiency of the direct evidence relied upon by Mr Sequeira that the Claimants produced the bank statements supporting the claim, and only then did Mr Sequeira revise his damages analysis downwards.[3745] In the light of Mr Sequeira's admission that he overlooked certain evidence when performing his initial calculation due to "time and logistical constraints",[3746] the Respondent asserts that the Tribunal should not credit Mr Sequeira's opinions or analysis.[3747]

2314. In support of the proposition that the Claimants have not substantiated their loss, the Respondent asserts that (i) only 40% of Chevron Argentina's funds in Argentine banks were subject to the freeze – which the Claimants failed to mention in their Memorial; and (ii) the Claimants have failed to produce any direct evidence showing which funds in the Standard Bank account were really frozen.[3748]

2315. As to Mr Sequeira's quantification of damages, based on the opinion of its own expert, Mr Daniel Flores, the Respondent considers that Mr Sequeira's alternative investment strategies are speculative and contradicted by actual events:[3749]

(i) In the Respondent's view, the suggestion that Chevron Argentina would have invested the frozen funds in an account that paid the BADLAR rate[3750] is pure speculation. There is no evidence from Chevron Argentina's actual investment habits or contemporaneous documents that any of the remaining funds were placed

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3743 Counter-Memorial, para. 1273.

3744 Rejoinder, para. 1760.

3745 Rejoinder, para. 1761.

3746 Second Sequeira Expert Report, para. 127.

3747 Rejoinder, paras. 1761-1762.

3748 Rejoinder, para. 1764.

3749 Rejoinder, para. 1765.

3750 Second Sequeira Expert Report, para. 129.

in an interest-bearing account, let alone in an account that paid the BADLAR rate.[3751]

(ii) Mr Sequeira, says the Respondent, makes his BADLAR theory look reasonable by selectively choosing an arbitrarily high rate of return as a supposed comparator.[3752]

(iii) According to the Respondent, there is no contemporaneous evidence that Chevron Argentina would have immediately converted the frozen amounts from Argentine pesos to U.S. dollars on the dates of deposit. Mr Sequeira also fails to take into account the time required to make requests to the Central Bank of Argentina in order to convert Argentine pesos to U.S. dollars.[3753]

2316. Should the Tribunal award any amount under this head of damages and determine that interest is warranted, the Respondent takes the view that simple interest at the 6-month or 1-year T-Bill rate is appropriate.[3754]

2317. Lastly, the Respondent denies that contesting the Argentina Embargo Order had any bearing on mitigating the alleged effects of the embargo, be it while it was in force or thereafter.[3755] Rather, Chevron Argentina should have made the requisite petitions to the Argentine courts for the investment of the frozen amounts, substitution with other assets, or purchase of U.S. dollars or dollar-denominated bonds, or brought an action for redress in an Argentine court following the lifting of the embargo.[3756] The Respondent points out that the Claimants do not dispute that all of these mitigation strategies were available to Chevron Argentina, who failed to resort to them.[3757]

3751 Rejoinder, para. 1767-1768; **RE-56**, Second Flores Expert Report, paras. 182-184.

3752 Rejoinder, paras. 1776-1777; **RE-42**, First Flores Expert Report, paras. 57-59; **RE-56**, Second Flores Expert Report, paras. 90, 184.

3753 Rejoinder, paras. 1771-1772; **RE-42**, First Flores Expert Report, paras. 84-85; **RE-56**, Second Flores Expert Report, para. 185.

3754 Rejoinder, para. 1786.

3755 Rejoinder, para. 1783.

3756 Counter-Memorial, paras. 1279-1281; Rejoinder, para. 1781.

3757 Rejoinder, para. 1785.

2318. For the Respondent, whether these mitigation methods were described in the Respondent's letter of 22 January 2013 to the Tribunal is irrelevant, as the letter also mentioned other mitigation options that were available to the Claimants, which were not undertaken.[3758] Considering the Claimants' representation by "a cadre of lawyers" in the Argentina Enforcement Proceedings and the legal fees they incurred as a result, the Respondent believes that the Claimants cannot now claim ignorance of these modes of mitigation.[3759]

3. The Tribunal's Analysis

2319. The Claimants' damages claim in Track III includes two different categories concerning separate yet related chains of events taking place in parallel in Argentina. Under the present heading, the Tribunal will address only the Claimants' claim concerning the embargo pursuant to the Argentina Embargo Order of two bank accounts held by Chevron Argentina.[3760] The Claimants' damages claim for the reimbursement of legal fees and expenses disbursed in connection with the Argentina Enforcement Proceedings is addressed separately in Section VIII.C above.

2320. In broad terms, the Claimants' claim under the present head of damages concerns the losses allegedly suffered by Chevron Argentina (and therefore Chevron indirectly, in the Claimants' submission) when the Argentine courts ordered the embargo of multiple assets owned by Chevron's Argentine and Danish subsidiaries in Argentina by way of the Argentina Embargo Order.[3761]

2321. In relevant part, the Argentina Embargo Order reads as follows:

> III.- In accordance with requirements stated in sections A), B), C), D), E) and F) of the letters rogatory, which are the foundational resolutions and subsequent petitions of the interested party, but also under article 204 of the Procedural Code with the limitation imposed therein, without foreclosing the use of the accounts of the affected company (Art. 3 of the Convention), and until the amount of $19,021,552,000 is reached, or its equivalent in Argentine pesos according to the official rate exchange for sale at the time the measure

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3758 Rejoinder, para. 1784.

3759 Rejoinder, para. 1781.

3760 **C-2349**, Order issued by the National Civil Trial Court No. 61 of Argentina in Aguinda Salazar Maria vs. Chevron Corporation on Preventive Measures, 6 November 2012.

3761 Memorial, para. 436.

> becomes effective, attachment shall be made upon the following assets, within the scope stated for each case:
>
> 1.-) on the entire amount of ownership shares CDC ApS and Ing. Norberto Priú S.R.L. own in their name in Chevron Argentina S.R.L.; and
>
> 2.-) on the entire amount of ownership shares CDC ApS and CDHC ApS own in their name in Ing. Norberto Priú S.R.L.
>
> . . .
>
> 3.-) *regarding accounts of any kind that Chevron Argentina S.R.L. owns in financial entities within the Argentine Republic, but such attachment shall be limited to 40% of the current or future amounts in said accounts*, which shall be frozen in the related bank entities by the order of this Court, until the decision of their destination be made. To this end, an official letter is to be sent to Banco Central de la República Argentina in order to inform the measure to all entities covered by the system, which shall reply to this Court within five (5) days of receipt of communication by said authority if they were informed of the measure, as well as the assets and amounts it was entered on. This shall be served to the authorized agents for its effectuation.
>
> 4.-) regarding the forty per cent (40%) of all amounts Chevron Argentina S.R.L. expects to receive by their hydrocarbon sale operations, performed or to be performed, of the following companies: a) YPF S.A., b) Shell Cía. Arg. de Petróleo S.A., c) Esso Petrolera Argentina S.R.L. and d) Petrobas Argentina S.A. Said amount shall be withheld until further notice. . .
>
> 5.-) regarding the entire amount of funds Chevron Argentina S.R.L. expects to receive under the case "Chevron Argentina S.R.L v. Shell Argentina de Petróleo S.A. on ordinary proceedings" before the National Trial Court for Commercial matters No. 17, Clerk's Office No. 34. The amount shall be frozen until its destination is decided. . .
>
> 6.-) regarding the entire shareholder participation of Chevron Argentina S.R.L in Oleductos del Valle S.A. . .[3762]

2322. The Claimants' damages claim does not encompass all of the assets identified in the Argentina Embargo Order. Rather, the claim put before the Tribunal specifically concerns the damages arising from the embargo of 40% of the funds held by Chevron Argentina in two non-interest-bearing, ARS-denominated accounts at Citibank and Standard Bank.[3763]

[3762] **C-2349**, Order issued by the National Civil Trial Court No. 61 of Argentina in Aguinda Salazar Maria vs. Chevron Corporation on Preventive Measures, 6 November 2012, pp. 1-4 (Claimants' translation, emphasis by the Tribunal).

[3763] Reply, para. 1102; Second Sequeira Expert Report, VP-66 through VP-120 (Citibank); VP-121, VP-122 (Standard Bank); **RE-56**, Second Flores Expert Report, para. 169.

2323. The Argentina Embargo Order was issued on 6 November 2012.[3764] The Argentine courts lifted the Embargo Order on 28 June 2013.[3765] ARS 163,894,031 that had been frozen in Chevron Argentina's Standard Bank account during this period were allegedly released on that date, *i.e.*, 28 June 2013.[3766] However, the lifting of the embargo over the funds held in Chevron Argentina's Citibank account effectively occurred in two instalments, namely, on 9 May 2013 (release of ARS 59,835,903) and 6 June 2013 (release of ARS 146,340,420).[3767]

2324. In essence, the Claimants submit that the freeze imposed on these funds during that period "led to a loss because of the time value and opportunity cost of money".[3768]

2325. Before beginning its analysis of the Claimants' damages claim resulting from the embargo of Chevron Argentina's Citibank and Standard Bank accounts, the Tribunal recalls the Claimants' position that their embargo losses in Argentina constitute direct damages and are recoverable in the alternative as incidental damages.[3769] As explained in paragraphs 321 and 396 above, any injury caused to the Claimants by the recognition or enforcement of any part of the Lago Agrio Judgment from 1 March 2012 onwards – whether through attachment, arrest, interim injunction, execution, or howsoever otherwise – constitutes a form of *direct* damage flowing naturally from the Respondent's Treaty breaches for which the Respondent is bound to make reparation under international law.

2326. Thus, the Claimants' claim under this heading, having been particularized as a claim for "losses suffered by Chevron's subsidiaries when their Argentine funds were embargoed for several months",[3770] must be addressed under the paradigm of direct damages in international law. Conversely, such damages cannot qualify as incidental damages under

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3764 **C-2349**, Order issued by the National Civil Trial Court No. 61 of Argentina in Aguinda Salazar Maria vs. Chevron Corporation on Preventive Measures, 6 November 2012.

3765 **C-2665**, Court Order, 28 June 2013.

3766 Second Sequeira Expert Report, Appendix H.3, note (1).

3767 Second Sequeira Expert Report, para. 137, fn 157, Appendixes H.1, note (2); H.3, note (1); H.4, tab 69-D, VP-114, p. 19, VP-120, p. 19; **RE-56**, Second Flores Expert Report, para. 173(i).

3768 Reply, para. 1098.

3769 Reply, para. 1112.

3770 Reply, para. 1084.

Article 36 of the ILC Articles because they do not concern the Claimants' efforts to repair damage and otherwise mitigate loss arising from the recognition and enforcement of the Lago Agrio Judgment.[3771]

2327. The second threshold question before the Tribunal is whether Chevron may claim compensation for the injuries suffered by Chevron Argentina – the purported owner of the funds that were frozen – as a result of the Argentina Embargo Order. The Tribunal has already addressed this question affirmatively in paragraph 438 above: 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. Such order required expressly the execution of the Lago Agrio Judgment against "[a]ccounts that [Chevron Argentina] may have open at financial entities in the Republic of Argentina".[3772] The Argentina Embargo Order mirrored the terms of the 15 October 2012 Order of the Lago Agrio Court in this particular respect.[3773]

2328. Having determined that the Claimants are entitled in their own right to claim compensation for the alleged losses falling under the present heading, the Tribunal shall now determine whether the Claimants have met their burden of proving the damages they claim.

2329. Relying on the expert opinion of Mr Kiran Sequeira, the Claimants assert that the partial freeze of the amounts held in Chevron Argentina's Citibank and Standard Bank accounts led to a loss as a result of "[t]he combination of not earning interest and not being able to hedge against the devaluation of the Argentine peso (which dropped dramatically in value relative to the U.S. dollar during this period)."[3774]

3771 *See* paras. 327-328 above.

3772 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, p. 7.

3773 **C-2349**, Order issued by the National Civil Trial Court No. 61 of Argentina in Aguinda Salazar Maria vs. Chevron Corporation on Preventive Measures, 6 November 2012, p. 3.

3774 Memorial, para. 436.

2330. To determine the extent of the loss that was actually suffered by Chevron Argentina, Mr Sequeira proposes two alternative calculations as a proxy,[3775] each based on a different assumption. First, Mr Sequeira calculates the losses "assuming [the frozen] amounts would have remained in Argentine peso-denominated accounts but earned interest at the BADLAR rate (the interest rate on deposits in excess of 1 million pesos published by the Central Bank of Argentina)."[3776]

2331. Second, as an alternative approach, Mr Sequeira calculates the loss "assuming the peso-denominated deposits should be translated to US Dollars as of the date of deposit at the prevailing ARS/US$ exchange rate, rather than be held in peso-denominated accounts."[3777]

2332. Following these approaches, Mr Sequeira concludes in his Second Report that the Claimants' losses before pre-award interest ranged from USD 4.25 million (assuming the amounts would have remained in interest-bearing ARS-denominated accounts) to USD 6.23 million (assuming the amounts would have been converted from Argentine pesos to U.S. dollars).[3778]

2333. The Respondent rejects Mr Sequeira's expert opinion. Noting that "[t]here is no testimony from people with personal knowledge of the Argentine bank accounts", the Respondent asserts that Mr Sequeira "cannot point to sufficient underlying evidence of any damage".[3779] Among other things, the Respondent asserts that (i) only 40% of the Citibank funds were frozen, and there is no evidence that any Standard Bank funds were frozen;[3780] and, (ii) in any event, Mr Sequeira's alternative investment strategies are speculative and contradicted by actual events.[3781]

3775 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1709 (Sequeira).

3776 Second Sequeira Expert Report, para. 124.

3777 Second Sequeira Expert Report, para. 124.

3778 Second Sequeira Expert Report, para. 137, Table 4.

3779 Rejoinder, para. 1760.

3780 Rejoinder, paras. 1763-1764.

3781 Rejoinder, paras. 1765-1773.

2334. At the outset, the Tribunal accepts that depriving Chevron Argentina of the opportunity to use funds it owned would amount, by itself, to a form of injury. This was, indisputably, the effect of the Argentina Embargo Order. Indeed, while the Parties disagree on the exact amounts in Chevron Argentina's Citibank and Standard Bank accounts that were actually frozen, there is no dispute regarding the fact that a portion of the funds held in those accounts was effectively unavailable to Chevron Argentina between November 2012 and June 2013.[3782] Thus, the Claimants have properly established that any damages arising from the embargo of Chevron Argentina's bank accounts pursuant to the Argentina Embargo Order amount to a form of direct damage caused by the recognition and enforcement of the Lago Agrio Judgment in Argentina.

2335. Having determined that a causal link exists between the Respondent's Treaty breaches and the injury for which damages are claimed under the present heading, the Tribunal shall now assess the extent of the damages suffered by Chevron Argentina as a result of the embargo of its accounts in Citibank and Standard Bank.

2336. For its assessment of the compensation owed to the Claimants, the Tribunal shall draw guidance once again from the applicable full reparation standard set forth in *Chorzów Factory*, pursuant to which full reparation for an international illegal act "must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[3783]

2337. When envisaging "the situation which would, in all probability, have existed if [the Treaty breaches] had not been committed", the Tribunal notes that the embargo of a bank account does not amount by itself to a monetary loss, particularly where, as here, the bank accounts that were subject to the Argentina Embargo Order were non-interest bearing.[3784] What might actually result in pecuniary damage is the inability to invest the frozen funds

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[3782] Second Sequeira Expert Report, para. 123; Rejoinder, para. 1764; **RE-56**, Second Flores Expert Report, paras. 175-178.

[3783] **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, p. 47.

[3784] Track III Hearing Transcript, Day 7 (26 August 2022), p. 1714 (Sequeira); **RE-56**, Second Flores Expert Report, para. 183.

during a given period and generate returns as a result.[3785] Indeed, the economic loss arising from the embargo, as conceived by the Claimants and Mr Sequeira, arises precisely from "[t]he combination of not earning interest and not being able to hedge against the devaluation of the Argentine peso (which dropped dramatically in value relative to the U.S. dollar during [the relevant] period)".[3786]

2338. Accordingly, assessing the extent of Chevron Argentina's losses under *Chorzów Factory* requires the Tribunal to determine, with a sufficient degree of certainty,[3787] the returns that Chevron Argentina would have obtained by investing the frozen funds in a hypothetical Treaty-compliant world – that is, in a scenario where Chevron Argentina's Citibank and Standard Bank accounts were not frozen as a result of the Argentina Embargo Order. Any such forgone returns would constitute the loss suffered by Chevron Argentina as a result of the recognition and enforcement of the Lago Agrio Judgment in Argentina, for which the Respondent must pay compensation.

2339. Notwithstanding the foregoing, the fact that Chevron Argentina might have had the possibility of placing funds in an interest-bearing account, or converting those same funds to U.S. dollars, does not mean *per se* that it would have actually done so in a Treaty-compliant but-for scenario. As a matter of hypothesis, the Tribunal can envisage a scenario where, even in the absence of Treaty breaches, Chevron Argentina would not have made *any* use of the funds that were frozen in the real world during the relevant period. For example, the funds could have been held as a liquidity reserve. In other words, a but-for scenario where Chevron Argentina did not invest any of the funds in the Citibank and Standard Bank accounts is within the realm of possibility.

2340. The burden thus falls on the Claimants to provide evidence showing that, but-for the Treaty breaches, the funds that were frozen in the real world would have been invested in a particular way and would have generated returns for Chevron Argentina as a result. An

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3785 *See* Track III Hearing Transcript, Day 7 (26 August 2022), p. 1709 (Sequeira): ". . . It is just used as a way to capture the economic loss that you're suffering because it is difficult to speculate exactly how the cash would have been used. It could have been used, deployed to invest in projects in Argentina as Working Capital, any different ways, but we use that as one way to capture the economic loss."

3786 Memorial, para. 436.

3787 *See* paras. 323, 324, 548 above.

economic loss for Chevron Argentina is only conceivable if this latter but-for scenario is that "which would, in all probability, have existed if [the Treaty breaches] had not been committed."[3788]

2341. Establishing the applicable but-for scenario requires the Tribunal to assess primarily the factual matrix surrounding the international delict that did in fact occur, as it provides the vantage point from which the Tribunal can discern that which would "in all probability have occurred", absent the Treaty breaches, from other scenarios that arise only as a matter of possibility.[3789]

2342. Critically, the Claimants have provided no evidence whatsoever illustrating the way in which the funds deposited in Chevron Argentina's Citibank and Standard Bank accounts were used *before* the start of the embargo period in June 2012. Among other things, there is no evidence on record showing that, prior to the embargo, the cash balances in these accounts (i) were ever transferred to any interest-bearing accounts, let alone accounts paying the BADLAR rate; or (ii) were ever converted to USD and sent to the United States. Nor, on the other hand, is there any evidence that these funds were used as working capital, *e.g.*, to fund Chevron Argentina's day-to-day operations, such that Chevron would have been forced to deploy other funds in their place during the period of the embargo. The Claimants have also failed to provide any evidence that Chevron Argentina planned to adopt any of these three investment strategies at any point in time.[3790]

2343. The Tribunal is thus faced with an evidentiary gap. To the extent that Chevron Argentina is a running petroleum company, the Tribunal would have expected the Claimants to be in a position to gather, without any difficulty, evidence illustrating Chevron Argentina's spending habits and the way in which it used the funds held in the Citibank and Standard Bank accounts in its day-to-day operations. In such circumstances, it is insufficient for the Claimants to theorize how Chevron Argentina might have rationally used the funds at

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[3788] **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, p. 47.

[3789] Partial Award on Track III, para. 173.

[3790] *See*, *e.g.*, Track III Hearing Transcript, Day 7 (26 August 2022), p. 1714 (Sequeira); **RE-56**, Second Flores Expert Report, paras. 180, 183, 187.

issue, absent the embargo, as a "proxy" for the actual loss.[3791] Indeed, Mr Sequeira himself agrees that his proxy calculations do not seek to support a but-for exercise by themselves.[3792] For these reasons, the Tribunal must dismiss Mr Sequeira's proposed investment strategies for the frozen funds[3793] as speculation unconstrained by the actual historical record.

2344. The Tribunal remains mindful that the Claimants have provided evidence showing that Chevron Argentina placed funds from the Standard Bank account in time deposits paying the BADLAR rate three months *after* the embargo was lifted.[3794] However, the Tribunal is not inclined to give much weight to this evidence arising after the embargo was lifted, as compared to the steps Chevron Argentina took in the real world both before and during the embargo. The latter are more reliable illustrations of the investment strategies Chevron's subsidiary would have deployed in the absence of Treaty breaches and of the consequential embargo – the proper subject matter of analysis under *Chorzów Factory*.

2345. While the evidence concerning Chevron Argentina's use of the funds held in the Citibank and Standard Bank accounts *before* and *after* the Argentina Embargo Order is deficient, the existing evidence on the use of those funds *during* the embargo period is particularly illuminating. Crucially, only a portion of the balance in these accounts was subject to the Argentina Embargo Order. It is undisputed that Chevron Argentina was free to invest the unfrozen amounts in whichever way it saw fit.[3795] It is also undisputed that Chevron failed

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3791 *See*, *e.g.*, Second Sequeira Expert Report, para. 130: "If Chevron's Argentine subsidiaries had chosen not to place these funds in time deposits, this would only *rationally* occur because they expected to earn a greater return (or a greater economic benefit) by using the funds for some other purpose. For example, the funds could have been used as a working capital account to fund the subsidiaries' day-to-day operations or might have been invested in other instruments or projects with a greater expected return than would be earned on time deposits. *Logically*, such a decision would only be made if the value or benefit of using the funds in some alternative way was expected to be greater than the interest that would be earned by placing the funds in time deposits at the BADLAR rate" (emphasis by the Tribunal).

3792 *See* Track III Hearing Transcript, Day 7 (26 August 2022), p. 1709 (Sequeira): "*I'm not saying that that is exactly what they would have done in a counterfactual world where there was no freeze*. It is just used as a way to capture the economic loss that you're suffering because it is difficult to speculate exactly how the cash would have been used. It could have been used, deployed to invest in projects in Argentina as Working Capital, any different ways, but we use that as one way to capture the economic loss" (emphasis by the Tribunal).

3793 *See* paras. 2330-2331 above.

3794 Second Sequeira Expert Report, para. 132.

3795 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1715 (Sequeira); **RE-56**, Second Flores Expert Report, para. 182.

to withdraw any amounts for such purpose at any point in time during the embargo period,[3796] despite the fact that both the Citibank and Standard Bank accounts were non-interest bearing.[3797] In sum, Chevron Argentina was free to invest the amounts not impacted by the embargo, but decided not to do so.

2346. In view of the Claimants' failure to provide countervailing evidence, and for reasons already explained, the use given by Chevron Argentina to the unfrozen balance of its Citibank and Standard Bank accounts during the embargo period in the real world is the best indicator available of the way in which the frozen portion of those funds would have been used in a but-for scenario where the embargo was not in place.[3798]

2347. Accordingly, the Tribunal concurs with the Respondent's expert, Mr Flores, in that "[s]ince [Chevron Argentina] did not invest at BADLAR . . . the amounts that were not frozen during the embargo period, it is unreasonable to assume that, but for the embargo, it would have done so on . . . the amounts that were frozen."[3799] For the same reason, the Tribunal considers it unreasonable to assume that, but-for the Argentina Embargo Order, Chevron Argentina would have converted the portion of the amounts that were not frozen to USD, as the Claimants claim it would have done.[3800] Consequently, the Tribunal infers that Chevron Argentina would not have obtained any returns from the funds held in its Citibank and Standard Bank accounts in a hypothetical scenario in which those accounts were not frozen.

2348. In sum, on the basis of the factual record as it currently stands, the Tribunal determines that the Claimants have failed to establish that the Argentina Embargo Order had the effect of depriving Chevron Argentina of any returns it might have otherwise obtained. In other words, the Claimants have failed to prove that Chevron Argentina suffered any losses as a result of the partial embargo of its accounts in Citibank and Standard Bank.

3796 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1716 (Sequeira); **RE-56**, Second Flores Expert Report, para. 183.

3797 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1714 (Sequeira); **RE-56**, Second Flores Expert Report, para. 183.

3798 *See* para. 2341 above.

3799 **RE-56**, Second Flores Expert Report, para. 183.

3800 **RE-56**, Second Flores Expert Report, para. 187.

2349. Accordingly, the Tribunal rejects the Claimants' damages claim in respect of the Embargo Losses in Argentina.

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B. INTELLECTUAL PROPERTY LOSSES IN ECUADOR

2350. The Claimants seek USD 85,315,652 as direct damages, or alternatively as incidental damages, for the intellectual property losses that the Claimants allege to have suffered in Ecuador as a result of the embargo by the Lago Agrio Court of Chevron's trademarks in 2012 for auction and sale for the benefit of the LAPs, which was in aid of enforcement of the Lago Agrio Judgment and therefore in violation of the Tribunal's Interim Orders and Awards.[3801] In support of their claim, the Claimants rely on the legal opinion of Dr José Luis Barzallo Sacoto, as well as the assessment of Mr Weston Anson on the value of Chevron's trademarks, along with the underlying technical know-how used to produce lubricants.[3802]

2351. The Respondent denies that the Claimants have proven that their alleged losses would not have occurred but-for the Respondent's Treaty breaches.[3803] Nor have the Claimants proven, in the Respondent's view, that the embargo rendered their trademarks worthless or prevented Chevron Intellectual Property LLC ("**Chevron IP**"), Texaco Inc. and Texaco Company (the owners of the attached trademarks) from exercising rights associated with them, as opined by the Respondent's Ecuadorian intellectual property law expert, Professor María de los Ángeles Lombeida.[3804] The Respondent argues that even if the Claimants were entitled to recover damages under this category and the Tribunal were to accept Mr Anson's proposed valuation approaches, the Claimants would be entitled to recover no more than USD 3.99 million, as quantified by Dr William Kerr and Mr Gregory Smith.[3805]

1. The Claimants' Position

2352. In the Claimants' submission, "[t]here can be no question that Ecuador's breaches of its obligations under international law . . . and this Tribunal's Interim Orders and Awards are the natural and foreseeable cause of the Claimants' intellectual property losses"

3801 Memorial, para. 431; Reply, paras. 1038-1039, 1082.

3802 Memorial, para. 432; Reply, paras. 29, 1039.

3803 Counter-Memorial, para. 1269; Rejoinder, para. 1697.

3804 Counter-Memorial, paras. 1235, 1269; Rejoinder, para. 1697; **RE-45**, First Lombeida Expert Report, para. 33.

3805 Counter-Memorial, para. 1219; Rejoinder, para. 1691.

resulting from the embargo orders of the Lago Agrio Court.[3806] The Claimants contend that the Respondent "cannot point to the theoretical possibility that an Ecuadorian court *might* have issued a judgment against Chevron" to argue otherwise.[3807] Moreover, the Claimants consider that the applicable "but-for" analysis should not be based on "an alternative universe in which the LAPs pursued an individual-rights lawsuit that, in fact, they never actually pursued in the real world."[3808]

2353. Accordingly, the Claimants submit that they are entitled to recover intellectual property losses in Ecuador as direct damages, and also state that they have established the quantum of their intellectual property losses.[3809]

2354. First, while Chevron maintained its 23% market share in the Ecuadorian lubricant market prior to the embargo orders, the Claimants contend that the market share declined to a more significant extent than that of other international oil companies during the relevant period – a point on which both Parties' experts agree.[3810] The Claimants reject the Respondent's assertion that Chevron's post-embargo market share of 7.8% was driven by market forces, arguing instead that the decline was attributable to the Respondent's own acts, notably: (i) the Respondent's coordinated *Mano Sucia* media campaign against Chevron's products; (ii) the Respondent's decision to uphold the Lago Agrio Judgment; and (iii) the refusal by the Ecuadorian Intellectual Property Agency ("**IEPI**", later known as the National Service for Intellectual Rights ("**SENADI**")) to renew Chevron's trademarks after it became the legal custodian of the trademarks.[3811] These Ecuador-caused actions, the Claimants underscore, led Chevron's Ecuadorian distributor to diversify its business away from Chevron.[3812]

3806 Memorial, para. 431.

3807 Reply, para. 1058.

3808 Reply, para. 1057.

3809 Reply, paras. 1039-1040.

3810 Reply paras. 1045-1046; Third Anson Expert Report, para. 63-64, Figure 5; **RE-43**, Second Kerr Expert Report, Schedule 9.

3811 Reply, paras. 1046-1049, 1062; Fourth Anson Expert Report, paras. 109-116; Barzallo Expert Report, paras. 4, 13, 16-19.

3812 Reply, para. 1076; Fourth Anson Expert Report, paras. 109-116.

2355. In the same vein, as a result of the lack of an "official regulatory body in charge of taking action against counterfeiting or illegal practices in the lubricant market", the Claimants assert that the sales of counterfeit products harmed Chevron's trademarks in Ecuador.[3813] In the Claimants' view, "the absence of confirmed cases of sales of counterfeit Chevron products only further illustrates the infirmity of the Ecuadorian regulatory and legal system".[3814]

2356. Second, the Claimants reject the Respondent's contention that they have failed to show a loss in respect of the value of their intellectual property. To this effect, the Claimants offer Mr Anson's valuation as proof of the value of the Claimants' intellectual property as of the valuation date, which he determines by reference to historical data regarding the Ecuadorian lubricants market, as well as evidence of royalty rates for comparable intellectual property assets.[3815]

2357. The Claimants disagree with the Respondent's suggestion to limit the value of Chevron's trademarks by reference to a single, non-exclusive Trademark Licence Agreement entered into between Chevron IP and Swissoil del Ecuador S.A. ("**Swissoil**") in 2010 (the "**Trademark Licence**").[3816] This is because, in Mr Anson's view, the "value of the ownership rights to the Trademarks exceeds the royalty charges payable by Swissoil and for their limited and non-exclusive use of the Trademarks."[3817] Furthermore, noting that the remittance control regime for royalties imposed by Ecuador at the time of the Trademark Licence ceased to exist in 2016, the Claimants submit that a higher royalty rate would now be applicable to Chevron's intellectual property in Ecuador.[3818]

2358. Third, noting that Chevron IP received no royalty payments for Chevron's trademarks registered outside of Ecuador, the Claimants posit that the embargo orders deprived the

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3813 Reply, para. 1051; **RE-43**, Second Kerr Expert Report, **Kerr Doc. 2,** Opportunities in lubricants 2015: Latin America and Caribbean Market Analysis, Ecuador: Overview, p. 22.

3814 Reply, para. 1052.

3815 Reply, paras. 1042, 1044; Third Anson Expert Report, para. 56; Fourth Anson Expert Report, para. 41.

3816 Reply, para. 1043.

3817 Reply, para. 1043; Second Anson Expert Report, p. 7.

3818 Reply, paras. 1044, 1074; Third Anson Expert Report, paras. 111, 113.

trademark owner of future economic benefits, thus diminishing the present value of those assets.[3819]

2359. Fourth, due to the "symbiotic relationship" between the trademarks and the technical know-how, the Claimants argue that "any impairment of [their] ability to use and obtain value from the trademarks has a directly proportional impact on the value of the technical know-how."[3820] This is because "any use of the technical know-how for third-party products would cannibalize the brand quality associated with the products bearing the Chevron trademarks."[3821] Thus, the Claimants reject the Respondent's attempts to distinguish between trademarks and associated technical know-how as two different assets.[3822]

2360. For the Claimants, the two licensing agreements entered between Chevron IP and Swissoil – the Trademark Licence and a Technology Licence Agreement for the technical know-how (the "**Technology Licence**") – do not discredit the symbiotic relationship in the manner the Respondent suggests, given that (i) the two licences entered into effect on the same date; and (ii) their provisions expressly cross-reference each other.[3823] Instead, as opined by Mr Anson, the two licences were intended to, and did, operate as a unified whole "consistent with general licensing industry practices."[3824]

2361. Fifth, the Claimants consider that Mr Anson's analysis of the value of the Claimants' intellectual property assets is reliable and conservative in its approach when compared to Dr Kerr's valuation, which, in the Claimants' view, is based on "flawed inputs and assumptions":[3825]

(i) *Size of the market*: Mr Anson bases his analysis of growth in the size of the Ecuadorian lubricant market on historical data; he also projects compound annual

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3819 Reply, para. 1053.

3820 Reply, para. 1054; Third Anson Expert Report, para. 42; Fourth Anson Expert Report, paras. 28-33; Barzallo Expert Report, paras. 31-40.

3821 Reply, para. 1054; Fourth Anson Expert Report, para. 28.

3822 Reply, para. 1054.

3823 Reply, para. 1055.

3824 Reply, para. 1056; Fourth Anson Expert Report, paras. 29-34.

3825 Reply, paras. 1059, 1075-1076.

growth rates ranging from 1.5 to 1.6% during the period 2019-2029. In the Claimants' submission, Mr Anson's projected growth rates are consistent with market research forecasts published in 2018.[3826] By contrast, Dr Kerr only relies on a 2011 growth forecast that did not materialize and ignores recent data that from 2015 to 2018 the compound annual growth rate in Ecuadorian lubricant consumption was 1.55%.[3827]

(ii) *Pricing*: Mr Anson relies on historical Chevron price lists to identify pricing information for the majority of the licensed products and adjusts those prices to current prices by relying on the Producer Price Index for Petroleum Lubricating Oil and Grease manufacturing to identify a compound annual growth rate of 0.66%.[3828] The average price for lubricants in Ecuador, Mr Anson asserts, was USD 31.14 per gallon in 2019.[3829] The conservative nature of Mr Anson's approach is confirmed, in the Claimants' view, by a 2019 Shell global price list, which supports an annualized growth rate of 2.06% for lubricant products.[3830] By contrast, the Claimants note that Dr Kerr relies on inapposite market consumption data and derives an artificially low average price of USD 15.36, which is contradicted by Chevron's actual prices, by data reflecting prices in the Ecuadorian market, and by those offered by Chevron's competitor, Shell.[3831]

(iii) *Profit Margin*: Mr Anson relies on data from companies specifically focused on the lubricants business, which showed an average profit margin of 14% between 2013 and 2018. These margins, according to the Claimants, are consistent with the 14.7% margin drawn from Chevron's public financial statement, as well as those earned by other lubricants businesses.[3832] By contrast, Dr Kerr attributes the profit margin

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[3826] Reply, para. 1061; Fourth Anson Expert Report, para. 99; **RE-43**, Second Kerr Expert Report, **Kerr Doc. 2,** Opportunities in Lubricants 2015: Latin America and Caribbean Market Analysis, Ecuador: Overview, p. 44.

[3827] Reply, para. 1061; Fourth Anson Expert Report, para. 103.

[3828] Reply, para. 1063; Fourth Anson Expert Report, para. 85.

[3829] Fourth Anson Expert Report, paras. 54-55.

[3830] Reply, para. 1064; Fourth Anson Expert Report, paras. 85, 92-96.

[3831] Reply, para. 1077; **RE-43**, Second Kerr Expert Report, Schedule 3; Fourth Anson Expert Report, paras. 78-83; Fourth Anson Expert Report, **Doc. 96**, E-mail from Sharbel Luzuriaga, Research Analyst at Kline, includes media articles and translations, 15 January 2020, p. 3.

[3832] Reply, paras. 1067-1068, 1078; Fourth Anson Expert Report, paras. 117, 119-122.

to Chevron's downstream international business segment, which does not necessarily reflect the profits associated with its Ecuadorian lubricants business.[3833]

(iv) *Purchase power allocation*: Noting that Dr Kerr fails to allocate any value to the technical know-how, the Claimants assert that Mr Anson's 23.7% purchase price allocation factor is the only figure that takes into account the intellectual property assets for which the Claimants have suffered losses.[3834]

(v) *Income approach*: Mr Anson's approach determines, *inter alia*, the portion of enterprise value for an Ecuadorian lubricant business that would be attributable to the Claimants' intellectual property assets with the inclusion of the know-how. In doing so, he relies on publicly available transaction data limited to transactions in the "Oil and Gas Field Machinery and Equipment" and "Oil and Gas Equipment Services Industry" categories to identify the proportion of purchase prices paid in comparable transactions for intellectual property assets.[3835] Mr Anson then applies a discount rate to reflect what a willing buyer would pay to a willing seller to acquire the Claimants' intellectual property assets.[3836] Under this approach, Mr Anson values Chevron's intellectual property assets at USD 85,315,652.[3837] By contrast, the Claimants state that Dr Kerr disregards the composition of the intellectual property assets and does not allocate any value to the technical know-how.[3838]

(vi) *Royalty approach*: Mr Anson calculates the aggregate royalty rate for licence agreements with a tiered royalty structure and uses those aggregate royalty rates in calculating a median royalty rate of 3.75%. Under this approach, Mr Anson values Chevron's intellectual property assets at USD 82,583,524.[3839] Mr Anson cautions

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3833 Reply, para. 1078.

3834 Reply, para. 1079.

3835 Reply, paras. 1069-1071; Third Anson Expert Report, paras. 96, 99; Fourth Anson Expert Report, para. 133.

3836 Reply, para. 1072; Third Anson Expert Report, paras. 79-90.

3837 Fourth Anson Expert Report, para. 6.

3838 Reply, para. 1079; **RE-53**, Kerr and Smith Expert Report, paras. 105, 107.

3839 Reply, para. 1039; Fourth Anson Expert Report, para. 6, 145.

that Dr Kerr's calculation of the median royalty rate, which treats each tiered royalty rate as a separate input, causes double-counting.[3840]

2362. Lastly, the Claimants clarify that Mr Anson's valuation figures are higher than those provided during the "show cause" phase in 2013 because his valuation in the present stage of the Arbitration values a broader set of intellectual property assets, applies a valuation date of 30 April 2019 (instead of 31 December 2012), and takes account of relevant changes in the Ecuadorian market, including an increased demand for lubricants and the lifting of remittance controls on royalties.[3841] Therefore, the Claimants submit that there is no basis to view Mr Anson's valuation with scepticism.[3842]

2. The Respondent's Position

2363. While it is the Claimants' burden to show that, but-for the Respondent's Treaty breaches, their trademarks in Ecuador would not have been attached, the Respondent submits that Chevron still might have faced a large monetary judgment adjudicating the LAPs' claims for their individual and collective, as opposed to diffuse, rights.[3843] Accordingly, the Respondent considers that the Claimants have failed to show that, "had a Treaty-compliant Lago Agrio Court entered a large monetary judgment against Chevron, the LAPs would not have obtained the Trademark Attachments attaching [Chevron IP]'s trademarks".[3844]

2364. Even if the Claimants could show that trademark attachments would not have been ordered but for the Treaty breaches, the Respondent argues that the Claimants still would not be entitled to any damages because they have failed to establish that (i) they suffered a complete diminution in value of Chevron's intellectual property assets; and (ii) that the diminution in value was a result of any Treaty breach.[3845]

3840 Reply, para. 1080; Fourth Anson Expert Report, paras. 143-144.

3841 Reply, para. 1060.

3842 Reply, para. 1060.

3843 Counter-Memorial, para. 1221.

3844 Counter-Memorial, para. 1221.

3845 Counter-Memorial, paras. 1212, 1223-1224; Rejoinder, para. 1692.

2365. First, noting that it is Chevron IP that actually owns the intellectual property assets at issue – not the two Claimants – the Respondent contends that the Claimants have failed to offer any proof that the trademark attachments caused the Claimants the same loss allegedly suffered by Chevron IP on a dollar-for-dollar basis.[3846]

2366. The Respondent argues that the Claimants have made no showing that there was any change in the value of the intellectual property assets since the trademark attachments.[3847] In this regard, the Respondent considers two of the Swissoil agreements – the Trademark Licence and the Technology Licence – as the best evidence on record to calculate the pre-trademark attachment value of Chevron's intellectual property assets.[3848] Under these Licences, the Respondent explains, Chevron IP assigned no value to the trademarks. Further, under the Technology Licence, Swissoil was to pay Chevron IP a minimum annual royalty of USD 760,000 and up to a maximum annual royalty of USD 1,100,000 based on the sales made by ConAuto Compañía Anónima Automotriz ("**ConAuto**") – an affiliate of Swissoil – of lubricants made using the technical know-how.[3849] In the Respondent's view, this implies that the strongest evidence concerning the value of the trademarks is the real-world value Chevron IP assigned to them, which is zero.[3850]

2367. Notwithstanding the actual real-world evidence of the pre-attachment value of the intellectual property assets, the Respondent criticizes the Claimants' reliance on a set of hypothetical assumptions according to which the intellectual property assets were much more valuable prior to the trademark attachments.[3851]

2368. Even if the Claimants were able to demonstrate that the intellectual property assets had substantial value prior to the trademark attachments, the Respondent insists that the Claimants have still failed to prove that the intellectual property assets lost value after the

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3846 Counter-Memorial, para. 1218(b); Rejoinder, paras. 1694-1695.

3847 Counter-Memorial, para. 1225; Rejoinder, para. 1696.

3848 Rejoinder, paras. 1698, 1702.

3849 Counter-Memorial, paras. 1228-1230; **R-1995**, Document 23, Trademark Licence Agreement; **R-1995**, Document 24, Technology Licence Agreement.

3850 Counter-Memorial, para. 1232.

3851 Rejoinder, paras. 1699-1701.

trademark attachments, much less all of their value as their damages claim requires.[3852] In this respect, the Respondent highlights that nothing in the embargo orders prevented Chevron IP from receiving payments outside of Ecuador under its existing agreements with Swissoil or any other licensing agreement.[3853]

2369. In the Respondent's view, a decline in market share in itself does not prove that the value of the underlying intellectual property suffers a diminution, given that several reasons that are unrelated to any Treaty breach could be attributable to the decline.[3854] Specifically, the Respondent considers that price competition might be more credibly linked to the decline of the market share of a commodity product, such as lubricants.[3855]

2370. Additionally, the Respondent maintains that none of the Claimants' arguments prove a diminution in the value of the know-how since the know-how could be licenced separately from the trademarks, it served a separate purpose, and had independent value.[3856] In particular, the Respondent notes that as a matter of Ecuadorian law, the trademark attachments do not encumber rights associated with the know-how and, thus, the know-how could not be subject to an attachment in any event.[3857] Thus, despite their assertion that the trademarks and the technical know-how have a "symbiotic relationship", the Respondent points out that the Claimants have not proven that any loss in the value of the trademarks resulted in an equivalent loss to the know-how.[3858]

2371. Second, even if there was any diminution in value of Chevron's intellectual property rights, the Respondent argues that the Claimants have not proven that it occurred as a result of any Treaty breach.[3859] Specifically, recalling the Tribunal's ruling that "public condemnatory statements regarding Chevron [] were also not the cause of an injury sustained by the Claimants" and that public statements by the Ecuadorian executive

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3852 Rejoinder, para. 1703.

3853 Counter-Memorial, para. 1242; Rejoinder, paras. 1703-1711.

3854 Rejoinder, para. 1705.

3855 Counter-Memorial, para. 1231; Rejoinder, para. 1706.

3856 Counter-Memorial, paras. 1243, 1249; Rejoinder, para. 1707.

3857 Counter-Memorial, para. 1244; **RE-45**, First Lombeida Expert Report, para. 55.

3858 Counter-Memorial, para. 1246; Rejoinder, para. 1707.

3859 Rejoinder, para. 1708.

branch did not amount to a denial of justice, the Respondent rejects the Claimants' suggestion that the Ecuadorian government's *Mano Sucia* media campaign was a breach of the Respondent's international obligations.[3860]

2372. Relying on the expert opinion of Professor Lombeida, the Respondent posits that even with the trademark attachment in place, the Claimants did not lose the right to control or administer the trademarks, with the exception of the right to transfer ownership of the trademarks.[3861] According to the Respondent, Chevron IP's ability to safeguard any goodwill associated with the trademarks was unaffected by the trademark attachments; rather, it maintained its ability to police the quality of the products bearing the trademarks, to bring an infringement action against an unauthorized user of the trademarks, and to file lawsuits for unfair competition.[3862] The Respondent further notes that the Claimants have not pointed to any evidence of counterfeit products, let alone suggested that Chevron IP attempted a lawsuit to enforce the trademarks or had a lawsuit rejected by an Ecuadorian court.[3863] As such, the Claimants have not proved that the trademark attachments depressed their value.[3864]

2373. To the extent Chevron IP suffered any loss as a result of an inability to licence the trademarks, the Respondent takes the view that it is due to Chevron IP's failure to renew the trademark registrations, not to the trademark attachments.[3865] In this regard, the Respondent disagrees with the Claimants that IEPI was legally qualified to act as a receiver or even accepted an appointment to that role.[3866] Even if IEPI had assumed the role of receiver, the Respondent states that the role would have been limited to conserving the trademarks and maintaining their value for an eventual auction in aid of the enforcement of the Lago Agrio Judgment.[3867] Professor Lombeida explains that under no

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3860 Rejoinder, para. 1709; Track II Award, para. 8.68.

3861 Counter-Memorial, para. 1235; **RE-45**, First Lombeida Expert Report, paras. 33, 39-43.

3862 Counter-Memorial, para. 1238; Rejoinder, para. 1713; **RE-45**, First Lombeida Expert Report, para. 40; **RE-59**, Second Lombeida Expert Report, para. 30.

3863 Counter-Memorial, para. 1239; Rejoinder, para. 1714.

3864 Rejoinder, para. 1712.

3865 Counter-Memorial, para. 1237.

3866 Rejoinder, para. 1710; **RE-59**, Second Lombeida Expert Report, paras. 18-21.

3867 Rejoinder, para. 1710; **RE-59**, Second Lombeida Expert Report, paras. 28-31.

circumstances could IEPI have legally filed to renew the registration of the trademarks.[3868] The Respondent notes that even the Claimants' expert, Dr Barzallo, never opined specifically that Chevron IP was prevented from renewing the trademarks.[3869]

2374. Third, even if the Claimants could get past all these hurdles, the Respondent argues that they are not entitled to the overly inflated valuation of their intellectual property losses.[3870] Specifically, the Respondent takes issue with Mr Anson's use of the wrong valuation date, his inclusion of the purported value of Chevron's know-how in the damages calculation, and his use of "flawed" inputs in his two valuation methodologies:

(i) *Valuation date*: According to the Respondent, the applicable valuation date should coincide with the date of the attachments in 2012. In the Respondent's view, applying a 30 April 2019 valuation date is unwarranted, as the proper approach to measure damages based on the loss of an asset is to value the asset immediately before the loss and then value what remains after the loss.[3871]

(ii) *Pricing*: In the Respondent's view, Mr Anson's calculation of the average price of USD 31.14 for lubricants bearing the trademarks in Ecuador in 2019 is based on outdated price lists with no applicability to Ecuador.[3872] Specifically, Mr Anson provides no reason why lubricant prices in Uruguay would correspond to Ecuador, how international marine customers compare to Ecuadorian lubricant consumers, and how the Producer Price Index for Petroleum Lubricating Oil and Grease Manufacturing has any relationship with Ecuador or its domestic market.[3873] The 2019 Shell price list for Shell products, the Respondent continues, bears no relationship to the 2008 Chevron price list.[3874] In contrast, Dr Kerr relies on the 2015 pricing data for finished lubricants in Ecuador from Kline Market Research,

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3868 Rejoinder, para. 1716; **RE-59**, Second Lombeida Expert Report, para. 31.

3869 Rejoinder, para. 1715; **RE-59**, Second Lombeida Expert Report, para. 30.

3870 Counter-Memorial, para. 1255; Rejoinder, para. 1717.

3871 Rejoinder, paras. 1720-1721; **RE-53**, Kerr and Smith Expert Report, paras. 9-12.

3872 Rejoinder, para. 1729.

3873 Rejoinder, paras. 1730-1735; **RE-53**, Kerr and Smith Expert Report, para. 45; **RE-43**, Second Kerr Expert Report, para. 41.

3874 Rejoinder, para. 1736, **RE-53**, Kerr and Smith Expert Report, para. 34.

an independent third-party market analysis, which shows that the average price of lubricants in Ecuador in 2015 was USD 15.06.[3875] According to the Respondent, this is comparable to the average price of comparable trademarked lubricants for sale in Ecuador on the MercadoLibre website.[3876]

(iii) *Market size*: Given the historical trends of Ecuador's lubricant market, Dr Kerr explains that market size projections must be taken with a grain of salt. The Respondent considers that Mr Anson "ignores that history."[3877] In Dr Kerr's view, Mr Anson also fails to account for the impact of the COVID-19 pandemic on Ecuador's lubricant market, as well as the prospect of an impending global recession.[3878]

(iv) *Market share*: According to the Respondent, Mr Anson fails to account for the economic reasons behind the drop in Chevron's market share, including the entry of low-cost competitors and the fact that the market shares of Chevron's competitors also declined.[3879]

(v) *Profit margin*: The Respondent notes that Mr Anson adopts the Chevron global profit margin without attempting to separate out the profit margin that would be attributable to Chevron's international downstream segment. Using a 2.9% profit margin derived from Chevron's own publicly filed financial statement would reduce Mr Anson's damages calculation by over 75%, from USD 85 million to USD 18 million.[3880] Mr Anson also fails to explain how an Ecuadorian lubricant operation would have a much greater profit margin than those of Shell and BP, which are 7.2% and 2.8%, respectively.[3881] In the Respondent's view, Dr Kerr's

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3875 Rejoinder, para. 1738; **RE-53**, Kerr and Smith Expert Report, paras. 28-29, Schedule 7.

