

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

PARTIAL AWARD ON THRESHOLD ISSUES OF TRACK III

30 June 2021

The Arbitration Tribunal:

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

Secretary to the Tribunal: Martin Doe

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I. INTRODUCTION

A. SCOPE OF THE PRESENT AWARD

1. This Partial Award addresses the Claimants' Request for a Partial Award on Threshold issues dated 21 April 2020 ("**Claimants' Request**") submitted in advance of the second procedural meeting conducted between the Tribunal and the Parties in Track III of the arbitration pursuant to paragraphs 23 and 24 of Procedural Order No. 56 dated 26 April 2019 ("**PO 56**") on 28 and 29 May 2020 ("**Second Procedural Meeting**").
2. For the purposes of this Partial Award, the Tribunal has further considered the Parties' subsequent written submissions concerning the Claimants' Request, as well as the Tribunal's various directions and rulings in relation to the Claimants' Request. These include:
 - (i) the Tribunal's Procedural Orders No. 60 dated 19 April 2020 ("**PO 60**"), No. 61 dated 2 May 2020 ("**PO 61**") and No. 62 dated 10 May 2020 ("**PO 62**");
 - (ii) the Respondent's Response to the Claimants' Request dated 19 May 2020 ("**Respondent's Response**");
 - (iii) the Tribunal's Procedural Orders No. 63 dated 26 May 2020 ("**PO 63**"), No. 65 dated 10 July 2020 ("**PO 65**") and No. 67 dated 28 September 2020 ("**PO 67**");
 - (iv) the Claimants' Second Submission on Request for Partial Award dated 1 October 2020 ("**Claimants' Second Submission**"); and
 - (v) the Respondent's Second Submission on Request for Partial Award dated 15 January 2021 ("**Respondent's Second Submission**").
3. The Tribunal has also considered the Parties' oral submissions made during several meetings and hearings conducted between the Tribunal and the Parties. These include:
 - (i) the Second Procedural Meeting;
 - (ii) the procedural meeting held on 3 September 2020;
 - (iii) the pre-hearing conference conducted on 4 March 2021;
 - (iv) Hearing on the Request for Partial Award, held on 16-17 March 2021 (the "**Hearing on a Partial Award**"); and

- (v) The Parties' respective submissions of 31 March and 7 April 2021, provided at the Tribunal's invitation at the conclusion of the Hearing on a Partial Award.
- 4. Lastly, the Tribunal has also considered its prior rulings in this arbitration, to the extent that they are relevant to address issues raised by the Claimants in their Request for a Partial Award. These include in particular:
 - (i) The First Partial Award on Track I dated 17 September 2013 ("**Partial Award on Track I**");
 - (ii) the Decision on Track I(B) dated 12 March 2015 ("**Decision on Track I(B)**"); and
 - (iii) the Second Partial Award on Track II dated 30 August 2018 ("**Track II Award**").

B. THE ARBITRATION

- 5. For the sake of good order and ease of reference, the Tribunal reproduces below the basic details of the present arbitration, as also set forth in Part I of the Track II Award.
- 6. *The First Claimant:* The First Claimant is Chevron Corporation, a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583, U.S.A. ("**Chevron**").
- 7. *The Second Claimant:* The Second Claimant is Texaco Petroleum Company, also a legal person organised under the laws of the United States of America, with its principal place of business at 6001 Bollinger Canyon Road, San Ramon, California 94583 U.S.A. ("**TexPet**").
- 8. Until 2001, TexPet was a wholly-owned indirect subsidiary of Texaco Inc., a legal person organised under the laws of the United States of America ("**Texaco**"); and thereafter, as from 2001, TexPet became and remains a wholly-owned indirect subsidiary of Chevron.
- 9. *The Respondent:* the Respondent is the Republic of Ecuador.
- 10. *The Arbitration Agreement:* The arbitration agreement invoked by the Claimants is contained in Article VI of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of 27 August 1993 (the "Treaty"), providing, *inter alia*, as follows:

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.
 2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution:
 - (a) to the courts or administrative tribunals of the Party that is a party to the dispute;
or
 - (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
 - (c) in accordance with the terms of paragraph 3.
 3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

[...]

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

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

[...]

 - (b) an “agreement in writing” for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (“New York Convention”).
 5. Any arbitration under paragraph 3(a) (ii), (iii) or (iv) of this Article shall be held in a state that is a party to the New York Convention.
 6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.
11. *Arbitration Rules:* Pursuant to Article VI(3)(a)(iii) of the Treaty, the Arbitration Agreement incorporates the UNCITRAL Arbitration Rules (1976) (the “UNCITRAL Rules”), according to which this arbitration has been conducted.

12. *The Arbitral Tribunal:* Pursuant to the Arbitration Agreement and the UNCITRAL Rules, the Tribunal is comprised of three arbitrators appointed thereunder as follows:
- (i) *Dr. Grigera Naón:* In their Notice of Arbitration dated 23 September 2009, the Claimants notified the Respondent of their appointment as co-arbitrator of Dr. Horacio A. Grigera Naón, of 5224 Elliott Road, Bethesda, Maryland 20816, United States of America.
 - (ii) *Professor Lowe:* On 4 December 2009, the Respondent notified the Claimants of its appointment as co-arbitrator of Professor Vaughan Lowe QC, of Essex Court Chambers, 24 Lincoln’s Inn Fields, London WC2A 3EG, United Kingdom.
 - (iii) *Professor van den Berg:* On 18 March 2020, following the resignation of Mr. VV Veeder as presiding arbitrator on 1 January 2020, the Secretary-General of the PCA appointed as the presiding arbitrator Professor Albert Jan van den Berg of Hanotiau & van den Berg, IT Tower (9th Floor), 480 Avenue Louise - B9, 1050 Brussels, Belgium.
13. *Place of Arbitration:* By agreement of the Parties, the legal place (or seat) of this arbitration is The Hague, the Netherlands.
14. *Language of Arbitration:* By agreement of the Parties, English and Spanish are the official languages of this arbitration and, as between them, English is to be the authoritative language, with all oral proceedings to be simultaneously interpreted and transcribed into English and Spanish. Orders, decisions and awards of the Tribunal are to be rendered in English.

II. THE CLAIMANTS’ REQUEST FOR A PARTIAL AWARD

15. This section addresses the Parties’ positions on the scope of this Partial Award, as well as the Parties’ requests for relief. The sections that follow address the Parties’ arguments on each of the four “threshold issues” (Questions #1-#4) that have been bifurcated for preliminary consideration.

A. THE CLAIMANTS’ POSITION AND REQUEST FOR RELIEF

16. The Claimants request that the Tribunal issue a partial award deciding on the following “four threshold questions”, which arise from the hypothetical “but-for” reduction and

“mitigation” arguments outlined in the Respondent’s Counter-Memorial on Track III (the “**Counter-Memorial**”):¹

- *Question #1:* Is Ecuador’s request for a reduction in damages based upon a hypothetical “but-for” scenario barred by the Tribunal’s Track II finding that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption?
- *Question #2:* Do the Tribunal’s prior rulings regarding the scope and effects of the 1995 and 1998 Settlement and Release Agreements, as well as its rulings on its own jurisdiction, preclude both the claims that Ecuador’s Counter-Memorial on Damages refers to as “collective” claims and any offset based on individual claims?
- *Question #3:* If any hypothetical “but-for” scenario offset were permitted here, would it be limited to the confines of those claims actually pursued by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record?
- *Question #4:* Do the Tribunal’s prior rulings preclude Ecuador’s argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law?²

17. The Request for a Partial Award is prompted by what the Claimants’ characterize as an attempt by the Respondent to “re-litigate” a number of issues in its Counter-Memorial which have already been argued and decided in the present arbitration:³ (i) the environmental allegations raised in the Respondent’s Track II environmental “cross-claim”, which are now presented as a hypothetical “but-for” reduction or offset argument; and (ii) the Respondent’s Track II “exhaustion of local remedies” defence, which is now presented as a “duty of mitigation” argument.⁴ The Claimants recall that the Parties “spent more than a decade and hundreds of millions of dollars adjudicating [such matters] in prior phases of this arbitration,”⁵ and insist that these arguments had already been considered and decided, meaning that reconsideration is barred by the Tribunal’s prior decisions.⁶

18. First, the Claimants argue that the Tribunal’s prior decisions in this arbitration are final and binding under the general principle of *res judicata*, such that the Claimants’ defence

¹ Claimants’ Request, paras. 2, 13-14; Claimants’ Second Submission, para. 5.

² Claimants’ Request, para. 13; Claimants’ Second Submission, para. 5.

³ Claimants’ Request, paras. 1, 13, 174; Claimants’ Second Submission, paras. 4, 6, 11.

⁴ Claimants’ Request, paras. 43-44; Claimants’ Second Submission, paras. 8-10, 12-14, 29-34.

⁵ Claimants’ Second Submission, para. 10.

⁶ Claimants’ Request, paras. 43-44, 171.

to this effect should be decided prior to undertaking a re-litigation of any issue.⁷ According to this principle, both final and partial arbitral awards, as well as interim awards and other decisions containing decisions on substantive matters, have preclusive effects in respect of the content of their dispositive part and all necessary reasoning.⁸ The Parties would be equally precluded by issue estoppel from re-litigating such matters, regardless of whether they arise from the same or a different claim, meaning that the Tribunal is bound by its determinations “of essential issues of fact or law”.⁹

19. Second, the Claimants posit that the Tribunal’s partial awards in this arbitration (i.e., the Partial Award on Track I and the Track II Award) are also final and binding as per Article 32 of the UNCITRAL Rules, Article VI(6) of the Treaty and case law under the UNCITRAL Rules.¹⁰

⁷ Claimants’ Request, paras. 35-36; Claimants’ Second Submission, paras. 16-18; **CLA-729**, Charles T. Kotuby Jr. and Luke A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS*, Oxford 2017, pp. 197-202; **CLA-8**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Resubmitted Case, 10 May 1988, 89 ILR 552, 560 (quoting **CLA-732**, *Company General of the Orinoco Case*, Award, 31 July 1905, 10 UNRIAA 184). The Claimants describe this principle on the basis of the “triple-identity” criterion, that is, referring to “subsequent proceedings involving the same subject matter or relief, the same legal grounds and the same parties”.

