

Note of Partial Dissent

1. I am unable to share the majority Arbitral Tribunal's decision in the Fourth Partial Award on Track III (the "Majority Award ") regarding the Claimants' RICO claim (the "RICO Compensation Claim") to be compensated for fees and expenses in the RICO litigation (the "RICO Litigation") that led to the RICO judgment of 4 March 2014 by the US District Court of the Southern District of New York (the "RICO Judgment")¹, later affirmed on 8 August 2016 by the US Court of Appeals of the Second Circuit. On 19 June 2017, the US Supreme Court denied a *certiorari* petition filed by the appellants.
2. Specifically having in mind the RICO Compensation Claim, I do not share certain findings and corresponding determinations or conclusions, essentially set forth in paras. 1290-1317; 1520-1522 of the Majority Award, regarding the Claimants' quantification of legal fees and costs considered as incidental fees and expenses² incurred to mitigate the harm ensuing from the Respondent's international law delicts and, in particular, in connection with the denial of justice breach found, as follows, in the Arbitral Tribunal's Track II arbitral award, which entitles the Claimants to full compensation for damages sought under the RICO Compensation Claim:

C: Declarations as to the Merits

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

10.5 The Tribunal declares that the Respondent, by issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador, wrongfully committed a

¹ Exhibits C-2135 and C-2134. Unless otherwise specified, references to the RICO Judgment shall be to Exhibit C-2135. Exhibit C-2134 contains what essentially is the Judgment's dispositive part.

² As set forth at paras.327 & fol. of the Majority Award.

denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty;

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

3. According to the Majority Award , “....*the Claimants’ claim for the reimbursement of legal fees and expenses incurred in connection with the RICO litigation must be granted...*” but only to the extent set forth by the Majority Award . In this respect, the Majority Award states that “...*the fact that Chevron’s choice of measures to prevent the enforcement of the Lago Agrio Judgment in its home jurisdiction was successful and effective in achieving this wholly legitimate result (....) compels the conclusion that the RICO litigation cannot be entirely excluded from compensation.* The Majority Award further acknowledges that “....*Chevron was defending itself against the risk of very serious harm created by the fraudulent Lago Agrio Judgment and its recognition and enforcement, including to prove the Claimants’ claims before this Tribunal. Accordingly, any potential shortcomings in the reasonableness of the Claimants’ choice of measures should, at most, result in a reduction of compensation of the fees and expenses incurred by the Claimants in connection with the RICO Litigation*”³. The issue is whether it was reasonable to take affirmative action by introducing and pursuing the RICO Litigation⁴
4. In its critical analysis of the reasonableness of the Claimants’ mitigation efforts pursued through the RICO Litigation, the Majority Award accepts that “*The RICO action may not have been the most economical and efficient strategy, but does not make it an unreasonable strategy*”⁵. Thus, according to the Majority Award, the reasonableness of the RICO Litigation strategy does not decisively depend on how economical or efficient it was. In parallel, the Majority Award stresses that the RICO Litigation was *an inherently costly endeavor* and that the Claimants failed to show the *reasonableness of the costs* they seek to see recognized⁶.

5. In this connection, the following aspects of the Majority Award are to be highlighted:

³ Majority Award at paras. 1288-1290.

⁴ Majority Award at para. 1295.

⁵ Majority Award at para. 1293.

⁶ Majority Award at paras.1310-1312.

a) although the Majority Award accepts that the Claimants' pursuit of the RICO Litigation had as its legitimate objective to prevent the enforcement of the 14 February 2011 (as clarified by order of 4 March 2011) Zambrano Judgment (the "Lago Agrio Judgment"), (and thus fulfilled "...the requirement of causation for the compensation of incidental damages under international law"), it also indicates that "... the same set of circumstances is nonetheless insufficient, on its own, to support the conclusion that the requirement of reasonableness is also met...the fact that Chevron's pursuit of the RICO Litigation was one course of action to achieve the goal of preventing enforcement does not entail that Chevron's choice of measures was reasonable overall" ⁷;

b) the purpose of RICO is not to address the enforcement of foreign judgments in the USA but is primarily intended to combat the corrupt influence of organized crime⁸;