3876 Rejoinder, para. 1739; **RE-43**, Second Kerr Expert Report, Schedule 5.

3877 Rejoinder, para. 1742.

3878 Rejoinder, paras. 1742-1743.

3879 Rejoinder, paras. 1745-1746.

3880 Rejoinder, para. 1747; **RE-53**, Kerr and Smith Expert Report, paras. 67-71.

3881 Rejoinder, para. 1749.

review of the profit margins for comparable companies in Ecuador confirms, in his opinion, that Mr Anson's proposed 14.7% profit margin is unreasonable.[3882]

(vi) *Purchase price allocation*: The Respondent asserts that, in determining a 23.7% purchase price allocation, Mr Anson incorrectly relies on transactions that were involved in upstream markets and operated in industrial markets at the supplier level, and not in the consumer and other markets in which trademarked products are sold.[3883]

(vii) *Income approach*: The Respondent submits that Mr Anson fails to mention that Chevron sold its Ecuadorian lubricants operation, Lubricantes y Tambores del Ecuador, C.A. ("**Lyteca**"), to Swissoil in 2010 for the sum of USD 15.4 million, not including the trademarks or know-how. In the Respondent's view, this stands in stark contrast to Mr Anson's valuation of his hypothetical Ecuadorian lubricants business at USD 359.7 million, including the trademarks and the know-how, and USD 274.4 million without the trademarks and the know-how.[3884]

(viii) *Royalty approach*: In the Respondent's view, the 3.75% royalty rate applied by Mr Anson is derived from purported "comparable" royalty agreements that have nothing to do with lubricants or Ecuador. Further, contrary to Mr Anson's opinion, the Respondent asserts that remittance controls did not constrain the royalty rate of the Technology Licence.[3885] Instead of accounting for multiple royalty rates, Mr Anson takes the median of all of the rates mentioned in a given licence, which yields an artificially higher median royalty.[3886]

2375. In light of the foregoing, correcting each of Mr Anson's purported errors affecting the foundational inputs and attributing 50% of the value of Chevron's intellectual property assets to trademarks, the Respondent calculates a trademark valuation of USD 1.29

3882 Rejoinder, para. 1751; **RE-53**, Kerr and Smith Expert Report, paras. 72-74.

3883 Rejoinder, para. 1753; **RE-53**, Second Kerr Expert Report, paras. 92-105.

3884 Rejoinder, para. 1754; **RE-53,** Kerr and Smith Expert Report, para. 86.

3885 Rejoinder, paras. 1755-1756; **RE-53**, Kerr and Smith Expert Report, paras. 95-98.

3886 Rejoinder, para. 1757; **RE-53**, Kerr and Smith Expert Report, paras. 99-104.

million under the income approach and USD 3.99 million under the relief from royalty approach.[3887]

3. The Tribunal's Analysis

(a) Introduction

2376. The Claimants' damages claim in Track III includes three different categories concerning separate yet related chains of events taking place in parallel in Ecuador. Under the present heading, the Tribunal will address only the Claimants' claim concerning the embargo of certain trademarks used for lubricant products in Ecuador. The Claimants' damages claim for the reimbursement of the legal fees and expenses disbursed in connection with the Lago Agrio Litigation is addressed separately in Section VIII.A above, while the Claimants' claim for the reimbursement of the legal fees and expenses disbursed in connection with the Ecuador Enforcement Proceedings is addressed separately in Section VIII.B above.

2377. In order to provide context for the Tribunal's decision on the Claimants' claim for intellectual property losses in Ecuador, the Tribunal will describe in this Section (i) the events leading to the attachment of Chevron's subsidiaries' intellectual property in Ecuador; and (ii) Chevron's lubricant business in Ecuador prior to the attachment, with a specific focus on the licence agreements between Chevron IP and Swissoil.

1. Attachment of intellectual property

2378. As already explained in Section VIII.B above, on 3 August 2012, in response to an application filed by the LAPs, the Lago Agrio Court issued a *mandamiento de ejecución* (*i.e.*, order of enforcement) ordering Chevron to pay the sum of USD 19,041,414,529 per the Lago Agrio Judgment – or to turn over assets of equivalent value free of any encumbrances – within 24 hours.[3888] On 15 October 2012, also in response to an application filed by the LAPs, the Lago Agrio Court ordered that the execution of the Lago Agrio Judgment "be applicable to the entirety of the assets" of Chevron (until such time as the entire obligation had been satisfied), which included Chevron's intellectual

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3887 Rejoinder, para. 1728.

3888 **C-1404**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 3 August 2012 at 3:00 p.m.

property assets in Ecuador, all of Chevron and its affiliates' bank accounts in Ecuador or transfers through the Ecuadorian banking system, and Chevron's USD 96 million award against Ecuador from the *Chevron v. Ecuador I* arbitration (defined earlier as the "15 October 2012 Order").[3889] With respect to intellectual property, the Court specifically ordered attachment over 13 assets:

> A) The intellectual property assets identified by the petitioner in his motion; that is; Chevron, Texaco, Ursa, Havoline, Doro, Geotex, Meropa, Motex, Multigear, Regal, Taro, Texatherm, Thuban and all their distinctive logos and/or associated with each of these, and consequently over all royalties and any type of income that has been generated or that may come to be generated by use, sale, distribution or other measure; B) Likewise, attachment is decreed over all the income, royalties and in general, any monetary benefit linked to these brands, whether present or future, that Chevron Corp. may come to have, directly or through its subsidiaries, including those received by Chevron Intellectual Property LLC, as a result of the Distinctive Logo Use License Contract between Chevron Intellectual Property LLC (licensor) and Swissoil del Ecuador S.A. (licensee) . . .[3890]

2379. The following day, the Lago Agrio Court notified the attachment of the above-mentioned trademarks to IEPI.[3891] On 18 October 2012, Chevron argued that the judge who issued the 15 October 2012 Order lacked competence, requesting that the Order be declared null and void and that the judge refrain from continuing to hear this matter.[3892] A few days later, and without prejudice to its nullification request, Chevron filed a cassation appeal against the 15 October 2012 Order, requesting that the enforcement of the Order be suspended.[3893]

2380. On 25 October 2012, the Lago Agrio Court rejected Chevron's motions against the 15 October 2012 Order and, in response to a request from the LAPs, expanded the

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[3889] **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:53 p.m., pp. 4-5. *See* **C-1575**, Plaintiff's Motion, 26 September 2012 at 8:39 a.m.

[3890] **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:53 p.m., p. 4.

[3891] **C- 2755**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 0002-2003-0002P-CPJSClerk's letter to the Ecuadorian Institute of Intellectual Property, 16 October 2017 at 4:53 p.m. The Court's order was also notified to Chevron's local bank in Ecuador (Banco Pichincha C.A.) and to all banks in the Ecuadorian financial system. *See* **C-1539**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 0002-2003-P-CPJS, Court Order, 16 October 2012 at 4:53 p.m.; **C-1540**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 0002-2003-P-CPJS, Notice of Embargo Order by Supervisory Agency of Banks and Insurance, 17 October 2012.

[3892] **C-2756**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 18 October 2012.

[3893] **C-2757**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Appeal, 22 October 2012 at 4:59 p.m.

attachment to additional intellectual property assets "registered by Chevron and its subsidiaries", including the following 54 trademarks owned by three of Chevron's subsidiaries (Chevron IP, Texaco Inc., and Texaco Company) (jointly, "**Chevron's IP Subsidiaries**") (defined earlier as the "25 October 2012 Order"):

> Havoline label design, registration No.15220, type PM [product mark]; Havoline label design (energy), registration No.15219, type PM; Havoline and Design ii, registration No.15218, type PM; Havoline formula 3 and Design, registration No.1490, type PM; Havoline, registration No.220, type PM; Texaco, un mundo de energía, registration No.7010, type PM; Texaco, un mundo de energía, registration No.2080, type SM [service mark]; t-texaco star design, registration No.2655, type PM; t-texaco star design; registration No.2626, type PM; Texaco, registration No.1915, type PM; Texaco and Design of a hexagonal edge with a star, registration No.140, type PM; Texacoat, registration No.513, type PM; Red star t greentexaco, registration No.457, type PM; Texaco, registration No.44,PM; Texaco, registration No.662, type SM; Texaco super outboard, registration No.1552, type PM; Texaco outboard, registration No.1553; type PM; Texaco vanguard, registration No.1554, type PM; Chevron, registration No.15133, type PM; Chevron, registration No.1334, type PM; Chevron design in blue, white and red, registration No.421, type PM; Chevron design in black and white, registration No.420, type PM; Chevron design in blue, white and red, surrounded by a white strip in the shape of a pentagon, registration No.419, type PM; Chevron, registration No.500, type PM; Chevron, registration No.38, PM; Chevron and Design (color), registration No.996, type PM; Chevron and Design (color), registration No.1032, type PM; Chevron and Design (color), registration No.422, type SM; Chevron and Design (white and black), registration No.997, type PM; Chevron and Design (white and black), registration No.998, type PM; Chevron and Design (white and black), registration No.423, type SM; Chevron and Design (black), registration No.2191, PM; Chevron and Design (black), registration No.2192, type SM; Chevron and Design (black), registration No.817, type PM; Chevron Design (color), registration No.2193, type PM; Chevron Design (color), registration No. 2194, type PM; Chevron Design (color), registration No.818, type SM; Chevron supreme, registration No.196, PM; Ursa super plus, registration No.265, PM; Ursa, registration No.204, type, PM; Ursa ofrece confianza, registration No.1220, type SM; Ursa delivers confidence, registration No.1221, type SM; Doro, registration No.500, type PM; Geotex, registration No.1324-10, type PM; Meropa, registration No.223, type PM; Motex, registration No.514, PM; Multigear, registration No.1536-10, PM; Rando, registration No.202, type PM; Regal, registration No.205, type PM; Taro, registration No.495, type PM; TDH, registration No.1551-10, type PM; Texatherm, registration No.1325-10, PM; Thuban, registration No.203, type PM; Universal, registration No.1550-10, type PM.[3894]

2381. Hereinafter, the Tribunal shall refer to the 15 October 2012 Order of the Lago Agrio Court (as further expanded by the Lago Agrio Court's 25 October 2012 Order) as the "**Attachment Order**".

[3894] **C-1541**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Amplification of Execution Order, 25 October 2012 at 11:23 a.m., pp. 1-2. *See also* Table A at para. 2400 below.

2382. Chevron subsequently filed several motions against the Court's expansion Order of 25 October 2012[3895] and later sought, unsuccessfully, to challenge the judge who issued the Attachment Order.[3896] On 16 January 2013, the Lago Agrio Court rejected Chevron's pending motions and, in addition, temporarily revoked the attachment of the award in the *Chevron v. Ecuador I* arbitration further to a submission from Ecuador's Attorney General.[3897]

2383. On 7 February 2013, the Tribunal issued its Fourth Interim Award on Interim Measures, deciding, *inter alia*, as follows:

> 1) The Tribunal declares that the Respondent has violated the First and Second Interim Awards under the Treaty, the UNCITRAL Rules and international law in regard to the finalisation and enforcement subject to execution of the Lago Agrio Judgment within and outside Ecuador, including (but not limited to) Canada, Brazil and Argentina;
>
> 2) The Tribunal decides that the Respondent shall show cause, in accordance with a procedural timetable to be ordered by the Tribunal separately, why it (the Respondent) should not compensate the First Claimant for any harm caused by the Respondent's violations of the First and Second Interim Awards . . . [3898]

2384. The Tribunal's above ruling led to a "show-cause" procedure involving two rounds of written submissions by the Parties between April and August 2013.[3899] During this procedure, the Parties submitted valuation reports prepared by their respective intellectual property experts, Mr Anson and Dr Kerr.[3900] However, the Tribunal ultimately deferred "all issues arising from the Claimants' claim for compensation under the Fourth Interim Award (the so-called 'Show Cause Procedure')" to Track III of the Arbitration.[3901]

3895 *See* **C-2754**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 30 October 2012 at 4:55 p.m.; **C-2758**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 30 October 2012 at 4:58 p.m.; **C-2759**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 30 October 2012 at 4:50 p.m.

3896 **C-2760**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002; Decision by the President of the Court, 14 December 2012 at 4:14 p.m.

3897 **C-1624**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 16 January 2013 at 10:52 a.m.

3898 Fourth Interim Award on Interim Measures, 7 February 2013, Part IV, p. 31.

3899 *See* Procedural Order No. 16, 19 March 2013, para. 6; Procedural Order No. 17, 5 June 2013, para. 5.

3900 *See generally* First Anson Expert Report; Second Anson Expert Report; **RE-43**, Second Kerr Expert Report.

3901 Procedural Order No. 18, 9 August 2013, para. 7(2).

2385. In parallel, on 27 June 2013, the Lago Agrio Court ordered again the attachment of the amounts owed by Ecuador to Chevron as a result of the award in the *Chevron v. Ecuador I* arbitration, further to a motion from the LAPs ("**27 June 2013 Order**").[3902] Chevron continued to seek the revocation of the Attachment Order and the 27 June 2013 Order, but the Court denied these motions.[3903] On 5 July 2013, the National Director of International Affairs and Arbitration (a department within the Attorney General's office) inquired with IEPI about the actions it had taken in response to the Attachment Order and the trademarks related to Chevron that had been attached as a result of that Order.[3904] In response, IEPI explained that it had requested the Lago Agrio Court to "clarify and specify the trademark registration numbers to which the attachment order refers", since "registrations do exist with the 'CHEVRON' denomination, but this does not mean that the titleholders to those registrations have any relationship to CHEVRON CORPORATION".[3905]

2386. On 9 September 2013, at the request of the LAPs, the Lago Agrio Court notified to IEPI the attachment of 50 trademarks ("**9 September 2013 Order**"), as opposed to the 54 originally provided for in its 25 October 2012 Order.[3906] Specifically, the 9 September

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3902 **C-1921**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002; Court Order, 27 June 2013 at 11:30 am. In February 2015, the LAPs requested that the amounts owed under the *Chevron v. Ecuador I* award be adjudicated to the ADF. However, the attachment of the award was eventually cancelled, reportedly, in 2016, also at the request of the LAPs. *See* **C-2771**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' Motion, 4 February 2015; **C-2772**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 5 October 2015 at 2:20 p.m.; **C-2775**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' Motion, 8 July 2016 at 4:56 p.m.; **C-2548/C-2777**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002 LAPs' Motion, 21 July 2016 at 2:15 p.m.; Memorial, Appendix 8: Ecuador Trademark Embargo, fns 30, 48.

3903 *See* **C-1923**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 29 July 2013 at 2:34 p.m.; **C-2761**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 2 July 2013 at 5:02 p.m. *See also* **C-2762**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 9 September 2013 at 10:24 a.m.; **C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m.

3904 **C-1924**, Official Letter No. 13762, 5 July 2013.

3905 **C-1925**, Official Letter No. DE-IEPI-2013-171-OF, 11 July 2013.

3906 **C-2646/C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m.; **C-2764**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' motion, 5 September 2013. *See also* Table A at para. 2400 below.

2013 Order did not include the trademarks "Texacoat", "Rando", "TDH", or "Universal", which were also not listed in the 15 October 2012 Order of the Lago Agrio Court.[3907] The Court instructed IEPI "to immediately make a margin note for each of the titles of the brands and distinctive signs so they reflect the ordered attachment" and further advised IEPI that it was "[t]hereby established as the legal custodian ["*depositario*"] of the attached property".[3908]

2387. On 3 October 2013, IEPI replied to the Lago Agrio Court as follows regarding the 50 notified trademarks in the 9 September 2013 Order:

> I hereby attach certified copies of 18 trademark registrations, duly annotated with the attachment order, as well as a CD containing the other 32 trademark registrations in PDF format, with electronic marginal notes and signatures.
>
> The foregoing notwithstanding, I want to point out that most of the aforementioned [trademark] registrations are in the name of CHEVRON INTELLECTUAL PROPERTY LLC, that 8 of them have expired, inasmuch as they have not been duly renewed, and that for 13 of them there are marginal notes on precautionary measures concerning constitutional matters related to the license granted in favor of the company, Swissoil del Ecuador S.A. (SWISSOIL) . . .[3909]

2388. On 17 October 2013, IEPI issued a press release confirming the attachment of the trademarks and conveying the following statement from its Executive Director:

> IEPI Executive Director Andrés Ycaza explained that with the attachment, Chevron loses the power to control its trademarks so it will not receive royalties from those trademark licenses. "This measure prohibits the transfer or sale of these intangibles assets and makes them available for administration by a third party." In this case, and by order of the Court of Sucumbíos, the IEPI will be the depositary of these intangible assets, so the Institution will have the power to control and administer the trademarks so that they will not lose their value, Ycaza said.
>
> Ycaza remarked that the purpose of this action is to find measures to obtain income from the sale of these trademarks, but under the court order. "The goal is to create a guarantee

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[3907] **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:53 p.m., p. 4; **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m. *See also* Table A at para. 2400 below.

[3908] **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m.; **C-2764**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' motion, 5 September 2013.

[3909] **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013. The Lago Agrio Court took note of IEPI's fulfilment of the Attachment Order on 14 October 2013. *See* **C-2766**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 14 October 2013 at 11:02 a.m. *See also* Table A at para. 2400 below.

> to secure the payment of a debt. The income the trademarks generate will no longer go to Chevron."[3910]

2389. On 20 January 2015, the LAPs requested that (i) the Lago Agrio Court order IEPI to renew the registration of the attached trademarks, given that some of them had expired or were about to expire; and (ii) the attached trademarks be valuated and subsequently auctioned.[3911] On 5 October 2015, Chevron opposed the LAPs' request to renew 13 of the attached trademarks, arguing that (i) the LAPs were not entitled to request such renewal, since the assets at issue belonged to a third party (Chevron IP); and (ii) the majority of those trademarks had "irrevocably expired as a matter of law".[3912] The LAPs reiterated their renewal request in April 2016, which Chevron opposed again, insisting that this Tribunal's awards on interim measures precluded the enforcement of the Lago Agrio Judgment.[3913] On 12 July 2016, the Lago Agrio Court denied the LAPs' request to renew the attached trademarks.[3914] According to the Claimants' Track III Memorial, the Lago Agrio Court has yet to rule on the LAPs' request for a valuation and auction of the trademarks.[3915]

[3910] **C-3224**, Press Release, *Ecuadorian Intellectual Property Institute Records the Attachment of 50 Chevron brands*, Government of Ecuador Secretary General of Communications, 17 October 2013, p. 1. *See also* **C-2141**, *IEPI attaches 50 Chevron brands*, EL TELÉGRAFO, 17 October 2013; **C-3464**, *Fifty Trademarks Will Not be Available to Chevron in Ecuador due to Attachment*, LAINFORMACION.COM, 18 October 2013.

[3911] **C-2769**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' Motion, 20 January 2015 at 2:34 p.m.; **C-2770**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' Motion, 20 January 2015 at 2:42 p.m.

[3912] **C-3227**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 5 October 2015 at 12:30 p.m. Chevron also requested that the LAPs' request for the valuation and subsequent auction of the trademarks be rejected. *See* **C-3225**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 11 July 2016 at 4:29 p.m., p. 6.

[3913] **C-3225**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Chevron's Motion, 11 July 2016 at 4:29 p.m.; **C-3228**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' Motion, 11 April 2016 at 2:54 p.m.

[3914] **C-2776**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 12 July 2016 at 5:27 p.m., p. 3.

[3915] Memorial, Appendix 8: Ecuador Trademark Embargo, p. 10. The LAPs filed a motion before the Court in 2019, but its contents are unknown to the Claimants. *See* **C-2869**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Docket showing LAPs' Motion, 23 April 2019.

2. The licence agreements between Chevron IP and Swissoil

2390. The Parties have provided limited evidence to the Tribunal regarding the scope of Chevron's lubricant business and the use of Chevron's IP Subsidiaries' trademarks and know-how in Ecuador prior to the issuance of the Attachment Order. The most significant materials on record concern Chevron's arrangements with Swissoil, which are relevant to place in context the attachments ordered by the Lago Agrio Court.

2391. On 12 January 2010, Lyteca (an Ecuadorian affiliate of Chevron IP) and Swissoil entered into a Purchase and Sale Agreement whereby Lyteca sold certain assets to Swissoil (the "**Swissoil PSA**"). The Swissoil PSA specifically provided for the sale of (i) certain real estate assets for USD 1,388,705; (ii) certain inventory (including lubricants, base oil, additives, and packages) for USD 12,500,000; and (iii) other assets for USD 1,473,920.[3916] The closure of the Swissoil PSA, which appears to have materialised in June 2010, was subject to the execution of additional agreements involving or related to Chevron IP, including the four agreements described below.[3917]

2392. First, Chevron IP entered into the Trademark Licence agreement with Swissoil, whereby Swissoil was granted "a limited, royalty-free, non-transferable, non-exclusive license to use" 17 trademarks owned by Chevron IP in Ecuador "only on and in connection with" certain products identified in the Trademark Licence.[3918] The Attachment Order issued at a later stage by the Lago Agrio Court covered 16 of the licenced trademarks expressly,[3919] as well as "all the income, royalties and in general, any monetary benefit linked to these brands, whether present or future", that Chevron might receive as a result of the Trademark Licence.[3920]

3916 **RE-53**, Kerr and Smith Expert Report, **Kerr Doc. 23**, CVX-Track III – 00016706-762, Art. I.

3917 *See* **RE-53**, Kerr and Smith Expert Report, para. 14(a), **Kerr Doc. 23**, CVX-Track III – 00016706-762, Arts. 6.2(h), 7.2(f), **Kerr Doc. 24**, CVX-Track III – 00016000-062, p. 1.

3918 **R-1995,** Document 23, Trademark Licence Agreement, Section 1(a).

3919 "Soluble" is the only trademark listed in the Trademark Licence that was not included in the Attachment Order. *See* Table A at para. 2400 below, Item No. 55.

3920 The trademarks included in the Trademark Licence were Doro, Geotex, Havoline, Meropa, Motex, Multigear, Rando, Regal, Soluble, Super Outboard, Taro, TDH, Texatherm, Thuban, Universal, Ursa, and Vanguard. *See* **R-1995,** Document 23, Trademark Licence Agreement, Exhibit A. As already noted, Soluble was not attached. **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:53

2393. Second, Chevron IP and Swissoil entered into a Technology Licence agreement, whereby Swissoil was granted "a non-exclusive, non-transferable license without right to sublicense to use" certain technical information in an "existing blending facility" of Swissoil in Ecuador, and only for purposes of manufacturing, packaging, marketing, distributing, using, and selling certain types of lubricants defined in the agreement.[3921] The licenced technical information included information and data related to the blending, packaging and marketing of the lubricants, certain product composition, characteristics and specifications, production and quality assurance procedures, and further know-how.[3922] [redacted][3923]

2394. Third, another division of Chevron, Chevron Products Company, and ConAuto, an affiliate of Swissoil, entered into the "Texaco and Chevron Lubrication Marketer Agreement (the "**Marketer Agreement**"), whereby ConAuto was appointed as a non-exclusive distributor of certain "Texaco and Chevron branded lubrication products" in Ecuador.[3924]

2395. Fourth, a Termination and Release Agreement was entered, under which ConAuto, *inter alia*, "release[d] certain claims against and acknowledge[d] certain rights of" three Chevron affiliates (Lyteca, Texaco Inc., and Chevron Global Energy Inc.).[3925]

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p.m., p. 4; **C-1541**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Amplification of Execution Order, 25 October 2012 at 11:23 a.m., pp. 1-2. *See also* Table A at para. 2400 below.

3921 **R-1995**, Document 24, Technology Licence Agreement, Sections 1.4, 2.1.

3922 **R-1995**, Document 24, Technology Licence Agreement, Section 1.8.

3923 **R-1995**, Document 24, Technology Licence Agreement, Section 6.1. The minimum royalty fee would not be payable if a *force majeure* event occurred. *See* **R-1995**, Document 24, Technology Licence Agreement, Section 6.3.

3924 **RE-53**, Kerr and Smith Expert Report, **Kerr Doc. 25**, CVX – Track III – 00016763-805, Section 1.1.

3925 *See* **R-1995**, Document 23, Trademark Licence Agreement, p. 1; **R-1995**, Document 24, Technology Licence Agreement, p. 1. *See also* **RE-53**, Kerr and Smith Expert Report, **Kerr Doc. 25**, CVX – Track III – 00016763-805, Section 4.3(h).

2396. Shortly before the issuance of the Attachment Order, Swissoil and ConAuto filed an application for constitutional preventive measures to safeguard their constitutional rights in light of the impending attachment of Chevron's trademarks, with a view to protecting the Trademark Licence that authorized those applicants to distribute products using those trademarks. On 5 October 2012, the Guayas Criminal Investigation Court No. 15 issued a judgment deciding as follows:

> I DECIDE: TO GRANT the preventive measures requested and for compliance with these measures in order to protect against the potential infringement of the rights the petitioner has alleged, it is ordered: 1. For the Ecuadorian Institute of Intellectual Property to maintain in the Registry for which it is responsible the administrative act of the License Agreement for Use of Distinctive and (sic) Signs entered into between Chevron Intellectual (sic) LLC and Swissoil del Ecuador S.A. (SWISSOIL) recorded on February 2, 2011, which ensures proper usage of the trademarks that the petitioners have requested. 2. During the term of such license, the National Customs Service of Ecuador shall not implement border measures against goods that bear licensed trademarks and that are described in the User License [illegible part below]. 3. The Hydrocarbons Regulation and Control Agency [shall] respect the [illegible part below] petitioners as authorized users to legally manufacture and distribute products with the Texaco and Chevron trademarks in processes for monitoring the production and commercialization of lubricant greases and oils for diesel and gasoline automotive use. 4. The petitioner is ordered to file, within the legal time bar period, the primary action and add it to this case file with the respective filing certificate. Having done so, the non-violability of the rights protected herein shall be subject to the decision of the judges having jurisdiction to hear the primary matter, the respective action for which must be filed by the petitioner within 90 days. This means that these preventive measures granted in this decision shall be temporary in nature for the aforementioned term. It is expressly provided that if the attachment, auction, and award of the above-mentioned trademarks were to occur, any payments, royalties, profits, or any other economic benefit arising from the license for use of distinctive signs shall be provided to the persons ordered by the competent Court, for purposes of safeguarding both the petitioner's rights and the rights of the plaintiffs in the primary proceedings, within which attachment of the trademarks may be ordered.[3926]

2397. Following the issuance of the 15 October 2012 Order, on 24 October 2012, Swissoil wrote to the Lago Agrio Court (i) taking note "of the obligation to withhold any outstanding or future payment or transfer of funds on the basis of the [Trademark Licence]"; and

[3926] **RE-45**, First Lombeida Expert Report, **Lombeida-1**, Judgment of 5 October 2012 at 3:48 p.m., issued by the Guayas Criminal Investigation Court Number Fifteen in Case No. 09265-2012-0286, brought by Swissoil del Ecuador S.A. and Conauto Compañía Anónima Automotriz against IEPI, SENAE and the Office of the Attorney General of Ecuador, pp. 2-3. *See also* **RE-45**, First Lombeida Expert Report, paras. 58-60.

(ii) informing the court that, at that time, Swissoil had "no monetary obligations outstanding or to be assumed in relation to the [Trademark Licence]".[3927]

2398. Approximately four years later, on 24 October 2016, the Guayas District Administrative Court No. 2 ordered:

> 1. The Ecuadorian Institute of Intellectual Property to maintain registration of the license agreement of distinctive signs, entered via the administrative act contained in order SD No. 2011-011, issued on February 2, 2011 by the Ecuadorian Institute of Intellectual Property (IEPI) in the respective record book; and, 2. That the Ecuadorian Institute of Intellectual Property (IEPI) and the National Customs Service of Ecuador be notified via official letter to duly comply with the provision contained in Article 219 of the Intellectual Property Law, which safeguards and protects the right of CONAUTO COMPAÑÍA ANÓNIMA AUTOTRIZ to carry out business activities in the country pursuant to the laws in force, with respect to the products whose distinctive signs are the trademarks distributed and identified in the various grounds contained in this judgment.[3928]

2399. While it is unclear how long these measures remained in force, it appears that the Attachment Order did not directly prevent Swissoil and ConAuto from continuing to import, commercialize, and distribute products in Ecuador bearing Chevron's licensed trademarks.[3929] Indeed, the Executive Director of IEPI confirmed that "the attachment d[id] not mean that the trademarks w[ould] be taken out of circulation from the national market, nor w[ould] consumers or the companies that s[old] these products be affected."[3930] The Tribunal notes that this is consistent with the Lago Agrio Court's decision in the Attachment Order to attach, in addition to the trademarks themselves, any monetary benefits generated by the Trademark Licence for Chevron. In addition, the 13 trademarks for which IEPI wrote "marginal notes on precautionary measures concerning

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3927 **RE-45**, First Lombeida Expert Report, **Lombeida-2**, Letter dated 24 October 2012 signed by the General Manager and CEO of Swissoil del Ecuador S.A., addressed to Dr Wilfrido Erazo, Acting Chief Judge of the Provincial Court of Sucumbíos, p. 2.

3928 **RE-45**, First Lombeida Expert Report, **Lombeida-3**, Judgment issued by the District Administrative Court seated in the canton of Guayaquil, Province of Guayas, Case No. 09801-2012-0956, 24 October 2016, in the proceeding brought by Swissoil del Ecuador and Conauto Cia. Anónima Automotriz against IEPI, National Customs Service of Ecuador, Attorney General of Ecuador, p. 9.

3929 **RE-45**, First Lombeida Expert Report, paras. 55, 59, 61.

3930 **C-3224**, Press Release, *Ecuadorian Intellectual Property Institute Records the Attachment of 50 Chevron brands*, Government of Ecuador Secretary General of Communications, 17 October 2013. *See also* **C-2141**, *IEPI attaches 50 Chevron brands*, EL TELÉGRAFO, 17 October 2013; **C-3464**, *Fifty Trademarks Will Not be Available to Chevron in Ecuador due to Attachment*, LAINFORMACION.COM, 18 October 2013.

constitutional matters related to the licence in favor of the company [Swissoil]" are all attached trademarks covered by the Trademark Licence.[3931]

3. Consolidated overview

2400. For reference purposes, the Tribunal indicates for each trademark in Table A below (i) whether it was listed in the 15 October 2012 Order of the Lago Agrio Court; (ii) whether it was listed in the 25 October 2012 Order of the Lago Agrio Court, expanding the 15 October 2012 Order; (iii) whether it was notified for attachment by the Lago Agrio Court to IEPI on 9 September 2013; (iv) whether IEPI confirmed the annotation of the corresponding trademark registration on 3 October 2013; (v) the date of expiry of the corresponding trademark registration; and (vi) whether the trademark in question is included in the Trademark Licence.

[3931] **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013. The 13 trademarks for which IEPI wrote marginal notes on precautionary measures are "Havoline", "Texaco super outboard", Texaco vanguard", "Ursa", "Doro", "Geotex", "Meropa", "Motex", "Multigear", "Regal", "Taro", "Texatherm" and "Thuban" (*see* Items 5, 16, 18, 40, 43, 44, 45, 46, 47, 49, 50, 52, and 53 in Table A at para. 2400 below).

Table A

No.	Registration Number[3932]	Name[3933]	Owner[3934]	Listed in 15 October 2012 Order?[3935]	Listed in 25 October 2012 Order?[3936]	Listed in 9 September 2013 Order?[3937]	Annotated by IEPI on 3 October 2013?[3938]	Date of Expiry[3939]	Included in Trademark Licence?[3940]
1	15220	Havoline Diseño de etiqueta	Chevron IP	Yes	Yes	Yes	Yes	26 February 2012	No

[3932] Registration numbers are taken from the Lago Agrio Court's Order of 25 October 2012. **C-1541**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Amplification of Execution Order, 25 October 2012 at 11:23 a.m., pp. 1-2. The LAPs' motion of 5 September 2013 and the Court's order of 9 September 2013 use the same registration numbers. **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m.; **C-2764**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' motion, 5 September 2013. IEPI's Letter to the Lago Agrio Court of 3 October 2012 includes years in the registration numbers, which are not reflected this table. **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013.

[3933] As found in the Lago Agrio Court's order of 25 October 2012, unless otherwise indicated. **C-1541**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Amplification of Execution Order, 25 October 2012 at 11:23 a.m.

[3934] As noted in IEPI's letter to the Lago Agrio Court of 3 October 2013. **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013. Where IEPI's letter did not identify the owner of a specific trademark (*see* Items 12, 48, 51, and 54 in this Table), the Tribunal has resorted to the relevant trademark registration certificate provided by Professor Lombeida to identify the owner of the trademark in question.

[3935] The Lago Agrio Court's Order of 15 October 2012 did not list specific trademarks, but brands. For the present purposes, the table considers any trademark including the name of one of these brands to have been attached. The Attachment order specifies that it attaches "the intellectual property identified by the petitioner in his motion; that is; Chevron, Texaco, Ursa, Havoline, Doro, Geotex, Meropa, Motex, Multigear, Regal, Ttaro, Texatherm, Thuban." **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:53 p.m., p. 4.

[3936] **C-1541**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Amplification of Execution Order, 25 October 2012 at 11:23 a.m., pp. 1-2.

[3937] **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m. The same trademarks are listed in the LAPs' motion of 5 September 2013. *See* **C-2764**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' motion, 5 September 2013.

[3938] **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013.

[3939] As noted in IEPI's letter to the Lago Agrio Court of 3 October 2013. **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013. Where IEPI's letter did not identify the expiry date of a specific trademark (*see* Items 12, 48, 51, and 54 in this Table), the Tribunal has resorted to the relevant trademark registration certificate provided by Professor Lombeida to identify the expiry date of the trademark in question.

[3940] **R-1995**, Document 23, Trademark Licence Agreement, Exhibit A.

No.	Registration Number[3932]	Name[3933]	Owner[3934]	Listed in 15 October 2012 Order?[3935]	Listed in 25 October 2012 Order?[3936]	Listed in 9 September 2013 Order?[3937]	Annotated by IEPI on 3 October 2013?[3938]	Date of Expiry[3939]	Included in Trademark Licence?[3940]
2	15219	Havoline Diseño de etiqueta (energy)	Chevron IP	Yes	Yes	Yes	Yes	26 February 2022	No
3	15218	Havoline y Diseño ii	Chevron IP	Yes	Yes	Yes	Yes	26 February 2012	No
4	1490	Havoline formula 3 y Diseño	Texaco Inc.	Yes	Yes	Yes	Yes	8 June 2012	No
5	220	Havoline	Chevron IP	Yes	Yes	Yes	Yes	23 January 2015	Yes
6	7010	Texaco, un mundo de energía	Chevron IP	Yes	Yes	Yes	Yes	29 December 2008	No
7	2080	Texaco, un mundo de energía	Chevron IP	Yes	Yes	Yes	Yes	28 December 2008	No
8	2655	Diseño estrella t-texaco	Chevron IP	Yes	Yes	Yes	Yes	4 November 2005	No
9	2626	Diseño estrella t-texaco	Chevron IP	Yes	Yes	Yes	Yes	4 November 2015	No
10	1915	Texaco	Chevron IP	Yes	Yes	Yes	Yes	6 January 2015	No
11	140	Texaco y Diseño de un borde hexagonal con una estrella	Chevron IP	Yes	Yes	Yes	Yes	12 March 2023	No
12	513	Texacoat	Texaco Inc.	No	Yes	No	No	30 December 1980[3941]	No
13	457	Estrella roja t verde - texaco	Texaco Company	Yes	Yes	Yes	Yes	26 October 2004	No
14	44	Texaco	Chevron IP	Yes	Yes	Yes	Yes	17 August 2014	No
15	662	Texaco	Chevron IP	Yes	Yes	Yes	Yes	12 January 2015	No
16	1552	Texaco super outboard	Chevron IP	Yes	Yes	Yes	Yes	25 February 2020	Yes[3942]

3941 **RE-45**, First Lombeida Expert Report, **Lombeida-RG-51**, Trademark Registration Certificate No. 513-60, "Texacoat", 30 December 1960.

3942 "Super Outboard." **R-1995**, Document 23, Trademark Licence Agreement, Exhibit A.

No.	Registration Number[3932]	Name[3933]	Owner[3934]	Listed in 15 October 2012 Order?[3935]	Listed in 25 October 2012 Order?[3936]	Listed in 9 September 2013 Order?[3937]	Annotated by IEPI on 3 October 2013?[3938]	Date of Expiry[3939]	Included in Trademark Licence?[3940]
17	1553	Texaco outboard	Chevron IP	Yes	Yes	Yes	Yes	25 February 2020	No
18	1554	Texaco vanguard	Chevron IP	Yes	Yes	Yes	Yes	25 February 2020	Yes[3943]
19	15133	Chevron	Chevron IP	Yes	Yes	Yes	Yes	4 October 2021	No
20	1334	Chevron	Chevron IP	Yes	Yes	Yes	Yes	16 May 2015	No
21	421	Diseño Chevron en negro y blanco[3944]	Chevron IP	Yes	Yes	Yes	Yes	13 August 2014	No
22	420	Diseño Chevron en azul, blanco y rojo	Chevron IP	Yes	Yes	Yes	Yes	13 August 2014	No
23	419	Diseño Chevron en azul, blanco y rojo, rodeado de una faja blanca en forma de pentágono	Chevron IP	Yes	Yes	Yes	Yes	13 August 2014	No
24	500	Chevron	Chevron IP	Yes	Yes	Yes	Yes	18 December 2013	No
25	38	Chevron	Chevron IP	Yes	Yes	Yes	Yes	26 August 2016	No
26	996	Chevron y Diseño (a color)	Chevron IP	Yes	Yes	Yes	Yes	9 January 2016	No

3943 "Vanguard." **R-1995**, Document 23, Trademark Licence Agreement, Exhibit A.

3944 The Tribunal notes that there is a discrepancy between the registration numbers assigned to the brands listed as Items 21 and 22 in this table in the Lago Agrio Court's Order of 25 October 2012 (**C-1541**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Amplification of Execution Order, 25 October 2012 at 11:23 a.m., p. 1) and in IEPI's letter to the Lago Agrio Court of 3 October 2013 (**C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013, p. 3). The Court's Order assigns registration number 421 to "Diseño de Chevron en Azul, Blanco y Rojo", while IEPI's letter assigns the same registration number to "Diseño de Chevron en Negro y Blanco". In turn, the Court's Order assigns registration number 420 to "Diseño de Chevron en Negro y Blanco", while IEPI's letter assigns the same registration number to "Diseño de Chevron en Azul, Blanco y Rojo". While the Tribunal has decided to follow the nomenclature laid out in IEPI's letter in this table, it considers this discrepancy to be immaterial: whatever the correct registration number for these two trademarks might be, it is clear that they both fell under the scope of the Attachment Order and were annotated by IEPI.

No.	Registration Number[3932]	Name[3933]	Owner[3934]	Listed in 15 October 2012 Order?[3935]	Listed in 25 October 2012 Order?[3936]	Listed in 9 September 2013 Order?[3937]	Annotated by IEPI on 3 October 2013?[3938]	Date of Expiry[3939]	Included in Trademark Licence?[3940]
27	1032	Chevron y Diseño (a color)	Chevron IP	Yes	Yes	Yes	Yes	9 January 2016	No
28	422	Chevron y Diseño (a color)	Chevron IP	Yes	Yes	Yes	Yes	9 January 2016	No
29	997	Chevron y Diseño (blanco y negro)	Chevron IP	Yes	Yes	Yes	Yes	9 January 2016	No
30	998	Chevron y Diseño (blanco y negro)	Chevron IP	Yes	Yes	Yes	Yes	9 January 2016	No
31	423	Chevron y Diseño (blanco y negro)	Chevron IP	Yes	Yes	Yes	Yes	9 January 2016	No
32	2191	Chevron y Diseño (negro)	Chevron IP	Yes	Yes	Yes	Yes	30 March 2016	No
33	2192	Chevron y Diseño (negro)	Chevron IP	Yes	Yes	Yes	Yes	31 March 2016	No
34	817	Chevron y Diseño (negro)	Chevron IP	Yes	Yes	Yes	Yes	31 March 2016	No
35	2193	Diseño de Chevron (a color)	Chevron IP	Yes	Yes	Yes	Yes	31 March 2016	No
36	2194	Diseño de Chevron (a color)	Chevron IP	Yes	Yes	Yes	Yes	31 March 2016	No
37	818	Diseño de Chevron (a color)	Chevron IP	Yes	Yes	Yes	Yes	31 March 2016	No
38	196	Chevron supreme	Chevron IP	Yes	Yes	Yes	Yes	5 September 2017	No
39	265	Ursa super plus	Texaco Inc.	Yes	Yes	Yes	Yes	21 March 1989[3945]	No
40	204	Ursa	Chevron IP	Yes	Yes	Yes	Yes	23 January 2015	Yes

[3945] **RE-45**, First Lombeida Expert Report, **Lombeida-RG-42**, Trademark Registration Certificate No. 265-79, "Ursa Super Plus", 30 January 2020.

No.	Registration Number[3932]	Name[3933]	Owner[3934]	Listed in 15 October 2012 Order?[3935]	Listed in 25 October 2012 Order?[3936]	Listed in 9 September 2013 Order?[3937]	Annotated by IEPI on 3 October 2013?[3938]	Date of Expiry[3939]	Included in Trademark Licence?[3940]
41	1220	Ursa ofrece confianza	Chevron IP	Yes	Yes	Yes	Yes	15 March 2020	No
42	1221	Ursa delivers confidence	Chevron IP	Yes	Yes	Yes	Yes	15 March 2020	No
43	500	Doro	Chevron IP	Yes	Yes	Yes[3946]	Yes	31 May 2016	Yes
44	1324-10	Geotex	Chevron IP	Yes	Yes	Yes	Yes	25 January 2020	Yes
45	223	Meropa	Chevron IP	Yes	Yes	Yes	Yes	23 January 2015	Yes
46	514	Motex	Chevron IP	Yes	Yes	Yes	Yes	30 December 2015	Yes
47	1536-10	Multigear	Chevron IP	Yes	Yes	Yes	Yes	25 February 2020	Yes
48	202	Rando	Texaco Inc.	No	Yes	No	No	19 April 2022[3947]	Yes
49	205	Regal	Chevron IP	Yes	Yes	Yes	Yes	23 January 2015	Yes
50	495	Taro	Chevron IP	Yes	Yes	Yes	Yes	31 May 2016	Yes
51	1551-10	TDH	Chevron IP	No	Yes	No	No	25 February 2020[3948]	Yes
52	1325-10	Texatherm	Chevron IP	Yes	Yes	Yes	Yes	25 January 2020	Yes
53	203	Thuban	Chevron IP	Yes	Yes	Yes	Yes	23 January 2015	Yes
54	1550-10	Universal	Chevron IP	No	Yes	No	No	25 February 2020[3949]	Yes
55	(N/A)	Soluble	Chevron IP	No	No	No	No	Unknown	Yes[3950]

[3946] In the 9 September 2013 Order, "Doro" is assigned registration number No. 265. *See* **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m., p. 1.

[3947] **RE-45**, First Lombeida Expert Report, **Lombeida-RG-52**, Trademark Registration Certificate No. 202/68, "Rando", 30 January 2020.

[3948] **RE-45**, First Lombeida Expert Report, **Lombeida-RG-53**, Trademark Registration Certificate No. 1551-10, "TDH", 30 January 2020.

[3949] **RE-45**, First Lombeida Expert Report, **Lombeida-RG-54**, Trademark Registration Certificate No. 1550-10, "Universal", 30 January 2020.

[3950] "Soluble" is the only trademark included in the Trademark Licence that was not included in the Attachment Order. *See* para. 2392 above. The Trademark Licence does not provide an application or registration number for "Soluble"; instead, it indicates "Application not Filed". *See* **R-1995**, Document 23, Trademark Licence Agreement, Exhibit A.

2401. The Tribunal extracts several key observations from the above table:

(i) The Claimants' claim for intellectual property losses relates to a total of 55 trademarks owned by Chevron's IP Subsidiaries.

(ii) 54 of those trademarks were listed in the Attachment Order (in particular, in the 25 October 2012 Order of the Lago Agrio Court). The remaining one trademark ("Soluble", Item 55 in Table A above) was the only trademark included in the Trademark Licence that was not listed in the Attachment Order.

(iii) As already noted, on 9 September 2013, the Lago Agrio Court notified to IEPI the attachment of 50 trademarks, as opposed to the 54 originally provided for in its 25 October 2012 Order. The 9 September 2013 Order did not include "Texacoat", "Rando", "TDH", or "Universal" (Items 12, 48, 51, and 54 in Table A above).

(iv) From among the 50 trademarks annotated by IEPI on 3 October 2013 per the Lago Agrio Court's 9 September 2013 Order, eight had expired prior to the issuance of the Attachment Order: "Havoline Diseño de etiqueta", "Havoline y Diseño ii", "Havoline formula 3 y Diseño", "Texaco, un mundo de energía" (No. 7010), "Texaco, un mundo de energía" (No. 2080), "Diseño estrella t-texaco", "Estrella roja t verde – texaco", and "Ursa super plus" (Items 1, 3, 4, 6, 7, 8, 13, and 39 in Table A above). Accordingly, IEPI only annotated 42 trademarks that were actually in force.

(v) In turn, from among the eight trademarks identified in the preceding paragraph, "Havoline formula 3 y Diseño" (Item 4 in Table A above) expired on 8 June 2012, meaning that the six-month grace period to renew that trademark did not conclude until December 2012 – that is, this trademark could have conceivably been renewed for a limited period after the issuance of the Attachment Order.[3951]

(b) Characterisation of the alleged damage

2402. The Claimants submit that they are entitled to recover the intellectual property losses they suffered in Ecuador as direct damages, such that "Ecuador is required to compensate for

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[3951] *See* para. 2419 below.

the value of the intellectual property that it embargoed."[3952] Specifically, the Claimants seek USD 85,315,652 (or alternatively, USD 82,583,524) as compensation for the value of the attached trademarks and "the underlying technical know-how used to produce lubricants" (the asset which, in the Claimants' submission, drives the value of Chevron's trademarks in Ecuador).[3953]

2403. The Claimants' expert, Mr Anson, describes his approach to the calculation of the damages sought under this heading as follows:

> As a result of the Lago Agrio Judgment, the Trademarks have been made subject to embargo orders in Ecuador, effectively denying Chevron's ability to exercise quality control over products bearing its Trademarks and denying it the value of the Technical Know-How underlying the Trademarks for these products. My analysis presents what the value of the Chevron [intellectual property, comprising the trademarks and the underlying technical know-how] would have been had the embargo orders not occurred, i.e., the But-For scenario. In contrast, under the situation that Chevron has lost or will lose all control and ownership of the Chevron [intellectual property], i.e., the As-Is scenario, the [intellectual property] would have no value to Chevron within Ecuador. The valuations I present are simply the difference between the But-For scenario, the value as though the Chevron [intellectual property] was not subject to embargo orders, and the As-Is scenario, the Chevron [intellectual property] having no value to Chevron within Ecuador. Since the As-Is scenario holds no value, it did not need to be calculated. Thus, the But-For scenario indicates the full loss of value of the Chevron [intellectual property].[3954]

2404. Each of the two elements of Mr Anson's proposed analysis – the "As-Is scenario" and the "But-For scenario" – requires a distinct analysis.

2405. First, Mr Anson's so-called "As-Is scenario" is essentially built upon two main assumptions: (i) the intellectual property assets at issue (*i.e.*, the trademarks and the underlying technical know-how) no longer "have . . . value to Chevron within Ecuador"; and (ii) this purported destruction of the full value of the trademarks and know-how is a consequence of the fact that "the [t]rademarks have been made subject to embargo orders in Ecuador".[3955] The Respondent disputes these two assumptions: in its view, in order to make such showing, the Claimants must prove "that the entire value of the trademarks

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[3952] Memorial, para. 431; Reply, paras. 1038-1039. In the alternative, the Claimants contend that they are entitled to recover these losses as incidental damages. *See* Reply, paras. 1038, 1082.