⁸ Claimants’ Request, paras. 37-38; Claimants’ Second Submission, paras. 18-20; **CLA-567**, The International Law Association Recommendations and Final Report on *Res Judicata* and Arbitration, 2006, Recommendation No. 1; **CLA-730**, Gary Born, *INTERNATIONAL COMMERCIAL ARBITRATION*, Kluwer Law International, 2nd Ed. 2014, p. 3772; **RLA-658**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Award, 25 August 2014, paras. 7.12, 7.41-7.42, 7.58; **CLA-73**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002, paras. 22-47; **CLA-731**, *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, (1977, 1978) 18 UNRIAA 3, para. 25; **CLA-732**, *Company General of the Orinoco Case*, Award, 31 July 1905, 10 UNRIAA 184, p. 276; **CLA-8**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Resubmitted Case, 10 May 1988, pp. 166, 171-173; **CLA-401**, *The Pious Fund of Californias, United States v. Mexico*, PCA Case No. 1902-01, Award, 9 UNRIAA 1, ICGJ 409, 14 October 1902; **CLA-733**, *Rachel S. Grynberg and others v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, paras. 4.6.4, 7.2.1; **CLA-734**, *Five Oceans Salvage Ltd. v. Wenzhou Timber Group Company* [2011] EWHC 3282 (Comm), para. 24.

⁹ Claimants’ Request, paras. 38-39; Claimants’ Second Submission, paras. 21-22; **CLA-73**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings, para. 45; **CLA-8**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Resubmitted Case, 10 May 1988, para. 30; **CLA-75**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Law Arbitration*, 8 Afr. J. Int’l & Comp. L. 38 (1996), p. 42; **CLA-565**, International Law Association, Berlin Conference (2004), International Commercial Arbitration, Interim Report: *Res judicata* and Arbitration; **CLA-523**, *International Military Services/Islamic Republic of Iran*, Netherlands Supreme Court, 24 April 2009, NJ 2010, 171, p. 6, para. 3.2; **CLA-735**, Silja Schaffstein, *THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS*, Oxford University Press 2016, paras. 6.198, 6.200.

¹⁰ Claimants’ Request, para. 40; Claimants’ Second Submission, para. 26; **CLA-295**, 1976 UNCITRAL Rules, Art. 32(2); **C-279**, US-Ecuador BIT, Art. VI(6); **CLA-513**, *Methanex Corporation v. United States of America*, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Tribunal’s Decision on Methanex’s Procedural Requests for Interpretation and Reconsideration of the Partial Award, paras. 16, 31;

20. Third, they add that the obligation of good faith, which is enshrined in the Treaty and applies also to the conduct of the Parties in the arbitration proceedings, bars the Respondent from re-litigating issues that the Tribunal has previously decided.¹¹

21. The Claimants' request for relief is as follows:

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

Specifically, Claimants request that the Tribunal find as follows:

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

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

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

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

d. The Tribunal's findings and holdings in the Track II Award dismissing Ecuador's exhaustion of local remedies defenses preclude Ecuador's damage mitigation defenses based on the same alleged local remedies.¹²

CLA-575, *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 425; **CLA-569**, *Islamic Republic of Iran v. United States of America*, Award No. 601-A3/A8/A9/A14/B61 – FT, 17 July 2009, para. 117, reprinted in 38 Iran-US C.T.R. 197, 242-43.

¹¹ Claimants' Request, paras. 41-42; Claimants' Second Submission, paras. 27-28; Track II Award, paras. 7.83, 7.86; **CLA-729**, C.T. Kotuby Jr. and L.A. Sobota, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS*, Oxford 2017, pp. 88-89.

¹² Claimants' Second Submission, paras. 222-223.

B. THE RESPONDENT'S POSITION AND REQUEST FOR RELIEF

22. The Respondent submits that the Claimants, in their Request and Second Submission, attempt to escape fundamental principles of international law for the determination of monetary damages, which include (i) the principle that damages awarded must not exceed what is necessary to restore the situation that would in all probability have occurred but for the breach, and (ii) the principle that every claimant must take reasonable steps to avoid harm and mitigate its losses.¹³ According to the Respondent, the Claimants have failed to show that these principles should be disregarded in the instant case.¹⁴
23. Further, the Respondent argues that the Claimants have not properly addressed the triple identity test or otherwise established how the issues they qualify as *res judicata* follow from the dispositive parts of the Tribunal's prior awards or other effectively determined issues that are necessary to such dispositive parts.¹⁵ Indeed, it denies that any of its Track III defences are precluded by *res judicata*,¹⁶ to the extent that these defences (i) are based on new legal arguments; (ii) seek relief different from that sought in Track II; and (iii) do not overlap factually with previous arguments in a manner that makes them "materially identical".¹⁷
24. In particular, the Respondent argues that international case law has largely confirmed that the conclusive and preclusive effects of *res judicata* only apply to the determinations and relief in the dispositive part of the relevant decision, as well as to any further reasoning or issues of fact or law that have actually been "determined" and are "necessary", "essential" or "fundamental" to the *dispositif*.¹⁸ Accordingly, a matter would not be

¹³ Respondent's Second Submission, paras. 1-4.

¹⁴ Respondent's Second Submission, paras. 5-11,

¹⁵ Respondent's Response, para. 44; **RLA-888**, Filip De Ly & Audley Sheppard, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (2009), para. II.1(4).

¹⁶ Respondent's Response, para. 34. On the *res judicata* triple identity test, see **CLA-130**, *Polish Postal Service in Danzig*, Advisory Opinion No. II, PCIJ Series B, No. 11, 16 May 1925, p. 30; **RLA-696**, *China Navigation Co., Ltd. (Great Britain) v. United States (Newchwang case)*, 9 December 1921, 6 UNRIAA, p. 65; **RLA-893**, Pedro Martinez-Fraga & Harout Samra, *The Role of Precedent in Defining Res Judicata in Investor-State Arbitration*, 32 NwJ. Int'l & Bus. 419 (2012), p. 421; **RLA-881**, *Case Concerning the Factory at Chorzow (Germany v. Poland)*, Interpretation of Judgments Nos 7 and 8, Dissenting Opinion of Judge Dionisio Anzilotti, 1928 PCIJ Series A, No 13, 16 December 1927, p. 23; **RLA-896**, Hanno Wehland, *The Application of Lis Pendens and Res Judicata in Investment Treaty Arbitration in THE COORDINATION OF MULTIPLE PROCEEDINGS IN INVESTMENT TREATY ARBITRATION* (2013), paras. 6.64, 6.85.

¹⁷ Respondent's Response, para. 45.

¹⁸ Respondent's Response, paras. 35-38; Respondent's Second Submission, paras. 87-89; **RLA-888**, Filip De Ly & Audley Sheppard, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (2009), para.

considered to be precluded simply because it is based on the same facts as a prior argument or because it was previously raised by one of the parties but not directly addressed by the tribunal.¹⁹ In fact, the Respondent notes that several jurisdictions limit the effects of *res judicata* “only to what is expressed in the *dispositive* of the award”.²⁰ In this vein, the Respondent disputes that arbitral tribunals have long applied the principle of *res judicata* to subsequent stages of a single arbitration, as the Claimants suggest.²¹ It adds, finally, that tribunals have also found themselves empowered to reconsider their past or interim decisions in the same proceeding so as to avoid prejudice to one of the parties.²²

25. As for the Claimants’ reference to issue estoppel, the Respondent rejects the suggestion that it constitutes a distinct principle or legal standard under international law, asserting in any event that the Claimants have failed to explain how exactly it would preclude the but-for and mitigation arguments at issue in this case.²³ The Respondent likewise opines

II.1(4); **CLA-73**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 45; **RLA-901**, *Naftogaz of Ukraine v. Gazprom*, SCC Case No. V2014/078/080, Final Award, 22 December 2017, para. 932; **CLA-732**, *Company General of the Orinoco Case*, Award, 31 July 1905, 10 UNRIAA 184, p. 276 (quoting **CLA-181**, *Southern Pacific Railway Co. v. U.S.*, 168 Sup. Ct. Rep., I, 1897); **CLA-75**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int’l & Comp. L. 38 (1996), p. 39; **RLA-881**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Interpretation of Judgments Nos. 7 and 8, Dissenting Opinion of Judge Dionisio Anzilotti, 1928 PCIJ Series A, No 13, 16 December 1927, p. 24; **CLA-8**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Resubmitted Case, 10 May 1988, para. 32.

¹⁹ Respondent’s Response, para. 39; **RLA-887**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, ICJ Reports 2007, 26 February 2007, para. 9; **RLA-896**, Hanno Wehland, *The Application of Lis Pendens and Res Judicata in Investment Treaty Arbitration* in THE COORDINATION OF MULTIPLE PROCEEDINGS IN INVESTMENT TREATY ARBITRATION (2013), para. 6.64.

²⁰ Respondent’s Response, para. 40; **RLA-885**, Christophe Seraglini, *Brèves remarques sur les Recommandations de l’Association de droit international sur la litispendance et l’autorité de la chose jugée en arbitrage*, 2006(4) Revue De L’arbitrage 909, paras. 4, 10; **RLA-110**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2009), p. 2908; **RLA-889**, Filip de Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 2009(1) Arb. Int’l 36, p. 50; **C-397**, Dutch Code of Civil Procedure, Art. 236; **RLA-890**, Cour de Cassation Assemblée Plénière, 13 March 2009, No. de pourvoi: 08-16033, Publié au Bulletin [1].

²¹ Respondent’s Second Submission, paras. 90-91; **RLA-658**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Award, 25 August 2014, para. 7.54; **CLA-73**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Mexico’s Preliminary Objection concerning the Previous Proceedings, 26 June 2002, para. 45. See also Respondent’s Response, para. 43.