c) "...before the RICO litigation, there was no clear precedent supporting the use of RICO to prevent the enforcement of a foreign judgment in the United States....in other words, there is a disconnect between the filing of Chevron's two RICO claims and the goal of preventing the enforcement of the Lago Agrio Judgment." ⁹;

d) by looking at the other claims for relief in the Claimants' amended complaint, other non-statutory, equitable relief remedies could have been pursued by the Claimants to obtain the non-enforcement of the Lago Agrio Judgment in the USA without resorting to RICO, therefore, the Majority is not persuaded that the RICO claims were reasonable steps to take in addition to the other legal steps taken by Chevron (i.e., Counts 3-7 and 9) ¹⁰.

6. In sum, the Majority Award concludes that "...80 % of the total amount of fees and costs claimed under the RICO Litigation category of damages must be excluded from compensation" and states that the Claimants have failed to discharge their burden to prove reasonableness¹¹. The Majority Award further increases this percentage to 85 %¹².

7. Thus, the focal points of the Majority Award are to evaluate the mitigation efforts undertaken by the Claimants in light of the purpose of the RICO Litigation when it was undertaken and the reasonableness of the mitigation costs and fees necessary to

⁷ Majority Award at para. 1289.

⁸ Majority Award at para. 1303.

⁹ Majority Award at para. 1307.

¹⁰ Majority Award at para.1312.

¹¹ Majority Award at para.1317.

¹² Majority Award at paras. 1521-1522.

successfully oppose enforcement of the Lago Agrio Judgment by way of the RICO Litigation. In sum, the Majority Award accepts that the RICO Litigation fulfils the requirement of causation for the compensation of incidental damages under international law but is not persuaded that it meets the reasonableness requirement to be fulfilled by a damage mitigation claim¹³. To this matter I turn now my attention.

8. A reasonableness analysis to carry out such evaluation requires a balancing exercise that should take into account: a) the odds faced by the Claimants when the RICO Litigation was undertaken as to – given the circumstances – adopting a cogent and justified strategy for the Claimants and their counsel to prevent the enforcement of a US\$ multibillion Ecuadorean court decision found to be illicit under international law although the Arbitral Tribunal’s Track II Award (the “Track II Award”) was not, at that moment, in the picture; b) the efficacy of the RICO Strategy to such effect, since – unlike the Majority Award position – the reasonableness of the fees and costs required by the RICO Litigation strategy also significantly depends on whether the RICO Litigation strategy was itself justified and successful, and not the other way around. In these respects, the following considerations strongly militate in favor of finding that the Claimants are to be fully compensated for the corresponding damages (mitigation fees and costs) ensuing from the RICO Litigation strategy if such fees and costs are proven.
9. In the first place, the actual *effectiveness* of the RICO Litigation strategy in: a) advancing the legitimate purpose of precluding the enforcement of a fraudulent judgment that breached international law; and b) proving the fraudulent nature of the Lago Agrio Judgment, which was finally confirmed, from an international law perspective, by the Track II Award (see para. 2 above) are elements of decisive importance to be factored in, both showing that, from a reasonableness perspective, including as to costs and fees involved, the RICO Litigation strategy was justified. Undoubtedly, the RICO Judgment prevented the enforcement of the Lago Agrio Judgment in the USA after concluding, on the basis of profuse and substantial evidence before the U.S. Federal Court, that it was procured by fraud through a racketeering activity in violation of RICO undertaken by the Donziger Defendants¹⁴. This shows: a) the unique and decisive role played by the RICO Litigation strategy both in preventing the enforcement of the Lago Agrio Judgment and proving fraudulent conduct attributed to the Respondent under the Track II Award; and accordingly, b) the reasonableness of the RICO Litigation strategy seen as mitigation efforts addressed at avoiding the harmful effects that would result if the Lago Agrio

¹³ Majority Award at para. 1289 .

¹⁴ As described in the Majority Award at para. 1259.

Judgment were enforced and, in principle, of the right to be fully compensated for fees and costs involved in such efforts.