[3953] *See* Memorial, para. 434; Reply, para. 1039. *See also* Third Anson Expert Report, paras. 8, 32-33.

[3954] Third Anson Expert Report, para. 51.

[3955] Third Anson Expert Report, para. 51.

and the entire value of the know-how were lost" and that "that loss was due wholly to treaty breaches and that the loss was incurred 100 percent by the Claimants."[3956]

2406. The Tribunal agrees with the Respondent that the Claimants must establish the two assumptions underlying Mr Anson's "As-is Scenario" as a threshold issue on the basis of the evidence. The Tribunal shall therefore assess first in sub-section IX.B.3(c) below whether the Claimants have established that the intellectual property owned by Chevron's IP Subsidiaries in Ecuador lost any value following the issuance of the Attachment Order. Subsequently, the Tribunal will assess in sub-section IX.B.3(d) below whether any such decrease in value was actually *caused* by the Attachment Order, in which case it would amount to a form of injury flowing from the recognition and enforcement of the Lago Agrio Judgment and, thus, from the Respondent's Treaty breaches.

2407. To the extent that the Claimants successfully establish that any damage to Chevron's intellectual property was caused by the Respondent's Treaty breaches, sub-section IX.B.3(e) below shall address the difference in value that the underlying property would have had in the absence of Treaty breaches (*i.e.*, the so-called "But-For scenario") as compared to the "As-Is" scenario to determine the amount of compensation owed to the Claimants under the present heading.

(c) Did the intellectual property owned by Chevron's IP Subsidiaries in Ecuador lose any value following the issuance of the Attachment Order?

2408. Owing to their distinctive nature as intangible assets, the Tribunal shall examine first how trademarks and know-how may generally generate value for their owners (particularly within Ecuador) and, in turn, how such value may be lost. The Tribunal shall assess thereafter whether the trademarks and the know-how at issue lost any value after the issuance of the Attachment Order.

1. Trademarks and know-how in Ecuador

2409. The Respondent's Ecuadorian law expert, Professor Lombeida, defines a trademark as "the distinctive sign that enables a product or service to be identified in the market and

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[3956] Track III Hearing Transcript, Day 2 (19 August 2022), p. 395 (Leonetti).

that distinguishes it from its competitors".[3957] In particular, upon registration of a trademark with the competent authority in Ecuador (IEPI, later known as SENADI) the owner acquires the right to (i) use the trademark directly or through duly authorized third parties; and (ii) prevent third parties from registering or using an identical or similar sign within Ecuador.[3958] A trademark registration may also be transferred to another party.[3959]

2410. Accordingly, the exercise of ownership and other rights over a trademark under Ecuadorian law are dependent on the registration of that trademark with the relevant domestic authority. Such registration, if granted, has a term of ten years, and may be renewed for successive ten-year terms.[3960] If renewal is not requested within a six-month period following the expiration date of the trademark, the registration "shall lapse by operation of law" ("*caducará de pleno derecho*"), meaning that the owner's (and any third party's) rights over the trademark are extinguished and the underlying sign becomes available to the public.[3961]

2411. Based on the above, the Tribunal understands that Chevron's IP Subsidiaries would have been able to derive revenues from their registered trademarks in Ecuador by (i) selling products bearing those trademarks (which can foster more effective and efficient marketing, and brand loyalty, among other things); (ii) charging royalties to third parties that were authorised to sell products bearing the trademarks; and/or (iii) selling the trademarks (*i.e.*, all rights associated with the trademarks) to a third party.[3962] The

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[3957] **RE-45**, First Lombeida Expert Report, para. 9. *See also* Barzallo Expert Report, para. 35; **C-3577**, Intellectual Property Law of Ecuador (Law No. 2006-013), Art. 194; Third Anson Expert Report, paras. 35-37. The Tribunal notes that the Claimants' Ecuadorian law expert, Dr Barzallo, did not address these issues in detail in his expert report or at the Track III Hearing.

[3958] **RE-45**, First Lombeida Expert Report, paras. 9-10, 15; **Lombeida-4**, Common Regime for Intellectual Property, Decision 486, Art. 162. *See also* **C-3577**, Intellectual Property Law of Ecuador (Law No. 2006-013), Arts. 216-217.

[3959] **RE-45**, First Lombeida Expert Report, **Lombeida-4**, Common Regime for Intellectual Property, Decision 486, Art. 161. *See also* Barzallo Expert Report, para. 30.

[3960] **RE-45**, First Lombeida Expert Report, para. 11; **Lombeida-4**, Common Regime for Intellectual Property, Decision 486, Art. 152.

[3961] **RE-45**, First Lombeida Expert Report, paras. 11, 13-14; **Lombeida-4**, Common Regime for Intellectual Property, Decision 486, Art. 174.

[3962] *See* Third Anson Expert Report, para. 39.

Tribunal also understands that the value of the trademarks would decrease if their owners were prevented from generating revenues by any of these means.

2412. Know-how, in turn, is not specifically defined or regulated under Ecuadorian law.[3963] Legal scholarship (as upheld by the Court of Justice of the Andean Community) has nonetheless defined "know-how" as "all of the undisclosed technical information, regardless of whether it is patentable, necessary for the industrial production of a product or procedure and that originates from experience".[3964] In particular, Professor Lombeida opines that know-how is (i) "specialised knowledge in a specific area" that "has a monetary value in competitive advantage with respect to third parties"; (ii) "not protectable under an exclusive right such as an industrial property right"; and (iii) confidential.[3965]

2413. Notwithstanding any relationship that might exist between trademarks and know-how, it is clear that they are two distinct types of intangible assets.[3966] Indeed, since know-how is not necessarily protected as an intellectual property right, the right to use certain know-how or technical information may be granted in a self-standing manner to a third party in a contract, licence, or similar legal transaction.[3967] Professor Lombeida opines that, because of its very nature, know-how "cannot be subject to a preventive measure", although "it would be possible to place an attachment on the proceeds that the use of that know-how may generate".[3968]

2414. Therefore, the Tribunal considers that Chevron's IP Subsidiaries could have derived revenues from any technical know-how they may have owned regarding the production of lubricants by (i) using that know-how to manufacture and later sell specific products;

3963 **RE-45**, First Lombeida Expert Report, paras. 19-20, 23-24.

3964 **RE-45**, First Lombeida Expert Report, **Lombeida-8**, Court of Justice of the Andean Community, Case 515-IP-2015, 15 March 2017. *See also* Track III Hearing Transcript, Day 6 (25 August 2022), p. 1411 (Barzallo).

3965 **RE-45**, First Lombeida Expert Report, para. 26.

3966 **RE-45**, First Lombeida Expert Report, paras. 21, 27; Barzallo Expert Report, paras. 31-39.

3967 **RE-45**, First Lombeida Expert Report, paras. 20, 24-25, 48-51; **Lombeida-9**, CHORRES BENAVENTE, H.: "*El contrato de know how o de provision de conocimientos técnicos: aspectos a ser considerados para su regulación normativa*", *Ius et Praxis*, No. 2, vol. 4, 2008, available at https://dialnet.unirioja.es/servlet/articulo?codigo=3056484, pp. 452-454; **Lombeida-10**, Organic Code of Social Economy of Knowledge, Creativity, and Innovation (COESCI), 9 December 2016, Art. 81.

3968 **RE-45**, First Lombeida Expert Report, paras. 27, 52.

and/or (ii) charging royalties or fees to third parties for accessing and using the know-how. Once again, the Tribunal also understands that the value of the know-how would decrease if its owner was prevented from generating revenues by any of these means.

2415. Against this background, the Tribunal shall determine next whether the trademarks and/or the know-how at issue lost any value after the issuance of the Attachment Order.

2. Whether the trademarks lost any value after the issuance of the Attachment Order

2416. As already explained, the Claimants (and their expert, Mr Anson) submit that the attachment ordered by the Lago Agrio Court resulted in a "complete diminution" of the value of the trademarks.[3969] The Respondent disputes this, asserting instead that the Claimants have failed to establish that "(a) the Trademarks had any economic value [for Chevron IP] before the Trademark Attachments and (b) after the Trademark Attachments they were rendered worthless".[3970]

2417. At the outset, the Tribunal recalls that the owner of a trademark holds certain rights in Ecuador while the trademark is registered with the competent authority (IEPI, later known as SENADI) and remains in force.[3971] A trademark owner may derive an economic benefit from the registered trademark by virtue of those underlying rights.[3972] For this reason, a trademark registered in Ecuador constitutes an asset of, at minimum, potential value for as long as it remains in force. Put differently, so long as a trademark remains in force, the Tribunal cannot, without more, dismiss the possibility that it holds some value. Rather, the Tribunal would need to undertake a valuation of the asset to determine whether it holds any discernible value.

2418. In this respect, the Tribunal recalls that when IEPI recorded the attachment of Chevron's trademarks pursuant to the Lago Agrio Court's orders in October 2013, it noted that eight

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[3969] *See* Reply, paras. 1047, 1049; Third Anson Expert Report, para. 51. *See also* Track III Hearing Transcript, Day 15 (7 September 2022), p. 3467 (Miles) (asserting that "[t]he effect of the attachment was to cause Chevron to lose its Trademarks and all related benefits").

[3970] Counter-Memorial, paras. 1216, 1218.c), 1225-1226.

[3971] *See* para. 2403 above.

[3972] *See* para. 2408 above.

of the 50 relevant trademark registrations had expired.[3973] One of those registrations had apparently expired in 1989, while four other registrations expired between 2004 and 2008.[3974] Two other trademark registrations expired on 26 February 2012, meaning that the six-month period to request their renewal also lapsed before the Attachment Order was issued on 15 October 2012 (and also before the LAPs requested the attachment of the trademarks).[3975] Once the rights of Chevron's IP Subsidiaries over these trademarks (including the right to renew their registration) had permanently extinguished, they became effectively worthless assets. Accordingly, the Tribunal concludes that seven of the eight trademarks lost all of their value before the issuance of the Attachment Order (and/or the Lago Agrio Court's expansion order of 25 October 2012).

2419. As for the one remaining trademark ("Havoline formula 3 y Diseño"), while it expired prior to the issuance of the Attachment Order, it did so on 8 June 2012, meaning that the six-month grace period to renew that trademark did not expire until December 2012.[3976] To the extent that the relevant Chevron subsidiary (Texaco Inc.) still held some rights with respect to this trademark at the time the Attachment Order was issued in October 2012, the Tribunal considers that the trademark potentially had some value as an asset. The Tribunal shall therefore consider any potential decrease in value to this trademark as part of its analysis of the impact of the attachment on the remaining 42 trademarks.

2420. The remaining 42 trademarks held by Chevron's IP Subsidiaries were in force at the time of the issuance of the Attachment Order. Professor Lombeida confirms that the registrations of these 42 trademarks attached by IEPI were set to expire by September

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[3973] *See* **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013. *See also* Table A at para. 2400 and para. 2401(iv) above.

[3974] *See* **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013, pp. 2, 4; **RE-45**, First Lombeida Expert Report, **Lombeida-RG-42**, Trademark Registration Certificate No. 265-79, "Ursa Super Plus", 30 January 2020. *See also* **RE-45**, First Lombeida Expert Report, Table 1, p. 21.

[3975] *See* **C-1575**, Plaintiff's Motion, 26 September 2012 at 8:39 a.m.; **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013, p. 1.

[3976] *See* para. 2401(v) above.

2023, and there is no indication that any of them was renewed.[3977] There is also no evidence that the attachment over them was ever formally lifted.

2421. Similarly, the Trademark Licence and the Technology Licence were also expected to expire on 15 June 2020, and there is no indication that any similar licence or agreement was entered into between Chevron IP and Swissoil.[3978] Dr Kerr and Mr Smith note that the "Chevron trademarks are being utilized by Swissoil and ConAuto today and have value in the market", but neither Party has conclusively established that such use of the trademarks is permitted under a licence agreement between Chevron IP and Swissoil.[3979]

2422. In sum, the Tribunal concludes that 43 of the trademarks at issue (*i.e.*, the 50 attached trademarks notified by the Lago Agrio Court to IEPI on 9 September 2013 minus the seven trademarks over which Chevron's IP Subsidiaries had extinguished their rights prior to the Attachment Order) granted certain rights to Chevron's IP Subsidiaries before the issuance of the Attachment Order and expired while they were subject to the Attachment Order. This suffices to confirm that these trademarks had at least potential economic value before the issuance of the Attachment Order and lost all value they might have held afterwards. Hereinafter, the Tribunal shall refer to these trademarks as the "**43 Trademarks**".[3980]

2423. The Respondent, however, has raised a distinct argument regarding a specific subset of 17 trademarks falling under the Trademark Licence (16 of which, the Tribunal recalls, were listed in the Attachment Order, and of which 13 were annotated by IEPI in October 2013).[3981] In the Respondent's submission, such trademarks "were assigned no value" by

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[3977] *See* **RE-45**, First Lombeida Expert Report, Tables 1-2, para. 64. *See also* Track III Hearing Transcript, Day 12 (2 September 2022), pp. 2863-2864 (Lombeida).

[3978] **RE-53**, Kerr and Smith Expert Report, **Kerr. 24**, Trademark Licence Agreement, Section 6.

[3979] *See* **RE-53**, Kerr and Smith Expert Report, paras. 15, 113; **R-1995**, Document 23, Trademark Licence Agreement, Exhibit A; **RE-45**, First Lombeida Expert Report, Tables 1-2.

[3980] For ease of reference, the 43 Trademarks correspond to the trademarks listed in Table A at para. 2400 above as Items 2, 4, 5, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 52, and 53.

[3981] *See* Table A at para. 2400 above. "Soluble" is the only trademark listed in the Trademark Licence that was not included in the Attachment Order.

Chevron IP in the licence – which, in its view, is "the strongest evidence concerning the value of the Trademarks".[3982]

2424. The Tribunal is not persuaded by the Respondent's argument. While it is true that the Trademark Licence did not specifically foresee any royalty payments for the use of the trademarks falling under its scope, this Licence formed part of a series of mutually-dependent transactions between several of Chevron's subsidiaries and Swissoil, some of which did foresee some kind of compensation for Chevron's subsidiaries.[3983] In fact, the Respondent's experts, Dr Kerr and Mr Smith, have calculated the current value of the trademarks by attributing to them 50% of the royalties payable under the Technology Licence.[3984] Crucially, also, the Trademark Licence only granted *non-exclusive* rights to use certain trademarks. In other words, Chevron IP (the owner of all trademarks included in the Trademark Licence) could have potentially used and/or licenced all of the trademarks at issue irrespective of the terms of the Licence. For present purposes, the Tribunal considers that this suffices to confirm that, prior to the issuance of the Attachment Order, the trademarks covered by the Trademark Licence had actual or at least potential economic value.

2425. In sub-section IX.B.3(d) below, the Tribunal will analyse the extent, if any, to which the Attachment Order caused the 43 Trademarks to lose any value they might have held.

3. Whether the underlying technical know-how lost any value after the issuance of the Attachment Order

2426. While the Tribunal has concluded in the preceding Section that the 43 Trademarks had at least potential economic value before the attachment and were rendered worthless while under attachment due to their expiry, the same conclusion does not necessarily extend to the know-how underlying those trademarks. Indeed, the know-how stands in stark contrast with the trademarks themselves. Unlike the know-how, the 43 Trademarks were distinctly registered with IEPI and were formally annotated following the issuance of the

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3982 *See* Counter-Memorial, paras. 1228-1232.

3983 *See* paras. 2392-2395 above.

3984 *See* **RE-43**, Second Kerr Expert Report, para. 130, Schedule 21; **RE-53**, Kerr and Smith Expert Report, para. 113, Schedule 21.

Attachment Order. Similarly, unlike the 43 Trademarks, no technical know-how to produce lubricants was expressly attached by the Lago Agrio Court.[3985]

2427. The Claimants describe the know-how at issue as "[t]he know-how [which was] used for marketing and putting for sale in Ecuador Chevron-branded lubricants (motor oils) that were made with Chevron's proprietary formulas and blending methods".[3986] In the context of his proposed valuation, Mr Anson further describes this know-how as "the underlying technical information . . . related to the products bearing these [attached] Trademarks", which "enables the Trademarks to convey a consistent message to consumers" by serving "as an indicator of a consistent quality standard."[3987]

2428. The question before the Tribunal is whether the technical know-how, as particularized by the Claimants, lost any value it may have had after the issuance of the Attachment Order. In essence, the Claimants argue that the value of the know-how was tied to that of the trademarks that were subject to the Attachment Order, such that "any impairment of Claimants' ability to use and obtain value from the trademarks has a directly proportional impact on the value of the technical know-how".[3988] According to Mr Anson,

> it would be illogical for Chevron to license the Technical Know-How in Ecuador without including the Trademarks. This could lead to consumers associating the quality of lubricant products, which are created based on Technical Know-How, with the brand of the licensee as opposed to Chevron, the owner. This consumer perception could potentially spread beyond the Ecuadorian border and cannibalize other aspects of Chevron's global business. Thus, regardless of whether the Technical-Know was explicitly listed in the embargo order, the effect is that any restriction on Chevron's ability to control the Trademarks (thus impairing the value of the Trademarks) would also impair the value of the Technical Know-How, which cannot be utilized except in combination with the Trademarks, and should be included in the value of the Chevron IP.[3989]

2429. In the Tribunal's view, a necessary implication of this purported "symbiotic relationship" between trademarks and know-how is that the only technical know-how that could have possibly been affected by the attachment of the trademarks is that which was used in

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[3985] *See* Memorial, para. 434; Reply, para. 1054; Counter-Memorial, para. 1244; Rejoinder, para. 1707. *See also* Track III Hearing Transcript, Day 2 (19 August 2022), p. 396 (Leonetti), Day 15 (7 September 2022), pp. 3475-3476 (Miles); Barzallo Expert Report, para. 42; **RE-59**, Second Lombeida Expert Report, para. 33.

[3986] Track III Hearing Transcript, Day 15 (7 September 2022), p. 3470 (Miles).

[3987] Third Anson Expert Report, paras. 8, 42; Fourth Anson Expert Report, para. 3.

[3988] Reply, para. 1054.

[3989] Fourth Anson Expert Report, para. 28.

connection with products bearing those trademarks. The burden thus falls on the Claimants to identify in a sufficiently detailed manner the products and technical know-how used to create such products which, in their submission, were affected by the attachment of the trademarks.

2430. In this respect, Mr Anson describes the content of the technical know-how underlying the Claimants' intellectual property losses claim by referring exclusively to the Technology Licence, which defines the licenced technical information as follows:

> "Technical Information" shall mean product composition, characteristics and specifications of base oil, the formulation of Finished Products from base oil with additives, production and quality assurance procedures for base oil and the manufacture of Finished Products therefrom, and technical information and data relating to the blending, packaging, marketing of Finished Products. . .[3990]

2431. Similarly, Mr Anson identifies the products sold under Chevron's trademarks by reference to the Trademark Licence, which includes a list of 77 products.[3991]

2432. Hence, the only technical know-how the Claimants have properly identified as an asset with economic value that might have been affected by the Attachment Order is the know-how that was licenced through the Technology Licence and was used in connection with the subset of trademarks included in the Trademark Licence (the "**Technical Information**"). The Claimants have not sufficiently identified any other form of know-how in a manner that allows the Tribunal to determine whether it suffered any decrease in value.

[3990] **R-1995**, Document 24, Technology Licence Agreement, Section 1.8. The Technology Licence defines "Finished Products" as "lubricants to be blended from approved base oils and packaged, marketed, used and sold by Licensee [*i.e.*, Swissoil] utilizing Licensor's Technical Information licensed hereunder, . . . as it may be amended from time to time by mutual written agreement of the Parties". *See id.* in Section 1.4.

[3991] *See* **R-1995**, Document 23, Trademark Licence Agreement, Exhibit B; Third Anson Expert Report, para. 52. Those products would indeed appear to include "Finished Products" as defined by the Technology Licence. *See* **R-1995**, Document 24, Technology Licence Agreement, p. 1.

2433. The Tribunal recalls in this connection that, from among the 43 Trademarks, only 13 were included in the Trademark Licence and expired while under the Attachment Order.[3992] The Tribunal shall refer to these trademarks as the "**13 Trademarks**".[3993]

2434. Having established the scope of the know-how at issue and its connection with a subgroup of the trademarks falling under the Trademark Licence, the ensuing question for the Tribunal is whether the Technical Information lost any value it may have had after the issuance of the Attachment Order. The Tribunal recalls that in order for such know-how to lose any value, the Attachment Order must have precluded or hindered Chevron IP from (i) using the Technical Information to manufacture and later sell specific products; and/or (ii) charging royalties or fees to third parties for accessing and using the Technical Information.[3994]

2435. At the outset, the Tribunal recalls that the Technology Licence provided for the payment of annual royalties to Chevron IP, while the Trademark Licence was "royalty-free". If any payments had ever been made to Chevron IP pursuant to the Trademark Licence, they would have fallen squarely within the scope of the Attachment Order, which expressly referred to this agreement.[3995] The effects of the Attachment Order on payments owed to Chevron IP under the Technology Licence, by contrast, are far less clear.

2436. The Tribunal recalls in this respect that the Technology Licence foresaw a minimum yearly royalty of USD 760,000 regardless of the amount of sold barrels, which was to be transferred in quarterly instalments to an account designated by Chevron IP.[3996] Had the Ecuadorian authorities seized any royalty (or other comparable) payments made to

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[3992] *See* para. 2423 above.

[3993] For ease of reference, the 13 Trademarks correspond to the trademarks listed in Table A at para. 2400 above as Items 5, 16, 18, 40, 43, 44, 45, 46, 47, 49, 50, 52, and 53. The Tribunal recalls that, from among the 17 trademarks included in the Trademark Licence, one ("Soluble", Item 55 in Table A) was not listed in the Attachment Order, while three other trademarks ("Rando", "TDH", and "Universal", listed respectively as items 48, 51, and 54 in Table A) were not annotated by IEPI.

[3994] *See* para. 2414 above.

[3995] **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012 at 4:53 p.m., p. 4.

[3996] **R-1995**, Document 24, Technology Licence Agreement, Section 6. Only in the event of *force majeure* would the minimum royalty not be payable, and replaced by a fee based exclusively on the number of barrels sold. There is no evidence that such a *force majeure* event ever occurred, or that the Technology Licence was otherwise terminated prematurely.

Chevron's subsidiaries pursuant to the Technology Licence, the documentary evidence of such attachment should be readily available. However, the Claimants have not provided evidence that any royalty payments made pursuant to the Technology Licence were ever attached by virtue of the Attachment Order, or that Swissoil was otherwise effectively prevented from making any such payments. Indeed, the Claimants have simply stated that "Chevron IP has received no royalty payments on the Chevron trademarks outside Ecuador", but have made no reference to royalty payments under the Technology Licence.[3997] In sum, there is no evidence that Chevron IP was ever precluded from receiving any royalty payments under the Technology Licence, whether as a result of the Attachment Order or for any other reason.

2437. This does not mean, however, that the ability of the Technical Information to generate economic returns under the Technology Licence was unimpaired following the issuance of the Attachment Order. Even if no payments due under the Technology Licence were ever seized, the Tribunal is persuaded by the Claimants that the expiry of the 13 Trademarks had an impact on Chevron IP's ability to monetize the Technical Information due to the "symbiotic relationship" between the trademarks and know-how at stake.[3998]

2438. In this respect, the Tribunal accepts that the Trademark Licence and the Technology Licence were intended to operate as a "unified whole", as the Claimants submit.[3999] Indeed, both agreements, alongside the Marketer Agreement and the Termination and Release Agreement, were executed simultaneously "as a condition to the consummation of the transactions contemplated in the [Swissoil PSA]".[4000] The connection between the licenced trademarks and the licenced technical know-how is further reflected in multiple cross-references between the Trademark Licence and the Technology Licence. In particular, the Technology Licence provided that the Finished Products manufactured

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[3997] Reply, para. 1053. Similarly, following the issuance of the Attachment Order, Swissoil did not make reference to any payments being due under the Technology Licence. *See* **RE-45**, First Lombeida Expert Report, **Lombeida-2**, Letter dated 24 October 2012 signed by the General Manager and CEO of Swissoil del Ecuador S.A., addressed to Dr Wilfrido Erazo, Acting Chief Judge of the Provincial Court of Sucumbíos, p. 2. *See also* **RE-45**, First Lombeida Expert Report, para. 56.

[3998] *See* para. 2428 above.

[3999] Reply, paras. 1055-1056; Fourth Anson Expert Report, paras. 29-34.

[4000] *See* **R-1995**, Document 23, Trademark Licence Agreement, p. 1; **R-1995**, Document 24, Technology Licence Agreement, p. 1.

with the Technical Information "shall be sold or otherwise conveyed" by Swissoil "only under the tradenames and trademarks licensed by [Chevron IP] to [Swissoil] in accordance with the [Trademark Licence]".[4001] The Trademark Licence, in turn, provided that "all Products offered in connection with the Marks shall conform to the terms of the [Technology Licence] so as to protect the prestige of the Marks and the goodwill represented and symbolized thereby".[4002] Crucially, the termination of the Technology Licence was foreseen as a ground for the termination of the Trademark Licence, and vice versa.[4003]

2439. In sum, the Technical Information was only granted to Swissoil for purposes of manufacturing products bearing the trademarks included in the Trademark Licence. It is therefore evident that the Trademark Licence and the Technology Licence were greatly dependent on each other, such that one of them could not fully operate without the other.

2440. Accordingly, the expiry of the 13 Trademarks must have necessarily had an impact on the exploitation of the underlying Technical Information in Ecuador, thus diminishing its value.[4004] For instance, based on Mr Anson's opinion, the Tribunal understands that if a trademark can no longer be used or enforced, the value of the underlying know-how in building brand equity or market differentiation can diminish significantly.[4005] Similarly, if any limitations are placed on the use of a trademark, the potential licensees of the underlying know-how may no longer be interested in licensing a bundled package of trademarks and know-how, or will do so at lower royalty rates. Indeed, in certain circumstances, no licensing of the underlying-know how may be possible at all without the benefit of trademark protection. This holds particular importance here, as the Trademark and Technology Licences were "non-exclusive", that is, Chevron IP retained

4001 **R-1995**, Document 24, Technology Licence Agreement, Section 2.4.

4002 **R-1995**, Document 23, Trademark Licence Agreement, Section 2(a)(i).

4003 **R-1995**, Document 23, Trademark Licence Agreement, Section 7(b); **R-1995**, Document 24, Technology Licence Agreement, Section 12.1.1.

4004 *See* para. 2434 above.

4005 *See* para. 2428 above.

the ability to licence the underlying trademarks and Technical Information to third parties other than Swissoil.[4006]

2441. At this stage, it is not necessary for the Tribunal to determine the precise manner or extent of the Technical Information's diminution in value. For present purposes, it suffices for the Tribunal to conclude that the Technical Information lost *some* value as a result of the expiry of the 13 Trademarks. The Claimants have otherwise failed to establish any diminution in value of any other technical know-how Chevron's IP Subsidiaries may have owned in Ecuador.

2442. For these reasons, the Tribunal is satisfied that the 43 Trademarks and the Technical Information underlying the 13 Trademarks had potential value before the issuance of the Attachment Order and lost at least some of that value thereafter. The ensuing question the Tribunal must address is whether such decrease in value was effectively caused by the Attachment Order.

(d) Did the Attachment Order cause the 43 Trademarks and/or the Technical Information to lose any value?

1. Introduction

2443. Before beginning its causation analysis, the Tribunal recalls the Claimants' position that their intellectual property losses in Ecuador constitute direct damages and are recoverable in the alternative as incidental damages.[4007] As explained in paragraphs 321 and 396 above, any injury caused to the Claimants by the recognition or enforcement of any part of the Lago Agrio Judgment from 1 March 2012 onwards – whether through attachment, arrest, interim injunction, execution, or howsoever otherwise – constitutes a form of *direct* damage flowing naturally from the Respondent's Treaty breaches for which the Respondent is bound to make reparation under international law.

2444. Thus, the Claimants' claim under this heading, having been particularized as a claim for "the full value of the Trademarks attached by Ecuador, including the value of any and all

4006 *See* para. 2393 above.

4007 Reply, para. 1038.

monetary benefits linked to the Trademarks",[4008] must be addressed under the paradigm of direct damages in international law and, thus, of proximate causation. Conversely, such losses cannot qualify as incidental damages under Article 36 of the ILC Articles because they do not concern the Claimants' efforts to repair damage and otherwise mitigate loss arising from the recognition and enforcement of the Lago Agrio Judgment.[4009]

2445. Accordingly, the Tribunal must determine whether there is a causal link between, on the one hand, the loss in value of the 43 Trademarks and the Technical Information and, on the other hand, the attachment of those trademarks ordered by the Lago Agrio Court – the relevant measure taken by the Respondent in furtherance of the enforcement of the Lago Agrio Judgment. Any intellectual property losses not caused by such attachment are not compensable in this Arbitration.

2446. The Tribunal further notes that two of the causation arguments raised by the Respondent are now moot in light of the Tribunal's prior findings.

2447. On the one hand, the Respondent claims that the intellectual property at issue is not owned by any of the Claimants, but rather by Chevron's IP Subsidiaries, none of which are claimants in this Arbitration.[4010] However, the Respondent avers, the Claimants have failed to prove that the trademark attachments "caus[ed] Claimants the same loss allegedly suffered by [Chevron IP] on a dollar-for-dollar basis".[4011]

2448. The Tribunal has already addressed this question in paragraph 438 above: 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 (*i.e.*, the Attachment Order). By virtue of the Lago Agrio Judgment, such order required the direct attachment of intellectual property assets in Ecuador that were owned by three of Chevron's wholly-

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4008 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3465 (Miles). *See also* Memorial, para. 431; Reply, para. 1058.

4009 *See* paras. 327-328 above.

4010 Counter-Memorial, para. 1214; Rejoinder, para. 1694.

4011 Counter-Memorial, para. 1218.b; Rejoinder, para. 1695.

owned subsidiaries (Chevron IP, Texaco Inc. and Texaco Company) as well as over any benefit that these subsidiaries might derive from those assets.[4012]

2449. On the other hand, the Respondent argues that the Claimants have not established that, had Ecuador complied with the Treaty, the trademarks would not have been attached.[4013] The Respondent asserts that "notwithstanding Ecuador's breaches, Chevron still might have faced a large monetary judgment adjudicating the LAPs' claims for their individual and collective, as opposed to diffuse, rights", and adds that "it is reasonable to conclude that the LAPs would not have attempted to enforce that judgment any differently from how they sought to enforce the Lago Agrio Judgment".[4014] The Respondent therefore concludes that the Claimants have failed to prove that any losses shown with respect to the attachment of the trademarks were caused by Ecuador's Treaty breaches, such that Ecuador cannot be held responsible for them.[4015]

2450. As explained by the Tribunal in Section VII.A.5 above, the applicable but-for scenario must be premised on a hypothetical Lago Agrio Judgment that dismisses the diffuse claims and at best ignores the individual claims.[4016] Accordingly, there is no basis to conclude that Chevron would in all probability have faced "a large monetary judgment" – or otherwise any judgment imposing some sort of pecuniary liability – in the but-for world. In other words, the Tribunal is satisfied that the relevant but-for scenario is one in which the Lago Agrio Court would not have ordered the attachment of Chevron's intellectual property (or any other) assets. The Respondent's argument is therefore dismissed.

2. Scope of the causation inquiry

2451. With the above threshold issues resolved, the Tribunal shall now assess whether the Attachment Order caused the 43 Trademarks and the Technical Information to lose any

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4012 **C-1532**, Execution Order Issued by the Provincial Court for Sucumbíos, 15 October 2012, p. 4. *See* para. 2380 above.

4013 Counter-Memorial, paras. 1220-1221.

4014 Counter-Memorial, para. 1221.

4015 Counter-Memorial, para. 1222.

4016 *See* paras. 386-390 above.

value. The Tribunal shall address causation first vis-à-vis the 43 Trademarks and thereafter as regards the Technical Information.

2452. As already noted, the Claimants seek compensation, *inter alia*, for the entire value of the attached trademarks.[4017] While it is undisputed that the Attachment Order did not formally dispossess Chevron's IP Subsidiaries of the trademarks, the Claimants submit that the value of these trademarks was completely diminished by the inability of Chevron's subsidiaries to exercise certain rights over them.[4018]

2453. As addressed earlier, seven of the trademark registrations falling under the scope of the Attachment Order had already expired irreversibly at the time the Attachment Order was issued.[4019] As such, Chevron's IP Subsidiaries no longer held any rights over them that could have been impacted by the attachment.[4020]

2454. With respect to the 43 Trademarks that were in force at the time of the attachment, the Parties (and their respective experts on Ecuadorian law, Dr Barzallo and Professor Lombeida) agree that the attachment prevented Chevron's IP Subsidiaries from selling or otherwise transferring ownership of those trademarks.[4021] In the Tribunal's view, the loss of the ability to transfer the 43 Trademarks, by itself, constitutes a form of injury flowing from the Attachment Order (as further expanded by the Lago Agrio Court's order of 25 October 2012) and, therefore, from the Respondent's Treaty breaches.

2455. However, the loss of the ability to transfer ownership of the 43 Trademarks, taken by itself, did not necessarily render the trademarks worthless. As already explained, any trademark in Ecuador carries with it a bundle of associated rights, including the right to use the trademark, licence it, prevent any unauthorized use, obtain royalties for the use of the trademark by a third party, and renew it before its expiry.[4022] In the Tribunal's

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4017 *See* Memorial, para. 431; Reply, para. 1039.

4018 *See* Reply, para. 1047; Third Anson Expert Report, paras. 7, 32, 51.

4019 *See* paras. 2418-2419 above.

4020 *See* para. 2418 above.

4021 *See* Counter-Memorial, para. 1235; Reply, para. 1047; **RE-45**, First Lombeida Expert Report, paras. 33, 39; **RE-59**, Second Lombeida Expert Report, paras. 5, 8; Barzallo Expert Report, paras. 29-30; Track III Hearing Transcript, Day 6 (25 August 2022), pp. 1439-1440 (Barzallo), Day 12 (2 September 2022), p. 2863 (Lombeida).

4022 **C-3577**, Intellectual Property Law of Ecuador (Law No. 2006-013), Arts. 216-219.

understanding, the value of a trademark is also tied to the ability to exercise those rights. In this connection, the Parties and their respective Ecuadorian law experts have debated at length the question whether the Attachment Order had the effect of preventing Chevron's IP Subsidiaries from exercising such rights over their trademarks while the attachment was pending, thus diminishing their value.

2456. The Respondent's position is that the Claimants have not established any causal link between any diminution in the value of the trademarks and the attachment of the trademarks, since Chevron IP "actually retained all of the rights associated with trademark ownership and registration, with the exception of the right to transfer ownership of the Trademarks":[4023]

(i) First, the Respondent argues that, as a matter of Ecuadorian law, Chevron IP "remained able to license, re-license, and renew their trademark registrations" following the attachment of the trademarks.[4024] In the Respondent's view, Chevron's IP Subsidiaries' purported inability to licence certain trademarks following the attachment is "due to an intervening act attributable to Claimants' subsidiaries themselves", who chose not to renew the corresponding trademark registrations before their expiry.[4025] The Respondent further explains that "IEPI was not legally qualified to act as a receiver" and "did not ever accept an appointment to that role", noting that "[e]ven if it had assumed the role of receiver, its role would have been to conserve the [t]rademarks so they maintained their value for an eventual auction", not to restrict Chevron IP "from licensing or otherwise utilizing the Trademarks prior to that auction."[4026]

(ii) Second, the Respondent posits that, under Ecuadorian law, Chevron IP remained able to bring "an infringement action against an unauthorized user of the [t]rademarks" and/or "to prevent the registration of similar or identical signs and

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[4023] Counter-Memorial, paras. 1217, 1234-1235, 1240; **RE-45**, First Lombeida Expert Report, paras. 33, 39-43.

[4024] Counter-Memorial, para. 1236; Rejoinder, para. 1711; **RE-45**, First Lombeida Expert Report, paras. 33, 39-43; **RE-59**, Second Lombeida Expert Report, paras. 8-14.

[4025] Counter-Memorial, para. 1237; Rejoinder, paras. 1715-1716; **RE-59**, Second Lombeida Expert Report, paras. 30-31.

[4026] Rejoinder, para. 1710; **RE-59**, Second Lombeida Expert Report, paras. 18-31.

file lawsuits for unfair competition".[4027] In any event, the Respondent insists that "there is no evidence of counterfeiting or of a failed attempt by [Chevron IP] to stop counterfeiting", and nothing in the record suggests that a separate Ecuadorian court hearing such a counterfeit claim "would not properly adjudicate the claim".[4028]

(iii) Third, in the Respondent's submission, the Claimants have not shown that the restrictions on payments in Ecuador imposed by the Attachment Order "did, in fact, prevent the receipt of any economic benefit".[4029]

2457. Conversely, the Claimants assert that a judicial attachment of intangible assets "materially restricts an owner's ability to exercise rights over the trademarks, including renewing trademarks, opposing their unauthorized use, granting new licenses or entering into license agreements for the trademarks".[4030] Among other things, the Claimants note that given the Tribunal's findings of denial of justice in its Track II Award "there is no reason to believe that proceedings launched by Chevron in Ecuadorian courts to prevent infringement of its seized trademarks would have been anything other than futile".[4031] The Claimants further note that "significant concerns exist regarding sales of counterfeit lubricants in Ecuador" and that the absence of confirmed cases "only further illustrates the infirmity of the Ecuadorian regulatory and legal system".[4032] Similarly, the Claimants explain that "it was only following the perfection of the embargo orders", in October 2013, that IEPI "became the legal custodian of the trademarks, with sole authority to renew them".[4033] However, the Claimants note, "IEPI has failed to take any action to

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4027 Counter-Memorial, para. 1238; Rejoinder, para. 1713; **RE-45**, First Lombeida Expert Report, para. 40; **RE-59**, Second Lombeida Expert Report, para. 30.

4028 Counter-Memorial, para. 1239; Rejoinder, paras. 1712, 1714.

4029 Counter-Memorial, paras. 1241-1242; **RE-45**, First Lombeida Expert Report, paras. 34, 57-58.

4030 Reply, para. 1047; Barzallo Expert Report, paras. 4, 18-23, 28-30, 41.

4031 Reply, para. 1050.

4032 Reply, paras. 1051-1052; **RE-43**, Second Kerr Expert Report, **Kerr Doc. 2**, Opportunities in Lubricants 2015: Latin America and Caribbean Market Analysis, Ecuador: Overview, p. 22.

4033 Reply, para. 1048; Barzallo Expert Report, paras. 4, 13, 16-19.

renew the Chevron trademarks".[4034] Lastly, the Claimants state that "Chevron IP has received no royalty payments on the Chevron trademarks outside Ecuador".[4035]

2458. The Tribunal has carefully considered the Parties' positions on whether Chevron's IP Subsidiaries were prevented from exercising their rights over their 43 Trademarks while the attachment was in force, causing the trademarks to lose value as a result. However, in the Tribunal's view, this question has been rendered immaterial to a significant extent by the fact that all of the 43 Trademarks expired at different times during the pendency of the Attachment Order, such that any and all rights that Chevron's IP Subsidiaries might have had over them were fully extinguished.[4036] As a result of their expiry, any value the 43 Trademarks may have had was definitively lost, regardless of whether the Attachment Order caused these trademarks to lose any portion of their value beforehand. Crucially, had the 43 Trademarks been renewed prior to their expiry, they might have maintained residual value for Chevron's IP Subsidiaries to this day: to the Tribunal's knowledge, the Lago Agrio Court has not yet ruled on the LAPs' request for a valuation and auction of the trademarks.[4037]

2459. It is thus unnecessary for the Tribunal to address comprehensively whether the Attachment Order caused Chevron's IP Subsidiaries to lose the right to use the 43 Trademarks, licence them, prevent any unauthorized use, or obtain royalties for the use of the trademark by a third party. In order to determine whether the Attachment Order caused the 43 Trademarks to lose all of their value, the Tribunal may circumscribe its analysis to the question whether Chevron's IP Subsidiaries retained the right to request the *renewal* of the corresponding trademark registrations while under attachment or, conversely, whether they were legally precluded from applying for renewal while under attachment, in which case the Attachment Order would constitute the proper cause of the full loss of the value of the 43 Trademarks.

4034 Reply, para. 1049.

4035 Reply, para. 1053.

4036 *See* para. 2422 above.

4037 *See* para. 2389 above.

2460. As further set out below, the Tribunal has concluded that Chevron's IP Subsidiaries retained the right to request the renewal of the 43 Trademarks while under attachment, yet failed to seek to renew them before their expiry. Accordingly, the Tribunal shall assess thereafter whether Chevron's IP Subsidiaries' failure to request the renewal of the 43 Trademarks amounts to a breach of their duty to mitigate damage under international law, thus precluding recovery for this injury. As discussed later in greater detail, the Tribunal concludes that Chevron's IP Subsidiaries did not breach their duty to mitigate. As a result, the Tribunal concludes below that the proper cause of the expiry of the 43 Trademarks lies in the Respondent's failure to renew the corresponding trademark registrations during the pendency of the Attachment Order, in breach of its duty under Ecuadorian law to preserve the value of the 43 Trademarks while under attachment. Lastly, the Tribunal concludes that, by causing the expiry of the 43 Trademarks, the Respondent also caused the Technical Information to lose value.

3. Whether Chevron's IP Subsidiaries retained the ability to request the renewal of the 43 Trademarks while under attachment

2461. The Parties hold diverging views as to whether Chevron's IP Subsidiaries were legally precluded from requesting the renewal of the 43 Trademarks during the pendency of the Attachment Order. In this connection, the Claimants and their Ecuadorian law expert, Dr Barzallo, state that the perfection of the attachment in October 2013 "prevented Chevron from renewing the trademarks", since from that moment IEPI "became the legal custodian of the trademarks, with sole authority to renew them".[4038] IEPI, they say, "knowingly allowed Chevron's trademarks to expire, thereby extinguishing Chevron's rights and resulting in a complete diminution of value".[4039]

2462. The Respondent and its Ecuadorian law expert, Professor Lombeida, state that "IEPI was not capable of serving as a judicial receiver", since "a judicial receiver must be a natural person" and "the law governing IEPI's powers did not endow it with the power to act as a judicial receiver".[4040] In any event, regardless of whether IEPI was appointed as a receiver, the Respondent posits that Chevron's IP Subsidiaries remained able to renew

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4038 Reply, paras. 1047-1048.

4039 Reply, para. 1049.

4040 **RE-59**, Second Lombeida Expert Report, paras. 18-21.

their trademark registrations following the attachment, noting that it was those subsidiaries that "chose not to renew" the relevant trademarks.[4041] According to the Respondent, "under no circumstances could IEPI have legally filed to renew the Trademarks' registrations"; as such, the expiry of the trademarks was not caused by the attachment "or any failure to act of IEPI".[4042]

2463. Two questions emerge against this background: (i) was IEPI effectively appointed as the receiver ("*depositario*") of the 43 Trademarks under Ecuadorian law?; and, if so (ii) did such appointment preclude the Claimants from requesting the renewal of the 43 Trademarks? The Tribunal addresses each question in turn.

2464. As regards question (i), the issue of whether IEPI was appointed as the receiver of the 43 Trademarks must be determined by reference to Ecuadorian law. The Tribunal finds the following provisions to be of particular relevance in this regard:

(i) Regarding the appointment of receivers, Article 17 of the Regulations for the Functioning of the Offices of Sheriffs and Judicial Receivers provides that a judicial receiver ("*depositario judicial*") "is the official in charge of the safekeeping, custody, conservation, administration, defense and handling of property entrusted to the receiver by an order from a court or judge of competent jurisdiction."[4043]

(ii) As to the duties of a receiver, Article 312 of the Ecuadorian Organic Code of the Judicial Branch provides that "[j]udicial receivers are personally, civilly and criminally liable for the deposit, custody and preservation of all types of property they receive in the performance of their duties".[4044] Pursuant to Article 313 of the same Code, judicial receivers cannot make use or benefit from the deposited property; rather, they must ensure that it renders a revenue in favour of the owner

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4041 Counter-Memorial, paras. 37, 1214, 1236-1237; Rejoinder, paras. 1710, 1715.

4042 Counter-Memorial, para. 1237; Rejoinder, para. 1716.

4043 **RE-59**, Second Lombeida Expert Report, **Lombeida-15**, Regulations for the Operation of the Offices of Sheriffs and Receivers and Rules for Setting the Fees for Receivers, Official Gazette No. 453, 24 October 2008, Art. 17.

4044 Barzallo Expert Report, **Barz-005**, Organic Code of the Judicial Branch, Art. 312. *See also* **RE-59**, Second Lombeida Expert Report, **Lombeida-15**, Regulations for the Operation of the Offices of Sheriffs and Receivers and Rules for Setting the Fees for Receivers, Official Gazette No. 453, 24 October 2008, Art. 17; Barzallo Expert Report, **Barz-004**, Code of Civil Procedure, Art. 916.

of the asset and the creditor.[4045] Similarly, Article 391 of the General Organic Code of Procedure foresees that the judicial receiver "will become the custodian of the attached property", such that this property will "remain under his/her care".[4046]

2465. The Tribunal infers from these provisions that the appointment of a judicial receiver under Ecuadorian law must be premised on a court order. Upon appointment, receivers become responsible for the deposit, custody, and preservation of any property placed under their care.

2466. In this connection, the Tribunal recalls that IEPI was "established as the legal custodian ["*depositario*"] of the attached property" by the same Ecuadorian court that issued the attachment of the trademarks, exactly as requested by the LAPs.[4047] IEPI never objected to this appointment or otherwise rejected it,[4048] and actually indicated expressly its intention to undertake the role of a receiver. Specifically, IEPI confirmed through a public statement of its Executive Director that "IEPI w[ould] be the depositary of these intangible assets, so the Institution w[ould] have the power to control and administer the trademarks so that they w[ould] not lose their value".[4049]

2467. Professor Lombeida states that "IEPI was not capable of serving as a judicial receiver" since, under her interpretation of the law, "a judicial receiver must be a natural person" and "the law governing IEPI's powers did not endow it with the power to act as a judicial receiver".[4050] However, Professor Lombeida has not identified any piece of Ecuadorian legislation or a judicial decision expressly precluding IEPI from undertaking the role of

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4045 Barzallo Expert Report, **Barz-005**, Organic Code of the Judicial Branch, Art. 313, p. 4.

4046 Barzallo Expert Report, **Barz-008**, General Organic Code of Procedure, Art. 391.

4047 **C-2764**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' motion, 5 September 2013; **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m.

4048 *See* Track III Hearing Transcript, Day 6 (25 August 2022), p. 1424 (Barzallo); Day 12 (2 September 2022), pp. 2880-2881, 2910-2911 (Lombeida).

4049 **C-3224**, Press Release, *Ecuadorian Intellectual Property Institute Records the Attachment of 50 Chevron brands*, Government of Ecuador Secretary General of Communications, 17 October 2013. *See also* **C-2141**, *IEPI attaches 50 Chevron brands*, EL TELÉGRAFO, 17 October 2013 (reporting on IEPI's Executive Director's statement that "[t]he official letter we received from the Provincial Court of Justice of Sucumbíos instructs the IEPI to be the receiver (administrator) of those brands").

4050 **RE-59**, Second Lombeida Expert Report, paras. 18-21.

a judicial receiver, and the Tribunal has found no self-evident reason why IEPI would not be in a position to act in such capacity.

2468. Indeed, the duties of a receiver would appear to be consistent with the main mission of IEPI, to which the Intellectual Property Law grants "jurisdiction to provide, promote, encourage, prevent, protect and defend" intellectual property rights on behalf of the Ecuadorian government, "without prejudice to any civil or criminal actions that the judiciary branch may adjudicate on this subject matter".[4051] In fact, the Regulations of the Intellectual Property Law expressly foresee that the Secretary General of IEPI may act as a receiver ("*depositario*") in certain administrative proceedings.[4052] For her part, Professor Lombeida only cites the Organic Statute for Organizational Management for IEPI Processes, which mainly addresses organizational matters and would not appear to list in an exhaustive manner the tasks or "powers" attributed to IEPI.[4053]

2469. In this context, the Tribunal must underscore that it is not disputed that the appointment of IEPI as a receiver was ordered by the Lago Agrio Court and accepted (even if somewhat unofficially) by IEPI. While the Tribunal has given due consideration to Professor Lombeida's disagreement with the legal interpretation of the Lago Agrio Court and IEPI's Executive Director in this respect,[4054] the evidence before the Tribunal suggests convincingly that IEPI was in a position to act as a receiver of the 43 Trademarks and did so.[4055] Regardless of the merits of Professor Lombeida's views, no Ecuadorian

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4051 *See* Barzallo Expert Report, **Barz-001**, Official Gazette No. 320, 19 May 1998, Art. 3. In particular, IEPI is in charge of the administrative protection of intellectual property rights. *See* **C-3577**, Intellectual Property Law of Ecuador (Law No. 2006-013), Art. 332.