²² Respondent’s Response, para. 43; **RLA-898**, *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Award, 12 September 2016, paras. 333, 347-349.

²³ Respondent’s Response, paras. 41-42; **RLA-889**, Filip de Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 2009(1) Arb. Int’l 36, p. 50; **CLA-75**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Law Arbitration*, 8 Afr. J. Int’l & Comp. L. 38 (1996), p. 42; **RLA-902**, Gavan Griffith & Isabella Seif, *Chapter 8: Work in Progress: Res Judicata and Issue Estoppel in Investment Arbitration* in

that issue estoppel has been applied in a “mixed and confusing” manner by international arbitral tribunals and hence does not reflect an established principle of international law, adding that it is unclear whether this standard would differ materially from the triple-identity test.²⁴

26. The Respondent’s request for relief is as follows:

In light of the foregoing, Respondent requests that, based on the arguments presented by the Parties in connection with Claimants’ Request for a Partial Award, the Tribunal issue a partial award in favor of Respondent on the preliminary questions it agreed to consider in its Procedural Order No. 67, as follows:

- (1) Reject the relief sought in paragraph 175 of the Claimants’ Request for a Partial Award and paragraphs 222 and 223 of Claimants’ Second Submission;
- (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;
- (3) Declare that Respondent’s arguments regarding individual claims for individual and collective rights have not been previously determined by the Tribunal in its prior awards and decisions regarding the scope and effect of the 1995 Settlement Agreement and are, therefore, not precluded by res judicata;
- (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;
- (5) Declare that Respondent’s arguments regarding Claimants’ failure to mitigate damages by not pursuing local remedies under Ecuadorian law are not precluded by res judicata; and
- (6) Award Respondent all of its costs of arbitration, including its cost of representation, in connection with the Request together with interest at a reasonable rate.

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.²⁵

JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION (Neil Kaplan & Michael J. Moser eds., 2018), p. 122; **CLA-8**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, Resubmitted Case, 10 May 1988.

²⁴ Respondent’s Second Submission, paras. 92-94; **RLA-902**, Gavan Griffith & Isabella Seif, *Chapter 8: Work in Progress: Res Judicata and Issue Estoppel in Investment Arbitration* in JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION (Neil Kaplan & Michael J. Moser eds., 2018), p. 122; **CLA-75**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int’l & Comp. L. 38 (1996), p. 42; **RLA-963**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Decision on Jurisdiction, Admissibility, and Liability, 21 April 2015, paras. 166, 172.

²⁵ Respondent’s Second Submission, paras. 283-284.

III. QUESTION #1

27. Question #1 is as follows:

Is Ecuador's request for a reduction in damages based upon a hypothetical "but-for" scenario barred by the Tribunal's Track II finding that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption?²⁶

A. THE CLAIMANTS' POSITION

28. The Claimants' position on Question #1 is that the Tribunal's prior rulings that the Lago Agrio proceeding constituted a denial of justice "comprised of fraud and corruption" preclude the Respondent from any damage offset based upon a hypothetical "but-for" scenario under the *Chorzów Factory* principle of full reparation.²⁷ As a consequence, the Respondent would not be entitled to what the Claimants characterize as "an offset of almost the entire US \$ 1.8 billion in damages that it owes to the Claimants on the ground that Claimants 'would... have incurred legal expenses and other losses [i.e., an unfavorable Ecuadorian judgment] of a comparable magnitude on the basis of the Lago Agrio Complaint and related enforcement actions'."²⁸
29. First, the Claimants cite the *Amco v. Indonesia (II)* case for the proposition that international law precludes any offset when, as here, the denial of justice pervades the entire underlying proceeding.²⁹ The *Amco* tribunal rejected an argument by Indonesia that the investor would have lost a hotel license even if the administrative proceeding by which the license was revoked had not constituted a denial of justice, noting that such approach "misaddress[ed] causality", was "speculative" and also "not the issue before it."³⁰ Instead, the *Amco* tribunal considered whether "there exist[ed] a generally tainted background that necessarily renders a decision unlawful, even if substantive grounds may

²⁶ Claimants' Second Submission, para. 5.

²⁷ Claimants' Request, Section V; Claimants' Second Submission, Section IV; **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, p. 47.

²⁸ Claimants' Request, para. 47; Claimants' Second Submission, para. 36; Counter-Memorial, paras. 183-184, 1203-1210.

²⁹ Claimants' Request, Section V.A; Claimants' Second Submission, Section IV.A; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990.

³⁰ Claimants' Request, paras. 50-51; Claimants' Second Submission, paras. 40-41; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990, paras. 75, 98, 174.

exist for such a decision.”³¹ In such circumstance, the Claimants posit that it is “neither possible nor appropriate for an arbitral tribunal to even attempt to reconstruct a ‘fair’ proceeding.”³²

30. Further, the Claimants observe that in multiple cases in which tribunals awarded damages to the victim of a denial of justice no but-for offset theory was applied or even considered.³³ For the Claimants, in those cases the no-offset principle follows from the nature of the loss: “the claimant’s legal expenses are damages flowing from the *loss of opportunity* to litigate in an adequate and effective domestic legal system”, which cannot be offset.³⁴
31. As to the authorities relied upon by Ecuador to support its offset theory, the Claimants consider that they are not germane to the present case. First, *Clayton v. Canada* involves “proof of lost profits, which naturally requires consideration of a hypothetical, not the reduction of damages arising from losses that are already definite and calculated.”³⁵ *Philip Morris v. Uruguay*, in turn, “offers no support” to the Respondent, since the tribunal made no finding of denial of justice in that case.³⁶ Moreover, *White Industries v. India* “offers no language” to infer that the tribunal was offsetting the claimant’s legal

³¹ **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990, para. 75.

³² Claimants’ Request, para. 50; Claimants’ Second Submission, paras. 40, 46.

³³ Claimants’ Second Submission, paras. 47-53; **CLA-824**, *Smith v. Compañía Urbanizadora del Parque y Playa de Marianao* (Cuba/United States), 2 May 1929, 24 Am. J. Int’l L. (1930), pp. 384-388; **CLA-825**, *Venable v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 8 July 1927, 4 UNRIAA 219, para. 30; **CLA-826**, *Salvador Commercial Co.* (El Salvador/United States), Award, 8 May 1902, 15 UNRIAA 467, pp. 476-479; **CLA-827**, *Fabiani* (French-Venezuelan Claims Commission), 30 December 1896, in 5 John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, TOGETHER WITH APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND MODERN, AND ON THE DOMESTIC COMMISSIONS OF THE UNITED STATES FOR THE ADJUSTMENT OF INTERNATIONAL CLAIMS 4878 (1898), pp. 4899, 4912; **CLA-828**, *Yuille, Shortridge & Co.* (Portugal/United Kingdom), 21 October 1861, in 2 RECUEIL DES ARBITRAGES INTERNATIONAUX 78–118 (A. de Lapradelle & N. Politis eds., 1923), p. 108; **CLA-829**, *Baldwin* (Mexico/United States), 23 February 1842, in 4 John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, TOGETHER WITH APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND MODERN, AND ON THE DOMESTIC COMMISSIONS OF THE UNITED STATES FOR THE ADJUSTMENT OF INTERNATIONAL CLAIMS 3235–40 (1898), pp. 3239-3240.

³⁴ Claimants’ Second Submission, para. 54 (emphasis in original).

³⁵ Claimants’ Request, paras. 57-58; Claimants’ Second Submission, para. 56; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019.

³⁶ Claimants’ Request, para. 59; **RLA-793**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 575-580.

expenses for what it might have spent in a counterfactual scenario.³⁷ As for the *Chevron Commercial Cases*, the tribunal had before it a “complete and reliable record—untainted by any allegation of fraud or malfeasance—” from which it could derive a counterfactual scenario.³⁸ Lastly, the Claimants consider that *Lemire v. Ukraine* was not a case of denial of justice, nor a case in which the tribunal was called upon to assess “the evidence of what would likely have happened in the absence of the breaches”;³⁹ rather, the *Lemire* tribunal “simply investigated the claimant’s applications one by one, determined which ones objectively should have succeeded, and awarded damages.”⁴⁰

32. In the Claimants’ view, the reasoning of *Amco* and other similar cases (such as *Roberts v. Mexico*⁴¹ and *Chattin v. Mexico*)⁴² applies in this case “given the inextricable link between Ecuador’s denial of justice and the outcome in the Lago Agrio proceeding.”⁴³ In circumstances where fraud tainted the entire Lago Agrio Litigation, the Claimants, relying on the maxim *fraus omnia vitiat* (fraud vitiates everything), conclude that no offset is permitted or possible.⁴⁴
33. In particular, the Claimants deny that the evidence of fraud was limited to the LAPs’ ghostwriting the Lago Agrio Judgment.⁴⁵ The Claimants recall what the Track II Award describes as “overwhelming” evidence of fraud in the Lago Agrio Litigation, including the LAPs’ secret meetings with several judges, their appointment of an independent environmental expert (Richard Stalin Cabrera) with whom they had reached a corrupt

³⁷ Claimants’ Request, para. 60; Claimants’ Second Submission, para. 56; **CLA-686**, *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, para. 16.1.1.

³⁸ Claimants’ Request, para. 66; Claimants’ Second Submission, para. 56; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010.

³⁹ Claimants’ Second Submission, paras. 59-60.

⁴⁰ Claimants’ Second Submission, para. 61. See **RLA-433**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011.

⁴¹ Claimants’ Request, paras. 52-53; **CLA-736**, *Harry Roberts (United States) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 2 November 1926, 4 UNRIAA, paras. 6-7.

⁴² Claimants’ Request, para. 54; **CLA-39**, *B. E. Chattin (United States) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 23 July 1927, 4 UNRIAA 282, paras. 21-22, 26, 30.

⁴³ Claimants’ Request, para. 62; Claimants’ Second Submission, para. 45; Track II Award, paras. 2.9, 8.59.