10. Secondly, another important factor in further support of the Claimants' entitlement to the full compensation of their RICO mitigation costs and fees is that, as found by the Track II Award¹⁵, the Respondent's conduct leading to a denial of justice finding by the Arbitral Tribunal was intentional, i.e., a circumstance aggravating the nature of the illicit conduct being considered, not only to establish its illegality, but also to assess the reasonableness of the mitigation efforts and associated costs and fees undertaken by the Claimants through the RICO Litigation given the pressing and urgent need to prevent the enforcement of the multi-billion Lago Agrio Judgment.
11. Thirdly, another component of such balancing analysis is the responsibility of the Claimants and their counsel – both professional and ethical (that for sure was not unnoticed by the Claimants' shareholders) – to resort to any available legal means to attack and deny effects to what at the time (even before the Track II Award was rendered) was rightly perceived to be a fraudulent Ecuadorean court decision in violation of international law. As found by the Majority Award, that those means – including resorting to the RICO Litigation – were appropriate both when undertaken and in hindsight upon the rendering of the Track II Award confirms that the RICO Litigation strategy was the right course of action to discharge such responsibility. This justifies the no-stone-left-unturned actions undertaken by the Claimants and their counsel to protect the Claimants against what (as they rightly anticipated) was a court decision permeated with illicit and fraudulent conduct and to seek full compensation for the costs and fees associated with such course of action.
12. Fourthly, as assessed by the RICO Judgment, the Claimants sought equitable relief protection against the enforcement of the Lago Agrio Judgment both on non-statutory grounds and under RICO¹⁶. As set forth in the RICO Judgment, “...*Chevron assert that it already had suffered substantial damages, that the entry of a large judgment against it was imminent as a result of the alleged corruption, that the defendants would move promptly to seek to enforce the judgment, and that it was irreparably injured absent equitable intervention*”. This included – as a remedy in equity – an injunction “.....*barring the defendants from seeking to enforce the imminent judgment anywhere in the world*”¹⁷. The RICO Judgment accepted that “....*Chevron had established that it is*

¹⁵ See text at para.2 above.

¹⁶ RICO Judgment at 306.

¹⁷ RICO Judgment at 312.

threatened with additional, imminent injury as a direct result of the Defendant's continued efforts to enforce the Judgment"¹⁸.

13. In this connection,

- a) the RICO Judgment, quoting from US Supreme Court decisions, states that RICO does not only apply to mobsters but to any person who violates its provisions, it is intended to be read broadly, and that the RICO case made by the Claimants is *a civil RICO*, i.e., that the plaintiff burden "...is to prove its case by a preponderance of evidence – that is, that *"its version of the facts is more probable than its adversary's – rather than beyond a reasonable doubt, as would be the case in a criminal prosecution"*¹⁹. Thus, there is nothing exceptional, unusual or inappropriate to utilize RICO – a US public policy statute incorporating mandatory rules sanctioning, *inter alia*, fraudulent conduct – to assert non-criminal causes of action when its provisions are found to have been violated, including relying on RICO to block the enforcement of a foreign court decision based on fraudulent conduct infringing RICO. From a mitigation perspective, it was equally justified for the Claimants and their counsel to resort to each and every available legal option to block the impending enforcement of the Lago Agrio Judgment or remedy its consequences and to include in the panoply of options the one that was considered – and finally proven to be (the RICO Litigation strategy)– the decisively effective one. Whether utilizing RICO as the Claimants have done is innovative or not is irrelevant in order to judge the merit or demerit of the Claimants' decision to tread the RICO path and of the accompanying costs and fees to advance RICO claims as a mitigation strategy and, in any case, the RICO Judgment has not suggested that resorting to RICO was improper or abusive;
- b) the careful and long analysis of RICO in the RICO Judgment (100 out of 485 pages) as a basis for the findings and determinations of the RICO court in the RICO Litigation shows the importance assigned to the evidence gathered as a result of the RICO claim to prevent enforcement of the Lago Agrio Judgment²⁰, and that resorting to remedies afforded by RICO cannot be considered inappropriate, excessive or superfluous because of the possible availability of other remedies. It is certainly difficult to conceive that, confronted with a situation urgently requiring to resort to defensive measures, the Claimants could have predicted, with any level of certainty, the legal options likely to be crowned with success to block the Lago Agrio Judgment

¹⁸ RICO Judgment at 315.