4052 **C-3576**, Regulation of the Intellectual Property Law of Ecuador published in the Official Registry No. 120, 1 February 1999, Art. 93. Dr Barzallo has also referred to legal entities serving as receivers in other types of proceedings. *See* **C-3575**, Regulations on Enforcement Jurisdiction (COSEDE), Art. 15; Track III Hearing Transcript, Day 6 (25 August 2022), pp. 1423-1424 (Barzallo). *See also* Track III Hearing Transcript, Day 6 (25 August 2022), pp. 1456-1458 (Barzallo).

4053 *See generally* **RE-59**, Second Lombeida Expert Report, para. 21, **Lombeida-17**, Organic Statute for Organizational Management for IEPI Processes, IEPI Resolution No. 177 (last modified 19 October 2012). *See also* Track III Hearing Transcript, Day 6 (25 August 2022), p. 1436 (Barzallo).

4054 Track III Hearing Transcript, Day 12 (2 September 2022), pp. 2908-2911 (Lombeida).

4055 The Tribunal is likewise not persuaded that IEPI acting as a receiver would be contrary to Article 226 of the Ecuadorian Constitution, as suggested by Professor Lombeida. Indeed, IEPI was appointed to act as a receiver by an Ecuadorian court in application of Ecuadorian law (including the Intellectual Property Law, which grants certain powers to IEPI "without prejudice to any civil or criminal actions that the judiciary branch may adjudicate"). *See* **RE-59**, Second Lombeida Expert Report, para. 21, **Lombeida-14**, Constitution of Ecuador (2008), Art. 226; Barzallo Expert Report, **Barz-001**, Official Gazette No. 320, 19 May 1998, Art. 3.

authority has adopted them, let alone pursued the necessary actions to modify the Lago Agrio Court's orders in this respect.

2470. For these reasons, the Tribunal determines that IEPI was effectively made responsible for "the deposit, custody and preservation" of the 43 Trademarks[4056] at least as from the issuance of the Lago Agrio Court's Order of 9 September 2013 designating IEPI as custodian.[4057]

2471. In any event, even assuming that IEPI had not been effectively appointed as the receiver of the 43 Trademarks or was otherwise not capable of serving in that capacity, the Tribunal is persuaded that Ecuadorian law would have still required the appointment of a receiver other than IEPI to preserve the value of the 43 Trademarks while under attachment.

2472. In this connection, the Tribunal notes that the Ecuadorian Intellectual Property Law, which was enacted in 2006, provides that industrial property rights "are considered chattel ["*bienes muebles*"] exclusively for the creation of encumbrances thereon".[4058] In turn, the Ecuadorian Code of Civil Procedure – which Dr Barzallo and Professor Lombeida agree applies to the attachment of trademarks[4059] – provides that "[r]eal or personal property ["*bienes raíces o muebles*"] will be attached by seizing the property and delivering it to the respective receiver".[4060] Other provisions of the Code of Civil Procedure referring to the receiver of the attached assets do not contain any exceptions as to the kinds of assets

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4056 Barzallo Expert Report, **Barz-005**, Organic Code of the Judicial Branch, Art. 312.

4057 **C-2764**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, LAPs' motion, 5 September 2013 p. 4; **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m.

4058 **RE-45**, First Lombeida Expert Report, **Lombeida-11**, Intellectual Property Law, Art. 283.

4059 *See* Track III Hearing Transcript, Day 6 (25 August 2022), pp. 1415-1416 (Barzallo); Day 12 (2 September 2022), pp. 2865-2866 (Lombeida).

4060 Barzallo Expert Report, **Barz-003**, Code of Civil Procedure, Art. 450. The Tribunal notes that both quoted provisions refer to "*bienes muebles*" in their original Spanish versions, although the English translations submitted by the Parties differ with regard to this term. *See also* Track III Hearing Transcript, Day 12 (2 September 2022), pp. 2865-2866 (Lombeida); Barzallo Expert Report, **Barz-005**, Organic Code of the Judicial Branch, Art. 311.

that can be held by a receiver,[4061] while the Organic Code of the Judicial Branch suggests that judicial receivers may be granted responsibility over "all types of property".[4062]

2473. In the Tribunal's view, these provisions support the proposition that Ecuadorian law required the attachment of the 43 Trademarks to be followed by the appointment of a receiver or another person or entity to perform a comparable role,[4063] notwithstanding the fact that the intangible nature of intellectual property assets prevents them from being physically apprehended by and/or deposited with a third party. Indeed, based on the materials on record, the Tribunal is persuaded that the attachment of trademarks under Ecuadorian law would not differ from the attachment of tangible assets for practical purposes. Professor Lombeida herself relies on Ecuadorian case law regarding the attachment of tangible assets to support her characterisation of the attachment of Chevron's trademarks as a "precautionary measure".[4064] Notably, the judgment of the National Court of Justice cited by Professor Lombeida in this connection notes that a "depositary" must take over the "custody and administration" of an asset following an attachment:

> Attachment is a precautionary measure imposed during debt execution proceedings, ordered by a judge or whoever has that authority by legal mandate, which involves the immobilization of an asset to prevent it from being transferred in order to guarantee the fulfillment of an obligation; in the case of attachment, not only is transfer of the asset prohibited by act or contract, but also *the custody and administration passes to the hands of an official*, a depositary.[4065]

2474. Based on the above, the Tribunal is not persuaded that the legal consequences of the attachment of an intellectual property asset, such as a trademark, under Ecuadorian law should be different from the legal consequences of the attachment of a tangible asset, except for the necessary practical implications derived from the intangible nature of intellectual property. The Tribunal is reluctant to draw another interpretation from the

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4061 Barzallo Expert Report, **Barz-002**, Code of Civil Procedure, Art. 439.

4062 Barzallo Expert Report, **Barz-005**, Organic Code of the Judicial Branch, Art. 312.

4063 *See* Track III Hearing Transcript, Day 6 (25 August 2022), p. 1447 (Barzallo) (stating that "[t]he attachment must carry with it always the appointment of a receiver").

4064 **RE-59**, Second Lombeida Expert Report, para. 11. *See* Track III Hearing Transcript, Day 12 (2 September 2022), p. 2895 (Lombeida).

4065 **RE-59**, Second Lombeida Expert Report, **Lombeida-19**, Judgment of 15 April 2013 of the Civil & Commercial Chamber of the National Court of Justice, Official Judicial Gazette 28, 2 May 2016 (emphasis by the Tribunal).

apparent absence of specific legal provisions on this matter, which might be a consequence of the fact that the attachment of intellectual property assets is relatively uncommon.[4066]

2475. Accordingly, even under the hypothesis that IEPI could not act as a receiver, the Tribunal is persuaded that Ecuadorian courts would have been required to appoint a receiver (or a comparable figure) to be in charge of the preservation of the 43 Trademarks, particularly in light of the LAPs' request to that effect. If, in such scenario, the Lago Agrio Court had failed to make such an appointment or had made an invalid appointment, the Ecuadorian judiciary (and hence, the Respondent as per Article 4 of the ILC Articles) would have remained responsible for the consequences of any wrongful administration of the 43 Trademarks during the attachment period.

2476. In the Tribunal's view, insofar as a requirement of exhaustion of local remedies may apply to this finding, it has already been satisfied. The Tribunal recalls that, in its Track II Award, it dismissed the Respondent's objections based on Chevron's failure to exhaust local remedies or to satisfy the requirement of judicial finality for its claims for denial of justice under the FET standard in Article II(3)(a) of the Treaty.[4067] In that context, the Tribunal found that (i) on 1 March 2012 the Respondent declared the Lago Agrio Judgment enforceable in breach of several of the Tribunal's orders and awards on interim measures; and (ii) given that the Respondent (by its judicial branch) knowingly did not comply with these orders and awards, it would be inappropriate for the Respondent to profit from its own wrong by requiring Chevron to pursue local remedies against the enforcement of the Lago Agrio Judgment after that date.[4068] Since the Attachment Order (dated October 2012) and the Lago Agrio Court's Order of 9 September 2013 designating

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4066 For instance, the Code of Civil Procedure establishes a preference for the attachment of "money, property subject to a security interest or mortgaged property, or the property that was subject to prohibition against disposal, sequestration or withholding". Professor Carmigniani also suggests that it might have been unclear at some point whether the attachment of trademarks was possible. *See* Barzallo Expert Report, **Barz-002**, Code of Civil Procedure, Art. 439; **RE-59**, Second Lombeida Expert Report, **Lombeida-13**, Eduardo Carmigniani Valencia, *Attachment of Trademarks*, PROCEDURAL LAW (1998), p. 99.

4067 Track II Award, para. 7.154.

4068 Track II Award, para. 7.132.

IEPI as custodian are both premised on the enforcement of the unremedied Lago Agrio Judgment, the requirement of judicial finality also applies in connection with these orders.

2477. As regards question (ii) in paragraph 2463 above, having determined that IEPI – and, more generally, the Respondent's authorities – were made responsible for the deposit, custody, and preservation of the 43 Trademarks while under attachment, the Tribunal must assess whether such circumstance precluded Chevron's IP Subsidiaries from requesting the renewal of the 43 Trademarks.

2478. At the outset, the Tribunal recalls that the only evidence of any action related to the renewal of the 43 Trademarks after the issuance of the Attachment Order is the renewal of a single trademark registration, which was reportedly requested by Chevron IP in March 2013 and was eventually granted on 27 May 2013.[4069] However, this renewal took place prior to the "perfection" of the Attachment Order in October 2013 (*i.e.*, IEPI's confirmation of the annotation of the attachment in the relevant trademark registrations),[4070] which is when the Claimants claim to have lost control over the trademarks.[4071] There is no indication that Chevron or its IP Subsidiaries sought to renew, or were granted renewal, of any of the 43 Trademarks following the perfection of the Attachment Order.

2479. Thus, the question whether Chevron's IP Subsidiaries had the ability to request the renewal of the 43 Trademarks while under attachment must be addressed again by reference to Ecuadorian law. In this connection, Article 153 of the Common Regime on Industrial Property applicable in the Andean Community (including Ecuador) indicates that the renewal of a trademark registration may be requested by "[t]he owner of a registered trademark, or any party with a legitimate interest".[4072] Professor Lombeida

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4069 **RE-45**, First Lombeida Expert Report, **Lombeida-RG-34**, Trademark Registration Certificate No. 140-69, "Texaco and design of a hexagonal border with a star", 30 January 2020, p. 2. *See* Track III Hearing Transcript, Day 12 (2 September 2022), pp. 2864, 2882 (Lombeida).

4070 *See* para. 2387 above.

4071 *See* Reply, paras. 1047-1048; **C-2646**/**C-2763**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, Court Order, 9 September 2013 at 11:51 a.m.; **C-2765**, *Maria Aguinda, et al. v. Chevron Corp.*, Provincial Court of Justice of Sucumbíos, Case No. 21100-2003-0002, IEPI's Letter to Court, 3 October 2013.

4072 **RE-59**, Second Lombeida Expert Report, **Lombeida-4*bis***, Common Industrial Property Regime, Decision 486, Art. 153.

explains that "[a]lthough neither domestic law nor community law has defined legitimate interest, it can be understood as an interest that may be proven by a person who is directly or indirectly affected if the trademark lapses, such as the licensee, the creditor, the provider of the products that a trademark identifies, among others".[4073] At the Track III Hearing, Dr Barzallo appeared to admit that Chevron's IP Subsidiaries could have sought to renew the trademarks, at least, until a judicial receiver was formally appointed, but noted that following such appointment "Chevron no longer had the obligations as administrator and as a custodian".[4074]

2480. Based on the record before it, the Tribunal is not persuaded that the Attachment Order prevented Chevron's IP Subsidiaries from requesting the renewal of the registration of the 43 Trademarks while under attachment. Chevron's IP Subsidiaries remained the registered owners of the 43 Trademarks at all times until their expiry. Regardless of the consequences of the Attachment Order over such ownership, the Claimants have not convincingly explained why formal ownership would not suffice for Chevron's IP Subsidiaries to qualify at the very least as a "party with a legitimate interest" for the purposes of Article 153 of the Common Regime on Industrial Property.[4075] As such, the Tribunal is persuaded that Chevron's IP Subsidiaries could have applied to renew the registrations, but failed to do so.

2481. However, the fact that Ecuadorian law expressly recognises the right to request a renewal to persons "having a legitimate interest" suggests that individuals or entities other than the formal owners of the 43 Trademarks may have also held a right to request the renewal of the corresponding trademark registrations. The Tribunal believes that, following the perfection of the Attachment Order, IEPI fell under this category of persons "having a legitimate interest". As acknowledged by the Respondent itself, from the moment IEPI assumed the role of receiver its function became "to conserve the Trademarks so they maintained their value for an eventual auction in aid of enforcement of the Lago Agrio

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4073 **RE-45**, First Lombeida Expert Report, para. 12.

4074 Track III Hearing Transcript, Day 6 (25 August 2022), pp. 1450-1452 (Barzallo).

4075 **RE-59**, Second Lombeida Expert Report, **Lombeida-4*bis***, Common Industrial Property Regime, Decision 486, Art. 153.

Judgment".[4076] As already determined by the Tribunal in paragraph 2470 above, IEPI had an obligation to preserve the value of the trademarks, including by seeking to renew them.

2482. Even if IEPI had not been able to act as a receiver under Ecuadorian law, as Professor Lombeida asserts, the fact that the Lago Agrio Court expressly designated IEPI as the receiver of the trademarks evinces an understanding that the Ecuadorian authorities were required to take measures to preserve the value of the trademarks while under attachment, which, in the Tribunal's view, would necessarily include seeking their renewal before their expiry. A different approach would deprive the attachment of any purpose. The Tribunal does not consider it necessary to determine which precise domestic Ecuadorian authority would have been authorised to request the renewal of the trademark registrations under Ecuadorian law in a scenario where IEPI was not empowered to do so: it is satisfied that any such authority would qualify as a "person with a confirmed actual or potential interest in maintaining and preserving the trademark registrations", as characterised by Professor Lombeida.[4077]

2483. In sum, the Tribunal determines that while the Claimants have failed to establish that Chevron's IP Subsidiaries were legally precluded from requesting the renewal of the 43 Trademarks, they have successfully established that Ecuadorian law required the Respondent's authorities to take measures to preserve the value of the trademarks while under attachment, including seeking to renew them before their expiry.

4. Whether Chevron's IP Subsidiaries breached their duty to mitigate by not requesting the renewal of the 43 Trademarks

2484. In view of the conclusion in the preceding section, the Respondent's argument that Chevron's IP Subsidiaries failed to meet their obligation to request the renewal of the 43 Trademarks can only be assessed as an allegation of failure to mitigate damage. In other words, the Tribunal must consider whether, in light of all relevant circumstances, Chevron's IP Subsidiaries' failure to request the renewal of the 43 Trademarks amounts

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[4076] Rejoinder, para. 1710. In the words of Professor Lombeida, "even if IEPI had validly been constituted as a judicial receiver to safeguard the attached trademarks, which it was not, this in no way means that CIP would have had lost its ability to use and enjoy its trademarks. Only CIP's ability to dispose of them would have been limited to ensure their preservation for an eventual auction". *See* **RE-59**, Second Lombeida Expert Report, para. 29.

[4077] **RE-59**, Second Lombeida Expert Report, para. 31.

to an unreasonable failure to mitigate the damage resulting from their expiry.[4078] The Tribunal rejects such proposition for two separate reasons.

2485. First, as already explained, the duty to preserve the value of the 43 Trademarks while under attachment, including the duty to request the renewal of the corresponding trademark registrations, rested with the Ecuadorian authorities as a matter of Ecuadorian law.[4079] As such, the Tribunal is not persuaded that Chevron's IP Subsidiaries should have been required to request the renewal of the attached trademarks, from which they could receive no economic benefit but from which the Ecuadorian authorities could – albeit for the benefit of the LAPs. For example, IEPI's Executive Director statements in October 2013 that "[t]he income the trademarks generate w[ould] no longer go to Chevron".[4080] In another contemporaneous statement, he explained that, after the attachment was recorded at IEPI, Chevron

> cannot dispose of [the trademarks]. It cannot use them, license them, generate royalties or income from them; it is not going to profit from the trademarks; instead the profits are part of the court's order. . . . [T]he products will continue in the market . . . it is the royalties that will no longer go to Chevron but to whatever the judge decides.[4081]

2486. Under these conditions, the Tribunal does not consider that Chevron failed to "act reasonably"[4082] by failing to request the renewal of trademarks that were under the custody of the Respondent's authorities, much less in the contemporaneous context of the present dispute.

2487. Second, on this point, the Tribunal recalls again that when addressing the question of the exhaustion of local remedies (or judicial finality) as a prerequisite for the Denial of Justice

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4078 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11): "Even the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury. Although often expressed in terms of a 'duty to mitigate', this is not a legal obligation which itself gives rise to responsibility. It is rather that a failure to mitigate by the injured party may preclude recovery to that extent."

4079 *See* para. 2483 above.

4080 **C-3224**, Press Release, *Ecuadorian Intellectual Property Institute Records the Attachment of 50 Chevron brands*, Government of Ecuador Secretary General of Communications, 17 October 2013.

4081 **C-3464**, *Fifty Trademarks Will Not be Available to Chevron in Ecuador due to Attachment*, LAINFORMACION.COM, 18 October 2013. *See also* **C-2141**, *IEPI attaches 50 Chevron brands*, EL TELÉGRAFO, 17 October 2013.

4082 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 31, Commentary (11).

Breach, the Tribunal determined that it would be wrong in principle to require Chevron to have pursued at the time any local remedy in Ecuador that lacked any reasonable prospect of a timely, effective and adequate protection against the enforcement of the Lago Agrio Judgment.[4083] The Tribunal also found that it would be inappropriate for the Respondent to profit from its decision to breach the Tribunal's orders not to declare the Lago Agrio Judgment enforceable:

> Before 1 March 2012, as already indicated, this Tribunal had ordered the Respondent, under its several orders and awards on interim measures, not to declare the Lago Agrio Judgment enforceable. Chevron was entitled to rely upon those orders and awards, which were legally binding upon the Respondent under the Arbitration Agreement to which the Respondent had decided to commit itself. Moreover, given that the Respondent (by its judicial branch) knowingly did not comply with these orders and awards, it would inappropriate for the Respondent now to profit from its own wrong under the general principle of international law known by its Latin maxim: *nullus commodum capere de sua injuria propria*.[4084]

2488. The Tribunal finds that the same rationale applies in this context. After 1 March 2012, it would have been unreasonable to require the Claimants to continue to attempt to render the Lago Agrio Judgment unenforceable, which is a prerequisite to lifting the Attachment Order made in connection with that Judgment. Accordingly, as of that date, it would have been unreasonable to require Chevron's IP Subsidiaries to seek to renew trademarks that were subject to an Attachment Order issued in breach of the Tribunal's orders and awards and were earmarked for auction in aid of the enforcement of the Lago Agrio Judgment. To conclude otherwise would be tantamount to permitting the Respondent to profit from its own wrong. The Tribunal recalls in this respect that the first of the 43 Trademarks to expire (Item 4 in Table A above) did so on 8 June 2012.[4085]

2489. Accordingly, the Tribunal determines that the proper cause of the expiry of the 43 Trademarks lies in the Respondent's failure to renew the corresponding trademark registrations, which was in breach of its duty under Ecuadorian law to preserve the value of the 43 Trademarks while under attachment.

4083 Track II Award, para. 7.123.

4084 Track II Award, para. 7.132 (emphasis in original).

4085 *See* paras. 2400, 2419 above.

5. Whether the Attachment Order caused the Technical Information to lose value

2490. The Tribunal has determined in paragraph 2441 above that the Technical Information lost at least a portion of its value as a result of the expiry of the 13 Trademarks. By necessary implication, the Tribunal's finding that the Respondent's actions caused the 13 Trademarks (a subset of the 43 Trademarks) to expire leads to the conclusion that the same actions also caused the Technical Information underlying the 13 Trademarks to lose value.

2491. The Tribunal shall assess the extent of the Technical Information's diminution in value in Section IX.B.3(e) below.

6. Conclusion on causation

2492. For the reasons set out above, the Tribunal determines that the Respondent caused the 43 Trademarks to expire – and, therefore, lose all their value – by ordering an attachment over them and, subsequently, failing to renew the corresponding trademark registrations. Such conduct also caused the Technical Information to lose, at least, a portion of its value. The Respondent thus inflicted an injury on the Claimants under international law for which they must be compensated.

(e) Valuation

1. Introduction

2493. Having determined that a causal link exists between the Respondent's Treaty breaches and the injury for which damages are claimed under the present heading, the Tribunal shall now assess the extent of the damages suffered by Chevron's IP Subsidiaries as a result of the loss in value of the 43 Trademarks and the Technical Information.

2494. For its assessment of the compensation owed to the Claimants, the Tribunal shall draw guidance once again from the applicable full reparation standard set forth in *Chorzów Factory*, pursuant to which full reparation for an international illegal act "must, as far as

possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[4086]

2495. According to the Claimants, reparation in respect of their intellectual property losses should be made in the form of compensation for the value of all trademarks owned by Chevron's IP Subsidiaries, as well as the underlying know-how.[4087] For reasons already explained, however, compensation is due only in respect of the 43 Trademarks and the Technical Information, not in respect of other trademarks that were listed in the Attachment Order or other forms of know-how. Accordingly, in this Section the Tribunal shall limit itself to assessing the value of the 43 Trademarks and the Technical Information in a but-for, Treaty-compliant scenario.[4088]

2496. In valuing the 43 Trademarks and the Technical Information, the Tribunal has been aided primarily by three experts: Mr Weston Anson for the Claimants, and Dr William Kerr and Mr Gregory Smith for the Respondent. Both Mr Anson and Dr Kerr submitted reports in 2013 during the "show cause" procedure[4089] as well as between 2019 and 2022 during Track III of the Arbitration.[4090] Mr Anson testified at the Track III Hearing. Dr Kerr was joined in 2022 on his third expert report by Mr Smith, who testified on all three reports authored by Dr Kerr at the Track III Hearing.[4091]

2497. Mr Anson provides valuations of the Claimants' intellectual property losses as at 2012 and as at 2019, employing the same two methodologies for each valuation date.[4092] The

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4086 **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, p. 47.

4087 Memorial, para. 431; Reply, para. 1039.

4088 *See* paras. 2402-2407 above.

4089 First Anson Expert Report; Second Anson Expert Report; First Kerr Expert Report.

4090 Third Anson Expert Report; Fourth Anson Expert Report; **RE-43**, Second Kerr Expert Report; **RE-53** Kerr and Smith Expert Report.

4091 Mr Smith states that he worked with Dr Kerr in developing all three of the reports, Track III Hearing Transcript, Day 12 (2 September 2022), pp. 2917-2918, 2921 (Smith).

4092 First Anson Expert Report, Exhibits 1, 2; Third Anson Expert Report, Exhibits 3, 4.

Respondent's experts have not performed any independent valuation of the Claimants' intellectual property loss, instead offering "rebuttal analyses" of Mr Anson's reports.[4093]

2498. After describing Mr Anson's proposed valuation approaches, the Tribunal will assess whether such proposed approaches may support a valuation of the 43 Trademarks and the Technical Information. For the reasons set out below, the Tribunal rejects Mr Anson's valuation approaches, with the result that the Claimants' claim for damages under the present heading must be dismissed.

2. Mr Anson's Proposed Valuation Approaches

2499. Mr Anson states that several methodologies are commonly employed to value intellectual property, with the best method for a specific scenario depending on "the information available and the specific circumstances."[4094] He explains that "[b]ased on the context of the situation we have chosen to employ the Income Approach and Relief from Royalty Approach [(respectively, the "**Income Approach**" and the "**RFR Approach**")] as the most reasonable indications of value for the Chevron IP trademarks."[4095] Each of these approaches is described in turn.

i. The Income Approach

2500. As described by Mr Anson, the Income Approach determines the current value of future economic benefits by way of a discounted cash-flow ("**DCF**") analysis.[4096] However, Mr Anson notes that "only the Chevron IP trademarks are subject to the embargo orders.

[4093] Track III Hearing Transcript, Day 12 (2 September 2022), pp. 2920-2921 (Smith). *See also* **RE-43**, Second Kerr Expert Report, paras. 7-10: "Anson 2019 offers two damages opinions based on the alleged losses to the value of the Trademarks caused by the Attachment. His calculations are excessively speculative. They are not supported by proper methodology or reliable economic analysis. Neither of the opinions accurately states the current value of the Trademarks or damages to the value of the Trademarks that might have been caused by the Attachment. Therefore, my opinion is that the damages as expressed in Anson 2019 should be rejected as being unduly speculative, based on unsound methodology and as having no basis in fact or economic evidence. However, if the Tribunal determines that an award for trademark damages is warranted, the damages amount should be computed only after correcting the obvious factual and computational errors committed by Mr. Anson. . . Schedule 1A shows that the total amount of damages calculated by Mr. Anson, after appropriate corrections, would be no more than $1.29 million using an income approach and no more than $3.99 million using a royalty approach."

[4094] First Anson Expert Report, p. 12.

[4095] First Anson Expert Report, p. 13; Third Anson Expert Report, para. 50.

[4096] Track III Hearing Transcript, Day 7 (26 August 2022), p. 1517 (Anson). Mr Anson explains that he applies "the same formulaic approach" in 2013 and 2019. *See* Track III Hearing Transcript, Day 7 (26 August 2022), p. 1541 (Anson).

Operating an actual lubricant business would require the use of additional tangible and intangible assets."[4097] Since there was no actual Chevron lubricants business in Ecuador immediately prior to the issuance of the Attachment Order,[4098] Mr Anson explains that he must first "determin[e] the enterprise value of a lubricant sales operation in Ecuador using the Chevron IP Trademarks" before apportioning a share of the enterprise value to the trademarks themselves.[4099] In his third report, Mr Anson updated this analysis to apportion a share of the value of this hypothetical enterprise to the trademarks and the underlying technical know-how.[4100]

2501. To determine the value of the hypothetical enterprise, Mr Anson first calculates the free cash flow of the business after determining the value of four inputs: (i) the size of the market; (ii) the price of all the products in the market; (iii) the market share of the business in question; and (iv) the profit margins (calculated on earnings before income and tax).[4101] The free cash flow of each year in the forecast period is calculated by taking this product and subtracting taxes and year-to-year changes in working capital.[4102] The net present value of the free cash flows is then determined by applying a discount rate to the cash flows.[4103] Mr Anson calculates the net present value of the free cash flows over a forecast period of 10 years.[4104]

2502. Mr Anson explains that, because trademarks have an "indefinite" life, he also calculates a terminal value,[4105] which is equivalent to "the present value of all future cash flows"

4097 First Anson Expert Report, p. 11.

4098 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1540 (Anson).

4099 First Anson Expert Report, p. 12.

4100 Third Anson Expert Report, para. 97.

4101 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1518 (Anson). *See also* Track III Hearing Transcript, Day 12 (2 September 2022), p. 2924 (Smith).

4102 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1541 (Anson); First Anson Expert Report, Exhibit 1.

4103 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1518 (Anson).

4104 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1521 (Anson); First Anson Expert Report, Exhibit 1.

4105 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1521 (Anson).

beyond the forecast period "assuming the company will operate in perpetuity" and factors a stable growth rate, "generally . . . the rate of inflation."[4106]

2503. The enterprise value identified by Mr Anson is the sum of the net present value and the terminal value of the free cash flows over a 10-year period.[4107] The value of the intellectual property itself is then calculated as the result of multiplying the enterprise value by an appropriate allocation of value for the intellectual property.[4108]

2504. The Respondent's experts consider the use of the Income Approach in the present proceedings to be a "fantasy".[4109] They opine that Mr Anson's valuations "are not based on a review of actual or verifiable economic or financial data" but instead "were created based on an arbitrary and hypothetical description of a fictitious enterprise."[4110] In this connection, the Respondent's experts state that Mr Anson ignores "the real-world evidence reflecting the use and value of the Trademarks",[4111] referring to Chevron's sale of its Ecuadoran lubricant business to Swissoil in 2010, including the sale of a lubricant operation by way of the Swissoil PSA, the Technology Licence, and the Trademark Licence.[4112] In any event, the Respondent's experts consider the "fictitious" enterprise to be "based on arbitrary and often questionable assumptions".[4113]

ii. The Royalty Rate Approach (RFR Approach)

2505. According to Mr Anson, under the RFR Approach "a hypothetical situation is created to estimate what a business would pay to license its own intellectual property assets in an

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4106 Third Anson Expert Report, para. 91.

4107 Track III Hearing - Anson Direct Presentation (26 August 2022), Slides 16-17.

4108 First Anson Expert Report, p. 18; Third Anson Expert Report, para. 97.

4109 **RE-43**, Second Kerr Expert Report, paras. 73-75.

4110 First Kerr Expert Report, para. 4. *See also* First Kerr Expert Report, para. 15.

4111 **RE-53,** Kerr and Smith Expert Report, para. 7(c).

4112 First Kerr Expert Report, paras. 17-19. *See also* Counter-Memorial, paras. 1260-1261; **RE-53,** Kerr and Smith Expert Report, paras. 13-21.

4113 First Kerr Expert Report, para. 20. *See also* Counter-Memorial, para. 1261.

arms-length transaction. The value is then calculated as the present value of the avoided hypothetical royalty charges."[4114]

2506. Applying the RFR Approach, Mr Anson first calculates a revenue base for a theoretical lubricants company by multiplying (i) the size of the market; (ii) prices of the products in the market; and (iii) the enterprise's market share.[4115] A royalty rate is then applied to this revenue stream[4116] before subtracting estimated taxes, resulting in an after-tax hypothetical royalty charge.[4117] The present value of the royalty income over the forecast period is provided by taking the sum of each year's royalty income after applying a discount rate.[4118] The terminal value is established in the same manner as in the Income Approach, which is then added to the present value of forecast cash flows.[4119]

2507. Mr Anson summarizes his proposed RFR Approach as follows:

> It uses all of the inputs from the Income Approach with the exception that . . . we need to establish a reasonably royalty, because in the Relief from Royalty Approach, one applies [a] reasonable royalty to the revenues of the theoretical lubricants company.[4120]

2508. The Tribunal observes that the RFR Approach is largely based on a modified DCF analysis when compared to the Income Approach. Mr Anson starts both analyses by calculating the revenue of lubricants sold using the trademarks and know-how.[4121] Where under the Income Approach he then applies a profit margin, under the RFR Approach he

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[4114] First Anson Expert Report, p. 13. Mr Anson confirmed as correct that in applying the RFR Approach, he "create[d] [a] hypothetical situation where [he] determine[d] what this business would get if it just licensed its Trademarks as opposed to operating the business" (Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1541-1542 (Anson)).

[4115] Track III Hearing Transcript, Day 12 (2 September 2022), p. 2924 (Smith); First Anson Expert Report, Exhibit 2.

[4116] Track III Hearing Transcript, Day 12 (2 September 2022), p. 2924 (Smith); First Anson Expert Report, Exhibit 2.

[4117] Track III Hearing Transcript, Day 12 (2 September 2022), p. 2924 (Smith); First Anson Expert Report, Exhibit 2.

[4118] First Anson Expert Report, Exhibit 2.

[4119] First Anson Expert Report, Exhibit 2.

[4120] Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1523-1524 (Anson). Mr Anson responds to these statements in the context of his 2019 valuation, but agrees that he applied the "same formulaic approach" in 2013. *See* Track III Hearing Transcript, Day 7 (26 August 2022), p. 1541 (Anson).

[4121] First Anson Expert Report, Exhibits. 1, 2; Third Anson Expert Report, Exhibits 3, 4.

applies a reasonable royalty rate.[4122] Both methods then adjust for taxes.[4123] Unlike the Income Approach, the RFR Approach does not adjust for working capital.[4124] Both analyses then apply a discount rate to find the net present value of future cash flows.[4125] The RFR Approach thus uses the revenue derived from the sale of lubricants bearing the trademarks to calculate the discounted cash flows of royalty income, whereas the Income Approach uses the same revenue base to calculate a total enterprise value, from which Mr Anson then apportions a share of the enterprise value to the Trademarks.[4126]

2509. As in respect of the Income Approach, the Respondent's experts state that the RFR Approach, being "based on speculation about the operations of a hypothetical enterprise is fundamentally wrong and cannot provide a meaningful estimate of damages."[4127] In addition, the Respondent's experts assert that the RFR Approach contains a number of errors that Mr Anson has failed to address, including (i) the lack of comparable licences; (ii) a statistical error in the median royalty rate; and (iii) the lack of any economic evidence or financial analysis to support his contention that remittance controls in Ecuador or elsewhere in Latin America reduced negotiated royalty rates on any type of intellectual property.[4128]

3. The Applicable Valuation Approach

2510. The crux of the Parties' disagreement on the applicable valuation methodology concerns Mr Anson's decision to provide a valuation of Chevron IP's Subsidiaries' trademarks based on the operation of a hypothetical lubricants business in Ecuador. According to the Respondent's experts, in estimating the value of the trademarks under both the Income Approach and the RFR Approach, Mr Anson "does not rely on what is most relevant in this matter: actual revenues and profits received from the sale of Chevron-branded

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4122 First Anson Expert Report, Exhibits. 1, 2; Third Anson Expert Report, Exhibits 3, 4.

4123 First Anson Expert Report, Exhibits. 1, 2; Third Anson Expert Report, Exhibits 3, 4.

4124 First Anson Expert Report, Exhibits. 1, 2; Third Anson Expert Report, Exhibits 3, 4.

4125 First Anson Expert Report, Exhibits. 1, 2; Third Anson Expert Report, Exhibits 3, 4.

4126 *See* Track III Hearing Transcript, Day 7, pp. 1540-1542 (Anson).

4127 **RE-53,** Kerr and Smith Expert Report, para. 22.

4128 **RE-53,** Kerr and Smith Expert Report, paras. 94-112.

lubricant products in Ecuador."[4129] They explain that, in the present case, the only pertinent evidence on record consists of the sale by Chevron of its Ecuadorian lubricants business in 2010 to Swissoil, as well as the Trademark Licence and the Technology Licence, which have been described in detail in paragraphs 2390-2399 above.

2511. The Tribunal notes that the Income Approach and the RFR Approach are both based on a DCF analysis. Accordingly, the Tribunal shall address first whether a DCF analysis may properly support a valuation of the 43 Trademarks and the Technical Information in the manner proposed by Mr Anson.

2512. At the outset, the Tribunal notes that, by applying his Income and RFR Approaches, Mr Anson purports to determine the fair market value of the intellectual property in respect of which the Claimants claim compensation.[4130] The Tribunal finds it to be a well-established principle in international law that "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost".[4131] Numerous investment tribunals have resorted to the DCF method in order to determine fair market value for compensation purposes. However, the Commentary to the ILC Articles notes that tribunals generally adopt a cautious approach in applying such method, as it "analyses a wide range of inherently speculative elements".[4132]

2513. In this connection, the Tribunal observes that the Claimants have identified no cases in which an investment tribunal applied a DCF analysis based on the operation of a

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4129 First Kerr Expert Report, para. 15.

4130 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1513 (Anson).

4131 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (22).

4132 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Art. 36, Commentary (26): "Since 1945, valuation techniques have been developed to factor in different elements of risk and probability. The discounted cash flow (DCF) method has gained some favour, especially in the context of calculations involving income over a limited duration, as in the case of wasting assets. Although developed as a tool for assessing commercial value, it can also be useful in the context of calculating value for compensation purposes. But difficulties can arise in the application of the DCF method to establish capital value in the compensation context. The method analyses a wide range of inherently speculative elements, some of which have a significant impact upon the outcome (e.g. discount rates, currency fluctuations, inflation figures, commodity prices, interest rates and other commercial risks). This has led tribunals to adopt a cautious approach to the use of the method. Hence, although income-based methods have been accepted in principle, there has been a decided preference for asset-based methods. . .".

hypothetical enterprise to determine the value of an existing asset, as proposed by Mr Anson in this case. However, multiple investment arbitration awards set out useful criteria to determine whether applying a DCF analysis is appropriate in light of all relevant circumstances.

2514. For instance, the tribunal in *Quiborax v. Bolivia* noted that "the DCF method is widely accepted as the appropriate method to assess the [fair market value] of going concerns with a proven record of profitability".[4133] The *Quiborax* tribunal relied in part on the World Bank Guidelines on the Treatment of Foreign Direct Investment (the "**World Bank Guidelines**"), which it stated "suggest that the market value of an expropriated investment may be determined 'for a going concern with a proven record of profitability'" through the DCF method.[4134]

2515. In the same vein, the *Sistem v. Kyrgyz Republic* tribunal quoted the World Bank Guidelines for the proposition that the DCF method is appropriate in valuing an expropriated investment in order to assess the:

> amount that a willing buyer would normally pay to a willing seller after taking into account the nature of the investment, the circumstances in which it would operate in the future and its specific characteristics, including the period in which it would operate in the future and its specific characteristics, including the period in which it has been in existence, the proportion of tangible assets in the total investment and other relevant factors pertinent to the specific circumstances of each case.[4135]

2516. In *Rusoro v. Venezuela*, the tribunal also observed that DCF valuations "have become usual in investment arbitrations whenever the fair market value of an enterprise must be established".[4136] The same tribunal, however, noted that a DCF approach "cannot be

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[4133] **CLA-757**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 344. *See also* **RLA-779**, *OI European Group B.V. v. Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 658; **CLA-207**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case*, No. ARB/01/3, Award, 22 May 2007, para. 385.

[4134] **CLA-757**, *Quiborax S.A. and Non Metallic Minerals S.A. v. Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 344. *See also* **CLA-207**, *Enron Corp. and Ponderosa Assets, L.P. v. Argentina, ICSID Case*, No. ARB/01/3, Award, 22 May 2007, fn 118.

[4135] **RLA-983**, *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 164.

[4136] **CLA-922**, *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 758.

applied to all types of circumstances".[4137] In particular, the *Rusoro* tribunal found that "DCF works properly if all, or at least a significant part, of the following criteria are met":

> - The enterprise has an established historical record of financial performance;
> - There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted *in tempore insuspecto*, prepared by the company's officers and verified by an impartial expert;
> - The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
> - The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;
> - It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;
> - The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty.[4138]

2517. Conversely, other investment tribunals declined to apply a DCF valuation, considering it overly speculative where an investment was not a going concern, had not established a performance record, or had not established its revenue.[4139] For instance, the tribunal in *Metalclad v. Mexico* noted:

> Normally, the fair market value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis . . . However, where the enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.[4140]

[4137] **CLA-922**, *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 759.

[4138] **CLA-922**, *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 759.

[4139] *See, e.g.*, **CLA-41,** *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 120-121; **CLA-403**, *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paras. 123-124; **CLA-898**, *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 604.

[4140] **CLA-41,** *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 119-120.

2518. On this basis, the *Metalclad* tribunal considered it inappropriate to apply a DCF analysis to determine the fair market value of an expropriated landfill "because the landfill was never operative and any award based on future profits would be wholly speculative."[4141]

2519. Similarly, the *Wena v. Egypt* tribunal declined to apply a DCF analysis in connection with the claimant's claim for lost profits flowing from the seizure of two hotels on the basis that "an award based on such claims would be too speculative".[4142] In particular, the *Wena* tribunal ruled:

> Like the *Metalclad* and *SPP* disputes, here, there is insufficiently "solid base on which to found any profit . . . or for predicting growth or expansion of the investment made" by Wena. Wena had operated the Luxor Hotel for less than eighteen months, and had not even completed its renovations on the Nile Hotel, before they were seized on April 1, 1991. In addition, there is some question whether Wena had sufficient finances to fund its renovation and operation of the hotels. Finally, the Tribunal is disinclined to grant Wena's request for lost profits and lost opportunities given the large disparity between the requested amount (GB£ 45.7 million) and Wena's stated investment in the two hotels (US$8,819,466.93).[4143]

2520. For the reasons set out below, the Tribunal finds Mr Anson's proposed Income and RFR Approaches speculative and thus incapable of establishing "the situation which would, in all probability, have existed if [the Treaty breaches] had not been committed", as required under *Chorzów Factory*.[4144]

2521. Both the Income Approach and the RFR Approach are based on the operation of a hypothetical, non-existing enterprise, not a going concern. There is therefore no "history of profitable operation" on record that could properly support a DCF analysis.[4145] For instance, the Tribunal notes that the starting point for both analyses is the determination of the revenue of lubricants sold using the trademarks, but there is no basis on which this enterprise could conceivably "show that it will generate a reasonably foreseeable free

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4141 **CLA-41,** *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 121.

4142 **CLA-403**, *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 123.

4143 **CLA-403**, *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 124.

4144 **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, p. 47.

4145 **CLA-41,** *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 119-120.

cash flow in the coming years" by selling those lubricants.[4146] The enterprise has no track record or pre-attachment revenue projections that could support such finding, let alone any productive assets that could support a running sales operation or an established or prospective portfolio of clients. There is also no evidence that such hypothetical company had or would obtain financing to support its operation in Ecuador during the years for which cash flows are projected, much less in which conditions.[4147]

2522. Apart from the question of whether it is appropriate to perform a DCF analysis based on a hypothetical enterprise, Mr Anson's Income Approach and the RFR Approach also fail to consider the fact that Chevron IP appears to have received yearly royalties under the Technology Licence until, at least, 2020,[4148] which could lead to duplicative compensation.[4149]

2523. Crucially, Mr Anson appears to have adopted a DCF analysis based on the operation of a theoretical enterprise because he was not provided with actual historical data of the sales of products bearing Chevron's IP Subsidiaries' trademarks in Ecuador. In particular, Mr Anson stated – without providing any support for such proposition – that "[i]t is often the case that intellectual property is valued without the benefit of actual historical revenue data, which the owner may view as proprietary", in which case it is appropriate to "conduct extensive market research to develop forecasts."[4150]

2524. In this connection, the Claimants have acknowledged that they are in possession of proprietary historical data that could have supported a different analysis. During the document production phase of Track III, the Claimants declined to produce documents in their possession, custody, or control relating to (i) "business information regarding payments or volume of products and sole, and/or royalties owed under Swissoil

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4146 **RLA-779**, *OI European Group B.V. v. Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 658.

4147 In this connection, the Tribunal dismisses Mr Anson's proposed application of Chevron's cost of debt as a proxy for the cost of debt of this hypothetical enterprise (Third Anson Expert Report, para. 81). The Claimants have not provided convincing reasons why both Chevron and this hypothetical enterprise would have the same cost of debt.

4148 *See* paras. 2393, 2421, 2436 above. *See also* Third Anson Expert Report, para. 51: "Since the As-Is scenario holds no value, it did not need to be calculated."

4149 *See* paras. 2529-2532 below.

4150 Reply, para. 1042; Third Anson Expert Report, para. 55; Fourth Expert Anson Report, para. 41.

Trademark License Agreement or Technology License Agreement"; (ii) "business information regarding historical revenue, pricing, and/or profit data for lubricant sales operations in Ecuador utilizing the Chevron IP"; (iii) "business information regarding pricing data for lubricant sales operations in Ecuador utilizing the Chevron IP"; (iv) "business information relating to the use or sale of products in Ecuador carrying the Trademarks, and/or the know-how that is the subject of the Technology License Agreement and the volume of products produced and sold, and/or royalties owed, under the Technology License Agreement"; and (v) "business information relating to the use or sale of products in Ecuador carrying the Trademarks, and/or the know-how that is the subject of the Technology License Agreement and the volume of products produced and sold, and/or royalties owed, under the Technology License Agreement, and payments under the Swissoil Trademark License Agreement or Technology License Agreement".[4151] In particular, the Claimants withheld production on the basis that extending attorneys' and experts'-eyes only treatment to these documents could still cause substantial harm to Chevron, while noting that such documents were not relevant or necessary to test the intellectual property valuation performed by Mr Anson, who did not receive or rely upon these materials.[4152]

2525. In respect of the purported harm that could have been caused to Chevron if such data had been provided to Mr Anson, the Claimants assert that "Petroecuador is a competitor of Chevron's in the lubricants business. Claimants thus could not make their proprietary data available to Mr Anson without also making it available to Ecuador and Petroecuador."[4153] While the Tribunal acknowledges the legitimacy of this concern, it does not discharge the Claimants' burden of proof. As noted by the Tribunal in Procedural Order No. 72, regardless of the commercially sensitive nature of such information, the onus remains on the Claimants to establish their claim for alleged intellectual property losses.[4154]

4151 Procedural Order No. 72, 8 February 2021, para. 49.

4152 *See* Procedural Order No. 72, 8 February 2021, paras. 49-51.

4153 Reply, para. 1042.

4154 Procedural Order No. 72, 8 February 2021, para. 54. *See also* Rejoinder, para. 1697.

2526. For these reasons, the Tribunal dismisses Mr Anson's Income and RFR Approaches. The Tribunal must accordingly disregard the Respondent's adjusted valuations based on those same approaches.[4155]

2527. Having ruled out Mr Anson's proposed Income and RFR Approaches, the Tribunal is left with no alternative valuations proposed by the Claimants to consider. In turn, the Respondent has not put forward its own independent valuation of the intellectual property assets underlying the Claimants' claims: its primary position is that the Claimants "opted to build a damages model entirely on conjecture, divorced from any data regarding revenue or profits demonstrating the real-world value of [Chevron IP]'s intellectual property prior to, and after, the Trademark Attachments. This renders it impossible to determine whether, as a matter of fact, [Chevron IP] suffered an injury due to any reduction of value of the Chevron IP following the Trademark Attachments."[4156] For the reasons stated above, the Tribunal agrees with the Respondent.

2528. In the circumstances, the Tribunal concludes that while the Claimants have established that Chevron's IP Subsidiaries suffered an injury as a result of the Attachment Order, they have failed to establish the extent of the corresponding loss. The Claimants' claim in respect of Intellectual Property Losses in Ecuador must therefore be dismissed.

2529. This conclusion notwithstanding, the Tribunal notes that the only real-world evidence on record that might have provided a basis for a valuation of at least a subset of 43 Trademarks (*i.e.*, the 13 Trademarks) and the Technical Information – the Trademark and Technology Licences[4157] – supports the conclusion that the Claimants are not owed any compensation.

2530. [redacted]

4155 *See* para. 2375 above.

4156 Rejoinder, para. 1696. *See also* para. 2497 above.

4157 Rejoinder, para. 1698. In his First Expert Report, Mr Anson acknowledged that Chevron's IP Subsidiaries' royalty damages – in particular, the applicable royalty rate – should take into account Chevron's IP agreements with Swissoil, since they are "as close to the 'perfect comparables' as there are". *See* First Anson Expert Report, p. 17.

[redacted][4158] While the Trademark Licence did not specifically foresee any royalty payments, the Trademark and Technology Licences should be considered as a unified whole.[4159] This means, in the Tribunal's view, that the value of the trademarks and the technical know-how underlying those licences should also be determined as unified whole – without prejudice to the subsequent attribution of a portion of that overall value to each individual asset.[4160] Since these Licences constitute hard evidence of a stable and predictable source of income, the Tribunal believes it might have been possible to determine the value of the intellectual property assets falling under the Trademark and Technology Licences as the net present value of the royalty payments due to Chevron IP over the duration of the Technology Licence, with appropriate adjustments.

2531. Crucially, however, the Claimants have provided no evidence that Chevron IP was ever precluded from receiving any royalty payments under the Technology Licence, whether as a result of the Attachment Order or for any other reason.[4161] Since the Technology Licence was in effect until 15 June 2020[4162] and Swissoil and ConAuto were not prevented from continuing to import, commercialize, and distribute products in Ecuador bearing Chevron's licensed trademarks during the attachment period,[4163] the Tribunal infers that Chevron IP received royalty payments under this Licence until that date. The Tribunal also notes that ConAuto continued to sell Chevron lubricant products beyond 15

4158 **R-1995**, Technology Licence Agreement, Document 24, Section 6.1. *See* paras. 2390-2399 above.

4159 *See* paras. 2438-2439 above.