⁴⁴ Claimants’ Request, para. 69; Claimants’ Second Submission, paras. 46, 62-68.

⁴⁵ Claimants’ Second Submission, para. 65.

agreement, their payment of bribes to former judge Alberto Guerra to draft orders for Zambrano, or their falsifying of the expert report of Dr. Charles Calmbacher.⁴⁶

34. In view of these findings, the Claimants reject the Respondent's suggestion that only the aspects of the fraud that the Tribunal directly attributed to Ecuador should be considered when evaluating the reliability of the Lago Agrio record.⁴⁷ In the Claimants' view, the fraud attributable to the Respondent (i) "thoroughly infected the underlying merits of the Lago Agrio Litigation such that Ecuador should not be permitted any offset based on those alleged merits"; and (ii) in any event, "the overall fraud so thoroughly infected the underlying Lago Agrio record such that there is no evidentiary basis for any offset in the first place."⁴⁸ At the end of the day, the Claimants aver, "it was Ecuador's obligation to ensure a fair procedure, which it failed to do."⁴⁹
35. *Second*, and in the alternative, the Claimants argue that an offset is inappropriate in this case because (i) no offset can be granted on the basis of the existing case record in the underlying proceeding; and (ii) the tribunal lacks jurisdiction over all relevant parties.⁵⁰
36. In respect of item (i) above, the Claimants cite *Chevron Commercial Cases* for the principle that the existing record of the underlying proceedings must be sufficiently reliable to permit an analysis of the hypothetical outcome of such proceedings.⁵¹ Similarly, in *Sramek v. Austria*, the European Court of Human Rights determined that the claimant would have lost her case even without the respondent's violation of Article 6(1) of the European Convention on Human Rights after having concluded that "the evidence in the file" (i.e., the appellate record) was "complete and untainted" by the state's breach.⁵² Relatedly, the Claimants note that the Respondent is unable to cite any precedent in which a tribunal performed a hypothetical analysis and granted an offset

⁴⁶ Claimants' Request, para. 70; Claimants' Second Submission, para. 66; Track II Award, paras. 4.213, 4.231, 4.303, 4.354-4.355, 4.378, 4.385-4.388, 5.231, 5.245, 5.248, 8.44, 8.54, 8.56, 8.59, 10.4.

⁴⁷ Claimants' Second Submission, para. 67.

⁴⁸ Claimants' Second Submission, para. 68.

⁴⁹ Claimants' Second Submission, para. 68.

⁵⁰ Claimants' Second Submission, paras. 69-84.

⁵¹ Claimants' Request, para. 66; Claimants' Second Submission, para. 70; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010, paras. 241-244, 270.

⁵² Claimants' Request, para. 67; Claimants' Second Submission, para. 71; **RLA-709**, *Sramek v. Austria*, ECHR App No. 8790/79, Judgment, 22 October 1984, paras. 8, 11, 13-15, 41-42, 46.

based on an underlying case permeated with fraud and corruption, or in which an offset was granted based on new evidence gathered in the arbitration itself,⁵³ as the Respondent purports to do here.⁵⁴

37. Applying this rationale, the Claimants repeat their arguments concerning the unreliability of the Lago Agrio record,⁵⁵ noting that even if some untainted portion of the underlying record could be found, the Respondent’s offset claim would require a complete “do over” of the Lago Agrio litigation “based upon hypothesized individual claims that the [Lago Agrio plaintiffs (the “LAPs”)] could have—but did not—pursue *for reasons entirely unrelated to Ecuador’s Treaty breaches*”, meaning that there is no reason to believe that those breaches would “in all probability” have led them to be pursued in a but-for scenario.⁵⁶ Rather, the Claimants argue that “since the only claims that the LAPs actually pursued were barred by the Settlement and Release Agreement, it is likely that a treaty-compliant Ecuadorian [court] would have simply dismissed the case in its entirety.”⁵⁷
38. As to item (ii) above, the Claimants state that tribunals have allowed an offset to damages based on the hypothetical outcome of the underlying proceedings only where the tribunal has jurisdiction over all relevant parties.⁵⁸ Requiring the Tribunal “to speculate about the claims third parties *might have brought* and the new evidence they *might have submitted*” is, in the Claimants’ view, “speculative and plainly improper.”⁵⁹ In this respect, the Claimants recall that the Tribunal has held that it “does not have jurisdiction over the [LAPs] themselves”, while at the same time preserving their “individual” rights

⁵³ Claimants’ Request, para. 68; Claimants’ Second Submission, para. 73.

⁵⁴ Claimants’ Second Submission, para. 77.

⁵⁵ Claimants’ Second Submission, para. 74.

⁵⁶ Claimants’ Second Submission, para. 76 (emphasis in original).

⁵⁷ Claimants’ Second Submission, para. 76.

⁵⁸ Claimants’ Request, para. 74; Claimants’ Second Submission, paras. 79-80; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990; **CLA-736**, *Harry Roberts (United States) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 2 November 1926, 4 UNRIAA; **CLA-39**, *B. E. Chattin (United States) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 23 July 1927, 4 UNRIAA 282; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010; **RLA-709**, *Sramek v. Austria*, ECHR App No. 8790/79, Judgment, 22 October 1984.

⁵⁹ Claimants’ Second Submission, para. 81 (emphasis in original).

throughout this arbitration and precluding the Respondent from asserting those rights.⁶⁰ The Claimants also recall that the LAPs elected not to pursue non-diffuse individual claims during the course of the Lago Agrio Litigation, meaning that that is not the situation that would “in all probability” have existed in the absence of a Treaty breach, as required by *Chorzów*.⁶¹

B. THE RESPONDENT’S POSITION

39. The Respondent asserts that the Claimants have failed to prove their predicate in Question #1 that the “entire underlying proceeding was pervaded by a denial of justice comprised of fraud and corruption.”⁶² Even if such predicate were true as a matter of fact, the Respondent states that the Claimants’ position would still fail as a matter of law because there is no rule of international law barring application of the but-for principle based upon the nature of the denial of justice.⁶³
40. *First*, the Respondent submits that there is nothing in the Tribunal’s Track II Award that constitutes a finding that “the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption.”⁶⁴ In particular, the Respondent recalls that the denial of justice found in this case was not comprised of all “fraud and corruption” committed by third parties: it was based solely upon the “issuing, rendering enforceable, maintaining the enforceability and executing *the Lago Agrio Judgment*”, ghost-written as a result of bribery and as unremedied by the higher Courts.⁶⁵ According to the Respondent, many of the instances of fraud that the Claimants allege “tainted” the entire proceeding (including the LAPs’ representatives blackmailing of Judge Yanez, collusion with Richard Cabrera and bribing of Dr. Alberto Guerra, as well as the expert report of Dr. Calmbacher and the remarks of Dr. David Russel) were excluded by the Tribunal from the Respondent’s Treaty breaches, meaning that they cannot be the “fraud and

⁶⁰ Claimants’ Second Submission, para. 82; Third Interim Award, 27 February 2012, para. 4.65; Track II Award, paras. 7.40, 7.45.

⁶¹ Claimants’ Request, para. 77; Claimants’ Second Submission, para. 83.

⁶² Respondent’s Response, Section V.B; Respondent’s Second Submission, Section II.A.1.

⁶³ Respondent’s Response, Section V.A; Respondent’s Second Submission, Section II.A.2.

⁶⁴ Respondent’s Response, para. 164; Respondent’s Second Submission, paras. 18, 24.

⁶⁵ Respondent’s Response, para. 164; Respondent’s Second Submission, para. 26; Track II Award, paras. 8.61, 10.5 (Claimants’ emphasis).

corruption” included in the denial of justice found in this case⁶⁶ and cannot be mislabelled now as “Ecuador’s misconduct.”⁶⁷ The Respondent finally rejects the Claimants’ reliance on the maxim *fraus omnia vitiat* “to invalidate a causation analysis.”⁶⁸

41. The Respondent also points to several “give-aways” that the Claimants are attempting to evade the fundamental but-for principle embodied in *Chorzów Factory*,⁶⁹ including what they characterize as “ever-changing” formulations for the principle they say prevents consideration of the Respondent’s but-for argument.⁷⁰
42. *Second*, the Respondent denies the proposition that international law precludes the application of the but-for principle depending on the nature of the denial of justice.⁷¹ In the Respondent’s view, the Claimants “attempt to construct such a ‘rule’ by combining bits and pieces of decisional statements to create entirely new principles and tests.”⁷² In particular, the Respondent submits that *Amco v. Indonesia II* does not displace the normal rules of causation under international law and is a flawed basis for the Claimants’ theory for four reasons:⁷³
 - (i) *Amco* does not address the but-for assessment of damages, “but rather when *liability* for a denial of justice can be premised upon procedural and other defects rather than an improper ruling”⁷⁴ and *Amco*’s contributory negligence to the damage it suffered.⁷⁵

⁶⁶ Respondent’s Response, para. 165; Respondent’s Second Submission, paras. 27-28; Track II Award, paras. 4.213, 5.242-5.247, 5.249, 8.14, 8.17.

⁶⁷ Respondent’s Response, para. 167; Respondent’s Second Submission, paras. 29-30.

⁶⁸ Respondent’s Second Submission, para. 31.

⁶⁹ Respondent’s Second Submission, paras. 17-20.

⁷⁰ Respondent’s Second Submission, paras. 19-20.

⁷¹ Respondent’s Second Submission, para. 33.

⁷² Respondent’s Second Submission, paras. 33-34.

⁷³ Respondent’s Second Submission, para. 35.

⁷⁴ Respondent’s Response, paras. 149-150; Respondent’s Second Submission, para. 36 (emphasis in original); **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990, paras. 98-99.

⁷⁵ Respondent’s Response, para. 152; Respondent’s Second Submission, para. 37; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990, paras. 75, 137, 139, 173-174.