¹⁹ RICO Judgment at 340-341.

²⁰ RICO Judgment, at 306-407.

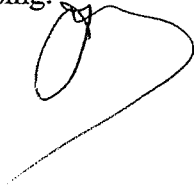
or its enforcement, or that the Claimants should have contented with or limited themselves to less costly options when what was at stake was to resist the enforcement of a fraudulent multibillion court decision compared with the about US\$ 323 Mio. costs and fees the Claimants claim as mitigation damages for their RICO Litigation strategy.

- c) in fact, resorting to the RICO tool was in itself – i.e. considered in isolation – a successful mitigation strategy decisively preventing the enforcement of the Lago Agrio Judgment. The record shows that, from a mitigation perspective, the RICO Litigation strategy undertaken by the Claimants, determinative of the RICO Judgment, was of paramount and decisive importance to shield the Claimants from substantial economic harm that would have ensued from the enforcement of the Lago Agrio Judgment. Given the existing circumstances, when evaluating which strategy to follow on the basis of possible costs or fees involved in avoiding the enforcement of a fraudulent judgment: a) large leeway should be afforded to the Claimants and their counsel judgement when opting for the RICO Strategy; and, therefore b) proven fees and costs commensurate to the RICO Litigation strategy are justified. It is submitted that even hypothetically assuming in hindsight that other options would have been equally effective or successful at the moment the RICO option was undertaken, i.e. when the Track II Award had not been rendered yet, such assumptions would have been, at least, no less speculative than the RICO option itself;
- d) further, since the creation of the risk of enforcement of the Lago Agrio Judgment addressed by the RICO Strategy undertaken by the Claimants is to be attributed solely to the Respondent, which is responsible for the fraudulent judgment itself, the Respondent has to fully suffer the economic consequences of a risk that was exclusively of its own making. Therefore, there is no principled basis, premised on lack of reasonableness or otherwise, to reduce from scratch the compensation for fees and costs associated with the RICO Litigation the Claimants are entitled to – even partially by resorting to percentage reductions, as propounded by the Majority Award – rather than undertaking instead a detailed analysis of whether RICO Litigation fees and costs amounts the compensation of which is sought by the Claimants are supported by the evidence; and
- e) there is no firm evidence that the RICO claim was exclusively motivated by the desire of Chevron to persecute Mr. Donziger or the other RICO defendants as some sort of vindictive campaign or for other reasons²¹. Be that as it may, the substance of the RICO Judgment does not allow to reach such conclusion or to conclude that resorting

²¹ See paras. 1312-1313 of the Majority Award.

to the RICO strategy did not prove to be a proper mitigation tool to resist enforcement of the fraudulent Rio Agrio Judgment. In any event, the careful analysis and supporting arguments and evidence relied upon in the RICO Judgment clearly show that the reasons given for granting remedies pursuant to RICO, irrespective of any other real or supposed reasons or considerations, stand on their own feet to support the findings, conclusions and orders of the RICO Court with the effect of preventing the enforcement of the illicit Rio Agrio Judgment in the USA, and that none of them hints to Chevron's supposedly vengeful conduct or other supposed purposes.

14. Thus, the Rico Litigation strategy was justified. From a mitigation perspective, there are no grounds to maintain that the RICO Litigation strategy was unreasonable in itself, nor to assume that costs and fees incurred in implementing the RICO Litigation strategy are unreasonable in full or in part. Accordingly, the Claimants are entitled to full compensation of costs and fees involved by their RICO Litigation strategy. This raises, for compensation purposes, the different issue of whether the costs and fees to implement it have been proven or not. In that respect, rather than an automatic reduction by 85 % of the RICO Litigation costs and fees, as concluded by the Majority Award, this requires to verify whether actual cost and fees specifically involved by the RICO Litigation strategy and claimed by the Claimants are or are not supported by the evidence. Such exercise is missing.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long, sweeping horizontal stroke.

Bethesda, Maryland, 17 November 2025