4160 *See* **RE-43**, Second Kerr Expert Report, para. 130, where Dr Kerr determines a "hypothetical measure of the actual value of the trademarks" assuming that "Chevron IP would receive technology fees as under the terms of the Technology License but that 50% of the fees should be attributed to the Trademarks." Dr Kerr explains that "[t]he selection of a 50% allocation is done in the absence of information from Chevron as to the details of the relationship between Chevron IP and SDE and of the basis of the negotiations between them that resulted in the license agreements" (**RE-43**,Second Kerr Expert Report, fn 142). *See also* **RE-43**, Second Kerr Expert Report, Schedules 20 and 21; **RE-53**, Kerr and Smith Expert Report, Schedules 20 and 21. The Tribunal notes that Dr Kerr and Mr Smith's analysis is not devised as an alternative valuation of Chevron's IP Subsidiaries' trademarks. Rather, it is meant to determine the hypothetical value of the trademarks in a scenario where Chevron becomes free to exploit the trademarks fully in Ecuador, with a view to subtracting that amount from the hypothetical but-for value of the trademarks to ensure that the Claimants are not awarded duplicative compensation (**RE-43**, Second Kerr Expert Report, paras. 126-130).

4161 *See* para. 2436 above.

4162 **R-1995**, Document 24, Technology Licence Agreement, Section 4; **RE-53**, Kerr and Smith Expert Report, para. 14(a), **Kerr Doc. 24**, CVX-Track III – 00016000-062, p. 1.

4163 *See* para. 2399 above.

June 2020 in the real-world scenario,[4164] which suggests that Chevron IP continues to receive compensation for the sale of Chevron products in the Ecuadorian market.

2532. This implies that the cash flows supporting the real-world valuation of the intellectual property assets included in the Trademark and Technology Licences are equivalent to the cash flows supporting the but-for valuation of those same assets. Since damages are to be measured as the difference between the value of those assets in the real-world scenario and the but-for scenario,[4165] and since these values are equal, the difference is zero. In other words, the Claimants have failed to prove that Chevron IP suffered any losses as a result of the Attachment Order.

2533. In sum, for the reasons stated above, the Tribunal rejects the Claimants' damages claim in respect of Intellectual Property Losses in Ecuador.

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4164 **RE-53**, Kerr and Smith Expert Report, para. 66.

4165 *See* para. 2403 above.

C. MORAL DAMAGES

2534. The Claimants seek compensation "in the amount that the Tribunal deems just and proper" for the moral damages they allegedly suffered as a result of the Respondent's Treaty breaches.[4166] In particular, the Claimants contend that the Criminal Proceedings initiated against Mr Ricardo Reis Vega and Dr Rodrigo Perez Pallares (TexPet's Vice President and legal representative, respectively), the Respondent's media campaign against the Claimants, and the Respondent's breach of the Tribunal's Interim Orders and Awards constitute the necessary "exceptional circumstances" that fulfil the three-part moral damages test articulated in *Lemire v. Ukraine*.[4167]

2535. The Respondent asserts that the Claimants' request for moral damages should be denied. In the Respondent's submission, the alleged acts relied upon by the Claimants in support of their moral damages claim are not Treaty breaches, and, in any event, the Claimants have failed to prove any exceptional circumstances warranting moral damages.[4168]

1. The Claimants' Position

2536. First, in the Claimants' submission, international law and arbitration tribunals have recognized and affirmed the possibility of awarding moral damages.[4169] In particular, the Claimants cite to the *Case Concerning Ahmadou Sadio Diallo* and *Dacia SRL v. Moldova* for the proposition that moral damages can be awarded when the claimant's reputation has been affected, and may also be granted to corporations "should ordinary compensation fail to make a claimant whole".[4170] The Claimants rely to this end on the three-part test articulated in *Lemire v. Ukraine*, under which moral damages may be awarded if the following requirements are met:

4166 Memorial, paras. 150, 463.

4167 Memorial, paras. 150, 447; Reply, paras. 1114-1115, 1122.

4168 Counter-Memorial, para. 1311; Rejoinder, para. 1787.

4169 Memorial, paras. 448-449.

4170 Memorial, paras. 449, 451; **CLA-676**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Judgment, 2012 ICJ Reports 324, 19 June 2012, paras. 11, 19; **CLA-678**, *Dacia S.R.L. v. Moldova*, Judgment, ECHR Application No. 3052/04, 24 February 2009, para. 6.

- the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;

- the State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and

- both cause and effect are grave or substantial.[4171]

2537. As to the "exceptional circumstances" entitling them to reparation, the Claimants first argue that the Respondent launched a global media campaign to promote the false narrative that the Claimants were liable for alleged "environmental crimes" in the Amazon as part of its national policy to promote the enforcement of the Lago Agrio Judgment.[4172] This included action taken directly by the Ecuadorian government by way of the "*La Mano Sucia de Chevron*" campaign, as well as meetings at international fora such as the European Parliament.[4173]

2538. The Claimants also assert that the Respondent targeted private individuals through the "*Los Vendepatria*" website, which provided "confidential personal information of Ecuadorian attorneys and experts who purportedly worked with Chevron".[4174] According to the Claimants, the Respondent's attacks were intended to cause serious damage to their "reputation[s], credit and social position", which calls for compensatory moral damages in accordance with international jurisprudence.[4175]

2539. Furthermore, the Claimants submit that the "mental anguish, degradation, humiliation, shame and reputational damage" suffered by their employees Mr Veiga and Dr Pérez as a result of the Respondent's "abusive and meritless" criminal investigations warrant

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[4171] Memorial, paras. 452; Reply, para. 1115; Counter-Memorial, para. 1315; Rejoinder, para. 1788; **CLA-660**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 333.

[4172] Memorial, para. 458; Track II Award, paras. 4.183, 4.231.

[4173] Memorial, para. 458; Reply, para. 1119; Track II Award, para. 4.474.

[4174] Reply, para. 1119; **C-1964**, *The nations's traitors*, available at losvendepatria.com.

[4175] Memorial, paras. 152, 448-449, 453; **CLA-280**, *Lusitania Case (United States v. Germany)*, Award, PCIJ, 7 Rep. Int'l Arb., 1 November 1923; **CLA-234**, *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 290; **CLA-676**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Judgment, 2012 ICJ Reports 324, 19 June 2012, paras. 11, 19.

compensatory moral damages.[4176] The Claimants recall in this respect the Tribunal's finding that the Respondent colluded with the LAPs in the criminal investigations "for the purpose of disadvantaging Chevron's defence in the Lago Agrio Litigation based on the 1995 Settlement Agreement."[4177]

2540. As such, relying on *Desert Line v. Yemen*, the Claimants posit that the Respondent's misuse of its prosecutorial powers, together with the personal attacks it launched against Mr Veiga and Dr Pérez, constitute exceptional circumstances entitling them to moral damages.[4178] For the Claimants, the Respondent's criminal prosecutions, together with the Respondent's conduct in its global media campaign against the Claimants, contravene "the norms according to which civilized nations are expected to act."[4179]

2541. Second, regarding the evidence on record seeking to prove a loss of reputation, credit or social position, the Claimants note that the witness statements provided by Mr Veiga and Dr Pérez provide a recollection of the enormous toll that the Respondent's actions had on them.[4180] The Claimants further assert that this evidence, along with other evidence they have submitted, is enough to establish a causal link between the State's actions and the alleged harm as articulated in *Tecmed v. Mexico*.[4181] In any event, to the extent there may be any "shortcomings in [the] evidence," the Claimants note that international courts have granted moral damages "based on equitable considerations."[4182]

2542. Third, the Claimants submit that the Respondent's actions and their effect on the Claimants, as well as their employees and attorneys, were grave and substantial as, testified by Mr Veiga and Dr Pérez.[4183] The threat of arrest and personal attacks hampered

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4176 Memorial, paras. 459-460; Reply, paras. 1120-1121; Third Veiga Witness Statement, paras. 7, 30-31, 33-34, 38, Pérez Pallares Witness Statement, paras. 3-5.

4177 Memorial, para. 462; Reply, para. 1120; Track II Award, para. 5.239.

4178 Reply, paras. 1121, 1124.

4179 Memorial, para. 462; Reply, para. 1125.

4180 Reply, para. 1126; Pérez Pallares Witness Statement, paras. 3-5; Third Veiga Witness Statement , paras. 22-38.

4181 Memorial, paras. 454, 457; **CLA-31**, *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB/AF/00/2, Award, 29 May 2003, para. 198.

4182 Reply, para. 1126; **CLA-676**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2012 ICJ Reports 324, 19 June 2012, para. 33.

4183 Reply, para. 1127.

their ability to aid in the Lago Agrio Litigation and also forced Dr Pérez to leave Ecuador.[4184]

2543. In addition, the Claimants argue that moral damages must be granted in light of the full circumstances of this case, including the failure to protect Chevron from gross violations of its due process rights, the refusal to investigate the fraud and corruption, and the refusal to comply with the Tribunal's Orders and Awards, which pressured the Claimants into accepting a "fraudulent and corrupt judgment".[4185]

2544. Accordingly, the Claimants submit that the Tribunal has absolute discretion in quantifying moral damages, and as such, they request that moral damages be awarded in the amount that the Tribunal deems "just and proper".[4186] In support of their position, the Claimants turn to the *Lusitania* case where moral damages were awarded despite the complexity behind their estimation.[4187]

2. The Respondent's Position

2545. The Respondent submits that the Claimants' request for moral damages should be denied because: (i) the alleged acts relied upon by the Claimants in support of their claim are not breaches of the Treaty; and (ii) there are no exceptional circumstances that could justify a moral damages award.[4188]

2546. First, as per the Respondent, the Claimants must prove that the moral damages they claim were caused by Treaty breaches.[4189] Citing to *Bank Melli and Bank Saderat v. Bahrain*, the Respondent asserts that "a claim to damages of a moral character does not escape the burden of proof resting on a claimant",[4190] that is, a claim for moral damages must be

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4184 Reply, paras. 1126-1127; Pérez Pallares Witness Statement, para. 5; Third Veiga Witness Statement, para. 38.

4185 Memorial, para. 153; Reply, para. 1122.

4186 Memorial, para. 463; Reply, para. 1128.

4187 Memorial, para. 448; **CLA-280**, *Lusitania Case (United States v. Germany)*, Award, PCIJ, 7 Rep. Int'l Arb, 1 November 1923.

4188 Counter-Memorial, para. 1311; Rejoinder, para. 1787.

4189 Rejoinder, para. 1791.

4190 Rejoinder, para. 1790; **RLA-1040**, *Bank Melli Iran and Bank Saderat Iran v. Bahrain*, PCA Case No. 2017-25, Award, 9 November 2021, para. 793.

supported with specific evidence.[4191] The Respondent also relies on the *Lemire* test to underscore the gravity of the conduct and the substantial effects required to prove moral damages.[4192]

2547. In contrast to *Diallo*, where moral and mental harm were found to be "an inevitable consequence of the wrongful acts of the DRC",[4193] the Respondent posits that neither the media campaign nor the criminal proceedings – the acts which allegedly resulted in moral damages – were found to be breaches of the Treaty.[4194] Therefore, the Respondent asserts that the *Diallo* case does not relieve the Claimants from their evidentiary burden.[4195]

2548. The Respondent further argues that the witness statements of Mr Veiga and Dr Pérez – the only purported evidence of the alleged harm – were not accompanied by any specific evidence as to the purported loss of the Claimants' reputation, credit, or social position.[4196] In any event, the Respondent considers that whether or not the two employees of TexPet suffered "severe anxiety, emotional anguish, degradation, humiliation, shame, and reputational damage" is not relevant to the Claimants' entitlement to moral damages, given that the investigations concerned these individuals, not the Claimants.[4197]

2549. Second, contrary to the Claimants' assertion, the Respondent avers that moral damages have only been awarded in a minimal number of cases, which involved loss of life, physical injury or threats, illegal detention, or other extreme circumstances.[4198] As the *Lemire* tribunal made clear, a "loss of reputation . . . is not enough: the main question is

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4191 Counter-Memorial, para. 1325.

4192 Rejoinder, paras. 1788-1789.

4193 Counter-Memorial, para. 1328; Rejoinder, para. 1797; **CLA-676**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 2012 ICJ Reports 324, 19 June 2012, para. 21.

4194 Counter-Memorial, paras. 1319, 1328; Rejoinder, paras. 1792-1794; Track II Award, paras. 5.241, 8.17(iv), 8.68-8.69.

4195 Rejoinder, para. 1797.

4196 Counter-Memorial, para. 1327; Rejoinder, para. 1795.

4197 Counter-Memorial, para. 1320; Rejoinder, para. 1795.

4198 Counter-Memorial, paras. 1312-1314; Rejoinder, para. 1798; **CLA-280**, *Lusitania Case (United States v. Germany)*, Award, PCIJ, 7 Rep. Int'l Arb., 1 November 1923, p. 35; **CLA-676**, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Judgment, 2012 ICJ Reports, 19 June 2012.

to determine whether the injury inflicted is substantial."[4199] Yet, in the present case, the Respondent posits that the Claimants have failed to establish that their purported injuries are of sufficient gravity and were caused by "exceptional circumstances" of the kind recognized as pertinent by international law.[4200] In this respect, the Respondent underscores that moral damages cannot be based on implied harm.[4201]

2550. The Respondent highlights that circumstances such as the ones forming the basis of the Claimants' moral damages claim have been found by investment tribunals not to meet the threshold for "exceptional circumstances" warranting an award of moral damages, *e.g.*, threats of false criminal accusations later rejected by State's courts; acts affecting reputation that led to the loss of business opportunities; and acts affecting relationships with bankers, investors or major commercial partners.[4202]

2551. In regard to the Criminal Proceedings initiated against Mr Veiga and Dr Pérez, the Respondent, relying on *Gavazzi v. Romania*, argues that claims for moral damages where breaches resulted in health or psychological conditions have been rejected because "the injury suffered cannot be compared to that caused by armed threats, by the witnessing of deaths or by other similar situations in which tribunals in the past have awarded moral damages."[4203] On this basis, the Respondent asserts that the circumstances invoked by the Claimants do not meet the standards to warrant compensation for moral damages: the criminal investigations lasted a little over a year and there was "no lasting prejudice" to the Claimants, since the Ecuadorian National Court of Justice declared the nullity of the proceedings discontinuing the accusations.[4204]

4199 Rejoinder, para. 1799; **RLA-433**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 338.

4200 Counter-Memorial, para. 1321; Rejoinder, paras. 1801, 1803-1804.

4201 Rejoinder, para. 1801.

4202 Counter-Memorial, para. 1322; Rejoinder, para. 1802; **CLA-31**, *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 198; **CLA-642**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, paras. 290-293; **CLA-664**; *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award, 18 April 2017, paras. 295-296.

4203 Counter-Memorial, para. 1323; **CLA-664**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award, 18 April 2017, paras. 295-296.

4204 Counter-Memorial, para. 1324; Rejoinder, para. 1803; **CLA-664**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award, 18 April 2017, para. 295.

2552. Lastly, regarding the argument of the "willful violation of [the] Tribunal's Interim Orders and Awards" as an exceptional circumstance, the Respondent asserts that the Tribunal did not find that the Respondent acted "willfully". Furthermore, the Claimants did not provide any precedent where non-compliance with a tribunal's order was deemed as grounds to award moral damages.[4205] For the Respondent, the fact that such alleged non-compliance was only raised in the Claimants' Reply evinces "how tenuous their 'willful violation' argument is now."[4206]

3. The Tribunal's Analysis

2553. The Tribunal's analysis of the Claimants' claim for moral damages must start with Article 31 of the ILC Articles, which reads:

> 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or *moral*, caused by the internationally wrongful act of a State.[4207]

2554. As gleaned from above, moral damages are recognized under international law as part of the injury for which a responsible State is bound to make full reparation. They are also subject to a requirement of proximate causation: to be compensable, moral damages must be caused by the internationally wrongful act of a State.

2555. Accordingly, as a form of direct damage, any moral damages must be proximately caused by the Respondent's Treaty breaches to warrant compensation. The Tribunal recalls in this respect that, in this case, the injury caused by the Respondent's Treaty breaches is circumscribed to any injury caused by the recognition or enforcement of any part of the Lago Agrio Judgment. Absent a finding of a separate and independent source of injury flowing from the Respondent's internationally wrongful acts, reparation cannot go beyond this limit.[4208]

4205 Rejoinder, para. 1804.

4206 Rejoinder, para. 1804.

4207 **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001), Art. 31 (emphasis by the Tribunal).

4208 *See* paras. 317, 321 above.

2556. Against this background, it becomes readily apparent that two of the three instances of alleged harmful conduct for which the Claimants claim moral damages – the Criminal Proceedings and the "media campaign against Chevron" – do not form part of the Respondent's Treaty breaches. As such, any harm arising from such conduct is outside the scope of the compensable injury in this case.

2557. First, the Respondent's "meritless persecution and criminal prosecution of Mr. Veiga and Dr. Pérez",[4209] as characterized by the Claimants themselves, is not connected to the Respondent's Treaty breaches. The Tribunal determined in Track II that there is 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.[4210]

2558. In turn, whatever harm might have arisen from the Criminal Proceedings, originated before the date on which the Lago Agrio Judgment was certified as enforceable by the Lago Agrio Court (1 March 2012). In particular, the "severe mental and emotional distress" allegedly experienced by Mr Veiga and Dr Perez was the result of "'intermittent investigations and prosecutions from [October] 2003 to [June] 2011' [which] involved 'vicious and unwarranted statements' directed at Mr. Veiga and others 'by senior members of the Government".[4211] In other words, the Criminal Proceedings came to an end almost a year before the critical date of 1 March 2012. As already determined by this Tribunal, no direct damages arising before this date, whether material or moral in nature, are compensable in these proceedings.[4212]

4209 Reply, para. 1114.

4210 Track II Award, paras. 5.240-5.241.

4211 Memorial, para. 459.

4212 *See* para. 350 above.

2559. Second, the Respondent's alleged "scorched-earth media campaign against Chevron"[4213] is also not connected to the Respondent's Treaty breaches. As in the case of the Criminal Proceedings, the Tribunal rejected in its Track II Award the proposition that the Respondent's media campaign amounted to a Treaty breach:

> In Parts IV and V above, the Tribunal discounted, as a distinct matter in regard to the Lago Agrio Judgment, the numerous public condemnatory statements regarding Chevron made by President Correa and members of his administration. As regards the Lago Agrio Litigation more generally, although particularly vicious in regard to Mr Veiga and Dr Pérez, Chevron's other legal representatives in Ecuador and (later) Dr Guerra, *these statements were also not the cause of any injury sustained by the Claimants in the Lago Agrio Litigation or under the Lago Agrio Judgment*.
>
> Moreover, as the Respondent submitted, Governments sometimes resort to extreme political language as regards alleged damage to the environment caused by foreign oil companies. The Tribunal does not consider such political, even populist, statements by a State's executive branch, however regrettable, as amounting by themselves to a denial of justice. This applies necessarily to a situation where *the sole cause for the denial of justice lies elsewhere within the State's judicial branch – as it does in the present case*.[4214]

2560. Similarly, any harm arising from this alleged "media campaign against Chevron" was not caused by the recognition and enforcement of the Lago Agrio Judgment and, as such, does not form part of the compensable injury in this case.

2561. A separate analysis of the moral damages allegedly arising from the Interim Awards Breach is in order. The Claimants submit in essence that the Respondent's "willful violation of this Tribunal's Interim Orders and Awards" inflicted moral damages on Chevron and its employees.[4215] In particular, against the background of the Criminal Proceedings and the Respondent's alleged "media campaign against Chevron", the Claimants assert that:

> Ecuador willfully violated the Tribunal's Interim Orders and Awards and thus intentionally and knowingly subjected Chevron to substantial risks of enforcement of a fraudulent and corrupt Judgment, with the intent of creating undue pressure to settle. This, too, is an exceptional circumstance warranting moral damages.[4216]

4213 Reply, para. 1114.

4214 Track II Award, paras. 8.68-8.69 (emphasis by the Tribunal).

4215 Reply, para. 1114.

4216 Reply, para. 1122.

2562. In the Tribunal's view, this claim must also fail. First, while the Interim Awards Breach forms part of the Respondent's Treaty breaches,[4217] the Tribunal has also found that any losses said to have flowed from the Interim Awards Breach are subsumed within the losses flowing from the Denial of Justice and Umbrella Clause Breaches.[4218] In other words, the fact remains that the only injuries for which compensation is warranted in Track III are the injuries arising from the recognition and enforcement of the Lago Agrio Judgment.[4219]

2563. Second, the Tribunal recalls that it has already granted substantial monetary compensation to the Claimants for the incidental damages arising from the recognition and enforcement of the Lago Agrio Judgment.[4220] While the Tribunal does not rule out the possibility that the recognition and enforcement of the Lago Agrio Judgment may have also adversely impacted the Claimants' reputation, the Tribunal does not consider it necessary to grant additional monetary compensation in respect of moral damages.

2564. For these reasons, the Tribunal rejects the Claimants' claim for moral damages.

2565. In view of this conclusion, the Tribunal does not consider it necessary to address other issues that were debated between the Parties regarding the Claimants' claim for moral damages, including ***(i)*** whether a showing of grave, exceptional, or extreme circumstances is required to award moral damages; ***(ii)*** whether corporations, as opposed to natural persons, may claim moral damages under international law; ***(iii)*** whether a company may claim moral damages for harm suffered by its employees; and ***(iv)*** whether compensation is warranted on the basis of the Interim Awards Breach as a matter of principle.[4221]

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4217 Track II Award, para. 10.18.

4218 *See* para. 416 above.

4219 *See* para. 377 above.

4220 *See* Section VIII.O above.

4221 *See* para. 416 above.

X. INTEREST

2566. The Claimants request that the Tribunal award compound interest both pre- and post-award to wipe out the consequences of the Respondent's Treaty breaches and make them "whole" in accordance with the principle of full reparation.[4222] They argue that they should be fully compensated for the loss of use of the funds they were forced to spend in various legal proceedings as a result of the Respondent's Treaty breaches.[4223] Accordingly, in the Claimants' submission, interest should be paid from the date of occurrence of the damage until the Respondent's full and final payment.[4224]

2567. In contrast, the Respondent argues that the Claimants are not entitled to any interest because they have not proven that any should be awarded.[4225] If the Tribunal were to award any interest, it should be at a rate lower than what the Claimants seek.[4226]

A. THE CLAIMANTS' POSITION

2568. *Sufficiency of evidence*: In support of their interest claim, the Claimants submit the expert report of Mr Sequeira, who calculates pre-award interest on the legal fees and expenses that the Claimants claim as damages.[4227] Mr Sequeira relies on analyses from the Claimants' other experts to determine whether and when the underlying invoices for the claimed fees and costs were paid.[4228] For the Claimants, Mr Sequeira's reliance on the analysis of other experts is appropriate, since, in order to calculate the pre-award interest, Mr Sequeira required other experts to establish the amount of costs incurred by Chevron in the Lago Agrio Litigation and related proceedings.[4229]

4222 Memorial, para. 438; Reply, paras. 1129, 1131-1132; **CLA-671**, *ConocoPhillips Petrozuata B.V. v. Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019, paras. 214-225; **CLA-672**, *Copper Mesa Mining Corp. v. Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, para. 8.11; **CLA-673**, *Occidental Petroleum Corporation v. Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 834.

4223 Reply, para. 1130.

4224 Reply, para. 1132.

4225 Counter-Memorial, paras. 1283-1284; Rejoinder, para. 1824.

4226 Counter-Memorial, para. 1285; Rejoinder, para. 1825.

4227 Memorial, para. 440.

4228 Reply, para. 1135.

4229 Reply, para. 1135.

2569. The Claimants add that they have produced the invoices and other relevant documents underlying the legal fees and expenses for which they claim compensation as damages, which are set out in Appendix 2 to their Reply.[4230]

2570. *Starting date:* As to the Respondent's argument that pre-award interest should run only from 27 June 2018, the Claimants submit that the Respondent breached the Umbrella Clause of the Treaty no later than 1 January 2004 or, alternatively, on 14 February 2011 when the Lago Agrio Judgment was issued, or 1 March 2012, when the Respondent declared the Lago Agrio Judgment enforceable.[4231]

2571. As regards the Denial of Justice Breach, the Claimants maintain that the date of the Respondent's Treaty breach was the date of the first composite act on 22 August 2006 (*i.e.*, when the judicial inspections were terminated) or 1 April 2008, the date of Mr Cabrera's first "ghostwritten" expert report.[4232] In the alternative, the Claimants posit that the Denial of Justice Breach crystallized no later than 1 March 2012, when the Lago Agrio Judgment became enforceable.[4233]

2572. *Appropriate rate*: Mr Sequeira invites the Tribunal to consider the application of four different interest rates:[4234]

(i) *Ecuador's cost of debt*: The Claimants consider this rate to be reasonable – in fact, the most appropriate – because it "represents the rate of interest paid to other willing lenders (*i.e.*, sovereign bond investors) with a monetary claim against [Ecuador]."[4235] Also known as the "coerced loan theory," the Claimants assert that this approach has been endorsed by commentary and used by multiple arbitral tribunals.[4236] Similarly, in Mr Sequeira's opinion, since the Claimants are

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4230 Reply, para. 1134. *See also* Reply, Updated Appendix 2.

4231 Reply, paras. 1136-1137.

4232 Reply, para. 1138.

4233 Reply, para. 1138.

4234 First Sequeira Expert Report, para. 71.

4235 Memorial, para. 442; Reply, para. 1153; First Sequeira Expert Report, para. 73.

4236 Reply, paras. 1154, 1156; **CLA-403**, *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 128, fn 289; **CLA-470**, Jeffery M. Colón and Michael S. Knoll, *Prejudgment Interest in International Arbitration*, in TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 4, Issue 6 (2007), pp. 11-12; **CLA-921**, *Cargill, Incorporated v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 544.

"effectively unwilling lenders" to Ecuador, it is "logical[]" to be compensated at an interest rate that is at least equal to that which Ecuador pays to its willing lenders.[4237] According to Mr Sequeira, Ecuador's cost of debt averaged approximately 11% between 2003 and 2019.[4238] An award of interest at a rate less than Ecuador's borrowing cost, the Claimants posit, would be tantamount to Ecuador obtaining a below-market rate loan from Chevron, thus benefitting economically from its wrongdoing.[4239]

(ii) *LIBOR + 4%*: Noting that LIBOR is one of the most widely cited benchmark rates, also frequently applied by arbitral tribunals, the Claimants submit that "[its] use should not be controversial."[4240] The Claimants further note that arbitral tribunals have generally applied a premium of 4% over the LIBOR rate to account for the fact that only the most solvent and creditworthy borrowers are able to borrow money from banks at the prime rate.[4241] The Claimants state that even after *Yukos Universal v. Russia*, in which the tribunal rejected the LIBOR rate, arbitral tribunals have continued to apply LIBOR + 4%.[4242]

(iii) *U.S. Prime rate + 2%*: Similar to LIBOR, the Claimants note that the U.S. Prime rate has been us*ed by international tribunals, though infrequently by investment tribunals, as an appropriate benchmark ra*te to determine the borrowing rate of an investor.[4243] Further, since not all enterprises can borrow money from banks at the

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4237 Memorial, para. 442; Reply, para. 1153; First Sequeira Expert Report, para. 73.

4238 First Sequeira Expert Report, para. 76.

4239 Reply, para. 1155.

4240 Reply, para. 1158; **CLA-922**, *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, paras. 836-837; **RLA-779**, *OI European Group B.V. v. Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, para. 942.

4241 Memorial, para. 443; Reply, paras. 1160-1162; **CLA-922**, *Rusoro Mining Ltd. v. Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 838; **CLA-924**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Venezuela (II)*, ICSID Case No. ARB/12/23, Award, 12 December 2016, para. 772; **RLA-791**, *Murphy Exploration and Production Company – International v. Ecuador (II)*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, para. 517.

4242 Reply, para. 1160.

4243 Memorial, para. 444; Reply, para. 1164.

U.S. Prime rate, a premium of 2% is appropriate to reflect a rate that is broadly available in the market.[4244]

(iv) *Chevron's weighted average cost of capital* ("**WACC**"): Citing academic sources, the Claimants submit that their WACC could be used as an appropriate interest rate to reflect their opportunity cost resulting from being deprived of funds as a result of the Respondent's Treaty breaches.[4245]

2573. By contrast, the Claimants argue that a short-term, risk-free rate, as proposed by the Respondent, would unduly reward the Respondent for its conduct and enable it to avoid compliance.[4246] According to the Claimants, the use of 6-month or 1-year U.S. Treasury bills has been rejected by investment tribunals on the basis that it is "unreasonably low" and "is inadequate to fulfil the *Chorzów* standard".[4247]

2574. Rejecting the Respondent's suggestion that there is a trend towards granting interest at the U.S. Treasury bill rate, un-augmented, the Claimants clarify that the tribunals in *Occidental v. Ecuador* and *Vestey v. Venezuela* awarded the U.S. Treasury bill rate because the claimants in those cases requested its application and the respondents did not oppose it.[4248]

2575. *Simple or compound interest*: For the Claimants, interest awarded on a compound basis reflects more accurately what a claimant would have been able to earn on the sums owed if it had been paid in a timely manner, while simple interest would not provide full compensation.[4249] According to the Claimants, investment tribunals have confirmed that compound interest is the most accepted and appropriate method to compensate a claimant

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4244 Memorial, para. 444; Reply, para. 1165; First Sequeira Expert Report, para. 81.

4245 Memorial, para. 445; Reply, paras. 1167-1168; **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), pp. 527-528.

4246 Reply, paras. 1139, 1150.

4247 Reply, paras. 1140-1144; **CLA-602**, *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, para. 961; **CLA-920,** *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 514; **RLA-811**, *South American Silver Limited v. Bolivia*, PCA Case No. 2013- 15, Award, 22 November 2018, para. 889.

4248 Reply, paras. 1147-1149; **CLA-673**, *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 842; **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), para. 3.399.

4249 Memorial, para. 439; Reply, para. 1175.

fully for the delay between the date of harm suffered and the award of damages, *i.e.*, to make a claimant whole.[4250] The Claimants add that compound interest would promote efficiency of enforcement.[4251]

2576. *Tax implications*: In the Claimants' view, the fact that that they took a tax deduction for the legal fees they claim as damages in this Arbitration is irrelevant for the purposes of quantum.[4252] According to the Claimants, it is firmly established in investment jurisprudence that the tax consequences of an arbitral award in an investor's home country are irrelevant for the purpose of determining the amount of compensation owed.[4253] The Claimants assert that tribunals have refused to gross-up awards to account for the investor's future tax liability in its home country because it is highly speculative and outside the realm of the compensation analysis.[4254]

2577. The Claimants rely on the tribunal's finding in the *Chevron v. Ecuador I* award that there must "exist[] a specific provision in an agreement or an established practice between the parties relating to their allocation, collection or withholding" for taxes to fall within the ambit of the Tribunal's assessment of damages.[4255] According to the Claimants, there is no provision in any agreement or established practice between the Parties concerning Chevron's future income tax obligations to the U.S. Treasury, the State of California

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4250 Reply, paras. 1169-1173; **CLA-228**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 9.2.6; **CLA-242**, *Middle East Cement Shipping and Handling Co. SA v. Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002, para. 174; **CLA-403**, *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 129; **CLA-657**, *Compañía del Desarrollo v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 101.

4251 Reply, para. 1174; **CLA-467**, John Y. Gotanda, *A Study of Interest*, in VILLANOVA UNIVERSITY SCHOOL OF LAW WORKING PAPER SERIES, Paper 83 (2007), p. 4; **CLA-470**, Jeffery M. Colón and Michael S. Knoll, *Prejudgment Interest in International Arbitration*, in TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 4, Issue 6 (2007), p. 8.

4252 Reply, para. 567.

4253 Reply, paras. 573-575, 577; **CLA-240**, *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*, ICSID Case No. ARB/97/4, Award, 29 December 2004, para. 367; **RLA-813**, *William Ralph Clayton, Bilcon of Delaware, Inc. and others v. Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 313.

4254 Reply, paras. 576, 578; **CLA-766**, *Les Laboratories Servier, S.A.A., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Poland,* PCA Case No. 2010-12, Award, 14 February 2012, para. 666; **RLA-760**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, 22 May 2012, para. 485.

4255 Reply, para. 583; **RLA-351**, *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, PCA Case No. 2007-02/AA277, Final Award on the Merits, 31 August 2011, para. 311.

(where Chevron is based) or to any other governmental authority.[4256] The Claimants add that Chevron's corporate income taxes in the U.S. are entirely unrelated to Ecuador.[4257]

2578. In view of the foregoing, the Claimants submit that the Tribunal should not consider the tax consequences of any award it renders on account of theoretical tax savings.[4258]

B. THE RESPONDENT'S POSITION

2579. *Sufficiency of evidence*: According to the Respondent, the Claimants have failed to substantiate their interest claims with any primary evidence.[4259] Specifically, the Respondent argues that Mr Sequeira's calculations are based entirely on the analyses of other experts, which are "unsupported" and "severely deficient."[4260] In its Counter-Memorial, the Respondent noted that no supporting data or analysis had been presented by the Claimants to verify any of the assumptions or calculations that were made in Appendix 2 to the Claimants' Memorial.[4261]

2580. *Starting date:* The Respondent contests the Claimants' assertion that pre-award interest started to accrue as early as 2004, arguing that the Respondent's Treaty breaches crystallized only on 27 June 2018, the date of the Judgment of the Constitutional Court rejecting Chevron's request to impugn the Lago Agrio Judgment.[4262] Accordingly, no international responsibility on the part of the Respondent could have arisen before this date.[4263]

2581. *Appropriate rate*: Assuming *arguendo* that the Tribunal were inclined to award interest, the Respondent submits that a short-term risk-free rate, such as the yield on 6-month or 1-year U.S. Treasury bills, would be appropriate and consistent with economic theory and

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4256 Reply, para. 584.

4257 Reply, para. 586.

4258 Reply, paras. 580, 588.

4259 Counter-Memorial, paras. 1287, 1289.

4260 Counter-Memorial, para. 1289.

4261 Counter-Memorial, para. 1290.

4262 Counter-Memorial, para. 1288.

4263 Counter-Memorial, para. 1288.

practice.[4264] Given that a damages award is not exposed to any business risk, the Respondent contends that an interest rate based upon risk-free instruments constitutes a "commercially reasonable interest rate" in this context.[4265] This rate, according to the Respondent, would ensure that the Claimants are compensated for their actual loss and are not overcompensated for a risk they did not bear.[4266] Emphasizing that it gained no economic benefit from the Treaty breaches at issue, the Respondent also cites *Vestey v. Venezuela* to emphasize that "reparation [] is not concerned with the possible enrichment of the Respondent."[4267]

2582. The Respondent distinguishes the jurisprudence cited by the Claimants as support against the application of a risk-free rate.[4268] Instead, the Respondent refers to decisions supporting an interest rate approximating the U.S. Treasury bill rate in this case.[4269] Noting that the tribunals in these cases used a rate matching the average borrowing rate of the claimant during the damages period, the Respondent points out that Chevron's borrowing rate averaged only 1.5% throughout the Claimants' entire proposed damages period, which is similar to the average 6-month or 1-year U.S. Treasury bill rate.[4270]

2583. The Respondent considers inappropriate the four interest rates proposed by the Claimants, arguing that the Claimants and Mr Sequeira failed to account for other risks associated

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[4264] Counter-Memorial, paras. 1291, 1294, 1296; Rejoinder, para. 1837; **RE-42**, First Flores Expert Report, para. 31.

[4265] Counter-Memorial, paras. 1295-1296.

[4266] Rejoinder, paras. 1838, 1840, 1850; **QE-25**, *Vestey Group Limited v. Venezuela*, ICSID Case No ARB/06/4, Award, 15 April 2016, para. 440.

[4267] Rejoinder, paras. 1844-1845; **QE-25**, *Vestey Group Limited v. Venezuela*, ICSID Case No ARB/06/4, Award, 15 April 2016, para. 440.

[4268] Rejoinder, paras. 1837-1838; **RLA-811**, *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, paras. 878, 891-892; **CLA-296**, *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras. 143-144; **CLA-920**, *Alpha Projekholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 514.

[4269] Rejoinder, para. 1837.

[4270] Rejoinder, para. 1837; **CLA-602**, *Flughafen Zürich A.G. and Gestion e Ingeniería IDC S.A v. Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, para. 965; **CLA-94**, *National Grid P.L.C. v. Argentina*, UNCITRAL, Award, 3 November 2008, paras. 291-294.

with such higher rates, including investment and maturity risks. The Respondent argues with respect to each of Claimants' proposed interest rates as follows:[4271]

(i) *Ecuador's cost of debt*: According to the Respondent, using Ecuador's cost of debt would include compensation for *ex-ante* lending risk to Ecuador, which is not a risk faced by the Claimants in the context of an *ex-post* damages award.[4272] The Claimants' interest rate is also likely inflated by a premium for maturity.[4273] The Respondent argues that the Claimants cannot be likened to "unwilling lenders" because Ecuador received no economic benefit from the amounts the Claimants allegedly spent in legal and other costs.[4274] The Respondent also takes issue with Mr Sequeira's calculation which, in its view, is not grounded in reality, pointing out that his approach creates and uses "proxies" instead of applying Ecuador's actual cost of debt.[4275]

(ii) *LIBOR + 4%*: The Respondent asserts that LIBOR rates have been subject to manipulation for years, are in the process of being discontinued, and have been "discredited" as a benchmark interest rate in arbitration, as concluded by the tribunal in *Yukos Universal v. Russia*.[4276] Even if LIBOR were a legitimate benchmark rate, the Respondent rejects the Claimants' proposed 4% premium, given that the Claimants have a history of borrowing at rates that correspond to discounts from the 12-month LIBOR rate.[4277]

(iii) *U.S. Prime rate + 2%*: In the same vein, the Respondent maintains that the Claimants could have borrowed money at a discount, not a premium, with respect to the U.S. Prime rate, given their size and credit rating.[4278]

4271 Rejoinder, para. 1843.

4272 Counter-Memorial, para. 1301; Rejoinder, para. 1849.

4273 Counter-Memorial, para. 1301; Rejoinder, para. 1844.

4274 Counter-Memorial, para. 1301; Rejoinder, para. 1844.

4275 Rejoinder, para. 1850; Second Sequeira Expert Report, paras. 78-82.

4276 Counter-Memorial, para. 1302; Rejoinder, para. 1856; **RE-42**, First Flores Expert Report, para. 48.

4277 Counter-Memorial, para. 1303; Rejoinder, para. 1859; **RE-42**, First Flores Expert Report, para. 51; **RE-56**, Second Flores Expert Report, paras. 75-76.

4278 Counter-Memorial, para. 1304; Rejoinder, paras. 1861-1862.

(iv) *Chevron's WACC*: The Respondent contends that WACC cannot be a proxy for a "commercially reasonable rate", as it is not a rate at which money is lent or borrowed.[4279] It notes, in addition, that Mr Sequeira has failed to explain why Chevron's WACC would be a proper measure for Texaco Petroleum Company's alleged losses.[4280] As with Ecuador's cost of debt, the Respondent posits that awarding interest at Chevron's WACC would result in compensating the Claimants for risks they did not bear: in the Respondent's view, it is entirely speculative that the Claimants would have invested the funds used for legal expenses in some money-making venture.[4281] WACC would also fail to account for the downside of whatever hypothetical investment the Claimants would have made.[4282]

2584. *Simple or compound interest*: Contrary to the Claimants' suggestion, the Respondent submits that there is no uniform practice under international law of awarding compound interest to an injured party.[4283] Rather, the general approach has been to award simple interest, in particular, in non-expropriation cases like this Arbitration.[4284] The Respondent criticizes the Claimants' focus on the potential unjust enrichment of a respondent, which is not the governing standard for an award on interest.[4285] In this respect, the Respondent takes the view that the only unjust enrichment potentially in play here is that of the Claimants – "if the [interest] rate is set too high, the claimant may have [an] incentive [to prolong arbitration]."[4286]

2585. *Tax implications*: According to the Respondent, to the extent that the Claimants suffered any harm by paying legal fees, that harm was reduced by the tax benefits they received:

4279 Counter-Memorial, para. 1305.

4280 Rejoinder, para. 1851.

4281 Counter-Memorial, para. 1305; Rejoinder, para. 1854.

4282 Rejoinder, paras. 1852-1853.

4283 Counter-Memorial, para. 1308.

4284 Counter-Memorial, para. 1308, fn 2445; Rejoinder, paras. 1863-1864, 1867; **RLA-357**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007, paras. 298, 300; **CLA-657**, *Compañía del Desarrollo v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 101.

4285 Rejoinder, para. 1869.

4286 Rejoinder, para. 1970; **CLA-470**, Jeffery M. Colón and Michael S. Knoll, *Prejudgment Interest in International Arbitration*, in Transnational Dispute Management, Vol. 4, Issue 6 (2007), p. 3.

the Claimants deducted 35% of their claimed legal fees on their taxes each year prior to 2018, and 21% after that.[4287]

2586. In the Respondent's view, granting the Claimants interest on the full amounts of legal fees they allegedly paid at the rate corresponding to Ecuador's cost of debt, without accounting for the tax deductions they took, would unjustly enrich the Claimants up to USD 455 million.[4288] Moreover, due to the decrease in the U.S. corporate tax rate from 35% to 21% in 2018, the Respondent argues that the Claimants would have to pay only a 21% tax rate on any award.[4289] The difference between the two rates, the Respondent asserts, is profit that will enrich the Claimants beyond their purported injury, for up to USD 107 million.[4290] Therefore, under the Claimants' proposed interest rates, the combined value of these tax effects would amount to USD 562.9 million, or 71% of their principal claimed legal fee damages.[4291]

2587. Consequently, drawing from the full reparation standard under *Chorzów Factory*, the Respondent submits that the Tribunal should factor in tax effects to prevent the Claimants from being unjustly enriched by their alleged injuries.[4292] This means that any damages awarded must be reduced by at least the difference between the marginal U.S. corporate tax rate when the applicable fees were deducted and the marginal tax rate when the damages award is paid.[4293]

C. THE TRIBUNAL'S ANALYSIS

1. Legal Principles

2588. According to the Claimants, they are entitled to "receive interest on any damages at a rate which will fully 'wipe out the consequences' of Respondent's actions" in accordance with

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4287 Counter-Memorial, para. 1306; Rejoinder, paras. 548-550, 561.

4288 Rejoinder, para. 551.

4289 Rejoinder, para. 552.

4290 Rejoinder, para. 552.

4291 Counter-Memorial, para. 1307; Rejoinder, para. 553; **RE-56**, Second Flores Expert Report, paras. 12, 142.

4292 Rejoinder, paras. 554-556.

4293 Counter-Memorial, paras. 1306-1307; Rejoinder, para. 565.

the principle of full reparation set forth in *Chorzów Factory*.[4294] The Claimants posit that an interest award is the "application of *Chorzów* to the loss of the time value of money" and that Chevron "should be fully compensated for its loss of use of the money."[4295] In the Claimants' submission, pre-award interest is appropriate[4296] and no distinction should be drawn between pre- and post-award interest, since full reparation requires an award of interest until the date of payment.[4297]

2589. The Respondent counters that interest is not an "automatic entitlement"; rather, it is only "payable when necessary to ensure full reparation."[4298] In the Respondent's view, interest is meant to "compensate for the time value of money and certain macroeconomic risks like inflation"; in particular, it seeks to compensate "for not having had the use of the money between the date when it ought to have been paid and the date of the payment."[4299] The Respondent submits that, "as a general principle, the awarded interest rate should compensate for the time value of money, the loss of purchasing power, and specific risks."[4300] The Respondent adds that interest is not meant to be punitive.[4301]

(a) Applicable Legal Standard

2590. As already explained, the Tribunal is guided in its assessment of damages under international law by the full reparation standard, set forth in *Chorzów Factory*, pursuant to which a damages award "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." The Tribunal also recalls that Article 31(1) of the ILC Articles focuses on restoring the status of the injured party, stating that "[t]he responsible

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4294 Memorial, para. 438.

4295 Reply, para. 1130.

4296 Reply, para. 1131.

4297 Reply, para. 1132.

4298 Counter-Memorial, para. 1286; Rejoinder, para. 1824.

4299 Counter-Memorial, para. 1292; **RLA-717**, *Southern Pacific Properties Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1990, para. 219.

4300 Counter-Memorial, para. 1295; **RLA-798**, Christina L. Beharry, *Prejudgment Interest Rates in International Investment Arbitration,* in J. INT'L DISPUTE SETTL., Vol. 8 (2017), p. 61.

4301 Rejoinder, para. 1829.

State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[4302]

2591. Both Parties also refer to Article 38 of the ILC Articles, entitled "Interest",[4303] which provides that:

> 1. Interest on any principal sum payable under this Chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
>
> 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.[4304]

2592. The Commentary to Article 38 of the ILC Articles explains that interest is awarded "as an aspect of full reparation" if necessary to put the injured party in the position in which it should have been absent the internationally wrongful act.[4305] Thus, "[i]nterest is not an autonomous form of reparation, nor is it a necessary part of compensation in every case", but instead forms a part of damages insofar as full reparation is required under international law.[4306]

2593. Professor Marboe likewise explains that "[i]nterest represents an important part of compensation or damages, but it is not a separate remedy".[4307] Investment tribunals have made similar observations. For instance, in *LG&E*, the tribunal explained that "interest is part of 'full' reparation to which the Claimants are entitled to assure that they are made whole".[4308] Similarly, the tribunal in *Metalclad* stated that interest serves "to restore the

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4302 *See* para. 303 above.

4303 Reply, para. 1129; Rejoinder, para. 1829.

4304 **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Art. 38.

4305 **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 38, para. 2.

4306 **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 38, para. 1.

4307 *See also* **VP-39**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017), para. 6.04.

4308 **CLA-684**, *LG&E Energy Corp. v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 55.

Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place".[4309]

2594. Based on the above, the Tribunal determines that interest under international law must be granted on principal amounts awarded to the extent required to "make full reparation for the injury caused" by the Respondent's Treaty breaches and to "re-establish the situation which would, in all probability, have existed" for the Claimants absent those breaches.

(b) Function of Interest

2595. The Parties, together with their experts, have provided helpful materials to the Tribunal concerning the function of interest in the assessment of damages.

2596. Dr Secomb notes that "interest is first and foremost an element of compensation"[4310] whose "primary role is to compensate the claimant for the time value of money" for the period during which "it did not have the use of the sum in question."[4311] Professor Gotanda describes interest similarly:

> Interest is a sum of money paid or payable as compensation for the temporary withholding of money. Today, interest is often awarded without proof of actual loss. Courts and tribunals presume that the delayed payment of money deprives the injured party of the ability to invest the sum owed. Thus, a party is entitled to compensation for this loss.[4312]

2597. Professor Marboe likewise explains that "in the first place, interest should address the claimant's financial disadvantage of not being able to dispose of the amount of money".[4313] Professor Affolder summarizes that "[i]nterest in the damages context refers to the compensation allowed by law for the loss of the use of money during the time between the accrual of the claim and the date of actual payment."[4314]

4309 **CLA-41**, *Metalclad Corp. v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 128.

4310 **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), para. 2.127.

4311 **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), para. 2.169.

4312 **CLA-467**, John Y. Gotanda, *A Study of Interest*, in VILLANOVA UNIVERSITY SCHOOL OF LAW WORKING PAPER SERIES, Paper 83 (2007), pp. 3-4.

4313 **VP-39**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017), para. 6.09.

4314 **CLA-469**, Natasha Affolder, *Awarding Compound Interest in International Arbitration*, AM. REV. INT'L ARB, Vol. 12, No. 1 (2001), p. 3.

2598. Investment tribunals have understood interest in much the same way. For example, the tribunal in *Vivendi v. Argentina* explained that:

> The object of an award of interest is to compensate the damage resulting from the fact that during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.[4315]

2599. Drawing from the above, as well as the basic premise that the primary function of interest is to provide compensation as necessary to achieve full reparation, the Parties and their experts identify two components potentially recoverable through an interest award: time value of money and opportunity cost.[4316] Each is addressed in turn.

1. Time value of money

2600. The Respondent's expert, Dr Flores, accepts a definition of time value of money as the deferral of consumption.[4317] Mr Sequeira explains that the concept of the time value of money represents the notion that money held in the past possesses greater value than the same nominal sum today, owing both to the erosive effects of inflation and to the principle that individuals generally prefer to receive funds sooner rather than later.[4318] Both Parties' experts agree that the time value of money is reflected in a risk-free interest rate, which often coincides with the rates of U.S. Treasury securities.[4319] The experts also agree that the applicable interest rate must compensate for the time value of money.[4320]

2601. Based on the foregoing, the Tribunal considers it uncontroversial between the Parties that an award of interest should compensate for the time value of money by applying, at least, a risk-free interest rate.