- (ii) *Amco* is inapposite on the facts, as, in that case, “the *respondent State*’s entire approach from the outset” amounted to a denial of justice, while in this case the Tribunal did not find a denial of justice on the premise that the actions of the Respondent tainted the entire Lago Agrio Litigation from the outset.⁷⁶
 - (iii) Mr. Paulsson, who acts as counsel for the Claimants in this case, has expressed “doubts” about *Amco*’s treatment of proximate causation.⁷⁷
 - (iv) *Amco* “does not support *any* of Claimants’ formulations of their...rule:” (a) there was no third party fraud in that case; and (b) *Amco* does not stand for the proposition that any finding of fraud forecloses consideration of a but-for defence.⁷⁸
43. According to the Respondent, the remaining authorities relied upon by the Claimants are also inapposite to the circumstances of the present case:
- (i) In *Chattin v. Mexico*, the respondent did not make a but-for argument with respect to the quantification of damages, and the commission did not state any proposition that “a denial of justice must be compensated irrespective of the merits of the underlying case.”⁷⁹
 - (ii) Similarly, in *Roberts v. Mexico*, the respondent did not make a but-for argument with respect to the quantification of damages, and “the unitary indemnity awarded covered the suffering Roberts endured due to the ‘excessively long [pre-trial] imprisonment’ and ‘cruel and inhumane’ treatment for which no but-for scenario could possibly be posited.”⁸⁰

⁷⁶ Respondent’s Response, para. 151; Respondent’s Second Submission, para. 39 (emphasis in original); Track II Award, para. 9.15; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990, paras. 98-99, 138.

⁷⁷ Respondent’s Second Submission, para. 40; **RLA-61**, Jan Paulsson, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* (Cambridge Univ. Press 2005), pp. 221-222.

⁷⁸ Respondent’s Second Submission, para. 41 (emphasis in original).

⁷⁹ Respondent’s Response, para. 157; Respondent’s Second Submission, para. 43; **CLA-39**, *B. E. Chattin (United States) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 23 July 1927, 4 UNRIAA 282, para. 22.

⁸⁰ Respondent’s Response, paras. 155-156; Respondent’s Second Submission, paras. 44-45; **CLA-736**, *Harry Roberts (United States.) v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 2 November 1926, 4 UNRIAA, paras. 7-10.

(iii) Finally, the Respondent characterizes the Claimants’ remaining authorities on this point as “outdated” (noting that all but one pre-date *Chorzów Factory*), and observes that (a) in none of those cases was a counterfactual scenario “ever posed or considered”, and (b) some of them did not even find a denial of justice.⁸¹

44. Further, the Respondent rejects the Claimants’ attempts to distinguish *Clayton v. Canada*, *White Industries v. India* and *Chevron Commercial Cases* from the present case. First, *Clayton* embodies the principle that Claimants have the burden to prove their damages, and the fact that it involved lost profits as damages is “a distinction without a difference”, since *Chorzów Factory* does not limit the applicability of the but-for test to cases involving lost profits.⁸² Second, *White Industries* undertook its analysis in the normal course of complying with *Chorzów Factory*’s but-for test.⁸³ The same goes for *Chevron Commercial Cases*, which, the Respondent notes, is also inapposite on the issue of the “quality” of the underlying record: the Respondent’s environmental experts do not rely here on “tainted” evidence, and the question remains irrelevant to the Respondent’s argument on the magnitude of legal fees and costs that the Claimants would have incurred in a but-for scenario.⁸⁴

⁸¹ Respondent’s Second Submission, paras. 47-55; **CLA-824**, *Smith v. Compañía Urbanizadora del Parque y Playa de Marianao* (Cuba/United States), 2 May 1929, 24 Am. J. Int’l L. (1930), pp. 384-385, 387; **CLA-825**, *Venable v. United Mexican States*, General Claims Commission (Mexico and United States), Decision, 8 July 1927, 4 UNRIAA 219, pp. 221, 239, 248, paras. 19, 30; **CLA-826**, *Salvador Commercial Co.* (El Salvador/United States), Award, 8 May 1902, 15 UNRIAA 467, pp. 476, 478-479; **CLA-827**, *Fabiani* (French-Venezuelan Claims Commission), 30 December 1896, in 5 John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, TOGETHER WITH APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND MODERN, AND ON THE DOMESTIC COMMISSIONS OF THE UNITED STATES FOR THE ADJUSTMENT OF INTERNATIONAL CLAIMS 4878 (1898), pp. 4899, 4912; **CLA-828**, *Yuille, Shortridge & Co.* (Portugal/United Kingdom), 21 October 1861, in 2 RECUEIL DES ARBITRAGES INTERNATIONAUX 78-118 (A. de Lapradelle & N. Politis eds., 1923), p. 108; **CLA-829**, *Baldwin* (Mexico/United States), 23 February 1842, in 4 John Bassett Moore, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, TOGETHER WITH APPENDICES CONTAINING THE TREATIES RELATING TO SUCH ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND MODERN, AND ON THE DOMESTIC COMMISSIONS OF THE UNITED STATES FOR THE ADJUSTMENT OF INTERNATIONAL CLAIMS 3235-40 (1898), pp. 3239-3240.

⁸² Respondent’s Response, para. 160; Respondent’s Second Submission, paras. 56-57; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019.

⁸³ Respondent’s Response, para. 160; Respondent’s Second Submission, para. 57; **CLA-686**, *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, paras. 14.2.2-14.2.66.

⁸⁴ Respondent’s Response, para. 160; Respondent’s Second Submission, paras. 57-58; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010, paras. 552, 556.

45. *Third*, the Respondent submits that the Tribunal should disregard the Claimants’ remaining arguments concerning whether this case meets the requirements of their “newly concocted rule” that international law precludes any offset when the denial of justice pervades the entire underlying proceeding, because they are outside the scope of this preliminary process.⁸⁵ In the Respondent’s view, they go to the merits of the environmental but-for argument⁸⁶ and risk prejudging the Respondent’s other arguments in Track III.⁸⁷ In particular, the Respondent asserts that the alleged “pervasiveness” of fraud also underpins the Claimants’ claims for legal fees incurred as far back as 2004 (i.e. 14 years before the denial of justice was committed in this case).⁸⁸
46. *Fourth*, and in any event, the Respondent submits that it will demonstrate that (i) the Claimants cannot show that fraud tainted the entire Lago Agrio Litigation and (ii) the existing record in the Lago Agrio Litigation is a reliable basis to assess the Respondent’s environmental but-for argument.
47. In respect of item (i) above, the Respondent asserts that the Claimants conflate the denial of justice by the State with the fraud committed by third parties, misrepresent the extent of fraud found by the Tribunal in the Track II Award, and overstate that the Lago Agrio Litigation was “infected” by fraud.⁸⁹ On this last point, relying on the expert evidence of Dr. Andrade, the Respondent argues that, based on the Claimants’ own submissions before the Constitutional Court, “all evidence introduced by the parties into the Lago Agrio record prior to the judicial inspections would have been preserved and would have been used in the remand proceedings” if the Court had granted the Claimants’ extraordinary protection action.⁹⁰ Further, the Respondent asserts that the Claimants have at no point alleged that the evidence-gathering judicial process starting in October 2003 was tainted by fraud—and observe, relatedly, that the Claimants do not seek to recover legal fees incurred during this phase of the Lago Agrio Litigation.⁹¹

⁸⁵ Respondent’s Second Submission, Section II.B.

⁸⁶ Respondent’s Second Submission, para. 59.

⁸⁷ Respondent’s Second Submission, para. 60.

⁸⁸ Respondent’s Second Submission, para. 60.

⁸⁹ Respondent’s Response, para. 169; Respondent’s Second Submission, para. 62.

⁹⁰ Respondent’s Second Submission, para. 63; **RE-9**, First Expert Report of Fabián Andrade Narváez, 18 February 2013, paras. 31, 33.

⁹¹ Respondent’s Second Submission, para. 64.

48. As to item (ii) above, the Respondent notes that its environmental but-for argument is based “on the evidence that Chevron itself introduced in the Lago Agrio Record, which Claimants cannot allege was tainted by any fraud.”⁹² The Respondent also posits that in Track II it showed that extant sources in the Lago Agrio record alone were sufficient to demonstrate that TexPet had caused widespread contamination throughout the Concession Area.⁹³ Moreover, the Respondent’s Track III expert, Dr. Delaney, relies primarily on Chevron’s data when determining whether there would have been substantial evidence available to the LAPs of environmental contamination.⁹⁴ The Respondent emphasizes that Dr. Delaney’s report is the only “new” evidence submitted in Track III on the question of hypothesized claims, thus disproving the Claimants’ argument that it is seeking a “retrial”.⁹⁵ The Respondent insists that it only seeks a finding that the Chevron would “in all likelihood, have incurred significant legal fees defending itself against the prospect of a significant judgment in a Treaty-compliant scenario based on non-diffuse claims”.⁹⁶
49. *Fifth*, the Respondent rejects the notion that the Tribunal must exercise jurisdiction over the LAPs to apply the but-for analysis.⁹⁷ It stresses that it only seeks to determine, under the *Chorzów Factory* standard, whether the Claimants “would have incurred legal expenses and other losses of a comparable magnitude in the counter-factual,” not to advance an environmental cross-claim on behalf of the LAPs or have the Claimants disburse any amounts as a result of their environmental contamination.⁹⁸ The Respondent cites *Lemire v. Ukraine* as an example of a case where a tribunal’s determination of a hypothetical scenario had no legal impact on the rights of a third party (just like any of the Tribunal’s hypothetical determinations in this case, such as the effects of the Settlement Agreement, will have no legal impact on the rights of the LAPs).⁹⁹

⁹² Respondent’s Second Submission, para. 66.

⁹³ Respondent’s Second Submission, para. 66.

⁹⁴ Respondent’s Second Submission, para. 66.

⁹⁵ Respondent’s Second Submission, para. 67.

⁹⁶ Respondent’s Second Submission, para. 68.

⁹⁷ Respondent’s Response, Section V.C; Respondent’s Second Submission, Section II.C.3.

⁹⁸ Respondent’s Response, para. 171; Respondent’s Second Submission, paras. 70-71.

⁹⁹ Respondent’s Response, paras. 173-175; Respondent’s Second Submission, paras. 72-73; **RLA-433**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, paras. 171, 196, 198-200.

IV. QUESTION #2

50. Question #2 is as follows:

Do the Tribunal's prior rulings regarding the scope and effects of the 1995 and 1998 Settlement and Release Agreements, as well as its rulings on its own jurisdiction, preclude both the claims that Ecuador's Counter-Memorial on Damages refers to as "collective" claims and any offset based on individual claims?¹⁰⁰

A. THE CLAIMANTS' POSITION

51. The Claimants submit that the Respondent's offset claims are fully precluded by the Tribunal's prior awards and decisions on (1) the scope and effect of the Settlement and Release Agreements; (2) its lack of jurisdiction over any claims by individual plaintiffs; and (3) its dismissal of the Respondent's environmental cross-claim.¹⁰¹

(1) Whether the Respondent's But-For Argument is *Res Judicata*

52. The Claimants recall that the question of the scope and effect of the Settlement and Release Agreements has been briefed and argued extensively in this arbitration, and submit that the Tribunal has already ruled in their favour by holding that the Settlement and Release Agreements bar all "diffuse (or collective)" environmental claims against the Claimants.¹⁰²

53. The Claimants observe that the Tribunal's rulings must apply with full force and effect in any but-for scenario constructed by the Respondent, as reflected in cases such as *Chorzów Factory*.¹⁰³ In this sense, the Claimants insist that the but-for scenario put forward by the Respondent ignores the Tribunal's multiple interim orders and awards.¹⁰⁴

54. In addition, the Claimants argue that, through its "speculative" but-for defense in Track III, the Respondent is attempting to "repackage" its "cross-claim" for environmental damage, which the Tribunal rejected in the Track II Award.¹⁰⁵ Indeed, the Tribunal held

¹⁰⁰ Claimants' Request, para. 13; Claimants' Second Submission, para. 5.

¹⁰¹ Claimants' Request, para. 125; Claimants' Second Submission, para. 153.

¹⁰² Claimants' Request, para. 81; Claimants' Second Submission, para. 90; Track II Award, para. 5.128.

¹⁰³ Claimants' Request, paras. 83-84; Claimants' Second Submission, paras. 92-93; **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, pp. 31-32.

¹⁰⁴ Claimants' Request, para. 85; Claimants' Second Submission, paras. 94-95.

¹⁰⁵ Claimants' Request, paras. 118-119, 124; Claimants' Second Submission, paras. 144-146; Counter-Memorial, para. 1166; Track II Award, paras. 7.30-7.31, 7.37; Respondent's Track I Supplemental Counter-

that (i) it had no jurisdiction to decide the LAPs' individual claims for personal harm to the extent that they constituted either a diffuse or collective claim, or individual claims which Ecuador lacked standing to assert; and (ii) in any event the Respondent had failed to prove its environmental cross-claim, which would amount to *res judicata*.¹⁰⁶ The Claimants dispute the Respondent's position that the Tribunal did not hold its cross-claim to be unproven "as a *factual* matter" or that Ecuador could be credited the value of claims belonging to individual LAPs as a reduction to the damages it caused, explaining that environmental quantum issues were only reserved for Track III in the event that the Respondent prevailed on its cross-claim.¹⁰⁷

(2) The Tribunal's Prior Determinations on the Scope and Effect of the Settlement Agreement

55. The Claimants recall that under the Settlement Agreement the government of Ecuador agreed to release TexPet from liability for diffuse or collective environmental claims (but not individual damage claims) in exchange for the remediation of certain portions of the relevant concession area.¹⁰⁸ In their view, it was Ecuador that violated the Settlement Agreement, while TexPet "fully complied" with its environmental remediation obligations, as found by the Tribunal in its Track II Award and reflected in further testimony and evidence.¹⁰⁹
56. The Claimants contend that the Tribunal ruled in their favor on the scope and effect of the Settlement Agreement by holding, on a final and binding basis for purposes of Track III, that (i) Ecuador forever released them from all diffuse (or collective) environmental claims, excluding only individual damage claims by individual plaintiffs for personal harm; and (ii) the Lago Agrio Judgement only adjudicates diffuse (or collective) claims,

Memorial on the Merits, 31 March 2014, para. 64; Respondent's Track I Rejoinder on the Merits, 26 October 2012, para. 134, fn. 163.

¹⁰⁶ Claimants' Request, paras. 120-122; Claimants' Second Submission, paras. 147-149; Track II Award, paras. 7.36, 7.39-7.40, 7.42, 7.44.

¹⁰⁷ Claimants' Request, para. 123; Claimants' Second Submission, paras. 150-152 (emphasis in original); Respondent's Counter-Memorial on Track II, 18 February 2013, para. 516; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010.

¹⁰⁸ Claimants' Request, paras. 86-87; Claimants' Second Submission, paras. 96-97; Track II Award, paras. 3.18, 3.20-3.21, 4.55, 4.66-4.69, 5.223; Partial Award on Track I, para. 97.

¹⁰⁹ Claimants' Request, paras. 88-90; Claimants' Second Submission, paras. 98-100; Track II Award, paras. 4.68-4.69, 4.179-4.181, 4.183, 4.213, 4.231.

which in turn is consistent with the rulings of Ecuadorian courts at all levels.¹¹⁰ As such, the Tribunal’s prior rulings would preclude the Respondent’s offset theory that a Treaty-compliant Lago Agrio Court would have addressed certain “individual claims” for “collective rights” of the plaintiffs now labelled as “individual collective claims”.¹¹¹

57. The Claimants posit that, in Track I, the Tribunal found that Ecuador settled all diffuse and collective rights relating to environmental claims against Claimants through the Settlement and Release Agreements, which bars any offset attempt by way of either a “cross-claim” or a hypothetical “but-for” reduction in damages.¹¹² On the one hand, in the 1995 Settlement Agreement, Ecuador released claims for “Environmental Impact”, which cover diffuse or collective claims for harm to both human (or “public”) health and the environment.¹¹³ On the other hand, the six settlement agreements which TexPet signed with municipalities in 1996 validly absolved the company from any responsibility or claim related to actions or omissions arising from its activity in those areas, while the Respondent’s offset argument is based on the collective rights of the members of those same municipalities.¹¹⁴
58. The Claimants further recall that the Tribunal has held that, in the Settlement and Release Agreements, Ecuador released all of the rights allegedly vindicated in the Lago Agrio Judgment, and deny that there is a “third path” for the Respondent involving individual-but-simultaneously-collective claims.¹¹⁵ Recalling that the scope and effect of the Settlement and Release Agreements was already addressed in Track I of the arbitration,

¹¹⁰ Claimants’ Request, paras. 92-97; Claimants’ Second Submission, paras. 102-107; Track II Award, paras. 4.196, 5.121, 5.132, 9.71, 10.8; **C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, 14 February 2011, at 8:37 a.m., pp. 33, 147, 170, 184; **C-971**, Lago Agrio Court Order addressing Chevron’s Motion to clarify and amplify, 4 March 2011, at 3:10 p.m., pp. 4, 23-24; **C-991**, First-Instance Appellate Decision by the Lago Agrio Appeals Court, 3 January 2012, at 4:43 p.m., p. 3; **C-1975**, Cassation Decision (Ecuadorian National Court Judgment), 12 November 2013, p. 72.

¹¹¹ Claimants’ Request, paras. 98-99; Claimants’ Second Submission, paras. 108-109; Counter-Memorial, paras. 31, 33, 967, 979, 986, 988.

¹¹² Claimants’ Request, paras. 100-101, 104; Claimants’ Second Submission, paras. 110-111, 115; Partial Award on Track I, paras. 108, 112(3); Track II Award, para. 5.223.

¹¹³ Claimants’ Request, para. 102; Claimants’ Second Submission, para. 112; Track II Award, paras. 3.18, 3.23; Partial Award on Track I, para. 19.

¹¹⁴ Claimants’ Request, para. 103; Claimants’ Second Submission, paras. 113-114; **RE-34**, Expert Report of Tod Delaney (of First Environment), 28 February 2020, p. 32; **C-29**, Release with Municipality of the Canton of Francisco de Orellana (Coca), 2 May 1996; **C-31**, Contract of Settlement and Release between Texaco Petroleum Company and the Provincial Prefect Office of Sucumbíos, 2 May 1996; Counter-Memorial, para. 986; Partial Award on Track I, paras. 28, 106; Track II Award, paras. 3.26, 4.160-4.161.

¹¹⁵ Claimants’ Second Submission, para. 116; Track II Award, paras. 8.7, 9.23-9.24.

they argue that the “non-diffuse”, “individual collective” claims, as labelled by the Respondent, are indivisible claims of a broader community brought by a particular person or entity as a representative.¹¹⁶ However, the only claims not barred by the Settlement Agreements are individual claims by individual plaintiffs for personal harm, since any diffuse and collective claims that the Lago Agrio Plaintiffs may have brought were released as per the holdings of the Tribunal and Ecuadorian courts.¹¹⁷ The Claimants underscore that the standard fixed by the Tribunal to distinguish individual and diffuse (and hence barred) claims is “personal harm”, which can only be claimed by the allegedly affected individual, as there is no class action or similar mechanisms under Ecuadorian law.¹¹⁸ Similarly, while Ecuador was the only party entitled to bring a claim for diffuse or collective rights, it settled those rights in full.¹¹⁹ The Claimants criticize the Respondent’s changing positions on the nature of the rights at issue in the Lago Agrio Litigation, and insist that any right to a clean environment or to public health concerns an indivisible, and thus released, claim, regardless of how it is labelled or of the identity of the claimant.¹²⁰

59. Furthermore, the Claimants explain that the Tribunal has repeatedly held that, for purposes of its rulings, diffuse and collective rights are the same,¹²¹ which is consistent with (i) the decision of Ecuador’s National Court of Justice in the Lago Agrio case;¹²²

¹¹⁶ Claimants’ Second Submission, paras. 117-118; Procedural Order No. 10, 9 April 2012; Counter-Memorial, paras. 970, 995; First Expert Report of Dr. Coronel, para. 9; Third Expert Report of Dr. Coronel (Rebuttal), 28 August 2012, paras. 9, 38-40.