4315 **CLA-228**, *Compañía de Aguas del Aconquija, S.A. and Vivendi Universal, S.A. v. Argentin*a, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 9.2.3.

4316 *See* First Sequeira Expert Report, para. 67; Track III Hearing Transcript, Day 13 (5 September 2022), p. 3121 (Flores).

4317 Track III Hearing Transcript, Day 13 (5 September 2022), p. 3121 (Flores).

4318 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1665 (Sequeira).

4319 **RE-56**, Second Flores Expert Report, paras. 46-47; Track III Hearing Transcript, Day 7 (26 August 2022), p. 1665 (Sequeira).

4320 *See, e.g.*, First Sequeira Expert Report, para. 67; **RE-56**, Second Flores Expert Report, para. 46.

2. Opportunity cost

2602. According to Mr Sequeira, the term "opportunity cost" encapsulates the notion that "if a damaged party receives timely compensation, they would invest that money or deploy that cash to achieve some incremental economic benefit over and above the Risk-Free Rate."[4321] Dr Flores, in turn, describes opportunity cost as the lost ability to do other things with the money.[4322] Whereas Mr Sequeira asserts that interest should serve to compensate for the cost of lost opportunity, Dr Flores disagrees.[4323]

2603. The Claimants submit that pre-award interest must account for opportunity cost.[4324] They contend that the vast majority of investment tribunals have reached a similar conclusion in determining interest rates.[4325] Countering Dr Flores, the Claimants argue that it is irrelevant whether Chevron had cash reserves at the time,[4326] since Dr Flores agrees that the more relevant question is what the Claimants would have done with the funds of which they were deprived at that time.[4327]

2604. On the other hand, the Respondent argues that interest should not factor in opportunity costs[4328] because the Tribunal's Award is not exposed to risk before the date of issuance.[4329] The Respondent contests the Claimants' proposed rates on the basis that each includes "significant Risk Premium[s]", including for default risk and maturity risk.[4330] In the Respondent's view, risk comes with potential reward, but also potential loss, and the Claimants "want all of the upside with none of the downside."[4331] The

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4321 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1665 (Sequeira).

4322 Track III Hearing Transcript, Day 13 (5 September 2022), p. 3121 (Flores).

4323 *See, e.g.*, First Sequeira Expert Report, para. 67; **RE-56**, Second Flores Expert Report, para. 46.

4324 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3495 (Kehoe).

4325 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3496 (Kehoe).

4326 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3497 (Kehoe).

4327 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3498 (Kehoe).

4328 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3632 (Leonetti).

4329 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3632-3633 (Leonetti).

4330 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3634-3636 (Leonetti).

4331 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3635 (Leonetti).

Respondent further argues that the spread between the Claimants' proposed rates "establishes that they bear no relationship to the purpose of interest".[4332]

2605. Lastly, the Respondent notes Mr Sequeira's opinion that Chevron could have used the funds of which it was deprived in any of a number of ways – including paying down existing debt, avoiding taking new debt, investing in existing or new projects, share buybacks, dividends, or holding the funds as cash.[4333] It submits, however, that there is no concrete evidence on what Chevron would have done with those funds, since no Chevron employees testified on this matter.[4334] Rather, the Respondent submits that, as Chevron held substantial cash reserves, at approximately USD 12 billion, the Claimants "were never deprived of any investment opportunity" by the use of some of its funds to pay for legal fees.[4335]

2606. In considering whether opportunity cost is to be compensated through an interest award, the Tribunal applies again the full compensation standard enshrined in *Chorzów Factory* and Article 31 of the ILC Articles. The Tribunal has already established that interest must "make full reparation for the injury caused" by the Respondent's Treaty breaches so as to "re-establish the situation which would, in all probability, have existed".[4336] Accordingly, the applicable interest rate must take into account opportunity cost to the extent that the Claimants are able to demonstrate that the specific opportunities they lost form part of the "situation which would, in all probability, have existed" absent the Treaty breaches. There are limitations to this test since an award accounting for returns that would not have been obtained by the injured party "in all probability" would lead to overcompensation.

2607. In the present case, the Tribunal is not satisfied that the Claimants have met their burden of proving Chevron's opportunity costs. The Tribunal does not have before it convincing evidence of how Chevron would have used the sums in question had they been freely at its disposal at particular points in time. Rather, the Claimants and Mr Sequeira

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4332 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3635 (Leonetti).

4333 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3635 (Leonetti).

4334 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3635-3636 (Leonetti).

4335 Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3645-3646 (Leonetti).

4336 *See* para. 2594 above.

consistently propose activities that Chevron "could" have undertaken in but-for scenarios.[4337] For instance, Mr Sequeira provides the following explanation of what the Claimants "could" have done:

> [I]f Chevron had received timely compensation for the cost it claimed, it could have deployed that cash in different ways. It could have used that to pay down existing debt, avoid taking on new debt, invest in existing projects, invest in new projects, use it for share buybacks, dividends, a variety of different ways. [4338]

2608. The Claimants also submit that:

> One cannot reasonably assume that if Chevron had excess cash coming in, it would sit idly in the bank or be invested in T-Bills or something. The more neutral assumption, as Mr. Sequeira testified, is that the cash would be deployed.[4339]

2609. The Tribunal cannot accept the above propositions without more. In applying the full reparation standard, the Tribunal cannot, in the absence of evidence, engage in speculation or presume that the funds of which Chevron was deprived would have been employed for some alternative productive purpose. Such exercise would not be consistent with the analysis required under *Chorzów Factory*. As rightly noted by the Respondent, the Claimants have provided no convincing evidence illustrating what Chevron would have done with the funds of which it was deprived in a Treaty-compliant but-for scenario, such as paying down existing debt, avoiding taking new debt, investing in existing or new projects, share buybacks, dividends, or holding such funds as a cash reserve.[4340]

2610. This does not, however, end the analysis. As affirmed by Professor Gotanda, courts and tribunals do not always require proof of opportunity cost. [4341] In certain circumstances, one may validly infer that the Claimants, as rational economic actors, would have made productive use of funds available to them.

4337 *See, e.g.*, Reply, para. 1131 ("Chevron could have invested US$ 800 million and earned an appropriate return on its investment"); First Sequeira First Expert Report, paras. 26, 84 ("Claimants could reasonably have invested these funds in the ordinary course of business"); Second Sequeira Expert Report, para. 49 ("Claimants could have invested the money"), 93 ("Claimants could reasonably have invested these funds in the ordinary course of business"), 97 ("Claimants could equally have invested in higher risk/higher return ventures").

4338 Track III Hearing Transcript, Day 7 (26 August 2022), pp. 1665-1666 (Sequeira).

4339 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3497 (Kehoe).

4340 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3635 (Leonetti).

4341 **CLA-467**, John Y. Gotanda, *A Study of Interest*, in VILLANOVA UNIVERSITY SCHOOL OF LAW WORKING PAPER SERIES, Paper 83 (2007), pp. 3-4.

2611. Nevertheless, even where such inference might be appropriate, it would not extend to presuming that the Claimants would have in all circumstances made *optimal* use of the funds available to them. As already explained, the evidence does not support the proposition that they did so in the actual scenario, and therefore they cannot be assumed to have done so in the but-for scenario.[4342]

2612. Furthermore, as discussed below in the context of WACC as a proposed interest rate, the Tribunal considers that it would be speculative to reward the Claimants for a risk not taken.[4343] On this point, the Tribunal agrees with the observation of the *Sistem v. Kyrgyzstan* tribunal that a claimant "might have made spectacularly good, or disastrously bad decisions" with their funds.[4344] The tribunal in *Guaracachi-Rurelec v. Bolivia* stated in like manner that it is inappropriate to apply an interest rate that "includes an *ex ante* allowance for forward-looking business risks which should not be applied *ex post*".[4345] While perhaps Chevron could have made riskier decisions than investing at the risk-free rate, the Tribunal has no concrete evidence that it would have done so, and moreover has no evidence that said riskier decision would have paid off.

2613. Consequently, the Tribunal declines to grant compensation for loss of opportunity to the extent that it requires speculation as to what opportunities (and *ex ante* risks) Chevron might have taken, and what payoffs it might have received.

3. Other putative rationales

2614. The Tribunal notes that the Claimants have proposed two additional reasons beyond compensation for an award of interest: (i) preventing unjust enrichment by the Respondent, and (ii) encouraging the Respondent to settle legitimate claims promptly.[4346]

4342 *See* para. 2653 below.

4343 *See* para. 2653 below.

4344 **RLA-983**, *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyzstan*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 194.

4345 **RLA-996**, *Guaracachi America, Inc. and Rurelec PLC v. Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, para. 615.

4346 Reply, para. 1174; **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), paras. 2.126-2.127, 2.130, 2.132, fn 166; Charles N Brower and Jeremy K Sharpe, *Awards of Compound Interest in*

2615. First, as regards unjust enrichment, the Tribunal refers again to Article 38 of the ILC Articles, pursuant to which interest is "payable when necessary in order to ensure full reparation".[4347] As discussed in paragraph 2590 above, the full reparation standard is focused on restoring the position of the Claimants. Accordingly, international law requires the granting of interest as necessary to re-establish the situation in which the Claimants – as opposed to the Respondent – would have found themselves in a Treaty-compliant counterfactual scenario. The ILC Articles do not explicitly consider unjust enrichment on the part of the respondent as an element of interest under Article 38. The Commentary to Article 38 also emphasizes only the entitlements of the "injured State", but at no point discusses the status of the *injuring* State.[4348]

2616. Second, the Tribunal is not persuaded that interest, whether applied pre- or post-award, should be regarded a tool to encourage prompt payment of the Award. In the context of reparation, interest forms part of compensation to the injured party. In turn, compensation under international law must remain, as the Commentary to the ILC Articles indicates, "purely compensatory":

> As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. In other words, the function of article 36 is purely compensatory, as its title indicates. Compensation corresponds to the financially assessable damage suffered by the injured State or its nationals. It is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character.[4349]

2617. By extension, if compensation does not serve to incentivize or disincentivize particular conduct through punitive or exemplary damages, neither does interest. Accordingly, it is simply not the function of interest to incentivize good behaviour in the form of prompt

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International Arbitration: The Aminoil Non-Precedent in LIBER AMICORUM IN HONOUR OF ROBERT BRINER (2005), p. 155; **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), pp. 495-496.

4347 **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Art. 38(1).

4348 *See generally* **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Art. 38.

4349 **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 38(1), para. 4.

payment of the award, just as it is not the function of interest to incentivize the post-award behaviour of any party in any other manner.

2. Period

2618. Having determined for what purpose interest shall accrue, the Tribunal turns to determining the period when interest should run.

2619. Elsewhere in this Award, the Tribunal has determined that compensation for the legal fees and expenses incurred by Chevron should be determined as of the date on which the underlying services were performed. Such date represents the moment when the relevant mitigation measures were effectively taken and also when the legal obligation to pay those services arose.[4350]

2620. However, the Tribunal notes that, for purposes of assessing interest, Chevron did not actually lose the use of its funds until the date of payment of the underlying invoices. Until that point, the Claimants were able to make productive use of the sums in question. Consequently, the Tribunal considers that interest on Chevron's damages should only begin to run from the date on which each invoice for legal fees and expenses was paid by Chevron.[4351]

2621. As to the question of until when interest should run, the Tribunal notes that the Claimants request both pre- and post-award interest.[4352] The Claimants request higher post-award interest than pre-award interest "to incentivize Ecuador to comply with its Treaty

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4350 *See* para. 2079 above.

4351 The Tribunal recognises that the Respondent first argued in its Counter-Memorial that the Claimants had failed to substantiate their interest claims with primary evidence. *See* para. 2579 above. The Tribunal understands the Respondent to have abandoned this argument, which the Respondent does not make in either its Rejoinder or at the Track III Hearing. To the extent that the argument is maintained, the Tribunal has dealt with the sufficiency of the Claimants' evidence in determining whether the Claimants have proven the principal sums of its damages claims.

4352 Memorial, para. 438.

obligations to pay the Award."[4353] The Respondent submits that the same rate should be used for both periods.[4354]

2622. As already explained, full reparation aims to make the injured party whole, not to incentivize any particular conduct by the injuring party following the Award.[4355] Nevertheless, the Tribunal accepts that that pre- and post-award interest function differently. Whereas pre-award interest is governed exclusively by the rules on compensation under international law, post-award interest is not. As the ILC explained in the Commentary to Article 38:

> Article 38 does not deal with post-judgement or moratory interest. It is only concerned with interest that goes to make up the amount that a court or tribunal should award, i.e. compensatory interest. The power of a court or tribunal to award post-judgement interest is a matter of its procedure.[4356]

2623. The Tribunal will thus determine the pre- and post-award interest rates separately.

3. Simple or Compound Interest

2624. Next, the Tribunal turns to the question of the potential compounding of interest. The Claimants request compound interest,[4357] whereas the Respondent submits that simple interest is more appropriate.[4358]

2625. The Tribunal is mindful that international investment tribunals have not adopted a uniform position regarding the compounding of interest. For example, in its 2010 award, the *Gemplus v. Mexico* tribunal stated that:

> it is clear [] that the current practice of international tribunals [] is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of 'jurisprudence *constante*' where the presumption has shifted from the position a decade or so ago with the

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4353 The Claimants made this request in their closing submissions at the Track III Hearing (*See* Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3500-3501 (Kehoe)). In their written submissions, they seek the same rate for both (*See* Memorial, para. 474; Reply, paras. 1132, 1151).

4354 *See, e.g.*, Track III Hearing Transcript, Day 15 (7 September 2022), p. 3646 (Leonetti).

4355 *See* para. 2616 above.

4356 **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 38(1), para. 12.

4357 Reply, para. 1175.

4358 Rejoinder, para. 1826.

> result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice versa.[4359]

2626. Yet almost a decade later, the tribunal in *RREEF Infrastructure* stated that "it [was] conscious that there is no *jurisprudence constante* as to the choice between compound or simple interest."[4360]

2627. This divergence of views on compound interest is broadly due to differing perceptions of the practice of international courts and tribunals under international law. Those opposed to compound interest frequently cite to the statement in the Commentary to the ILC Articles, now a quarter of a century old, to the effect that "special circumstances" are necessary to justify compound interest:

> The general view of courts and tribunals has been against the award of compound interest, and this is true even of those tribunals which hold claimants to be normally entitled to compensatory interest . . . The preponderance of authority thus continues to support the view [that] the arbitral case law in matters involving compensation of one State for another for damages suffered by the nationals of one within the territory of the other . . . is unanimous . . . in disallowing compound interest. In these circumstances, very strong and quite specific arguments would be called for to grant such interest. [. . . Thus,] given the present state of international law, it cannot be said that an injured State has any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation.[4361]

2628. On the other hand, tempering this purported rule against compound interest is the aforementioned principle that "[t]he awarding of interest depends on the circumstances of each case; in particular, on whether an award of interest is necessary in order to ensure full reparation".[4362] Accordingly, the Tribunal is not persuaded that a presumption in favour or against any form of interest exists in international law.

[4359] **CLA-658**, *Gemplus S.A. v. Mexico*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, paras. 16-26.

[4360] **CLA-919**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Spain*, ICSID Case No. ARB/13/30, Award, 11 December 2019, para. 67.

[4361] **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 38(1), paras. 8-9.

[4362] **CLA-291**, ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 38, para. 7.

2629. For its part, guided by the same full reparation standard enshrined in *Chorzów Factory* and in the ILC Articles, the Tribunal has found above that awarding interest is necessary to compensate the Claimants for their inability to use their funds. The Tribunal has further found that this compensation must account for the time value of money.[4363]

2630. In the Tribunal's view, this resolves the question: compensation for the time value of money generally requires an award of compound interest to provide full reparation.[4364] As the *Pankki v. Estonia* tribunal explained:

> [C]ompound interest reflects economic reality. The time value of money in free market economies is measured in compound interest; simple interest cannot be relied upon to produce full reparation for a claimant's loss occasioned by delay in payment [].[4365]

2631. The Tribunal finds persuasive Dr Secomb's explanation that inflation is cumulative, "akin to compounding", requiring compound interest:[4366]

> Because inflation is cumulative, compounding interest is effectively necessary to maintain a constant real rate of return on the original loan, plus the interest on the loan. Put otherwise, granting simple interest, when inflation is compound, means that the real rate of return will inevitably erode over time.[4367]

2632. In the Tribunal's view, therefore, an award of simple interest would not appropriately update the value of the Claimants' losses from the date of loss to its current value.

2633. The Tribunal further notes that there is substantial support for the proposition that compound interest is necessary to provide full reparation.[4368] For example, the tribunal in *Wena Hotels v. Egypt* stated that:

4363 *See* Section X.C.1(b)1 above.

4364 *See, e.g.*, **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), p. 509 ("In today's finance world, compound interest is the international standard applied in most time value applications").

4365 **CLA-654**, *Pankki et al. v. Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, para. 345. *See also* **RLA-787**, *Hrvatska Elektroprivreda d.d. v. Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, para. 556 ("compounding interest reflects simple economic sense").

4366 **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), para. 2.112.

4367 **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), para. 2.113.

4368 *See* **VP-39**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017), paras. 6.237-6.248 ("This brief overview shows that compound interest as opposed to simple interest is predominantly accepted in recent international investment arbitration. It is regarded as better

> [A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. As Professor Gotanda has observed "almost all financing and investment vehicles involve compound interest . . . If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest."[4369]

2634. Having decided that compound interest is required by the full reparation standard in the circumstances of this case, the Tribunal must determine the appropriate compounding period. The Tribunal notes that the compounding period "can have a significant impact on the amount of the award."[4370] Considering the relationship between compounding period and the interest rate, Professor Affolder warns against "the artificial separation" of the two.[4371] Professors Colón and Knoll also caution that tribunals "should therefore use the same compounding period in computing the award as the reference interest rate."[4372] The Tribunal will thus determine below the compounding period based on the maturity of the applicable interest rate.[4373]

4. Pre-Award Interest Rate

2635. The Tribunal turns next to determining the applicable pre-award interest rate.

2636. The Tribunal observes that, at the Track III Hearing, the Claimants invoked Article 3(1) of the Treaty for the proposition that the interest should be "at a commercially reasonable rate."[4374] The Claimants assert that their four proffered rates – *i.e.*, Ecuador's cost of debt, LIBOR + 4%, U.S. Prime rate + 2%, and Chevron's WACC – are such "commercially

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reflecting actual economic realities both for the purpose of remedying the loss actually incurred by the injured party and for the prevention of unjustified enrichment of the respondent state."); **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), pp. 508-509.

4369 **CLA-403**, *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 129.

4370 **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), p. 533; **CLA-470,** Jeffery M. Colón and Michael S. Knoll, *Prejudgment Interest in International Arbitratio*n, in TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 4, Issue 6 (2007), p. 18.

4371 **CLA-469**, Natasha Affolder, *Awarding Compound Interest in International Arbitration*, AM. REV. INT'L ARB, Vol. 12, No. 1 (2001), p. 25.

4372 **CLA-470**, Jeffery M. Colón and Michael S. Knoll, *Prejudgment Interest in International Arbitratio*n, in TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 4, Issue 6 (2007), p. 18.

4373 *See* para. 2670 below.

4374 Track III Hearing Transcript, Day 1 (18 August 2022), p. 204 (Silbert).

reasonable interest rates."[4375] The Respondent, on the other hand, notes that the Treaty refers to interest only in Article 3, which deals with expropriation.[4376]

2637. The Tribunal agrees with the Respondent that "[t]his is not an expropriation case".[4377] The Claimants' legal fees and expenses awarded as incidental damages do not arise from an expropriation. Accordingly, the provision in Article 3(1) of the Treaty on "commercially reasonable" interest rates does not apply as such in this case.

2638. Instead, in determining the appropriate interest rate, the Tribunal remains guided by the full reparation standard, with the objective of fully compensating the Claimants for the time value of their money. Correspondingly, the Tribunal, constrained to establish the situation which "in all probability" would have existed but for the Respondent's Treaty breaches, may not speculate as to how the Claimants would have used the funds of which they were deprived, nor grant the Claimants compensation for activities which they have not proven that they would have undertaken in a Treaty-compliant but-for scenario.

2639. The Parties have proposed five possible interest rates: (i) Ecuador's Cost of Debt; (ii) Chevron's WACC; (iii) LIBOR + 4%; (iv) U.S. Prime + 2%; and (v) U.S. Treasury bills. The Tribunal addresses each proposed rate *seriatim*.

(a) Ecuador's Cost of Debt

2640. The Claimants argue that Ecuador's cost of debt is "the most appropriate interest rate" under a "coerced loan theory".[4378] The Claimants draw support from the scholarship of Professors Colón and Knoll, who explain that the coerced loan theory "treats the harm of the respondent as a forced borrowing by the respondent", which must be repaid at the interest rate of the Respondent's unsecured debt.[4379] The Claimants explain that this is logical because:

4375 Track III Hearing Transcript, Day 1 (18 August 2022), p. 205 (Silbert).

4376 Track III Hearing Transcript, Day 2 (19 August 2022), p. 409 (Leonetti).

4377 Track III Hearing Transcript, Day 2 (19 August 2022), p. 409 (Leonetti).

4378 Reply, para. 1153.

4379 Reply, para. 1154; **CLA-470**, Jeffery M. Colón and Michael S. Knoll, *Prejudgment Interest in International Arbitratio*n, in TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 4, Issue 6 (2007), pp. 11-12.

> If Ecuador were to pay interest at less than its cost of debt, it would be as if Ecuador had obtained a below-market rate loan from Chevron at the time of Ecuador's breach and would thereby benefit economically from its own wrongdoing and undercompensate Chevron in the process. Furthermore, an award of interest at a rate less than the state's borrowing cost would incentivize states to essentially "refinance" their fiscal obligations by withholding money from the private sector.[4380]

2641. The Claimants further note that several tribunals have adopted this theory.[4381]

2642. In response, the Respondent asserts that the dispute does not involve an expropriation, and moreover, the Respondent has "received no economic benefit" from its Treaty breaches.[4382] For the same reason, it disputes that awarding a lower interest rate would "incentivize states . . . to withhold money from the private sector," as Ecuador is not accused of such activity in these proceedings.[4383] Regardless, Ecuador relies on arbitral jurisprudence and the writings of Professor Marboe to argue that Ecuador's cost of debt is the wrong standard, as it has nothing to do with the full reparation of the Claimants.[4384]The Respondent further asserts that the use of its cost of debt would be inappropriate, as the rate incorporates the risk of sovereign default, which the Claimants do not face.[4385]

2643. The Tribunal observes that the Claimants' justification for employing Ecuador's cost of debt is premised on the Respondent's status as a supposed "borrower" in a "coerced loan".[4386] According to the Claimants, Ecuador could benefit economically from this "coerced loan", which could create perverse incentives for States to disregard their international obligations. However, as already explained, the full reparation standard is not concerned with incentivizing any particular behaviour by the injuring party.[4387]

4380 Reply, para. 1155.

4381 Reply, paras. 1154, 1156; **CLA-403,** *Wena Hotels Limited v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 128, fn 289; **CLA-470**, Jeffery M. Colón and Michael S. Knoll, *Prejudgment Interest in International Arbitratio*n, in TRANSNATIONAL DISPUTE MANAGEMENT, Vol. 4, Issue 6 (2007), p. 10; **CLA-921**, *Cargill, Incorporated v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 544.

4382 Rejoinder, para. 1844.

4383 Rejoinder, para. 1844.

4384 Rejoinder, paras. 1845-1848.

4385 The Respondent also asserts that the Claimants do not apply "Ecuador's actual [cost of debt] in a consistent fashion" (*See* Rejoinder, paras. 1849-1850).

4386 *See* para. 2640 above.

4387 *See* para. 2616 above.

Rather, its objective is to place the *injured party* in the position it would have enjoyed but for the injury arising from an internationally wrongful act. As such, in applying the standard, this Tribunal must seek to make the injured party whole, not to discourage certain conduct on the part of the injuring party.

2644. Moreover, the Claimants have not convincingly shown how applying interest at the Respondent's cost of debt would re-establish the situation which would, in all probability, have existed absent the Treaty breaches. Indeed, the Claimants' expert, Mr Sequeira, recognizes that "Ecuador's Cost of Debt is specific to the Respondent"[4388] and that the coerced loan theory "really looks at it from the perspective of the Respondent."[4389] This echoes Professor Marboe's observation that, when following the coerced loan theory, "the amount of interest has nothing to do with the claimant's actual loss, but rather depends on the respondent's risk characteristics."[4390]

2645. In addition, the Tribunal notes that the Claimants' "coerced loan theory" does not "re-establish the situation which would, in all probability, have existed if that act had not been committed". Whereas a coerced loan may be an accurate depiction of the actual scenario, it bears no relationship with the but-for scenario. The Claimants have submitted no evidence that, in a Treaty-compliant but-for scenario, Chevron would have made a loan to the Respondent. To the contrary, the Claimants' expert, Mr Sequeira, testified that he does not "think that [Chevron] was ever an investor in Ecuadorian bonds".[4391] In the Tribunal's view, to grant the Claimants interest equivalent to compensation for a loan would not be consistent with the applicable counterfactual scenario. The Tribunal therefore declines to apply Ecuador's cost of debt as the interest rate for this case.

(b) Chevron's WACC

2646. The Claimants also submit that Chevron's WACC could serve as an appropriate interest rate.[4392] The Claimants assert that in the but-for scenario, the funds that went to legal fees

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4388 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1668 (Sequeira).

4389 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1671 (Sequeira).

4390 **VP-39**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017), para. 6.110.

4391 Track III Hearing Transcript, Day 8 (29 August 2022), p. 1827 (Sequeira).

4392 Reply, paras. 1167-1168.

and expenses "could have been used either to pay off debts or to re-invest in the business."[4393] The Claimants assert that several commentators, including Professor Gotanda and Mr Sénéchal, consider a publicly held company's WACC to be the appropriate rate.[4394] Mr Sequeira adds that the WACC is the most appropriate rate from an economic standpoint.[4395]

2647. The Respondent counters that Chevron's WACC could not be the appropriate interest rate for Texaco Petroleum Company, the Second Claimant, or for Chevron's subsidiaries.[4396] In addition, the Respondent notes that while Mr Sequeira believes that the WACC represents the expected returns from the Claimants investing in their business, he fails to acknowledge that they could have lost money on those projects.[4397] Consequently, the Respondent submits that applying the WACC would "fail to account for the downside of these hypothetical investments" and the possibility that Chevron would have lost money.[4398] The Respondent also contends that that the rate "fails to account for what Chevron Corp. actually did with its spare cash between 2004 [and 20]19", during which time the Claimants held substantial amounts of cash reserves.[4399] Dr Flores, the Respondent's expert, calculates that Chevron "earned on average 2.2% on its cash reserves" from 2004 to 2021.[4400]

2648. Mr Sequeira explains that the WACC is "the return that average investors expect on average with cash that is deployed by this Claimant in this case."[4401] In other words, he describes it as "a measure of the opportunity cost associated with the funds Claimants used due to the alleged breaches."[4402] The Respondent's expert, Dr Flores, similarly

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4393 Reply, para. 1167.

4394 Reply, para. 1168; **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), pp. 527-528.

4395 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1734 (Sequeira).

4396 Rejoinder, para. 1851.

4397 Rejoinder, para. 1852.

4398 Rejoinder, paras. 1852-1853; **QE-40**, Julie Carey, Christian Dippon and Will Taylor, "Measuring Economic Damages with Maximum Certainty", Global Arbitration Review, 30 April 2019, p. 4.

4399 Rejoinder, paras. 1854-1855; **RE-56**, Second Flores Expert Report, paras. 91, 96-97, Figure 7.

4400 Rejoinder, para. 1855; **RE-56**, Second Flores Expert Report, para. 97.

4401 Track III Hearing Transcript, Day 7 (26 August 2022), p. 1673 (Sequeira).

4402 First Sequeira Expert Report, para. 84.

defines WACC as "the average expected return required by shareholders and bondholders to invest in a company or project."[4403]

2649. Mr Sequeira submits that "[i]f the Tribunal determines that Claimants should be compensated for the opportunity cost of having been deprived of the ability to reinvest these funds in their business", then "the application of WACC [would] be reasonable".[4404]

2650. On the other hand, Dr Flores explains that the WACC "includes compensation for *ex ante* business risks to which Claimants' claimed amounts in this arbitration have not been exposed".[4405] Dr Flores submits that "a claimant is not entitled to compensation for risks it did not bear"[4406] since there is no guarantee that the return on investment expected by the WACC would actually be achieved.[4407] He opines that using WACC as an interest rate assumes that funds would have been invested in "endeavours with the same risks of Chevron's average project."[4408] He notes, however, that "those risks could have materialized as negative returns", and the fact that the Claimants were never exposed to those risks makes such compensation inappropriate.[4409] Dr Flores submits that scholars and investment tribunals have found that the WACC is not an appropriate interest rate as, while injured claimants are "deprived of the opportunity to invest", they are likewise "not exposed to the risk of those investments".[4410] Dr Flores adds that the Claimants held an annual average of USD 11.7 billion in cash and short-term investments from 2004-2019, yet claim spending of, on average, USD 49.6 million in legal expenses over this

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4403 **RE-42**, First Flores Expert Report, para. 56.

4404 Second Sequeira Expert Report, para. 95.

4405 **RE-56**, Second Flores Expert Report, para. 88.

4406 **RE-42**, First Flores Expert Report, para. 57.

4407 **RE-56**, Second Flores Expert Report, para. 90.

4408 **RE-42**, First Flores Expert Report, para. 57.

4409 **RE-42**, First Flores Expert Report, para. 57.

4410 **RE-42**, First Flores Expert Report, paras. 58-59; **QE-40,** Julie Carey, Christian Dippon and Will Taylor, "Measuring Economic Damages with Maximum Certainty", Global Arbitration Review, 30 April 2019, p. 4; **CLA-674/QE-41,** *Burlington Resources Inc. v. Ecuador*, ICSID Case No ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paras. 532-533. *See also* **RE-56**, Second Flores Expert Report, para. 92; **CLA-573/QE-85**, *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1336.

timeframe. Consequently, he considers it speculative to assert that the Claimants were forced "to forgo investing in their 'ordinary course of business'".[4411]

2651. The Tribunal observes that a number of investment arbitration tribunals have previously rejected awarding a claimant's WACC as an interest rate.[4412] For instance, the *EDF v. Argentina* tribunal rejected such request on the basis that the claimants had not presented evidence that they "could or would have earned the high-risk WACC rate."[4413] Dr Secomb similarly observes that, despite some academic support,[4414] "[t]he use of WACC has been criticized."[4415] He notes that the tribunal in *Burlington v. Ecuador* found the claimant's WACC "contains an element of reward for risk that is inappropriate . . . because [the claimant] no longer bears the risk of operation".[4416]

2652. The Tribunal concurs with the analysis in *Burlington v. Ecuador*:

> [T]he Tribunal agrees with Ecuador that the WACC is not necessarily the appropriate actualization rate for this purpose. The WACC contains an element of cost of capital that allows cash flows to reflect the time value of money, but it also includes a reward for all the risks involved in doing business. The WACC is thus appropriate to discount future cash flows, because these flows are adjusted to reflect the time value of money (i.e., that 100 dollars in the future are worth less today) and to reflect the risks of doing business due to the fact that the operator's profit-making capacity is not certain.
>
> By contrast, using the WACC as an actualization rate for past cash flows could overcompensate Burlington. While the WACC contains an element of cost of capital that would allow past cash flows to reflect the time value of money (i.e., that 100 dollars in the past are worth more today), it also contains an element of reward for risk that is inappropriate here because Burlington no longer bears the risk of operation. As Fisher and

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4411 **RE-56**, Second Flores Expert Report, para. 91.

4412 **VP-39**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017), paras. 6.103-6.105; **CLA-573/QE-85**, *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1336; **CLA-615**, *TECO v. Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, paras. 766, 768; **CLA-693**, *Swisslion DOO Skopje v. Macedonia*, ICSID Case No ARB/09/16, Award, 6 July 2012, para. 358.

4413 **CLA-573/QE-85**, *EDF International S.A., SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Award, 11 June 2012, para. 1336.

4414 **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), paras. 3.343, 3.345.

4415 **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), fn 539.

4416 **CLA-674/QE-41**, *Burlington Resources Inc. v. Ecuador*, Decision on Reconsideration and Award, ICSID Case No ARB/08/5, 7 February 2017, para. 533; **CLA-904**, Matthew Secomb, INTEREST IN INTERNATIONAL ARBITRATION (2019), fn 539.

> Romaine conclude . . . a claimant is entitled to interest compensating for the time value of money, but not for risk.[4417]

2653. Similarly, the Claimants here are not entitled to compensation for a risk they did not take. An interest rate which rewards a risk not taken "only pick[s] the winning side of an investment".[4418] Risk implies a chance of reward, but also of loss. Absent convincing evidence that the Claimants were prevented from undertaking a specific investment that did prove successful, it would be speculative and unjustified to presume that they would have invariably invested in successful ventures. The Tribunal has no such specific evidence before it.[4419] Thus, the Tribunal cannot use Chevron's WACC to compensate the Claimants for a hypothetical lucrative investment, just as it cannot reduce the Claimants' compensation for a hypothetical loss.[4420]

2654. Moreover, as observed by Professor Marboe, the WACC "represents an *ex ante* expectation involving certain risks, while pre-award interest is an *ex post* calculation of compensation only requiring time-value adjustments to an awarded damages amount known with certainty."[4421] To the extent that the Tribunal is concerned here with an *ex post* calculation of compensation for the time value of money, it finds the use of Chevron's WACC inappropriate.

2655. For the foregoing reasons, the Tribunal declines to award an interest rate equivalent to Chevron's WACC.

4417 **CLA-674/QE-41**, *Burlington Resources Inc v. Ecuador*, Decision on Reconsideration and Award, ICSID Case No ARB/08/5, 7 February 2017, paras. 532-533.

4418 *See* **QE-40,** Julie Carey, Christian Dippon, Will Taylor, "Measuring Economic Damages with Maximum Certainty", Global Arbitration Review, 30 April 2019, p. 4; **QE-20**, Franklin M. Fisher and R. Craig Romaine, Janis Joplin's Yearbook and the Theory of Damages, in JOURNAL OF ACCOUNTING AUDITING AND FINANCE, Vol. 5, No. 1 (1990), pp. 145-157.

4419 *See* paras. 2606-2612 above.

4420 *See* **QE-20**, Franklin M. Fisher and R**.** Craig Romaine, Janis Joplin's Yearbook and the Theory of Damages, in JOURNAL OF ACCOUNTING AUDITING AND FINANCE, Vol. 5, No. 1 (1990), p. 146.

4421 *See* **VP-39**, Irmgard Marboe, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW (2017), paras. 6.100-6.101.

(c) Benchmark Rates

2656. The Claimants further propose two adjusted benchmark interest rates: the 12-month USD LIBOR rate plus a premium of 4%,[4422] and the U.S. Prime rate plus a premium of 2%.[4423] The Respondent, on the other hand, proposes a risk-free rate at the 6-month or 1-year U.S. Treasury bill rate.[4424] The Tribunal will discuss all three benchmark rates under this heading.

2657. At the outset, the Tribunal notes Mr Sequeira's explanation that LIBOR + 4% and U.S. Prime + 2% are closely related:

> Historically, LIBOR + 2% has closely tracked the US Prime rate of interest. As such, LIBOR + 4% would be a commercial rate of interest on par with the US Prime rate + 2%, which we apply in our third calculation of pre-award interest.[4425]

2658. The Tribunal considers that this close relationship permits it to exclude LIBOR from detailed consideration for reasons of judicial economy. With the phase-out of LIBOR in June 2023, the Tribunal is disinclined to apply an interest rate in a 2025 award using an interbank lending rate that was been officially phased out over two years prior. The Tribunal is also reluctant to apply the USD LIBOR12M fallback rate proposed by the Claimants as an alternative, as the Parties did not fully brief the Tribunal on its application.[4426]

2659. Given Mr Sequeira's confirmation that the proposed LIBOR + 4% is on par with the U.S. Prime + 2%, and given that the U.S. Prime rate has been and continues to be published, the Tribunal proceeds instead to consider the Claimants' proposal of the U.S. Prime rate + 2%.

4422 First Sequeira Expert Report, para. 77.

4423 First Sequeira Expert Report, para. 80.

4424 Rejoinder, para. 1830.

4425 First Sequeira Expert Report, para. 79. *See also* Track III Hearing Transcript, Day 7 (26 August 2022), p. 1689 (Sequeira).

4426 E-mail from the Claimants to the Tribunal, 3 August 2023; E-mail from the Respondent to the Tribunal, 31 August 2023.

2660. The Claimants submit that "[t]he U.S. Prime rate is the interest rate commercial banks charge their most creditworthy borrowers."[4427] They state that this rate has been applied by the Iran-U.S. Claims Tribunal, although infrequently by investment treaty tribunals.[4428] Mr Sequeira explains that:

> The US Prime Rate is typically calculated by adding a 3% margin to the Federal Funds Rate, or the overnight rate that banks charge to lend reserve balances to each other. Various types of American lending institutions use the rate as an index or base rate for the pricing of short- and medium-term financial products.[4429]

2661. Mr Sequeira further submits that he "consider[s] US Prime + 2% to be representative of a commercially reasonable rate over the entire 2004 to 2019 period."[4430]

2662. In reply, the Respondent contends that the U.S. Prime rate + 2% is "arbitrary and unsupported".[4431] Relying on Dr Flores' opinion, the Respondent argues that Chevron can in fact borrow money at a discount compared to the U.S. Prime rate.[4432] According to Dr Flores, "[b]orrowing at negative spreads over U.S. Prime is commonly observed".[4433] In particular, he states that given Chevron's size and credit rating, it can borrow money at a discount, not a premium, with respect to U.S. Prime.[4434] As such, applying the Claimants' proposed U.S. Prime rate + 2% would "result in overcompensating Claimants above what is economically reasonable."[4435]

2663. Instead, Dr Flores suggests that an interest rate equivalent to a "short-term risk-free rate, such as the yield of 6-month or 1-year U.S. Treasury bills, is consistent with economic

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4427 Reply, para. 1164; **CLA-665**, *Sylvania Tech. Sys., Inc. v. Iran*, IUSCTR, Case No. 64, Award No. 180-64-1, 27 June 1985, pp. 15-16, fn 6.

4428 The Claimants note that US Prime + 2% was applied in *TECO v. Guatemala* (*See* Reply, paras. 1164-1166; **CLA-615**, *TECO v. Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, para. 767).

4429 First Sequeira Expert Report, para. 80 (internal citations removed).

4430 Second Sequeira Expert Report, para. 92.

4431 Counter-Memorial, para. 1304.

4432 Counter-Memorial, para. 1304; Rejoinder, paras. 1861-1862.

4433 **RE-42**, First Flores Expert Report, paras. 54-55 (emphasis removed); **RE-56**, Second Flores Expert Report, para. 86.

4434 **RE-42**, First Flores Expert Report, paras. 54-55 (emphasis removed); **RE-56**, Second Flores Expert Report, para. 86.

4435 **RE-42**, First Flores Expert Report, para. 26.

theory and practice."[4436] In this connection, the Respondent submits that due to the fact that time value of money, loss of purchasing power, and specific risks are priced together in interest rates, international tribunals overcome uncertainty and reduce speculation by applying the interest rate of a risk-free instrument.[4437] Since the Claimants "should not be compensated for risk that they did not bear", and because "a damages award is not exposed to any business risk", the Respondent contends that "the yield of 6-month or 1-year U.S. Treasury bills constitutes a reasonable commercial rate" of interest.[4438] The Respondent further argues that the use of a risk-free rate avoids speculation as to what the Claimants would have done with their funds.[4439] In this case, the Respondent highlights that the U.S. Treasury bill rate was "virtually identical" to the Claimants' short-term borrowing rates in any event.[4440] Lastly, the Respondent contends that the cases relied upon by the Claimants in which a risk-free rate was applied are distinguishable, and assert that there is ample academic and jurisprudential support for the use of a risk-free rate.[4441]

2664. The Claimants respond that "the risk-free rate is inappropriate because it is based on terms for short-term debt . . . which garner lower interest rates than long-term debt".[4442] Since "Ecuador has owed Chevron interest for well over a decade," higher rates applicable to long-term debts should be used.[4443] The Claimants also cite international investment tribunals and scholars who have found that risk-free rates do not fully compensate

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4436 **RE-42**, First Flores Expert Report, para. 27.

4437 Counter-Memorial, para. 1295. *See also* Rejoinder, paras. 1833-1835.

4438 Counter-Memorial, paras. 1296-1297; **CLA-673**, *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No ARB/06/11, Award, 5 October 2012, paras. 842, 848; **QE-25**, *Vestey Group Limited v. Venezuela*, ICSID Case No ARB/06/4, Award, 15 April 2016, paras. 328, 446. *See also* Rejoinder, paras. 1831-1832; **RLA-983**, *Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyzstan*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, para. 194; **QE-25**, *Vestey Group Limited v. Venezuela*, ICSID Case No ARB/06/4, Award, 15 April 2016, para. 440.

4439 Rejoinder, para. 1836.

4440 Track III Hearing Transcript, Day 2 (19 August 2022), p. 410 (Leonetti).

4441 Rejoinder, paras. 1837-1841.

4442 Reply, para. 1139.

4443 Reply, para. 1139.

investors as required by the full reparation standard.[4444] Relying on Professor Gotanda and Mr Sénéchal, the Claimants assert that the use of risk-free rates such as the U.S. Treasury bill "ignores the reality that businesses typically invest in opportunities that have a significantly greater amount of risk than" these rates, such that the tribunals are misapplying *Chorzów Factory*.[4445] The Claimants further deny that the Respondent's referenced cases support the latter's position.[4446]

2665. The quantum experts are also of two minds as regards the appropriateness of a risk-free rate. In support of the application of a risk-free rate, Dr Flores opines that the Claimants are not entitled to their opportunity cost of capital.[4447] He cites Fisher and Romaine, who explain:

> The plaintiffs' opportunity cost of capital includes a return that compensates the plaintiff for the average risk it bears. But, in depriving the plaintiff of an asset worth Y at time 0, the defendant also relieved it of the risks associated with investment in that asset. The plaintiff is thus entitled to interest compensating it for the time value of money, but it is not also entitled to compensation for the risks it did not bear. Hence prejudgment interest should be awarded at the risk-free interest rate.[4448]

2666. Dr Flores explains that different commercial interest rates relate to different risks, such that higher rates reflect higher perceived risks.[4449] He also explains that longer-term rates include maturity risk, making them not risk-free.[4450] He opines that "a damages award is

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[4444] Reply, paras. 1140-1144; **CLA-94**, *National Grid P.L.C. v. Argentina*, UNCITRAL, Award, 3 November 2008, paras. 292-293; **CLA-296**, *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras. 143-144; **CLA-602**, *Flughafen Zürich A.G. y Gestión e Ingeniría IDC S.A. v. Venezuela*, ICSID Case No. ARB/10/19, Award, 18 November 2014, para. 961; **CLA-920**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, para. 514; **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), pp. 526-527; **RLA-811**, *South American Silver Limited v. Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 889.

[4445] Reply, para. 1146; **CLA-936**, John Y. Gotanda and Thierry J. Sénéchal, *Interest as Damages*, in COLUMBIA JOURNAL OF TRANSNATIONAL LAW, Vol 47, No. 3 (2009), pp. 508-510, 513.

[4446] Reply, paras. 1147-1149.

[4447] **RE-42**, First Flores Expert Report, para. 28; **RE-56**, Second Flores Expert Report, para. 44.

[4448] **RE-42**, First Flores Expert Report, para. 28; **QE-20**, Franklin M. Fisher and R. Craig Romaine, Janis Joplin's Yearbook and the Theory of Damages, in JOURNAL OF ACCOUNTING AUDITING AND FINANCE, Vol. 5, No. 1 (1990), p. 146. *See also* **RE-42**, First Flores Expert Report, para. 30; **QE-21,** Mark Kantor, VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS AND EXPERT EVIDENCE (2008), p. 49.

[4449] **RE-42**, First Flores Expert Report, para. 31; **QE-22,** James Dow, *Interest* in THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (2018), p. 308.

[4450] **RE-42**, First Flores Expert Report, para. 32; **RE-56**, Second Flores Expert Report, paras. 46-49.

not exposed to risk" and, accordingly, interest should be calculated applying a short-term risk-free rate, as other arbitral tribunals have awarded.[4451] He therefore disagrees with Mr Sequeira that opportunity cost should be compensated, opining that to do so "incorrectly assum[es] that a risky investment would have delivered its promised returns with 100% certainty."[4452] He distinguishes or disagrees with the authors presented by Mr Sequeira.[4453]

2667. For his part, Mr Sequeira states that the risk-free rate is economically inappropriate, as it does not compensate for both the time value of money and the opportunity cost of money.[4454] He opines that a damages award against a State "is exposed to similar risks as a sovereign bond issued by that [S]tate".[4455] In his view, the academic authorities relied upon by Dr Flores "are not representative of the broad range of economic arguments" on the subject and are contradicted by other literature.[4456] Mr Sequeira also considers that a long-term interest rate should be used, as the Claimants have not had the option to choose to roll over their short term rates, reinvest, or use their money as they desired.[4457] He notes that DCF analyses typically use the 10-year Treasury note as the risk-free rate.[4458] Mr Sequeira also submits that several arbitral awards do not support Dr Flores' proposed rate.[4459]

2668. In the Tribunal's view, the choice between applying the U.S. Prime rate and the U.S. Treasury bills rate, which is significantly lower, ultimately rests upon the notion of compensation for risk and, in particular, on whether compensating for such risk is an

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4451 **RE-42**, First Flores Expert Report, paras. 32-33; **QE-24** *Occidental Petroleum Corp. v. Ecuador*, ICSID Case No ARB/06/11, Award, 5 October 2012, paras. 842, 848; **QE-25**, *Vestey Group Limited v. Venezuela*, ICSID Case No ARB/06/4, Award, 15 April 2016, paras. 328, 446. *See also* **RE-56**, Second Flores Expert Report, para. 39; **QE-20**, Franklin M. Fisher and R. Craig Romaine, Janis Joplin's Yearbook and the Theory of Damages, in JOURNAL OF ACCOUNTING AUDITING AND FINANCE, Vol. 5, No. 1 (1990), p. 146.

4452 **RE-56**, Second Flores Expert Report, para. 44.

4453 **RE-56**, Second Flores Expert Report, paras. 50-58.

4454 Second Sequeira Expert Report, paras. 45, 49.

4455 Second Sequeira Expert Report, paras. 17, 48; **VP-41**, John D. Taurman and Jeffrey C. Bodington, *Measuring damage to a firm's profitability: ex ante or ex post*, in ANTITRUST BULLETIN (1992), p. 11.

4456 Second Sequeira Expert Report, paras. 50-51.

4457 Second Sequeira Expert Report, para. 52.

4458 Track III Hearing Transcript, Day 8 (29 August 2022), p. 1817 (Sequeira).

4459 Second Sequeira Expert Report, paras. 53-76.

appropriate function of interest. The Tribunal has already established that the function of interest is to provide compensation adequate to ensure full reparation, accounting for the time value of money during the period Chevron was deprived of its use, and not to compensate Chevron for risks it did not bear.[4460] On this basis, the Tribunal considers that the U.S. Treasury bill rate, which the Parties and their experts agree reflects the time value of money but not other risks, is the appropriate interest rate for application in this case.

2669. By contrast, the Claimants' suggestion that the Tribunal apply U.S. Prime + 2% accounts for additional risks that are not convincingly shown to be compensable in this case. As Mr Sequeira stated, the U.S. Prime rate is typically calculated by adding a 3% margin to the overnight rate that banks charge to lend reserve balances to each other. This 3% administrative spread covers considerations particular to commercial borrowing, such as bank funding costs, liquidity risks, capital charges, and profit. Thus, the Tribunal understands that the U.S. Prime rate itself already incorporates a premium that prices other factors beyond the time value of money. Adding another 2% margin to the U.S. Prime rate is not shown to be warranted, especially given that, as Dr Flores explains, creditworthy borrowers such as Chevron can typically borrow money at a discount with respect to U.S. Prime.[4461] This observation is echoed by Mr Sequeira, who stated that he has seen Chevron loans at less than the U.S. Prime rate, and agreed that "at times", "some of the most creditworthy customers . . . can borrow money at below the Prime Rate".[4462] Further, the Tribunal notes Dr Flores' observation that Chevron's borrowing rate during the claimed damages period (2004 to 2019) averaged only 1.5%,[4463] closer to the risk-free U.S. Treasury bill rate than to U.S. Prime + 2%. Thus, even the theory that Chevron was forced to borrow funds to replace those withheld by the Respondent – and ignoring the large cash reserves maintained by Chevron – would not support a rate significantly exceeding the risk-free rate.