¹¹⁷ Claimants’ Second Submission, paras. 119-120, 124; Track II Award, para. 10.8.

¹¹⁸ Claimants’ Request, paras. 105-107; Claimants’ Second Submission, paras. 121-123; Partial Award on Track I, paras. 91, 96, 112(3); Track II Award, paras. 5.121, 5.223, 7.45, 10.7; Respondent’s Counter-Memorial on Track II, 18 February 2013, para. 516; Track I(B) Award, 12 March 2015, para. 186(1); Claimants’ Track I Supplemental Memorial, 31 January 2014, para. 12.

¹¹⁹ Claimants’ Second Submission, para. 125; Partial Award on Track I, paras. 106-107.

¹²⁰ Claimants’ Request, paras. 108-110; Claimants’ Second Submission, paras. 126-130; Eighth Expert Report of Dr. Coronel, paras. 18, 31-36, 38-39; Respondent’s Track I Rejoinder on the Merits, 26 October 2012, paras. 20, 22, 29.

¹²¹ Claimants’ Request, paras. 111-112; Claimants’ Second Submission, para. 131; Partial Award on Track I, para. 97. The Tribunal would have also held that there are no new or otherwise excluded categories of diffuse or collective rights not within the scope of the Settlement and Release Agreements. See Claimants’ Request, para. 112; Claimants’ Second Submission, para. 132.

¹²² Claimants’ Request, para. 113; Claimants’ Second Submission, para. 133; **C-1975**, Cassation Decision (Ecuadorian National Court Judgment), 12 November 2013, pp. 17, 72, 185, 200-201.

(ii) Ecuadorian laws;¹²³ and (iii) the Respondent's submissions.¹²⁴ As such, they reject the category of "non-diffuse rights" including "individual claims based on...collective rights under Ecuadorian law" proposed by the Respondent.¹²⁵ Relying on Dr. Coronel's report, they submit that diffuse and collective rights have not been distinguished under Ecuadorian law and that, to the extent that some decisions have drawn a distinction, these confirm that (i) the right to a healthy environment is a diffuse right belonging to the entire community and (ii) collective rights are not individual rights and may not be construed as an aggregate thereof.¹²⁶ The Claimants conclude that the relevant distinction is between individual claims and non-individual claims which comprise both collective and diffuse rights, since a different understanding would render the final settlement and adjudication of the released claims "illusory" and force the Claimants to continue litigating the same non-individual rights and claims "in perpetuity".¹²⁷

B. THE RESPONDENT'S POSITION

60. The Respondent denies that it is re-asserting the cross-claim defense raised in Track II or that the Tribunal already determined that Ecuador settled and released the individual claims for individual and collective rights pleaded by the LAPs, such that its but-for argument is not precluded.¹²⁸ Accordingly, it submits that the Tribunal should answer Question #2 in the negative and reject the request to issue a partial award on this issue.¹²⁹

¹²³ Claimants' Request, para. 114; Claimants' Second Submission, para. 134; **C-0073**, 1999 Environmental Management Act, Official Registry No. 37, 30 July 1999, Glossary; Partial Award on Track I, paras. 105, 112(3); Track II Award, para. 5.223.

¹²⁴ Claimants' Request, para. 115; Claimants' Second Submission, para. 135; Respondent's Track I Rejoinder on the Merits, 26 October 2012, paras. 116-117; Le Chatelier and Oquendo Report, p. 2.

¹²⁵ Claimants' Request, paras. 116-117; Claimants' Second Submission, paras. 136-137.

¹²⁶ Claimants' Request, para. 116; Claimants' Second Submission, paras. 138-139; Eighth Expert Report of Dr. Coronel, paras. 22-31, 35-36(ii).

¹²⁷ Claimants' Second Submission, paras. 140-143; Partial Award on Track I, para. 107.

¹²⁸ Respondent's Response, para. 140; Respondent's Second Submission, paras. 75, 171.

¹²⁹ Respondent's Second Submission, para. 171.

(1) Whether the Respondent's But-For Argument is *Res Judicata*

61. At the outset, the Respondent argues that the Claimants have not proven that its but-for argument on damages is *res judicata*.¹³⁰ The Respondent accuses the Claimants of having mischaracterized the argument, which it restates as follows:

The first [aspect] relates to Claimants' proposed relief of damages for their *legal costs* caused by the Treaty breaches. In particular, the *but-for* argument on legal costs is that Claimants have not proven, and cannot prove, that they would not in all probability have incurred legal fees and expenses in the *but-for* scenario comparable to those they incurred in the actual scenario. The second aspect of the *but-for* argument relates to Claimants' requested relief for an order of *indemnification* by Respondent in the event the LAPs enforce the Lago Agrio Judgment. Respondent argues that Claimants have not proven, and cannot prove, that they would not have faced potential liability for the claims asserted in the Lago Agrio Complaint that were not extinguished by the 1995 Settlement Agreement in a Treaty-compliant scenario, and hence that they are entitled to full indemnification should the Lago Agrio Judgment be enforced.¹³¹

62. The Respondent stresses that this argument does not require the Tribunal to decide which party would have prevailed in a Treaty-compliant Lago Agrio Litigation, but rather only (i) what portion of the legal fees and costs actually and reasonably incurred would have been avoided; and (ii) whether the Claimants would likely have avoided a judicial order for remediation.¹³²
63. The Respondent reiterates that its but-for argument could not have been decided by the Tribunal in Track II, to the extent that it is a quantum issue assigned to Track III by prior procedural rulings, as the Claimants acknowledged during Track II.¹³³ Precisely, it clarifies that the cross-claim and but-for arguments are materially different in kind and purpose, to the extent that the former was a defense to the Claimants' proposed non-monetary relief of nullification of the Lago Agrio Judgment and the latter is a defense to the Claimants' proposed monetary remedies of damages for their legal fees and expenses

¹³⁰ Respondent's Response, paras. 50-53.

¹³¹ Respondent's Second Submission, paras. 80-81 (emphasis in original, footnotes omitted). *See also* Respondent's Response, paras. 47-49, 60, 67-69.

¹³² Respondent's Response, para. 69; Respondent's Second Submission, paras. 82-84; Second Procedural Meeting, Transcript, Day 1 (28 May 2020), p. 152:6-10 (Ettinger). In this vein, the Respondent concedes that "some aspects of the but-for argument do depend on Claimants' failure and inability to show that Chevron would not have sustained an adverse judgment". *See* Respondent's Response, para. 70.

¹³³ Respondent's Response, paras. 55-56, 63-65; Respondent's Second Submission, paras. 95-96; Procedural Order No. 18, 9 August 2013, paras. 7(1)-7(2); Procedural Order No. 23, 10 February 2014, paras. 1(i), 5.1; Track II Award, para. 10.14; Track II Hearing on the Merits, Transcript, Day 1 (21 April 2015), p. 167:13-23, Day 12 (7 May 2015), pp. 2572:25-2573:4, 2735:20-2736:9 (Paulsson).

and indemnification.¹³⁴ As such, the triple identity test would not be satisfied, given that (i) the Respondent's defenses were not bifurcated and the rejection of the cross-claim otherwise has no implication for later defenses to monetary remedies; and (ii) the cross-claim would have required the Tribunal to decide the Lago Agrio Litigation on the merits, whereas the but-for argument does not.¹³⁵

64. The Respondent further elaborates that the Tribunal's reasons for rejecting the cross-claim in the Track II Award do not apply to the but-for argument, since the cross-claim required the Respondent to assert the LAPs' claims and the Tribunal to assert jurisdiction over them, whereas the but-for argument does not require the Tribunal to declare what the LAPs' actual rights are or to otherwise exercise jurisdiction over the LAPs.¹³⁶ Similarly, while the Tribunal reasoned that the cross-claim argument depended on a judgment that had been "impugned by the claimant", the but-for argument would require assessing what would have occurred in a Treaty-compliant scenario.¹³⁷ The Respondent adds that the Tribunal did not even dismiss the cross-claim argument by rejecting the proposition that the Claimants argue is the same as the but-for argument.¹³⁸ Moreover, the context of the Tribunal's decision on the cross-claim argument shows that such decision was based on jurisdictional reasons, which would not apply to the but-for argument as it does not require the Tribunal to make any decisions that are legally binding on the LAPs.¹³⁹
65. Even if the Track II Award had addressed the but-for argument, the Respondent claims, that reasoning would not be contained in, or necessary to, the *dispositif*, which (i) assigned issues of compensation and indemnification to Track III; and (ii) did not rely on the

¹³⁴ Respondent's Response, paras. 57-58, 66, 71-74; Respondent's Second Submission, paras. 97-100; Respondent's Track II Supplemental Counter-Memorial on the Merits, 7 November 2014, paras. 320-354, 415; Respondent's Track II Supplemental Rejoinder on the Merits, 17 March 2015, paras. 411-445.

¹³⁵ Respondent's Second Submission, paras. 101-105.

¹³⁶ Respondent's Response, paras. 59, 61, 78-83; Respondent's Second Submission, paras. 106-109; Track II Award, paras. 7.39-7.44.

¹³⁷ Respondent's Response, paras. 84-86; Respondent's Second Submission, para. 110; Track II Award, para. 7.44.

¹³⁸ Respondent's Second Submission, paras. 112-114; Second Procedural Meeting, Transcript, Day 2 (29 May 2020), p. 266:15-18 (Ettinger).