2670. As regards the maturity rate, the Tribunal observes that it is common for investment tribunals applying a risk-free rate to choose either 6-month or 1-year U.S. Treasury bills.

4460 *See* paras. 2596, 2653 above.

4461 **RE-56**, Second Flores Expert Report, para. 86.

4462 Track III Hearing Transcript, Day 8 (29 August 2022), pp. 1859-1860 (Sequeira).

4463 **RE-42**, First Flores Expert Report, para. 65; **QE-3**, Other Supporting Calculations, Tabs 3, 4.

Considering that Chevron has been deprived of at least some of the funds for which it requests compensation for a decade or even longer, the Tribunal considers a 1-year maturity rate better reflects the time value of money over the relevant period, also bearing in mind that the compounding period should be equal to the maturity of the interest rate.[4464]

2671. The Tribunal therefore grants pre-award interest at 1-year U.S. Treasury bill rate, compounded annually.

5. Post-Award Interest Rate

2672. Having determined the pre-award interest rate, the Tribunal now turns to the post-award interest rate. The Claimants have argued that the Respondent's risk of default should be factored into the post-award interest rate.[4465] For its part, the Respondent appears to acknowledge that the risk reflected in an interest rate could change once an award is issued, noting that "[a]ny award from this Tribunal is not exposed to any risk at least until the Date of the Award, and we would contend after that".[4466]

2673. As previously explained, pre- and post-award interest have different legal bases.[4467] Nevertheless, nothing in the procedural framework of this Arbitration leads to a variation in the overall compensatory aim of post-award interest from that of pre-award interest.

2674. In the Tribunal's view, however, pre- and post-award interest contain different risk profiles. As the tribunal in *Gold Reserve v. Venezuela* explained in its discussion of post-award interest:

> the purpose of post-Award interest is arguably different – damages become due as at the date of the Award, and from this time, Respondent is essentially in default of payment. As such, the Tribunal considers that continuing to apply a risk-free interest rate would be inappropriate.[4468]

4464 *See* para. 2634 above.

4465 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3499 (Kehoe).

4466 Track III Hearing Transcript, Day 15 (7 September 2022), p. 3632 (Leonetti).

4467 *See* paras. 2621-2623 above.

4468 **CLA-617**, *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 856.

2675. The Tribunal agrees with this analysis. Once the Award is issued, the Claimants essentially become creditors of the Respondent. To this point, the Tribunal recalls that the PCIJ assigned a post-award interest rate reflecting the parties' creditor-debtor status through a reference to "public loans" in *S.S. Wimbledon*.[4469] This additional risk must be considered in establishing an appropriate post-award interest rate. In doing so, the Tribunal emphasizes that the post-award interest rate remains compensatory, not punitive.

2676. Yet, despite the creditor analogy, the Tribunal declines to award Ecuador's cost of debt as the post-award interest rate for two separate reasons. First, arbitral awards are not equivalent to sovereign bonds. Unlike sovereign bonds, this Award falls under the enforcement provisions of the New York Convention. As the Respondent noted:

> While Ecuador has certainly defaulted on its sovereign debt obligations in the past, it cannot walk away from arbitration awards . . . Ecuador has no such option [to declare bankruptcy under Chapter 11 of the U.S. Bankruptcy Code] under international law, which is why there is no litigation risk, which is why there should be no premium for that risk either pre-award or post-award.[4470]

2677. The Tribunal is not persuaded that the enforcement of the Award carries *no* risk, but considers that, in effect, an arbitral award enforceable under the New York Convention could place the Claimants in the position of privileged creditors. As enforcement under the New York Convention carries less risk, the post-award interest rate must come at a discount to the Ecuadorian cost of debt.

2678. Furthermore, the Tribunal must consider only the evidence on the record of these proceedings. No short-term Ecuadorian debt instruments have been proposed as a basis to determine the interest rate applicable to damages in this Arbitration. The only alternative evidence provided by the Claimants and Mr Sequeira are long-term Ecuadorian sovereign bonds, with lengths of 20, 10, 7, and 5 years.[4471] As both experts

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[4469] **RLA-697**, *Case of the S.S. Wimbledon*, Judgment, PCIJ Series A, No. 1, 17 August 1923, para. 56 ("As regards the rate of interest, the Court considers that in the present financial situation of the world and *having regard to the conditions prevailing for public loans, the 6 % claimed is fair*; this interest, however, should run, not from the day of the arrival of the 'Wimbledon' at the entrance to the Kiel Canal, as claimed by the applicants, but *from the date of the present judgment*, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established.") (emphasis by the Tribunal).

[4470] Track III Hearing Transcript, Day 15 (7 September 2022), pp. 3633-3634 (Leonetti).

[4471] *See* Second Sequeira Expert Report; Appendix G.4.

have acknowledged, longer-term rates carry maturity risk.[4472] The Tribunal does not deem it appropriate to incorporate maturity risk, which arises from the time-dependent sensitivity of long-term bonds to interest rate fluctuations, into the post-award interest rate.[4473] Similarly, using a longer maturity for the post-award interest rate would equate to presuming prolonged non-payment by the Respondent of the Award, which the Tribunal declines to do.

2679. As for Chevron's WACC, as already discussed in paragraph 2653 above, the Tribunal has declined to apply this rate for being insufficiently supported by evidence in this case.

2680. As for the benchmark rates proposed by the Parties, as discussed in paragraphs 2668 to 2669 above, the Tribunal considers the U.S. Treasury bill rate to be more appropriate, since it reflects solely the compensatory function of the time value of money, and not other factors more closely related to the cost of commercial borrowing.

2681. To account for the enforcement risk after the issuance of this Award, which the Tribunal recognized in paragraph 2677 above, the Tribunal considers it appropriate to adjust the pre-award interest rate by adding a risk premium of 2% to the rate of 1-year U.S. Treasury bills, compounded annually.

6. Tax implications

2682. As discussed in Section VII.F above, the Respondent requests that, when assessing compensation, the Tribunal consider the undisputed fact that the Claimants took a tax deduction for the legal fees and expenses they claim as damages in this Arbitration at the published marginal tax rate prevailing in the United States at the relevant times – which was 35% between 1993 and 2018 and 21% from 2018 onwards.[4474] The Claimants acknowledge that they reduced the amount of corporate income tax they owed by paying these legal fees and expenses.[4475] As a consequence, the Respondent asserts that (i) any damages awarded to the Claimants must be reduced by the difference between the

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4472 Second Sequeira Expert Report, para. 84; **RE-42**, First Flores Expert Report, para. 32.

4473 **RE-42**, First Flores Expert Report, para. 32.

4474 Counter-Memorial, para. 1306; Rejoinder, para. 548; Reply, para. 567.

4475 Reply, para. 567.

marginal U.S. corporate tax rate when the applicable fees were deducted and the marginal tax rate when the damages award is paid;[4476] and (ii) for the purposes of determining the amount of an interest award, the Respondent requests that the Tribunal calculate any interest on the Claimants' losses net of tax savings, not on the full amounts spent as legal fees and expenses.[4477]

2683. The Tribunal has previously determined that grossing down its damages award to account for the Claimants' tax savings on account of their legal fees and expenses spent is outside the realm of compensation analysis and therefore inappropriate.[4478] Moreover, such exercise is also inherently speculative, as any purported "tax savings" – or whether such "tax savings" will materialize at all – can only be determined at the time of enforcement and is hence uncertain.[4479]

2684. In a similar vein, the Tribunal must reject the Respondent's request that interest be calculated on the Claimants' losses net of tax savings. In particular, while there is no dispute that the Claimants took a tax deduction for the legal fees and expenses they claim as damages in this Arbitration,[4480] the Respondent has not established that such deductions translated effectively into tax *savings*. For instance, while the Claimants may have suffered a tax-deductible loss, their taxable income in any of the relevant years may have been too low to apply a deduction. Any deductions applied by the Claimants may have also been reversed thereafter as a result of a tax audit or a change in the law. Similarly, a deduction taken by Chevron in the United States may have had to be offset by foreign tax obligations, particularly in view of the involvement of Chevron's international subsidiaries in the events underlying the present dispute.

2685. As noted in paragraph 518 above, the Tribunal is not prepared to reduce the determination of the tax liability of this Award to a simple arithmetical exercise, particularly without having had the benefit of evidence from tax experts. This decision is made particularly in

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4476 Rejoinder, para. 565.

4477 Counter-Memorial, para. 1306.

4478 *See* para. 512 above.

4479 *See* para. 517 above.

4480 Reply, para. 567.

light of the absence of a fuller briefing on the Claimants' overall tax situation during the relevant period, which, as just explained, may well have affected the Claimants' tax liability in numerous ways other than by way of tax deductions.

2686. Accordingly, the Tribunal rejects the Respondent's request that interest be calculated on the Claimants' losses net of tax savings, not on the full amounts spent as legal costs.

D. CONCLUSION ON INTEREST

2687. For the foregoing reasons, the Tribunal:

(i) Grants, with respect to Chevron' legal fees and expenses awarded as incidental damages under Section VIII above, pre-award interest calculated at the 1-year U.S. Treasury bill rate, from the date of payment of each invoice until the date of this Award, compounded annually;

(ii) Grants, with respect to all damages awarded to Chevron, post-award interest at the rate of 1-year U.S. Treasury bill + 2%, from the date of this Award until the date of full payment, compounded annually; and

(iii) Rejects the Respondent's request that interest be calculated on the Claimants' losses net of tax savings, not on the full amounts spent as legal costs.

2688. For the reasons set out in paragraphs 2293-2296 above, interest must be calculated on the basis of the Respondent's Damages Model. On the date of the last version of the Respondent's Damages Model filed with the Tribunal prior to the issuance of this Award (dated 15 October 2025), pre-award interest amounted to USD 40,404,250.51.

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XI. INDEMNIFICATION

2689. The Claimants request that the Tribunal order the Respondent "to indemnify them and their affiliates for any further damages resulting from pending or future actions to enforce the Lago Agrio Judgment."[4481] In the Claimants' view, this relief is warranted in view of the Tribunal's finding in the Track II Award that "any injury" to the Claimants "caused by the recognition or enforcement of any part of the Lago Agrio Judgment . . . shall be injuries for which the Respondent is liable to make reparation under international law".[4482] It follows therefrom, in the Claimants' view, that the Tribunal can exercise its discretion to grant corresponding relief, in the form of an indemnity order, in circumstances where the risk of enforcement of the Lago Agrio Judgment has not been dispelled.[4483]

2690. The Respondent submits that contingent, speculative, and indeterminate damages cannot be awarded under international law.[4484] On this basis, the Respondent argues that the Tribunal should deny the Claimants' request for indemnification, as it is predicated on "an extremely remote possibility" of hypothetical harm.[4485]

A. THE CLAIMANTS' POSITION

2691. According to the Claimants, by failing to render the Lago Agrio Judgment unenforceable in Ecuador and abroad, the Respondent has refused to comply with the Tribunal's past orders and awards and remains in continuing breach of its obligations under the Treaty.[4486] The likelihood that the Respondent's breach will continue, the Claimants assert, is further evidenced by the Respondent's lack of assurance in its response to this indemnification claim that it will comply with the Tribunal's orders.[4487] Therefore, the

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4481 Memorial, para. 469; Reply, para. 1179.

4482 Memorial, para. 470; Reply, para. 1205; Track II Award, para. 10.11.

4483 Memorial, para. 466; Reply, paras. 1181-1182, 1205.

4484 Counter-Memorial, paras. 1330-1332; Rejoinder, para. 1811; **RLA-57**, *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 210.

4485 Rejoinder, para. 1822.

4486 Memorial, para. 466; Reply, para. 1180; First Award on Interim Measures, Part VI(2)(o); Track II Award, para. 10.13(i).

4487 Reply, para. 1206.

Claimants consider that there is nothing speculative about their request for indemnification.[4488] Rather, in the Claimants' view, it is entirely appropriate for them to seek an indemnity order for future damages as a way of defending themselves against the Respondent's continuing breach of the Treaty.[4489]

2692. According to the Claimants, it is well established that future damages are compensable in principle; the question that remains for the Tribunal is to determine the threshold of certainty required.[4490] As to the relevant standard, the Claimants acknowledge that their indemnity request based on the occurrence of a contingent event – the enforcement of the Lago Agrio Judgment – is unprecedented because investment jurisprudence has established that future damages can be awarded "based on future events that are reasonably certain to occur" and "can only be awarded for loss that is certain."[4491] In such circumstances, the Claimants contend that it would not be logical to apply the same threshold for immediate compensation for future damages and to an indemnity for these: other factors should also be considered.[4492]

2693. Specifically, the Claimants rely on cases in which arbitral tribunals have given particular consideration to the respondent's conduct, including its continued wrongdoings and non-compliance, to award indemnities or compensation for future losses.[4493] The Claimants

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4488 Reply, para. 1207.

4489 Reply, paras. 1189, 1207.

4490 Reply, paras. 1183-1186; **CLA-291,** ILC Articles on State Responsibility, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 36, paras. 4, 27; **CLA-652**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016) pp. 115-116; **CLA-683**, Hans van Houtte and Bridie McAsey, *Future Damages in Investment Arbitration – a Tribunal with a Crystal Ball?* in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION (2015), pp. 642, 653.

4491 Memorial, para. 471; **CLA-683**, Hans van Houtte and Bridie McAsey, *Future Damages in Investment Arbitration – a Tribunal with a Crystal Ball?* in PRACTISING VIRTUE: INSIDE INTERNATIONAL ARBITRATION (2015), pp. 643-657; **CLA-684**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 89; **CLA-685**, *Swenson v. Bushman Inv. Propts., Ltd.*, 870 F. Supp. 2d 1049 (D. Idaho 2012).

4492 Reply, para. 1189.

4493 Memorial, para. 468; Reply, paras. 1191-1195, 1197, 1199; **CLA-227**, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 387; **CLA-652**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016), pp. 115-116; **CLA-684**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 97; **CLA-927**, *Hochtief AG v. Argentina*, ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, para. 327; **RLA-766**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Award, 27 November 2013, paras. 190-191.

further note that the International Court of Justice recognized the possibility of issuing orders concerning continuing breaches, giving particular weight to the respondent State's good faith when deciding whether or not to grant the order.[4494] The Claimants also highlight that other tribunals have ordered post-award tax indemnities.[4495]

2694. Conversely, the Claimants criticize the Respondent's reliance on several legal authorities that did not address a request for an indemnity, but rather concerned claims for lost profits and the application of the DCF method.[4496]

2695. Turning to the facts of this case, the Claimants argue that the Respondent's years-long refusal to comply with the Tribunal's orders, coupled with its silence on the enforcement risk in its response to the indemnity relief, warrants an assumption that the Respondent will persist in its unlawful conduct.[4497] In light of this, the Claimants submit that the Tribunal should give particular consideration to the certainty of the Respondent's continuing breach of the Treaty, as well as its continuing violations of the Tribunal's orders and awards to date, to conclude that "[its] persistent violations have eroded any presumption of good faith."[4498]

2696. Lastly, the Claimants note that the Respondent has the means at its disposal to avoid any indemnity by simply rendering the Lago Agrio Judgment permanently unenforceable, as ordered by the Tribunal.[4499]

4494 Reply, para. 1197; **CLA-928**, *Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, 13 July 2009, p. 267, para. 150.

4495 Reply, paras. 1201-1203; **CLA-929**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, paras. 705-706; **RLA-789**, *Crystallex International Corporation v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 184.

4496 Reply, para. 1190; **RLA-57**, *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 210; **RLA-746**, *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008), Final Award, 8 June 2010, para. 102.

4497 Reply, paras. 1196, 1198.

4498 Reply, para. 1204.

4499 Memorial, para. 472; Reply, para. 1208.

B. THE RESPONDENT'S POSITION

2697. In the Respondent's view, the Claimants' request for indemnity for "contingent damages" is contrary to basic principles of law because there is no justification for the Claimants to be awarded reparations in any form for the losses that they allege they may, but have yet, to incur.[4500]

2698. First, the Respondent argues that while only "the actual losses incurred as a result of the international wrongful act" are recoverable under applicable principles of international law, the Claimants have failed to prove "both the principle of the loss and its extent."[4501] According to the Respondent, the Claimants seek to create an entirely new standard for "contingent damages" by relying on inapposite authorities.[4502] The Respondent clarifies that the cases cited by the Claimants to exemplify orders of indemnity all involved a measure of certainty that is absent in this case.[4503]

2699. By contrast, the Respondent suggests that if the Claimants were to seek to enforce an indemnity order issued by this Tribunal to recover legal expenses incurred to defend against future recognition and enforcement efforts, a domestic court chosen by the Claimants would be tasked with determining the amount of the indemnity obligation, thus requiring such court to address legal and factual issues that could be comparable to those arising in Track III of the Arbitration.[4504] For the Respondent, establishing such mechanism for domestic courts to address potential future damages claims would be in contravention of the express agreement of the Contracting Parties of the Treaty to resolve disputes before an international tribunal.[4505]

4500 Counter-Memorial, paras. 1330-1331.

4501 Counter-Memorial, para. 1331; **RLA-804**, *Caratube International Oil Company LLP and Dr. Devincci Salah Hourani v. Kazakhstan*, ICSID Case No. ARB/13/13, Award, 27 September 2017, para. 1104; **CLA-291**, ILC Articles on State Responsibility Art. 36, Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10 at 43, UN Doc. A/56/10 (2001), Commentary to Art. 36, para. 4.

4502 Counter-Memorial, para. 1335; Rejoinder, para. 1810.

4503 Rejoinder, para. 1811.

4504 Rejoinder, paras. 1813-1815.

4505 Rejoinder, para. 1817.

2700. Second, as acknowledged by the Claimants, the Respondent maintains that future damages can only be awarded for loss that is certain and that "the assessment of damages cannot be based on conjecture or speculation".[4506] Yet, the Claimants' request, according to the Respondent, is predicated on the "infinitesimal risk" that the LAPs will seek to enforce the Judgment – noting, in this respect, that that the LAPs have not filed any new enforcement actions since the initiation of the Gibraltar Proceedings.[4507]

2701. In this connection, the Respondent points out that the Claimants have in fact admitted that "the likelihood of the fraudulent Judgment ever being enforced has been greatly reduced" and that "[d]ue to the defects associated with the Ecuadorian [J]udgment, [Chevron] does not believe the [J]udgment has any utility in calculating a reasonably possible loss (or a range of loss)."[4508] Accordingly, in the Respondent's view, there is no basis for the Claimants' contention that the Respondent will seek to support the enforcement of the Lago Agrio Judgment.[4509]

2702. Third, the Respondent posits that there can be no "continuing violations" of the Tribunal's orders and interim awards because all prior interim measures have now lapsed.[4510] In particular, the Respondent rejects the Claimants' allegation of a "continuing violation" of the Track II Award, arguing that the Respondent has taken steps to comply with the Tribunal's final orders.[4511]

2703. As to the Claimants' specific indemnity requests, the Respondent submits the following:

(i) As held by the Tribunal, public statements by the Respondent's government do not constitute Treaty breaches and the Respondent is not responsible for the LAPs' actions.[4512] Therefore, the Claimants are not entitled to be indemnified against "any

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4506 Counter-Memorial, para. 1332; **RLA-746**, *Mohammad Ammar Al-Bahloul v. Tajikistan*, SCC Case No. V (064/2008), Final Award, 8 June 2010, para. 39.

4507 Rejoinder, paras. 1806, 1809, 1812; 1819; Kobre Witness Statement, para. 32.

4508 Counter-Memorial, para. 1333; Rejoinder, para. 1819; Memorial, para. 155; **R-1939**, Chevron Annual Report (2018), p. 73.

4509 Rejoinder, para. 1821.

4510 Rejoinder, para. 1820.

4511 Rejoinder, para. 1820.

4512 Rejoinder, paras. 1807, 1821; Track II Award, paras. 5.229, 8.68-8.69.

costs incurred in responding to the public relations campaigns by which the LAPs' lawyers and/or Ecuador target Chevron".[4513]

(ii) The Claimants' request for indemnity "from and against any loss, expenses, liability, damage or cost (including litigation costs and attorneys' and experts' fees) incurred by Claimants and their affiliates arising out of [] any related Ecuadorian Criminal Proceedings" should also be rejected because the Tribunal has already determined that the Criminal Proceedings do not constitute Treaty breaches.[4514]

(iii) Lastly, the Respondent is critical of the Claimants' request that the Tribunal order the Respondent to satisfy the Lago Agrio Judgment directly "in the event that any court orders the recognition or enforcement of the Judgment".[4515] According to the Respondent, the Tribunal has no power to intrude in domestic court proceedings and reconfigure the litigants or to order the Respondent, who was not a party to the Lago Agrio Litigation, to assume affirmative obligations and substitute the Claimants as debtor of the Judgment.[4516]

C. THE TRIBUNAL'S ANALYSIS

2704. The Claimants request an indemnity order as "corresponding relief"[4517] for the Tribunal's declaration reproduced below from its Track II Award that the Respondent is liable to make reparation for any injuries to the Claimants caused by the recognition or enforcement of the Lago Agrio Judgment:

> The Tribunal declares that any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgement within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make reparation under international law.[4518]

4513 Rejoinder, para. 1807.

4514 Rejoinder, para. 1808; Track II Award, para. 5.241.

4515 Rejoinder, para. 1816; Reply, para. 1212(7).

4516 Rejoinder, para. 1816.

4517 Reply, para. 1205.

4518 Track II Award, para. 10.11.

2705. More precisely, the Claimants seek indemnification, or remedies akin to an indemnification, under seven distinct claims for relief. In particular, the Claimants request in their Reply an award granting the following relief:

> 4. Ordering Ecuador to indemnify and hold harmless Claimants for any and all damages, including fees and costs, arising from Ecuador's violation of any injunctive relief this Tribunal has granted or will in the future grant;
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> 5. Ordering Ecuador to indemnify and hold harmless Claimants from and against any costs incurred in responding to the public relations campaign by which the LAPs' lawyers and/or Ecuador target Chevron;
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> . . .
>
> 7. Ordering that, in the event that any court orders the recognition or enforcement of the Judgment, Ecuador must satisfy the Judgment directly;
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> 8. Awarding Claimants any sums that the nominal LAPs or any other party collect against Claimants or their affiliates in connection with enforcing the Judgment;
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> 9. Awarding Claimants contingent damages in the amount of the Lago Agrio Judgment, contingent on the enforcement of the Judgment and to the extent enforced;
>
> 10. Ordering Ecuador to indemnify and hold harmless Claimants from and against any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) incurred in any jurisdiction by Claimants or their affiliates arising out of: (i) any and all attempts to seek the recognition or enforcement of the Judgment within or without Ecuador (including any sums collected in connection with the Judgment); and (ii) the Lago Agrio Litigation in Ecuador and any related Ecuadorian Criminal Proceedings;
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> 11. Ordering Ecuador to indemnify and hold harmless Claimants from and against any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) arising from Ecuador's violations of the Tribunal's Orders and Awards;[4519]

2706. Setting aside certain items that will be addressed separately in paragraphs 2715 and 2719 to 2722 below, the requests for relief quoted in the preceding paragraph, while phrased in various ways, are in substance aligned in seeking an order that the Respondent "indemnify [the Claimants] and their affiliates for any further damages resulting from pending or future actions to enforce the Lago Agrio Judgment".[4520] Indeed, notwithstanding the fact that two of those requests concern an *award* of future damages (*i.e.*, requests for relief (8)

[4519] Reply, para. 1212.

[4520] Reply, para. 1179.

and (9)) the Claimants clarify that they do not request that the Respondent "pay them now for future damages", but rather seek only for the Tribunal to issue an indemnity *order*.[4521] The Tribunal will conduct its analysis on the basis of this understanding.

2707. As to the forms of damage for which the Claimants seek indemnification, the requests for relief set out in the quote in paragraph 2705 above refer both to direct damages arising from future enforcement efforts, such as requests for relief (7) to (9), and to any incidental expenses that may be incurred in the future to mitigate the injury arising from such enforcement efforts, such as request for relief (10).

2708. Against this background, the Tribunal is not satisfied that the Claimants have established the necessary predicates for the granting of an indemnity order.

2709. First, even where a respondent State has been declared liable to repair the injury arising from an internationally wrongful act, damages that have not been established with the requisite degree of certainty remain, at best, uncertain or speculative and therefore cannot be awarded under international law.[4522] Thus, in order for the Tribunal to award damages in this Arbitration – including future damages – the Claimants must prove the existence of a concrete injury arising from the recognition and enforcement of the Lago Agrio Judgment, as well as the extent of such injury. Only then will the Tribunal be in a position to order the payment of damages. The Tribunal would be reluctant to issue such order unless the quantum of the obligation has been conclusively determined or at least can be readily quantified at the time that the indemnity order is made.

2710. Second, the future damages in respect of which the Claimants seek an indemnity order remain far from being established with any meaningful degree of certainty. To the contrary, assessing such damages would require a domestic court to conduct a comprehensive damages analysis not unlike that performed by this Tribunal in Track III of the Arbitration. Compounding this uncertainty, such domestic court would be required

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4521 Reply, para. 1189.

4522 Rejoinder, para. 1811; **RLA-57**, *Occidental Exploration and Production Company v. Ecuador*, LCIA Case No. UN 3467, Final Award, 1 July 2004, para. 210 (declining to "order the payment of compensation or a refund or amounts that are not due or paid" on the basis that "contingent and [i]ndeterminate damage cannot be awarded"); **CLA-452**, *Amoco International Finance Corp v. Iran*, IUSCTR Case No. 56, Partial Award No. 310-56-3, 14 July 1987, para. 238 ("One of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded").

to determine not merely the quantum of the loss, but also, as a threshold matter, whether such loss satisfies the requirements under international law to qualify as direct or incidental damages arising from the recognition and enforcement of the Lago Agrio Judgment. The Tribunal concurs with the Respondent's description of how such a hypothetical scenario might unfold, and its associated complexities:

> Though Claimants do not make this explicit, they would have the Tribunal go down a rabbit hole in which at some indeterminate time, in some unknown country, the LAPs would seek to enforce the impugned Lago Agrio Judgment, after an extended period of inactivity on that hopeless cause. This, the hypothesis goes, would lead Claimants to incur defense costs of an uncertain amount and the prospect of the LAPs succeeding in obtaining a judgment outside of Ecuador domesticating the fraudulent Lago Agrio Judgment. To suspend disbelief further, then the LAPs would manage to collect on the domesticated judgment in some unknown way, which could take the form of attaching assets of unknown value. The amounts for which Claimants seek indemnity would include the defense costs (the reasonableness . . . of which would need to be litigated before some unknown domestic court) and the value of whatever was collected (which could give rise to a valuation dispute in some unknown court not unlike the battle in this arbitration over the value of the Chevron subsidiary's trademark portfolio).[4523]

2711. Lastly, the Tribunal is disinclined to devise a procedural mechanism that might oblige a domestic court to engage with matters exceeding its competence. Pursuant to the Treaty, an "investment dispute" such as the present one is subject to the dispute resolution procedures set out in Article VI, including binding arbitration in accordance with the UNCITRAL Arbitration Rules. As just explained, an indemnity order might effectively require a domestic court to adjudicate matters forming part of the present investment dispute, over which this Tribunal presently retains jurisdiction. In the circumstances, the Tribunal is not persuaded that a domestic court constitutes a suitable forum for supervising the application of the indemnity order as framed by the Claimants.

2712. For these reasons, the Tribunal declines to issue an order that the Respondent "indemnify [the Claimants] and their affiliates for any further damages resulting from pending or future actions to enforce the Lago Agrio Judgment".[4524] This ruling extends to the Claimants' requests for relief (7), (8), (9), and (10)(i), as set out in paragraph 1212 of the Claimants' Reply and reproduced in paragraph 2705 above.

[4523] Rejoinder, para. 1812.

[4524] Reply, para. 1179.

2713. This conclusion should not be understood to imply that future damages are not compensable under international law. The Tribunal accepts that international law allows the recovery of future losses, such as loss of profits.[4525] In such instances, however, the analytical challenge lies primarily in assessing the quantum of those future losses and discounting them to present value. Critically, in loss of profits cases the event triggering the injury – usually some form of deprivation of property – would normally lie in the past, which is why future losses may be traced directly back to such event with reasonable certainty.[4526]

2714. By contrast, in the instant case the event triggering the injury – any additional attempt to enforce the Lago Agrio Judgment – lies in the future and its occurrence is, as of yet, uncertain. Absent further details about its targets and other surrounding circumstances, any losses arising from such hypothetical enforcement action would be speculative and thus non-compensable.

2715. The same conclusion applies in respect of (i) the Claimants' request for relief (4), as reproduced in the quote in paragraph 2705 above, which concerns an indemnity for "any and all damages, including fees and costs, arising from Ecuador's violation of any injunctive relief this Tribunal has granted or will in the future grant"; and (ii) request for relief (11), concerning an indemnity for "any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) arising from Ecuador's violations of the Tribunal's Orders and Awards". Potential future breaches of the Tribunal's orders and awards, as well as any potential losses arising therefrom, are inherently speculative, as their occurrence and scope remain, at this stage, uncertain.

4525 **CLA-652/RLA-738**, Sergey Ripinsky and Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2016) p. 115 ("In principle, international law allows recovery of both past and future losses. Future losses encompass losses that lie in the future both in relation to the breach and in relation to the arbitral award, and usually manifest themselves in the form of loss of profits or incidental expenses. Recoverability of future damages, specifically the loss of profit, is conditioned on a number of factors and may be limited. Past losses are generally brought to their present day values by adding interest, while future losses are discounted.")

4526 **CLA-660/RLA-433**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 246 ("Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss.") *See* also para. 548 above.

2716. The present case must also be distinguished from other cases invoked by the Claimants where indemnification was awarded in relation to future events, as those instances involved (i) a clearly defined triggering event; and (ii) a quantification of future damages established with sufficient certainty.

2717. For instance, the tribunal in *Total v. Argentina* declared that "future requests for additional retroactive taxes on exports from Tierra del Fuego for the period 2002-2006 would also be in breach of Article 3 of the BIT".[4527] On this basis, the tribunal declared that should the claimant or one of its local subsidiaries "be compelled to pay any such taxes to Argentina's tax authorities, Claimant Total S.A. would be entitled any such taxes with interest under this Award".[4528] As rightly noted by the Respondent, in *Total* the quantum of the indemnity obligation – the levying of additional taxes by Argentina's tax authorities – "would become 'certain' immediately upon the triggering event and would not need to be adjudicated by a court enforcing the indemnity".[4529] In the Tribunal's view, the same proposition applies to *Siemens v. Argentina*,[4530] *OperaFund v. Spain*,[4531] and

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4527 **RLA-766**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Award, 27 November 2013, para. 281.

4528 **RLA-766**, *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Award, 27 November 2013, para. 281.

4529 Rejoinder, para. 1811.

4530 **CLA-227**, *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 387 ("The Tribunal considers that the claim on account of post-expropriation costs is justified in order to wipe out the consequences of the expropriation. As regards the sub-contractors' claims, Argentina has affirmed to have taken the necessary measures to ensure that these claims are transferred to Argentina. The Tribunal acknowledges this affirmation and decides that Argentina shall hold the Claimant, its subsidiaries and affiliates, wherever located, harmless from, and indemnify the same in respect of, any claims heretofore or hereafter asserted against any of them by any of the following subcontractors. . .").

4531 **CLA-929**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 705 ("However, the Tribunal does not agree with Respondent that the tax gross up is prohibited under the first sentence of Article 21(1) of the ECT or that this creates a tax gross up carve-out. There is nothing in Article 21 of the ECT prohibiting a tax gross up or limiting a tax gross up to ensure full reparation. To the Tribunal, it is clear that Spain as the Respondent is to pay the entire amount of damages and cannot charge and deduct Spanish taxes on the amount awarded. As other Tribunals have done in similar cases, in view of Respondent's express objection, there is indeed a need to clarify that. Therefore, as a precaution, the Tribunal concludes and will expressly provide in the dispositive of this Award that the Award is made net of all taxes and/or withholdings by Spain, and Spain is ordered to indemnify Claimants for any tax liability or withholding that may be imposed in Spain.")

Swenson v. Bushman Inv. Properties Ltd. – a case which, the Tribunal notes, arose under the laws of Idaho, not international law.[4532]

2718. The Claimants also rely on *LG&E v. Argentina*, in which the tribunal declared that Argentina was "liable for the payment of compensation as long as Argentina failed to restore" a pre-existing gas tariff regime. The Tribunal also considers this case to be inapposite: the *LG&E* tribunal itself characterized such declaration as a "recognition of [] responsibility",[4533] not unlike this Tribunal's declaration that the Respondent is liable to make reparation for any injuries to the Claimants caused by the recognition or enforcement of the Lago Agrio Judgment.[4534] In other words, the *LG&E* tribunal did not order indemnification: it issued a declaration of liability.

2719. A separate analysis of the Claimants' requests for relief (5) and (10)(ii), as reproduced in the quote in paragraph 2705 above, is in order. These requests, in contrast to the Claimants' other indemnification requests, concern purported future harm arising from

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4532 **CLA-685**, *Swenson v. Bushman Inv. Propts., Ltd.*, 870 F. Supp. 2d 1049 (D. Idaho 2012), pp. 14-15 ("At the arbitration, the investors argued that their entire $2.7 million investment in the property had been destroyed because the property—which was supposed to be debt-free—was encumbered with a deed of trust and county tax lien. The Swensons argued that the deed of trust had been partially released, which meant that even if the deed of trust was foreclosed, the investors would retain their interest in the property—thus getting exactly what they bargained for. The arbitrator concluded that the investors were entitled to roughly $458,000, which represented the amount needed to pay off the tax lien, plus land management costs the investors had incurred . . . The arbitrator did not accept the argument that the investors had lost their entire $2.7 million investment. He concluded that the investors would be entitled to a damages award for this larger sum only if they actually lost their property interests due to a foreclosure. So he fashioned a flexible award, which called for a 'potential prospective' damages award against Douglas Swenson, which would be triggered if the investors lost the interest in the property due to a foreclosure of the deed of trust or the county tax lien. *See Final Award*, at 5 ('If Claimants' interest in the property is foreclosed as a result of the Deed of Trust or Arapahoe County tax lien, Claimants shall be entitled to prospective actual damages from Mr. Swenson in the amount of $2,729,186.13')".)

4533 **CLA-684**, *LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007 paras. 96-97 ("Fourthly, Claimants' arguments that they would have to bear the risk and uncertainty resulting from Argentina's conduct and the burden to seek periodic additional relief at great cost and expense are not entirely without merit. However, the Claimants have chosen to maintain their investments in Argentina regardless of its reluctance to re-establish the gas regulatory framework following the end of the State of Necessity period. The decision to maintain their investments in Argentina has its consequences: (i) the impact of Argentina's conduct on the value of investments has not crystallized and is subject to the changing regulatory environment and fluctuations of the stock market; (ii) lost future profits are uncertain and their calculation is speculative; and (iii) compensation could only be awarded for damages actually suffered and sufficiently proven. This is in no way a reward to Argentina for its continued wrongdoing. This Tribunal has established that the abrogation of the basic guarantees of the gas tariff regime has breached Argentina's obligations under the Treaty. This breach makes Argentina liable for the payment of compensation as long as Argentina failed to restore such regime after 28 February 2005. The recognition of this responsibility is, on the contrary, an incentive to Argentina to restore the tariff regime or at least to engage in genuine arms-length negotiations to avoid future condemnatory decisions.")

4534 *See* para. 2704 above.

conduct that bears no relation to the Respondent's Treaty breaches and which, accordingly, is outside the scope of the compensable injury in this case.

2720. First, request for relief (5) concerns an indemnity from "any costs incurred in responding to the public relations campaign by which the LAPs' lawyers and/or Ecuador target Chevron". However, the Tribunal rejected in its Track II Award the proposition that the Respondent's media campaign amounted to a Treaty breach:

> In Parts IV and V above, the Tribunal discounted, as a distinct matter in regard to the Lago Agrio Judgment, the numerous public condemnatory statements regarding Chevron made by President Correa and members of his administration. As regards the Lago Agrio Litigation more generally, although particularly vicious in regard to Mr Veiga and Dr Pérez, Chevron's other legal representatives in Ecuador and (later) Dr Guerra, *these statements were also not the cause of any injury sustained by the Claimants in the Lago Agrio Litigation or under the Lago Agrio Judgment*.
>
> Moreover, as the Respondent submitted, Governments sometimes resort to extreme political language as regards alleged damage to the environment caused by foreign oil companies. The Tribunal does not consider such political, even populist, statements by a State's executive branch, however regrettable, as amounting by themselves to a denial of justice. This applies necessarily to a situation where *the sole cause for the denial of justice lies elsewhere within the State's judicial branch – as it does in the present case*.[4535]

2721. Accordingly, as already found by the Tribunal, any harm arising from this alleged "public relations campaign against Chevron" was not caused by the recognition and enforcement of the Lago Agrio Judgment and, as such, does not form part of the compensable injury in this case.[4536] In the circumstances, no indemnification for such harm is warranted.

2722. Second, request for relief (10)(ii) concerns an indemnity from "any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) incurred in any jurisdiction by Claimants or their affiliates arising out of [] the Lago Agrio Litigation in Ecuador and any related Ecuadorian Criminal Proceedings". To the extent this request concerns harm arising from the Criminal Proceedings, the Tribunal has already rejected in its Track II Award and elsewhere in this Award the Claimants' arguments that (i) there is a causative link between the Criminal Proceedings and the Lago

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4535 Track II Award, paras. 8.68-8.69 (emphasis by the Tribunal).

4536 *See* para. 2560 above.

Agrio Judgment;[4537] (ii) any harm arising from the Criminal Proceedings is compensable in this Arbitration.[4538] Accordingly, no indemnification for such harm is warranted.

2723. In sum, for the reasons set out above, the Tribunal rejects the Claimants' requests for relief (4), (5), (7), (8), (9), (10), and (11), as set out in paragraph 1212 of the Claimants' Reply.

2724. Notwithstanding this conclusion, the Tribunal reiterates its declaration that any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgement within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make reparation under international law.[4539]

* * *

4537 Track II Award, paras. 5.240-5.241.

4538 *See* paras. 2000, 2558 above.

4539 Track II Award, para. 10.11.

XII. INJUNCTIVE RELIEF

2725. The Claimants request that the Tribunal order injunctive relief "to wipe out all the consequences of Ecuador's internationally wrongful acts and to achieve the obligations of result that the Tribunal imposed" in its Track II Award.[4540] According to the Claimants, the Respondent continues to fail to comply with the Track II Award, thus exacerbating and increasing the Claimants' damages.[4541]

2726. The Respondent submits that the Claimants are not entitled to further injunctive relief, as such requests are outside the scope of Track III and have already been granted by the Tribunal in its Track II Award.[4542] In any event, the Respondent considers that it has complied with the Tribunal's orders in the Track II Award "to the extent possible under Ecuadorian Law".[4543]

A. THE CLAIMANTS' POSITION

2727. According to the Claimants, the Respondent must cease its "continued refusal" to comply with the Tribunal's Orders and Awards.[4544] The Claimants describe such non-compliance as "habitual" and "deliberate" since the Tribunal issued its First Interim Award in 2012. In the Claimants' submission, the Respondent's arguments "as to its alleged compliance and the alleged impossibility of its compliance" with the Tribunal's Orders and Awards are meritless: the Respondent "is legally obligated to achieve a specific result."[4545]

2728. In particular, the Claimants note that the Respondent has not removed the status of enforceability of the Lago Agrio Judgment.[4546] In the Claimants' submission, the Respondent could have dissolved the enforcement order of the Lago Agrio Judgment (*mandamiento de ejecución*) or made a public statement acknowledging the corruption

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4540 Memorial, para. 161.

4541 Memorial, para. 160.

4542 Counter-Memorial, para. 1342-1343.

4543 Rejoinder, paras. 1920-1925.

4544 Memorial, paras. 156-161. *See also* Reply, para. 116.

4545 Reply, para. 131.

4546 Reply, para. 132.

impacting the Judgment.[4547] Instead, the Respondent has continued to align itself publicly with the LAPs and their counsel, Mr Fajardo, in violation of Articles 29 and 30 of the ILC Articles, pursuant to which the legal consequences of an internationally wrongful act do not affect the continued duty of the responsible State to discharge the breached obligation.[4548]

2729. According to the Claimants, the Respondent's refusal to comply with the Tribunal's Awards and Orders is also evidenced by public statements "from the highest levels of Ecuador's government" made after the issuance of the Track II Award.[4549] For instance, the Claimants allege that: (i) Ecuador's Vice President, Ms María Alejandra Vicuña, described this Arbitration as a "national cause", adding that all Ecuadorians "should condemn the arbitral award";[4550] (ii) Ecuador's Attorney General expressed his "absolute empathy" for the LAPs, announced that the LAPs had met with the Office of Presidency, and confirmed that they "could work together";[4551] and (iii) Vice President Vicuña stated during an interview that Ecuador's fundamental goal was to avoid the enforcement of the Award.[4552]

2730. As further evidence of the Respondent's non-compliance, the Claimants point to the order issued by the Ombudsman's Office of Ecuador in September 2018, whereby it granted a request from Mr Fajardo and directed the Ombudsman's Office of Sucumbíos to "oversee" the enforcement of the Lago Agrio Judgment, which was issued with no notice

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4547 Reply, para. 132.

4548 Memorial, para. 156; Reply, para. 135; **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Arts. 29-30(a).

4549 Memorial, para. 156.

4550 Memorial, para. 157; **C-3063**, Vice President of Ecuador, Maria Alejandra Vicuña's Twitter Account, 8 September 2018, available at https://twitter.com/marialevicuna/status/1038533796705067008.

4551 Reply, para. 135; **C-3084**, Radio Interview of Attorney General Salvador, RADIO CENTRO, 11 September 2018, available at http://www.juiciocrudo.com/video/entrevista-radio-centro-inigo-salvador-11-sep-2018/285 at minute 30.

4552 Memorial, para. 157; **C-3085**, TV Interview of Vice President Maria Alejandra Vicuña, TC TV, 14 September 2018, available at https://www.youtube.com/watch?v=65qnUBp43Cc&feature=youtube.

to Chevron and lacked any reference to the "fraud, bribery, and corruption through which the Judgment was obtained".[4553]

2731. For these reasons, the Claimants request that the Tribunal reach "a finding that Ecuador has breached the obligations of result in §10.13 of the Track II Award and a re-affirmation that they remain binding on Ecuador".[4554]

B. THE RESPONDENT'S POSITION

2732. The Respondent requests that the Tribunal reject the Claimants' request for injunctive relief, which it describes as "duplicative" and going beyond the scope of Track III. In the Respondent's view, pursuant to Procedural Order No. 23, "non-monetary remedies were to be dealt with in Track II only".[4555] The Respondent adds that the Claimants waived any claims for injunctive relief in Track III when, prior to the issuance of the Track II Award, they indicated which of their prayers for relief in the Arbitration remained extant, and "did not highlight a single request for injunctive relief as remaining extant in Track III."[4556]

2733. In any event, the Respondent states that it has not refused to comply with the Track II Award, and has instead "taken all the steps that are legally permissible to fulfil the Tribunal's orders and continues to do so."[4557] The Respondent argues that a formal investigation was initiated against Judge Zambrano, by virtue of communications sent by the State Attorney General regarding the Track II Award to, *inter alia*, the President of the National Assembly, the President of the Republic, the Chief Judge of the Constitutional Court, and the Prosecutor's Office.[4558]

4553 Memorial, para. 158; **C-3064**, Ombudsman's Order of Admission, No. 001-DPE-DPS-2018-001218-KB, 25 September 2018, para. 4.

4554 Track III Hearing, Day 1 (18 August 2022), Claimants' Opening Statement Presentation, Slide 277.

4555 Counter-Memorial, para. 1345; Procedural Order No. 23, 10 February 2014, para. 4.

4556 Counter-Memorial, paras. 1346-1347; Claimants' Letter to the Tribunal, Appendix A – Claimants' Extant Claims for Relief, 19 March 2018.

4557 Rejoinder, para. 1920.

4558 Rejoinder, para. 1920; **R-2144**, Letter of Ecuador's Attorney General to the President of the National Assembly, 19 September 2018; **R-2145**, Letter of Ecuador's Attorney General to President Lenín Moreno, 17

2734. The Respondent also submits that there is no legal mechanism under Ecuadorian law for the Respondent to take action to annul a judgment of an Ecuadorian court with *res judicata* effect that has already been reviewed by all higher instance courts.[4559] Consequently, the Respondent argues that Ecuador has executed the Tribunal's orders in the Track II Award by notifying competent foreign authorities and informing the President of the Provincial Court of Sucumbíos about the Award.[4560] According to the Respondent, "the State Attorney General understands that in accordance with this notification, the Provincial Court of Sucumbíos will not certify any copies of the Lago Agrio Judgment, which are necessary to seek its enforcement abroad."[4561]

2735. In sum, the Respondent considers that while it cannot under Ecuadorian law legally annul the Lago Agrio Judgment, it has taken "concrete steps to comply with the Tribunal's orders in the Second Partial Award" to render the Lago Agrio Judgment unenforceable, while also initiating criminal investigations into the judicial conduct found by this Tribunal to be in violation of the Treaty.[4562]

C. THE TRIBUNAL'S ANALYSIS

2736. The Tribunal's Track II Award sets forth a series of orders constituting corrective measures intended to wipe out all the consequences of the Respondent's internationally wrongful acts, so as to re-establish as far as possible the situation which would have existed if those internationally wrongful acts had not been committed by the Respondent.[4563] In relevant part, the Track II Award reads:

October 2018; **R-2146**, Letter of Ecuador's Attorney General to the General Prosecutor, 17 October 2018; **R-2147**, Letter of Ecuador's Attorney General to the General Prosecutor, 15 January 2019; **R-2148**, Letter of Ecuador's Attorney General to the General Prosecutor, 23 January 2019; **R-2155**, Letter of Ecuador's Attorney General to the Chief Judge of the Provincial Court of Sucumbíos, 8 April 2019; **R-2156**; Letter of Ecuador's Attorney General to the President of the Constitutional Court, 22 April 2019. According to the Respondent, at the date of submission of the Rejoinder, the investigation against Judge Zambrano was still ongoing.

4559 Rejoinder, para. 1923.

4560 Rejoinder, paras. 1921-1922.

4561 Rejoinder, paras. 1921-1922.

4562 Rejoinder, para. 1925.

4563 Track II Award, paras. 9.17-9.18.

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

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

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

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

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

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

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

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

(viii) subject to further order of this Tribunal in Track III, make full reparation in the form of compensation for any injuries caused to the First Claimant and the

> Second Claimant by the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts).[4564]

2737. In Track III, the Claimants request additional injunctive relief "to wipe out all of the consequences of Ecuador's internationally wrongful acts and to achieve the obligations of result that the Tribunal imposed" in the Track II Award.[4565] In particular, the Claimants request an award granting the following relief:

> 6. Ordering Ecuador to use all measures necessary to enjoin enforcement of the Judgment in compliance with the Track II Award;
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> . . .
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> 12. Ordering Ecuador to refrain from providing any funding or support to the LAPs or Related Parties that may assist or support any efforts to seek the recognition or enforcement of the Judgment within or without Ecuador;
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> 13. Ordering Ecuador to cease violations of Procedural Order Nos. 17, 26, 58, 64, and 67;
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> 14. Ordering Ecuador immediately to cease its continuing violations of the Treaty and the Tribunal's Awards;
>
> 15. Ordering Ecuador to protect the rights of Claimants' lawyers, experts, witnesses, litigation vendors, consultants, and contractors involved in any litigation or proceedings relating to the Lago Agrio Judgment, whether within or without Ecuador, including this arbitration, the proceedings in the Aguinda litigation in Ecuador, Southern District of New York proceedings, Section 1782 proceedings, recognition and enforcement actions, Gibraltar proceedings and others discussed in this Memorial and its attachments and to take all steps necessary to ensure they are not subject to arbitrary action (including searches, seizure of person or belongings, arrest or detention), harassment, retaliation, intimidation, threats or public derogatory statements;[4566]

2738. In addition, at the Track III Hearing the Claimants made a request that the Tribunal reach "a finding that Ecuador has breached the obligations of result in §10.13 of the Track II Award and a re-affirmation that they remain binding on Ecuador".[4567]

4564 Track II Award, para. 10.13.

4565 Memorial, para. 161.

4566 Reply, para. 1212. The Tribunal notes that the Claimants also identified request for relief (11) in paragraph 1212 of their Reply as a request for injunctive relief (*see* Reply, para 141, fn 301). Request for relief (11) was addressed by the Tribunal as part of its analysis of the Claimants' request for indemnification in Section XI above.

4567 Track III Hearing - Claimants' Opening Statement Presentation, Slide 277.

2739. At the outset, the Tribunal confirms and restates with full force and effect the Orders set out in paragraph 10.13 of the Track II Award, which are reproduced in paragraph 2736 above. As set out there and later re-confirmed by the Tribunal in its Decision on the Request for Interpretation, the Respondent is required to comply with such orders to the satisfaction of the Tribunal and as unconditional obligations of result – that is, the Respondent must secure the specified results, not merely make its best efforts to secure those results.[4568]

2740. Foremost among the obligations of result incumbent upon the Respondent is the obligation to take immediate steps, of its own choosing, to remove the status of enforceability from the Lago Agrio Judgment.[4569]

2741. The Respondent submits that "there is no legal mechanism under Ecuadorian law for the Respondent to take action to annul a judgment of an Ecuadorian court with *res judicata* effect, which has been reviewed by all higher instance courts, including the Constitutional Court."[4570] However, while it "cannot legally annul the Lago Agrio Judgment", the Respondent submits that it "did take concrete steps to comply with the Tribunal's orders in the Second Partial Award toward rendering the Lago Agrio Judgment unenforceable."[4571]

2742. Notably, the Respondent states that (i) Ecuador's Attorney General's office briefed the National Assembly, the President of the Republic, the Chief Judge of the Constitutional Court, and the Chief Judge of the court sitting in Sucumbíos on the content of the Track II Award so that they could "consider actions to take within the scope of their powers" in connection with the Award;[4572] (ii) an "investigation process into the wrongdoing identified by the Tribunal in its Track II Award began against Judge Zambrano" and was ongoing at the time of the filing of the Rejoinder;[4573] (iii) foreign authorities have been advised of the Tribunal's findings in relation to the Lago Agrio Judgment by sending

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4568 Decision on Request for Interpretation, para. 16.

4569 Track II Award, para. 10.13(i).

4570 Rejoinder, para. 1923.

4571 Rejoinder, para. 1925.

4572 Rejoinder, para. 1920.

4573 Rejoinder, para. 1921. The Rejoinder was filed on 20 May 2022.

notifications to "competent authorities" in Argentina, Brazil, and Canada;[4574] and (iv) following Ecuador's Attorney General's notification to the President of the Provincial Court of Sucumbíos of the content of the Track II Award, "the State Attorney General understands that in accordance with this notification, the Provincial Court of Sucumbíos will not certify any copies of the Lago Agrio Judgment, which are necessary to seek its enforcement abroad."[4575]

2743. The Tribunal does not consider that the steps taken by the Respondent towards removing the status of enforceability of the Lago Agrio Judgment are sufficient to fulfil the terms of the Tribunal's Orders set out in paragraph 10.13 of the Track II Award. In the Tribunal's view, the Respondent's failure to render the Lago Agrio Judgment unenforceable to this date reflects a continuing pattern originating with the Interim Awards Breach, which the Respondent committed by rendering the Lago Agrio Judgment final, enforceable, and subject to execution within Ecuador no later than 3 August 2012 (upon its judiciary's certifying the Lago Agrio Judgment's enforceability), in violation of the First and Second Interim Awards.[4576] In addition, the Claimants have identified multiple ways in which, in their submission, the Respondent could have met this obligation after the issuance of the Track II Award, such as by Ecuador's Attorney General filing a motion to stay or dissolve the *mandamiento de ejecución* (the Lago Agrio Judgment's enforcement order) issued by the Provincial Court of Justice of Sucumbíos on 3 August 2012, or the courts dissolving the enforcement order on their own initiative.[4577] In the circumstances, the Tribunal is left with persisting doubts as to whether the Respondent has exhausted all efforts to comply with the Tribunal's Orders and Awards in this Arbitration.

2744. Having said that, the adequacy of the Respondent's efforts is immaterial to the assessment of compliance with the Tribunal's order to remove the status of enforceability from the Lago Agrio Judgment (an unconditional obligation of result). In this regard, it appears undisputed that the steps undertaken by the Respondent in connection with the Lago

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4574 Rejoinder, para. 1921.

4575 Rejoinder, paras. 1921-1922.

4576 Fourth Interim Award, paras. 78-79. *See also* Section VII.B above.

4577 Reply, para. 132, Letter from the Claimants to the Tribunal dated 4 May 2020.

Agrio Judgment fall short of achieving the result mandated by the Tribunal in paragraph 10.13(i) of the Track II Award. The alleged impediment to the attainment of this result – specifically, the absence of a legal mechanism under Ecuadorian law to remove the status of enforceability from the Lago Agrio Judgment – even if established, would not excuse the failure to fulfil the obligations under the Orders set out in paragraph 10.13 of the Track II Award. Pursuant to Article 32 ("Irrelevance of Internal Law") of the ILC Articles, "[t]he responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this Part". Such obligations include the obligation to make full reparation for the injury caused by the Respondent's internationally wrongful acts in the form mandated by the Tribunal.[4578]

2745. Accordingly, the Tribunal finds that as of the date of this Award, the Respondent has failed to meet its obligation to remove the status of enforceability from the Lago Agrio Judgment through steps of its own choosing, as required under paragraph 10.13(i) of the Track II Award. The Lago Agrio Judgment's ongoing enforceability under Ecuadorian law further reflects the Respondent's failure to meet the unconditional obligations of result set forth in paragraphs 10.13(ii), (vi), and (vii) of the same Award.[4579]

2746. The Respondent remains bound to achieve the unconditional obligations of result identified in paragraphs 10.13(i), (ii), (vi), and (vii) of the Track II Award. To this extent, the Tribunal grants request for relief (6), as set forth in paragraph 2737 above.

2747. The Tribunal turns now to request for relief (12) set forth in paragraph 2737 above, which seeks an award "[o]rdering Ecuador to refrain from providing any funding or support to the LAPs or Related Parties that may assist or support any efforts to seek the recognition or enforcement of the Judgment within or without Ecuador".

2748. Save as otherwise indicated earlier in this Section, the Tribunal declines to grant request for relief (12). Paragraph 10.13(ii) of the Track II Award already requires, as an obligation of result, that the Respondent

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4578 **CLA-291**, ILC Articles on Responsibility of States for Internationally Wrongful Acts (updated compilation) (2001), Arts. 31, 32.

4579 *See* para. 2736 above.

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

2749. As framed by the Claimants, request for relief (12) is for an order that the Respondent take *specific* steps – *i.e.*, "refrain from providing any funding or support to the LAPs or Related Parties" – vis-à-vis third parties who may seek to have the Lago Agrio Judgment recognized or enforced within or without Ecuador, or which may support those efforts. As such, granting request for relief (12) would contradict the Tribunal's determination that the Respondent must take steps *of its own choosing* to achieve the obligation of result identified in paragraph 10.13(ii) of the Track II Award, which, as already noted, remains otherwise in full force and effect.

2750. In turn, request for relief (13) set forth in paragraph 2737 above is for an award "[o]rdering Ecuador to cease violations of Procedural Order Nos. 17, 26, 58, 64, and 67". In the Tribunal's view, the Claimants have failed to sufficiently particularize the violations of those orders purportedly committed by the Respondent. Request for relief (13) is accordingly rejected. The Tribunal reiterates, however, that the confidentiality order set out in Procedural Order No. 58 dated 22 May 2019 (and extended in Procedural Order No. 64 dated 29 May 2020) shall remain in effect for all Track III materials until expressly abrogated.[4580]

2751. The Tribunal turns next to request for relief (14) set forth in paragraph 2737 above, which seeks an award "[o]rdering Ecuador immediately to cease its continuing violations of the Treaty and the Tribunal's Awards." As already noted, the Track II Award includes a series of declarations and orders constituting corrective measures intended to wipe out all the consequences of the Respondent's internationally wrongful acts – that is, the Respondent's "violations" for the purposes of request for relief (14).[4581] Such measures include the orders set out in paragraph 10.13 of the Track II Award, which the Respondent must meet as unconditional obligations of result to the Tribunal's satisfaction. As also

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4580 Procedural Order No. 67, 28 September 2020, para. 19.

4581 Track II Award, paras. 9.17-9.18.

noted, the Tribunal confirms and restates with full force and effect such orders.[4582] In the circumstances, save as otherwise indicated in paragraphs 2745-2746 above, the Tribunal believes that granting additional relief pursuant to request for relief (14) would be duplicative of its prior orders and is therefore unnecessary. Request for relief (14) is accordingly rejected.

2752. Lastly, the Tribunal turns to request for relief (15) set forth in paragraph 2737 above. The Tribunal is unable to grant request for relief (15) in the terms in which it has been framed by the Claimants. Among other things, the Claimants have failed to particularize the specific "rights of Claimants' lawyers, experts, witnesses, litigation vendors, consultants, and contractors" the Respondent should be ordered to protect. The Claimants have also failed to identify any instance of "arbitrary action" that is either currently in progress or imminently threatened against the individuals referenced in request for relief (15). This request for relief is therefore rejected.

2753. In sum, for the above reasons, the Tribunal:

(i) Confirms and restates with full force and effect the orders set out in paragraph 10.13 of the Track II Award;

(ii) Declares that, by failing to remove the status of enforceability from the Lago Agrio Judgment through steps of its own choosing to this date, 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;

(iii) Reiterates that, pursuant to Procedural Order No. 67, the confidentiality order set out in Procedural Order No. 58 (and extended in Procedural Order No. 64) shall remain in effect for all Track III materials until expressly abrogated;

(iv) Save as otherwise indicated in paragraphs 2745-2746 above, rejects requests for relief (12), (13), (14), and (15) set out in paragraph 1212 of the Claimants' Reply; and

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4582 *See* para. 2739 above.

(v) Recalls that, as noted in its Decision on Interpretation, if it were alleged in this Arbitration that the Respondent was not complying with any part of paragraph 10.13 of the Track II Award and that such non-compliance affected any further relief to be ordered by the Tribunal in this Arbitration, the Tribunal would, on the application of any Party, decide on the matter as may be appropriate.[4583]

* * *

[4583] Decision on Request for Interpretation, para. 18.

XIII. RELIEF

A. INTRODUCTION

2754. The Tribunal here addresses the Claimants' and the Respondent's material requests for relief in Track III as set out in Section IV above, in the light of the decisions taken in this Award, together with the Tribunal's earlier Awards, Decisions, and Orders. These requests are taken from the Parties' respective communications of 20 October 2025, wherein they indicated which of their requests of relief made in this Arbitration remain extant in Track III.[4584]

2755. The Tribunal has fully considered the Parties' respective written and oral submissions regarding their respective requests for relief. Given the several decisions made by the Tribunal in this Award, it is unnecessary to set out these submissions for the purpose of this Award, beyond the Parties' specific requests for relief.

B. THE CLAIMANTS' REQUESTS FOR RELIEF

2756. For this Track III, in light of its decisions in this Award, the Tribunal addresses below the material relief sought by the Claimants in the form of specific orders highlighted in yellow, blue and green in their marked-up Enclosure 1 to their letter of 20 October 2025 and recited in Section IV.A above. As noted there, the Claimants highlighted only requests for relief included in their Reply, as set out in paragraph 111 above. For each of the below requests, the Tribunal identifies the specific subparagraph of paragraph 1212 of the Claimants' Reply where the request appears.

2757. Paragraph 1212 of the Claimants' Reply: "*To "make full reparation in the form of compensation for any injuries caused to the First Claimant and the Second Claimant by the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts)," in addition to the Track II relief already ordered, Claimants request an Award on Track III granting the following relief:*"

[4584] Letter from the Claimants to the Tribunal dated 20 October 2025, Enclosure 1; Letter from the Respondent to the Tribunal dated 20 October 2025, Enclosure 1.

2758. This general request is granted in principle, on the terms and subject to the determinations that follow.

2759. Request for Relief No. (1): "*Awarding Claimants all of their costs in Tracks I, II, and III of these proceedings*".

2760. This request is not granted in this Award, any such costs being issues allocated to Track IV as set out in paragraph 95 above.

2761. Request for Relief No. (2)(a): "*Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: US$ 161,525,161.89 in relation to the Lago Agrio Litigation".*

2762. This request is granted to the extent that Chevron is awarded USD 41,587,664.54 as damages in connection with the Lago Agrio Litigation, as set out in paragraph 2296 above.

2763. Request for Relief No. (2)(b): "*Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 62,363,592.93 in relation to the Section 1782 Actions".*

2764. This request is granted to the extent that Chevron is awarded USD 8,728,717.69 as damages in connection with the Section 1782 Proceedings, as set out in paragraph 2296 above.

2765. Request for Relief No. (2)(c): "*Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any* jurisdiction*, including: . . . US$ 323,180,099.51 in relation to the RICO Action".*

2766. This request is granted to the extent that Chevron is awarded USD 33,322,257.24 as damages in connection with the RICO Litigation, as set out in paragraph 2296 above.

However, any sums collected by Chevron in connection with the *Amazonia* Damages Judgments, as well as any costs Chevron may in the future collect in the RICO Litigation, must be deducted from the amount of compensation due to Chevron, as set out in paragraph 1523 above.

2767. Request for Relief No. (2)(d): "*Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 3,582,889.44 in relation to the Ecuador Enforcement Action*".

2768. This request is granted to the extent that Chevron is awarded USD 1,261,521.19 as damages in connection with the Ecuador Enforcement Proceedings, as set out in paragraph 2296 above.

2769. Request for Relief No. (2)(e): "*Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 25,695,438.12 in relation to the Argentina Enforcement Action".*

2770. This request is granted to the extent that Chevron is awarded USD 10,469,299.38 as damages in connection with the Argentina Enforcement Proceedings, as set out in paragraph 2296 above.

2771. Request for Relief No. (2)(f): *Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 20,668,398.44 in relation to the Brazil Enforcement Action".*

2772. This request is granted to the extent that Chevron is awarded USD 14,136,263.73 as damages in connection with the Brazil Recognition Proceedings, as set out in paragraph 2296 above.

2773. Request for Relief No. (2)(g): *Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 39,798,158.90 in relation to the Canada Enforcement Action".*

2774. This request is granted to the extent that Chevron is awarded USD 30,047,127.12 as damages in connection with the Canada Enforcement Proceedings, as set out in paragraph 2296 above.

2775. Request for Relief No. (2)(h): *"Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 26,166,897.09 in relation to defense against recognition and enforcement in other countries and general recognition and enforcement work".*

2776. This request is granted to the extent that Chevron is awarded USD 14,282,909.81 as damages in connection with the Costs of Planning Against Potential Enforcement in Other Jurisdictions category of damages, as set out in paragraph 2296 above.

2777. Request for Relief No. (2)(i): *"Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 38,421,547.26 in relation to the Gibraltar Actions and General Offensive Measures".*

2778. This request is granted to the extent that Chevron is awarded USD 26,566,930.75 as damages in connection with the Gibraltar Proceedings, as set out in paragraph 2296 above.

2779. Request for Relief No. (2)(j): *"Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 47,213,917.33 in relation to the general defense against the Lago Agrio fraud and the resulting fraudulent Judgment".*

2780. This request is not granted, as set out in paragraph 1980 above.

2781. Request for Relief No. (2)(k): *"Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 6,933,905.69 in relation to the Ecuadorian Criminal Proceedings".*

2782. This request is not granted, as set out in paragraph 2001 above.

2783. Request for Relief No. (2)(l): *"Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 34,653,249.61 in relation to the BIT Non-Counsel-of-Record Fees".*

2784. This request is not granted, as set out in paragraph 2052 above. The Tribunal defers to Track IV its determination of the Claimants' costs claim under Articles 38 and 40 of the UNCITRAL Arbitration Rules in respect of the legal fees and expenses falling under the damages category "Treaty Arbitration Costs incurred by Non-Counsel of Record".

2785. Request for Relief No. (2)(m): *"Awarding Claimants all of their damages, including all costs and attorneys' fees incurred by Claimants in uncovering and proving the Judgment fraud, and preparing for and defending against enforcement of the Lago Agrio Judgment in any jurisdiction, including: . . . US$ 3,676,711.53 in relation to the Dutch Set-Aside Proceedings".*

2786. This request is not granted, as set out in paragraph 2030 above.

2787. Request for Relief No. (3)(a): "*Awarding Claimants: US$ 85,315,652 in compensation for the Ecuador IP Losses".*

2788. This request is not granted, as set out in paragraph 2533 above.

2789. Request for Relief No. (3)(b): "*Awarding Claimants: . . . US$ 13 million in compensation for the Argentina Embargo Losses".*

2790. This request is not granted, as set out in paragraph 2349 above.

2791. Request for Relief No. (3)(c): "*Awarding Claimants: . . . Moral Damages in the amount that the Tribunal deems just and prope*r".

2792. This request is not granted, as set out in paragraph 2564 above.

2793. Request for Relief No. (4): "*Ordering Ecuador to indemnify and hold harmless Claimants for any and all damages, including fees and costs, arising from Ecuador's violation of any injunctive relief this Tribunal has granted or will in the future grant*".

2794. This request is not granted, as set out in paragraph 2723 above.

2795. Request for Relief No. (5): "*Ordering Ecuador to indemnify and hold harmless Claimants from and against any costs incurred in responding to the public relations campaign by which the LAPs' lawyers and/or Ecuador target Chevron*".

2796. This request is not granted, as set out in paragraph 2723 above.

2797. Request for Relief No. (6): "*Ordering Ecuador to use all measures necessary to enjoin enforcement of the Judgment in compliance with the Track II Award*".

2798. This request, albeit in different forms of wording, has already been addressed above in paragraphs 2739-2745 and 2753 above. It is therefore unnecessary to address it here separately.

2799. Request for Relief No. (7): "*Ordering that, in the event that any court orders the recognition or enforcement of the Judgment, Ecuador must satisfy the Judgment directly*".

2800. In respect of this request, the Tribunal reiterates (i) its declaration in paragraph 10.11 of the Track II Award that any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make reparation under international law; (ii) its order in paragraph 10.13(iv) of the Track II Award that the Respondent shall abstain from collecting or receiving, directly or indirectly, any proceeds from the enforcement or recognition of any part of the Lago Agrio Judgment (as also

decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) within or without Ecuador; and (iii) its order in paragraph 10.13(v) of the Track II Award that the Respondent shall return promptly to the First Claimant any such proceeds that (notwithstanding the foregoing) come into the Respondent's custody, possession or control. Save as otherwise indicated here, this request is not granted, as set out in paragraph 2723 above.

2801. Request for Relief No. (8): "*Awarding Claimants any sums that the nominal LAPs or any other party collect against Claimants or their affiliates in connection with enforcing the Judgment*".

2802. In respect of this request, the Tribunal reiterates (i) its declaration in paragraph 10.11 of the Track II Award that any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make reparation under international law; (ii) its order in paragraph 10.13(iv) of the Track II Award that the Respondent shall abstain from collecting or receiving, directly or indirectly, any proceeds from the enforcement or recognition of any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) within or without Ecuador; and (iii) its order in paragraph 10.13(v) of the Track II Award that the Respondent shall return promptly to the First Claimant any such proceeds that (notwithstanding the foregoing) come into the Respondent's custody, possession or control. Save as otherwise indicated here, this request is not granted, as set out in paragraph 2723 above.

2803. Request for Relief No. (9): "*Awarding Claimants contingent damages in the amount of the Lago Agrio Judgment, contingent on the enforcement of the Judgment and to the extent enforced*".

2804. This request is not granted, as set out in paragraph 2723 above.

2805. Request for Relief No. (10): "*Ordering Ecuador to indemnify and hold harmless Claimants from and against any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) incurred in any jurisdiction by Claimants*

or their affiliates arising out of: (i) any and all attempts to seek the recognition or enforcement of the Judgment within or without Ecuador (including any sums collected in connection with the Judgment); and (ii) the Lago Agrio Litigation in Ecuador and any related Ecuadorian Criminal Proceedings".

2806. This request is not granted, as set out in paragraph 2723 above.

2807. Request for Relief No. (11): "*Ordering Ecuador to indemnify and hold harmless Claimants from and against any loss, expense, liability, damage or cost (including litigation costs and attorneys' and experts' fees) arising from Ecuador's violations of the Tribunal's Orders and Awards*".

2808. This request is not granted, as set out in paragraph 2723 above.

2809. Request for Relief No. (12): "*Ordering Ecuador to refrain from providing any funding or support to the LAPs or Related Parties that may assist or support any efforts to seek the recognition or enforcement of the Judgment within or without Ecuador*".

2810. This request is not granted except as set out in paragraph 2753(iv) above.

2811. Request for Relief No. (13): "*Ordering Ecuador to cease violations of Procedural Order Nos. 17, 26, 58, 64, and 67*".

2812. The Tribunal reiterates that, pursuant to Procedural Order No. 67, the confidentiality order set out in Procedural Order No. 58 (and extended in Procedural Order No. 64) shall remain in effect for all Track III materials until expressly abrogated. Save as aforesaid, this request is not granted.

2813. Request for Relief No. (14): "*Ordering Ecuador immediately to cease its continuing violations of the Treaty and the Tribunal's Awards*".

2814. This request is not granted except as set out in paragraph 2753(iv) above.

2815. Request for Relief No. (15): "*Ordering Ecuador to protect the rights of Claimants' lawyers, experts, witnesses, litigation vendors, consultants, and contractors involved in any litigation or proceedings relating to the Lago Agrio Judgment, whether within or without Ecuador, including this arbitration, the proceedings in the Aguinda litigation in*

Ecuador, Southern District of New York proceedings, Section 1782 proceedings, recognition and enforcement actions, Gibraltar proceedings and others discussed in this Memorial and its attachments and to take all steps necessary to ensure they are not subject to arbitrary action (including searches, seizure of person or belongings, arrest or detention), harassment, retaliation, intimidation, threats or public derogatory statements".

2816. This request is not granted, as set out in paragraph 2752(iv) above.

2817. Request for Relief No. (16): "*Awarding Claimants' costs incurred in this Arbitration until completion*".

2818. This request is not granted in this Award, any such costs being issues allocated to Track IV as set out in paragraph 95 above.

2819. Request for Relief No. (17): "*Awarding both compound pre- and post-award interest until the date of payment*".

2820. This request is granted to the extent set out in paragraphs 2687-2688 above.

2821. Request for Relief No. (18): "*Such other and further relief as the Tribunal shall deem just and proper.*"[4585]

2822. This general request has been addressed by the Tribunal in its several decisions above. To the extent necessary and appropriate, the Tribunal defers to Track IV this request as to any further relief or undecided issues outstanding from Track I, IB, II, and III.

C. THE RESPONDENT'S REQUESTS FOR RELIEF

2823. For this Track III, in light of its decisions in this Award, the Tribunal addresses below the material relief sought by the Respondent in the form of specific orders identified as "Track III" in blue and/or "Track IV" in green in its marked-up Enclosure 1 to its letter of 20 October 2025 and recited in Section IV.B above. For each of the below requests,

[4585] Reply, para. 1212. *See* fn 2079: "The relief requested herein is not intended to limit the requests for relief made by Claimants in their other Memorials, which are incorporated herein by reference to the extent extant and not already granted."

the Tribunal identifies the Respondent's submission containing each request, as well as the specific paragraph and subparagraph where the request appears.

1. Requests for Relief in Track 1 Counter-Memorial dated 3 July 2012

2824. Request for Relief in paragraph 263[7]: "*Declare further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties*".

2825. This request is granted only to the extent that the Tribunal rejects the Claimants' requests for relief (4), (5), (7), (8), (9), (10), and (11) set out in paragraph 1212 of the Claimants' Reply, concerning indemnification, as indicated in paragraph 2723 above. Save as aforesaid, this request is not granted.

2826. In addition, the Tribunal confirms and restates with full force and effect the orders set out in paragraph 10.13 of the Track II Award, including, without limitation (i) its order in paragraph 10.13(ii) that the Respondent shall take immediate steps, of its own choosing, to preclude any of the Lago Agrio Plaintiffs, any "trust" purporting to represent their interests (including the "Frente de Defensa La Amazonia"), any of the Lago Agrio Plaintiffs' representatives, and any non-party funder from enforcing any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts), directly or indirectly, whether by attachment, arrest, interim injunction, execution or howsoever otherwise; (ii) its order in paragraph 10.13(iii) that on notice from the First or Second Claimants, the Respondent advise promptly in writing any State (including its judicial branch), where the Lago Agrio Plaintiffs may be seeking directly or indirectly, now or in the future, the enforcement or recognition of any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) of this Tribunal's declarations and orders regarding the Respondent's internationally wrongful acts comprising a denial of justice resulting from the Lago Agrio Judgment (as thus decided); (iv) its order in paragraph 10.13(iv) that the Respondent abstain from collecting or receiving, directly or indirectly, any proceeds from the enforcement or recognition of any part of the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) within or without Ecuador; (v) its order in paragraph 10.13(v) that the Respondent return promptly to the First Claimant any such proceeds that (notwithstanding the foregoing) come into the

Respondent's custody, possession or control; and (vi) its order in paragraph 10.13(vii) that the Respondent comply with its obligations towards the First Claimant and the Second Claimant as "Releasees" under the 1995 Settlement Agreement, in accordance with Article II(3)(c) of the Treaty.

2827. Request for Relief in paragraph 263[9]: "*Award Respondent all costs and attorneys' fees in connection with this phase of the proceedings*".

2828. This request is not granted in this Award, any such costs being issues allocated to Track IV as set out in paragraph 95 above.

2829. Request for Relief in paragraph 263[10]: "*Award Respondent any further relief that the Tribunal deems just and proper*".

2830. To the extent necessary and appropriate, the Tribunal defers to Track IV any further relief or undecided issues outstanding from Track I, IB, II, and III.

2. Requests for Relief in Track 1 Rejoinder Memorial dated 26 October 2012

2831. Request for Relief in paragraph 192[1]: "*Denies all the relief and each remedy requested by Claimants in relation to Track 1, including the relief and remedies requested in Paragraph 272 of Claimants' Reply on the Merits*".

2832. This general request, as well as other similar requests identified below, have been addressed by the Tribunal in its several decisions in this Award, as well as earlier awards and decisions. To the extent necessary and appropriate, the Tribunal defers to Track IV this request as to any further relief or undecided issues outstanding from Track I, IB, II, and III.

2833. Request for Relief in paragraph 192[8]: "*Declares further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by, or judgments or other relief obtained by, third parties including the claims filed by the Lago Agrio Plaintiffs, the Lago Agrio Judgment, and the enforcement thereof*".

2834. The Tribunal reiterates its ruling in paragraphs 2825-2826 above in connection with this request.

2835. Request for Relief in paragraph 192[11]: "*Awards Respondent all costs and attorneys' fees incurred by Respondent in connection with this phase of the proceedings*".

2836. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

2837. Request for Relief in paragraph 192[12]: "*Awards Respondent any further relief that the Tribunal deems just and proper*".

2838. The Tribunal reiterates its ruling in paragraph 2830 above in connection with this request.

3. Requests in Track 1 Supplementary Counter-Memorial dated 31 March 2014

2839. Request for Relief in paragraph 143(a): "*Denies all the relief and each remedy requested by Claimants in relation to Track 1, including the relief and remedies requested in Paragraph 32 of Claimants' Supplemental Track 1 Memorial*".

2840. The Tribunal reiterates its ruling in paragraph 2832 above in connection with this request.

2841. Request for Relief in paragraph 143(g): "*Awards Respondent all costs and attorneys' fees incurred by Respondent in connection with this phase of the proceedings*".

2842. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

2843. Request for Relief in paragraph 143(h): "*Awards Respondent any further relief that the Tribunal deems just and proper*".

2844. The Tribunal reiterates its ruling in paragraph 2830 above in connection with this request.

4. Requests in Track II Counter Memorial on the Merits dated 18 February 2013

2845. Request for Relief in paragraph 542(f): "*Otherwise dismissing all of Claimants' claims against the Republic in these arbitration proceedings as meritless*".

2846. The Tribunal reiterates its ruling in paragraph 2832 above in connection with this request.

2847. Request for relief in paragraph 542(g): "*Awarding all costs and attorneys' fees incurred by the Republic in this arbitral proceeding*".

2848. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

2849. Request for relief in paragraph 542(h): "*Any other and further relief that the Tribunal deems just and proper*".

2850. The Tribunal reiterates its ruling in paragraph 2830 above in connection with this request.

2851. Request for relief in paragraph 545: "T*he Republic reserves its rights to supplement its pleadings and request for relief*".

2852. The Tribunal takes note of this reservation of rights.

5. Requests in Track II Rejoinder on the Merits dated 16 December 2013

2853. Request for relief in paragraph 387(a): "*Denies all the relief and each remedy requested by Claimants in relation to Track II, including the relief and remedies requested in Paragraph 424 of Claimants' Amended Track II Reply on the Merits*".

2854. The Tribunal reiterates its ruling in paragraph 2832 above in connection with this request.

2855. Request for relief in paragraph 387(h): "*Alternatively, even if any of Claimants' claims are upheld, orders the arbitration proceedings to continue to Track 3, so that the Tribunal may assess what Chevron's liability should have been for the claims asserted in Lago Agrio so that the Tribunal may fashion a final award that takes into consideration such liability*".

2856. The Tribunal recalls its determination, set out in paragraphs 7.37 to 7.45 of the Track II Award, that the Respondent (i) has no standing to bring a cross-claim for environmental damage caused to individual plaintiffs alleging personal harm in the Lago Agrio Litigation; and (ii) the Tribunal has no jurisdiction under the Treaty to decide upon the merits of these individual plaintiffs' claims for personal harm against Chevron (not being diffuse claims).

2857. To the extent Respondent seeks to offset the Claimants' damages claim on account of environmental liability arising from claims brought against Chevron in the Lago Agrio Litigation, the Tribunal recalls that, as noted in paragraph 191 above, during the Hearing on a Partial Award held in March 2021 Counsel for the Respondent clarified that the Respondent is "not seeking any offset against [the Claimants'] legal costs damages claim

for any environmental liability."[4586] In turn, in its Partial Award on Track III, the Tribunal ruled that its past findings preclude an offset based on an indemnification order.[4587]

2858. For these reasons, this request is not granted. For completeness, however, the Tribunal also recalls its rulings in paragraphs 128-167 and 188 of the Partial Award on Track III, as well as paragraphs 378-395 and 731-738 above, concerning the Tribunal's determination of the applicable Treaty-compliant but-for scenario and its impact on the Claimants' damages claims.

2859. Request for relief in paragraph 387(i): "*Declares further that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties*."

2860. The Tribunal reiterates its ruling in paragraphs 2825-2826 above in connection with this request.

2861. Request for relief in paragraph 387(j): "*Declares that the 1995 Settlement Agreement has no effect on the claims brought in the Lago Agrio Litigation*".

2862. This request is not granted, as set out, *inter alia*, in paragraphs 9.102, 9.104, 9.106, 9.108, 9.116, 9.118, and 10.7-10.9 of the Track II Award.

2863. Request for relief in paragraph 387(k): "*Otherwise dismisses all of Claimants' claims against the Republic in these arbitration proceedings as meritless*".

2864. The Tribunal reiterates its ruling in paragraph 2832 above in connection with this request.

2865. Request for relief in paragraph 387(l): "*Orders, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon*".

2866. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

4586 Partial Award on Track III, para. 185.

4587 Partial Award on Track III, para. 142.

2867. Request for relief in paragraph 387(m): "*Awards any other and further relief that the Tribunal deems just and proper*".

2868. The Tribunal reiterates its ruling in paragraph 2830 above in connection with this request.

2869. Request for relief in paragraph 388: "*The Republic reincorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial on the Merits to the extent that such Request remains pending*."

2870. To the extent relevant, the Tribunal reiterates its rulings in paragraph 2832 above in connection with this request.

2871. Request for relief in paragraph 389: "*The Republic reserves its rights to supplement its pleadings and request for relief*."

2872. The Tribunal takes note of this reservation of rights.

6. Requests in Track II Supplemental Counter-Memorial dated 7 November 2014

2873. Request for relief in paragraph 481(c): "*Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation.*"

2874. The Tribunal reiterates its ruling in paragraph 2862 above in connection with this request.

2875. Request for relief in paragraph 481(e): "*Denying all the relief and each remedy requested by Claimants in relation to Track II, including the relief requested in Paragraph 199 of their Supplemental Track II Memorial on the Merits*".

2876. The Tribunal reiterates its ruling in paragraph 2832 above in connection with this request.

2877. Request for relief in paragraph 482(b): "*Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants' request for attorneys' fees incurred in any enforcement action in any jurisdiction*".

2878. The Tribunal reiterates its ruling in paragraphs 2825-2826 above in connection with this request.

2879. Request for relief in paragraph 482(c): "*Declares that Claimants are not entitled to moral damages*".

2880. This request is granted, as set out in paragraph 2564 above.

2881. Request for relief in paragraph 483: "*In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper.*"

2882. The Tribunal reiterates its rulings in paragraphs 2828 and 2830 above in connection with this request.

2883. Request for Relief in paragraph 484: "*The Republic incorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial and Rejoinder on the Merits to the extent that such Requests remain pending.*"

2884. To the extent relevant, the Tribunal reiterates its rulings in paragraph 2832 above in connection with this request.

7. Requests in Track II Supplemental Rejoinder on the Merits dated 17 March 2015

2885. Request for relief in paragraph 446(c): "*Declaring that Claimants do not possess the rights they claim to have under the 1995 Settlement Agreement, the 1998 Final Release, and/or the 1996 Local Settlements in connection with the Lago Agrio Litigation*".

2886. The Tribunal reiterates its ruling in paragraph 2862 above in connection with this request.

2887. Request for relief in paragraph 446(e): "*Denying all the relief and each remedy requested by Claimants in relation to Track II, including the relief requested in Paragraph 435 of their Supplemental Track II Reply*".

2888. The Tribunal reiterates its ruling in paragraph 2832 above in connection with this request.

2889. Request for relief in paragraph 447(b): "*Declares that the Respondent is under no obligation to indemnify, protect, defend or otherwise hold Claimants harmless against claims by third parties, including but not limited to, Claimants' request for attorneys' fees incurred in any enforcement action in any jurisdiction*".

2890. The Tribunal reiterates its ruling in paragraphs 2825-2826 above in connection with this request.

2891. Request for relief in paragraph 447(c): "*Declares that Claimants are not entitled to moral damages*".

2892. The Tribunal reiterates its ruling in paragraph 2880 above in connection with this request.

2893. Request for relief in paragraph 448: "*In all events, the Republic requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Claimants be ordered to pay all costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the cost of the Republic's legal representation, plus pre-award and post-award interest thereon. The Republic also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper*".

2894. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

2895. Request for Relief in paragraph 449: "*The Republic incorporates by reference its Request for Relief in Track I and in its Track II Counter-Memorial, Rejoinder, and Supplemental Counter- Memorial, to the extent that such Requests remain pending.*"

2896. To the extent relevant, the Tribunal reiterates its rulings in paragraph 2832 above in connection with this request.

8. Requests in Submission on Costs dated 28 November 2018

2897. In this Submission on Costs, the Respondent claimed a total of USD 72,825,262.65 for legal fees and costs, while reserving its right to update this amount. In this respect, the Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

9. Requests in Counter-Memorial on Damages dated 28 February 2020

2898. Request for Relief in paragraph 1382(a): "*Denying all the relief and each remedy requested by Claimants in paragraph 479 of their Memorial on Damages and paragraph 1212 of their Reply*".

2899. This request is not granted, subject to the Tribunal's declarations and orders in Section XIV below.

2900. Request for Relief in paragraph 1382(b): "*Should the Tribunal consider that its Interim Awards have not been superseded by the Second Partial Award on Track II, granting Respondent's application of 1 March 2013 for "Reconsideration of the First, Second and Fourth Interim Awards" and vacating those Awards*".

2901. This request is not granted. As noted in paragraph 415 above, the Tribunal declines to reconsider and instead re-confirms that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law.

2902. Request for Relief in paragraph 1382(c): "*Pursuant to Article 40 of the UNCITRAL Arbitration Rules, ordering Claimants to pay all the costs and expenses of this arbitration proceeding, including the fees and expenses of the Tribunal and the costs of Respondent's legal representation and assistance, plus pre-award and post-award interest thereon*."

2903. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

2904. Request for Relief in paragraph 1383: "*Respondent also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper*".

2905. The Tribunal reiterates its ruling in paragraph 2830 above in connection with this request.

10. Requests in Response to the Claimants' Request for a Partial Award dated 19 May 2020

2906. Request for Relief in paragraph 214(1): "*Reject the relief sought in paragraph 175 of the Claimants' Request for a Partial Award*".

2907. The Tribunal recalls that paragraph 175 of the Claimants' Request for a Partial Award reads:

> In light of the foregoing, Claimants respectfully ask the Tribunal for a Partial Award declaring that:
>
> (1) Ecuador's claim for a reduction in damages in this case based upon its hypothetical "but-for" scenario is precluded by the doctrine of *res judicata* and/or international law.
>
> (2) What Ecuador in its Counter-Memorial refers to as "collective" claims are in fact "diffuse" claims encompassed in the 1995 and 1998 Settlement and Release Agreements, as previously determined by the Tribunal in its prior awards and decisions, which are *res judicata*.
>
> (3) Ecuador's argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law is precluded under the doctrine of *res judicata*.

2908. In its Partial Award on Track III, the Tribunal ruled that (i) there is no finding in the Tribunal's Track II Award that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption, such that it would bar the Respondent's request for a reduction in damages based upon a hypothetical "but-for" scenario as a matter of *res judicata* or international law;[4588] (ii) its prior rulings do not preclude an offset based on individual claims or collective claims, to the extent that it refers to the legal costs that the Claimants would in all probability have incurred in defending themselves against those claims in a Treaty-compliant Lago Agrio Litigation;[4589] and (iii) the Tribunal's prior rulings do not preclude the Respondent's argument that the Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law.[4590]

2909. Furthermore, the Tribunal's determinations regarding the applicable Treaty-compliant but-for scenario and its impact on the Claimants' damages claims are set out in paragraphs 378-395 and 731-738 above. In turn, in paragraph 477 above the Tribunal has dismissed the Respondent's defences based on the Claimants' failure to mitigate (i) by failing to recuse Judge Zambrano; (ii) by failing to post a bond to suspend the enforceability of the Lago Agrio Judgment; (iii) by failing to file an action under the CPA.

4588 Partial Award on Track III, paras. 125-127, 188(i).

4589 Partial Award on Track III, para. 188(ii).

4590 Partial Award on Track III, para. 188(iv).

2910. The Respondent's request under the present heading is rejected to the extent it contradicts the Tribunal's aforementioned determinations.

2911. Request for Relief in paragraph 214(2): "*Declare that Respondent's contentions for reduction of damages based on its "but-for" argument are not precluded by res judicata and/or international law*".

2912. The Tribunal reiterates its ruling in paragraph 188(iii) of the Partial Award on Track III that any hypothetical but-for scenario offset should in principle be limited to the confines of the claims actually pleaded by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record. It also reiterates its ruling in paragraphs 2907-2909 above. The Respondent's request under the present heading is rejected to the extent it contradicts the Tribunal's aforementioned determinations.

2913. Request for Relief in paragraph 214(4): "*Declare that the consideration of Respondent's but-for argument shall not be limited to evidence in the record of the Lago Agrio proceedings*".

2914. The Tribunal reiterates its ruling in paragraph 2912 in connection with this request.

2915. Request for Relief in paragraph 214(6): "*Award Respondent all of its costs of arbitration, including its cost of representation, in connection with the Request together with interest at a reasonable rate*".

2916. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

11. Requests in Second Submission on the Claimants' Request for a Partial Award dated 15 January 2021

2917. Request for Relief in paragraph 283(1): "*Reject the relief sought in paragraph 175 of the Claimants' Request for a Partial Award and paragraphs 222 and 223 of Claimants' Second Submission*".

2918. The Tribunal reiterates its ruling in paragraph 2912 in connection with this request.

2919. Request for Relief in paragraph 283(2): "*Declare that Respondent's contentions for reduction of damages based on its "but-for" argument are not precluded by res judicata and/or international law*".

2920. The Tribunal reiterates its ruling in paragraph 2912 in connection with this request.

2921. Request for Relief in paragraph 283(4): "*Declare that the consideration of Respondent's but-for argument shall not be limited to evidence in the record of the Lago Agrio proceedings*".

2922. The Tribunal reiterates its ruling in paragraph 2912 in connection with this request.

2923. Request for Relief in paragraph 283(6): "*Award Respondent all of its costs of arbitration, including its cost of representation, in connection with the Request together with interest at a reasonable rate*".

2924. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

2925. Request for Relief in paragraph 284: "*Respondent respectfully requests further that the Tribunal decline to make determinations with respect to the issues raised by Claimants' arguments, as identified above, pertaining to the merits of Respondent's environmental but-for argument and proceed to the consideration of all Track III issues*".

2926. The Tribunal reiterates its ruling in paragraph 2912 in connection with this request.

12. Requests in Rejoinder on Damages dated 28 May 2022

2927. Request for Relief in paragraph 1940(a): "*Denying all the relief and each remedy requested by Claimants in paragraph 479 of their Memorial on Damages and paragraph 1212 of their Reply*".

2928. The Tribunal reiterates its ruling in paragraph 2899 above in connection with this request.

2929. Request for Relief in paragraph 1940(b): "*Should the Tribunal consider that its Interim Awards have not been superseded by the Second Partial Award on Track II, granting Respondent's application of 1 March 2013 for "Reconsideration of the First, Second and Fourth Interim Awards" and vacating those Awards*".

2930. The Tribunal reiterates its ruling in paragraph 2899 above in connection with this request.

2931. Request for Relief in paragraph 1940(c): "*Pursuant to Article 40 of the UNCITRAL Arbitration Rules, ordering Claimants to pay all the costs and expenses of this arbitration*

proceeding, including the fees and expenses of the Tribunal and the costs of Respondent's legal representation and assistance, plus pre-award and post-award interest thereon."

2932. The Tribunal reiterates its ruling in paragraph 2828 above in connection with this request.

2933. Request for Relief in paragraph 1941: "*Respondent also asks that the Tribunal grant it any other and further relief that the Tribunal deems just and proper*".

2934. The Tribunal reiterates its ruling in paragraph 2830 above in connection with this request.

13. Request in Respondent's Cash Call Application dated 2 September 2022

2935. In this Application, Respondent requests that the Tribunal "strike from the damages claim any fees and costs that Claimants attribute to the [Claimants'] Ecuador Legal Team, and in the alternative, draw an adverse inference against Claimants for failing to produce the invoices referenced in Claimants' Cash Call documents."

2936. The Tribunal's determinations in respect of the Cash Calls are set out in paragraphs 2091-2148 above. For the reasons set out therein, the Respondent's request under the present heading is rejected.

* * *

XIV. THE OPERATIVE PART

2937. **For the reasons set out in this Award, based on the evidential materials adduced in these arbitration proceedings together with its earlier awards, orders and decisions, the Tribunal makes the following orders under the Treaty and international law:**

A. DECLARATIONS AND ORDERS AS TO COMPENSATION

2938. **The Tribunal declares that in order to make full reparation in the form of compensation for the injuries caused to the First and Second Claimant by the recognition and enforcement of the unremedied Lago Agrio Judgment (as also decided by the Lago Agrio Appellate Court, Cassation and Constitutional Courts), the Respondent must pay the following sums to the First Claimant:**

(i) **USD 41,587,664.54, representing legal fees and expenses awarded as damages in connection with the Lago Agrio Litigation;**

(ii) **USD 1,261,521.19, representing legal fees and expenses awarded as damages in connection with the Ecuador Enforcement Proceedings;**

(iii) **USD 10,469,299.38, representing legal fees and expenses awarded as damages in connection with the Argentina Enforcement Proceedings;**

(iv) **USD 14,136,263.73, representing legal fees and expenses awarded as damages in connection with the Brazil Recognition Proceedings;**

(v) **USD 30,047,127.12, representing legal fees and expenses awarded as damages in connection with the Canada Enforcement Proceedings;**

(vi) **USD 14,282,909.81, representing legal fees and expenses awarded as damages in connection with the damages category "Costs of Planning Against Potential Enforcement in Other Jurisdictions";**

(vii) **USD 33,322,257.24, representing legal fees and expenses awarded as damages in connection with the RICO Litigation, as decided by the majority of the Tribunal;**

(viii) **USD 8,728,717.69, representing legal fees and expenses awarded as damages in connection with the Section 1782 Proceedings;**

(ix) **USD 26,566,930.75, representing legal fees and expenses awarded as damages in connection with the Gibraltar Proceedings;**

(x) **Pre-award interest on the amounts indicated earlier in this paragraph, calculated at the 1-year U.S. Treasury bill rate, from the date of payment of each invoice corresponding to legal fees and expenses awarded by the Tribunal as damages until the date of this Award, compounded annually; and**

(xi) **Post-award interest at the rate of 1-year U.S. Treasury bill + 2 %, which shall otherwise be calculated in the same manner as pre-award interest, from the date of this Award until the date of full payment.**

2939. **The Tribunal declares that any sums collected by the First Claimant in connection with the *Amazonia* Damages Judgments, as well as any costs the First Claimant may in the future collect in the RICO Litigation, must be deducted from the amount of compensation due to the First Claimant under paragraph 2938(vii) above.**

2940. **The Tribunal orders the Respondent to pay the amounts indicated in paragraph 2938 above to the First Claimant, subject to its declaration in paragraph 2939 above.**

2941. **The Tribunal reiterates its declaration in paragraph 10.11 of the Track II Award that any injury to the First Claimant or the Second Claimant caused by the recognition or enforcement of any part of the Lago Agrio Judgment within or without Ecuador (as decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) shall be injuries for which the Respondent is liable to make reparation under international law.**

B. DECLARATIONS AND ORDERS AS TO INJUNCTIVE RELIEF

2942. **The Tribunal confirms and restates with full force and effect the orders set out in paragraph 10.13 of the Track II Award.**

2943. **The Tribunal declares that the Respondent, by failing to remove the status of enforceability from the Lago Agrio Judgment through steps of its own choosing to**

this date, 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.

C. LEGAL AND ARBITRATION COSTS

2944. **All issues relating to the allocation and assessment of costs and expenses (within the meaning of Articles 38-40 of the UNCITRAL Arbitration Rules), as claimed by the Claimants and the Respondent, are currently assigned for further submissions by the Parties later in these arbitration proceedings. These issues are not decided in this Award.**

2945. **Pursuant to paragraph 13 of Procedural Order No. 84, dated 13 November 2022, and subject to any further order of the Tribunal, the Parties shall each file a statement of their respective costs no later than 90 days after the issuance of this Award.**

D. MISCELLANEOUS

2946. **The Tribunal declines to reconsider and instead re-confirms, as declared in its Fourth Interim Award and confirmed its Track II Award, that the Respondent violated its First and Second Interim Awards on Interim Measures dated 25 January and 16 February 2012 in breach of Article VI of the Treaty, Article 32(3) of the UNCITRAL Arbitration Rules and international law.**

2947. **The Parties' extant requests for relief, as marked-up in the enclosures to their respective letters dated 20 October 2025, shall be addressed by the Parties in Track IV of these arbitration proceedings.**

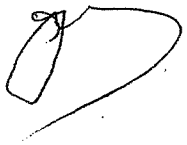
2948. **Save as aforesaid, the requests for relief made by the First and Second Claimants for decision in this Track III are not granted, and the requests for relief made by the Respondent for decision in this Track III are not granted.**

2949. **This Award, although separately signed by the Tribunal's members on three signing pages, constitutes a "partial award" signed by the three arbitrations under Article 32 of the UNCITRAL Arbitration Rules.**

Made at The Hague, the Netherlands as the place (or seat) of this Arbitration, by the Tribunal,

On 17 November 2025

Dr Horacio Grigera Naón:



Subject to his Note of Partial Dissent
On the Rico Litigation Claim

Professor Vaughan Lowe KC:

Professor Albert Jan van den Berg (President):

Made at The Hague, the Netherlands as the place (or seat) of this Arbitration, by the Tribunal,

On 17 November 2025

Dr Horacio Grigera Naón:

Professor Vaughan Lowe KC:

Professor Albert Jan van den Berg (President):

Made at The Hague, the Netherlands as the place (or seat) of this Arbitration, by the Tribunal,

On 17 November 2025

Dr Horacio Grigera Naón:

Professor Vaughan Lowe KC:

Professor Albert Jan van den Berg (President):