¹³⁹ Respondent's Response, paras. 75-77; Respondent's Second Submission, paras. 115-116; Track II Award, paras. 7.30-7.31, 7.35-7.36; Respondent's Track II Supplemental Rejoinder on the Merits, 17 March 2015, para. 433.

rejection of the cross-claim argument, as the Claimants' proposed remedy of nullification was rejected on different grounds.¹⁴⁰

66. Finally, the Respondent denies that the Tribunal decided the merits of the environmental claims raised in Track II, arguing that the Tribunal only held that the Respondent had failed to prove its cross-claim because it did not establish the requisite standing and jurisdiction and because the argument relied on an impugned judgment, which is why the Tribunal did not refer to the environmental evidence presented by the Parties.¹⁴¹ Even if the Tribunal had decided that the Claimants incurred no environmental liability, that would not affect the but-for argument, since arguing this could have caused them to incur legal fees and expenses comparable to those actually incurred.¹⁴²

(2) The Tribunal's Prior Determinations on the Scope and Effect of the Settlement Agreement

67. The Respondent first notes that the Claimants acknowledge that the Tribunal's prior rulings on the scope of the Settlement and Release Agreements do not foreclose a but-for scenario in which a Treaty-compliant Lago Agrio court could adjudicate the LAPs' individual claims for individual rights such as (i) the individual right to health and to live in a healthy and ecologically balanced environment; (ii) individual property rights; and (iii) individual rights to chattel and crops.¹⁴³ Accordingly, and as confirmed by the Tribunal's prior decisions and Ecuadorian law, in a Treaty-compliant proceeding, Chevron would have still faced the prospect of a momentous adverse judgment ordering it to fund environmental investigation and remediation, such that a favourable ruling for the Claimants on whether the LAPs could have asserted individual claims for collective rights would have no impact on the question of causation of the claimed legal fees and costs or the quantum of the relevant offset.¹⁴⁴

¹⁴⁰ Respondent's Response, paras. 87-88; Respondent's Second Submission, para. 117; Track II Award, Section VII(F), paras. 9.38, 10.2-10.3, 10.14.

¹⁴¹ Respondent's Response, paras. 89-91; Respondent's Second Submission, paras. 118-120; Track II Award, para. 7.44.

¹⁴² Respondent's Response, para. 92; Respondent's Second Submission, para. 121.

¹⁴³ Respondent's Response, paras. 95-96; Respondent's Second Submission, paras. 123-124; Counter-Memorial, paras. 980-983; Track II Award, paras. 5.223, 7.38, 10.12.

¹⁴⁴ Respondent's Response, paras. 97-101; Respondent's Second Submission, paras. 125-126; Counter-Memorial, paras. 1141-1145, 1155; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, para. 81; Track II Award, paras. 8.73, 8.75, 9.25-9.26; Decision on Track I(B), paras. 174, 181.

68. In addition, the Respondent submits that the Tribunal’s prior rulings are not inconsistent with a but-for scenario in which the LAPs would have pursued individual claims for collective rights pertaining to discrete communities (and thus distinct from diffuse rights), which are identified as follows:

(1) the collective rights to a healthy and ecologically balanced environment held by each of the three discrete communities to which the LAPs belong; (2) the “collective property rights of the indigenous communities of Rumipamba and San Pablo de Aguatico;” and (3) collective rights that the indigenous LAPs are entitled to under Article 84 of the 1998 Constitution.¹⁴⁵

69. In the Respondent’s view, the Tribunal never ruled, and the Claimants have not established, that the non-diffuse collective rights asserted in the Lago Agrio Complaint were either the same as the diffuse right covered by the Settlement Agreement or otherwise released, such that this issue would not be *res judicata*.¹⁴⁶ In fact, diffuse rights and collective rights are distinct categories as a matter of Ecuadorian law, as the Claimants have previously acknowledged.¹⁴⁷

70. In furtherance of this proposition, the Respondent first asserts that none of the Tribunal’s prior rulings substantively equated the diffuse right to a healthy environment pertaining to all Ecuadorians with the distinct collective rights to a healthy environment pertaining to the LAPs’ individual communities, as this distinction never crystallized into a dispute between the Parties until now.¹⁴⁸ Indeed, notwithstanding an occasional interchangeable semantic use of the terms “collective” and “diffuse” rights, adopted for a “limited purpose” in connection with the subject of previous stages of the arbitration, the Tribunal did not hold them to be materially identical as a matter of Ecuadorian law.¹⁴⁹ In particular, the Claimants would have failed to explain how (i) a dispute over the distinction between collective and diffuse rights was “directly dealt with” by the Tribunal; (ii) “collapsing” such distinction was necessary to render any prior decision on the scope of the Settlement Agreement; (iii) any “superficially synonymous usage” of these two terms or other “lack

¹⁴⁵ Respondent’s Second Submission, paras. 127-128; Counter-Memorial, paras. 988-989.

¹⁴⁶ Respondent’s Second Submission, paras. 128-131, 139.

¹⁴⁷ Respondent’s Response, paras. 104-106; Counter-Memorial, paras. 992-995; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, paras. 9, 12-13, 16, 26, 50; Decision on Track I(B), paras. 58, 130.

¹⁴⁸ Respondent’s Response, para. 107; Respondent’s Second Submission, para. 132.

¹⁴⁹ Respondent’s Response, para. 111; Respondent’s Second Submission, para. 132; Partial Award on Track I, para. 97.

of a material distinction” between them was “the product of a reasoned decision” aimed at resolving such distinction or otherwise relied upon in the *dispositif* of any of the Tribunal’s prior rulings; and (iv) the Tribunal otherwise decided that all rights created by Article 19-2 of the Ecuadorian Constitution were diffuse rights.¹⁵⁰

71. To the extent that the diffuse and collective rights to a healthy environment are distinct, the Respondent further contends that the Tribunal did not (and could not) previously decide whether the Respondent (could have) settled the LAPs’ individual communities collective rights to a healthy environment, or whether the Settlement Agreement did so.¹⁵¹ Indeed, the Tribunal only addressed the diffuse right belonging to the entire community of Ecuadorian citizens, and the Claimants would have failed to show that the Tribunal ruled on whether the Respondent or the Settlement Agreement could or did settle and release the collective right of a communal group of which an individual plaintiff is a member.¹⁵²
72. The Respondent acknowledges that claims that do not seek to vindicate personal harm were settled in the Settlement Agreement, but argues that the Claimants have failed to demonstrate that the Tribunal ruled that claims for collective rights do not concern personal harm.¹⁵³ It rejects the Claimants’ arguments to the contrary, observing that they cannot rely on Ecuadorian courts’ statements to define what rights the Tribunal decided were vindicated by the Lago Agrio Judgment or subject to the Settlement and Release Agreements.¹⁵⁴ According to the Respondent, the Tribunal never ruled that the Lago

¹⁵⁰ Respondent’s Response, paras. 107-110, 113-116, 119-123; Respondent’s Second Submission, paras. 135-136; Counter-Memorial, paras. 989-991; **RLA-888**, Filip De Ly & Audley Sheppard, *ILA Recommendations on Lis Pendens and Res Judicata and Arbitration* (2009), para. II.1(4); **RLA-883**, Bernard Hanotiau, *The Res Judicata Effect of Arbitral Awards*, ICC Special Supplement: Complex Arbitrations (2003), para. 34; Partial Award on Track I, paras. 36, 97, 100, 102, 106, 108; Track II Award, paras. 5.121, 5.123, 5.223, 9.25-9.26, 10.7; Decision on Track I(B), paras. 156-157.

¹⁵¹ Respondent’s Response, paras. 129-131, 135; Respondent’s Second Submission, para. 133; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, paras. 8-9, 13; **RE-41**, Expert Report of Dr. Verónica Arias Cabanilla, 20 February 2020, para. 26, fn. 25; Partial Award on Track I, paras. 96-97, 100, 102, 106.

¹⁵² Respondent’s Response, paras. 108, 112, 117-118, 130-132; Respondent’s Second Submission, paras. 137-138; Partial Award on Track I, paras. 36, 45, 96-110, 112.

¹⁵³ Respondent’s Response, paras. 123, 129; Respondent’s Second Submission, paras. 140-141; Counter-Memorial, paras. 986, 988-989; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, paras. 9, 17; **RE-41**, Expert Report of Dr. Verónica Arias Cabanilla, 20 February 2020, para. 26; Partial Award on Track I, paras. 100-101, 105, 108, 110, 112(3); Track II Award, paras. 5.223, 7.38, 8.75, 10.7-10.8.

¹⁵⁴ Respondent’s Second Submission, paras. 142-145; **CLA-75**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Law Arbitration*, 8 Afr. J. Int’l & Comp. L. 38 (1996), p. 40.

Agrio Judgment vindicated the collective rights of any of the specific, discrete communities to which the LAPs belong as opposed to the diffuse right of all Ecuadorian citizens, also because Ecuadorian courts did not refer to the collective rights of those communities and only used “collective” (“*colectivo*” in Spanish) to refer “in the colloquial sense” to a diffuse right pertaining to an undetermined group or to a broader category of rights.¹⁵⁵ The Claimants fail to identify how the Tribunal otherwise reasoned that claims for collective rights do not concern personal harm, particularly considering that these claims are “materially similar” to the claims in the *Aguinda* complaint that the Tribunal did not deem barred by the Settlement Agreement.¹⁵⁶

73. Leaving aside the collective rights to a healthy environment, the Respondent submits that the Tribunal has not decided whether the indigenous LAPs’ individual claims for other collective property and constitutional rights were settled in the Settlement Agreement or vindicated in the Lago Agrio complaint, meaning that they could form part of a but-for scenario.¹⁵⁷
74. Further, the Respondent recalls that Question #2 is exclusively concerned with what the Tribunal has previously ruled and not with the merits of the but-for scenario, and asserts that the Tribunal should ignore the Claimants’ arguments that extend beyond its prior decisions.¹⁵⁸
75. This notwithstanding, the Respondent submits, on a preliminary basis, that the LAPs’ claims based on the collective rights of their distinct communities entail individual claims

¹⁵⁵ Respondent’s Response, paras. 121, 126, 131; Respondent’s Second Submission, paras. 146-149; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, paras. 9, 16; **RE-41**, Expert Report of Dr. Verónica Arias Cabanilla, 20 February 2020, paras. 26, 29, fn. 24-25; Second Procedural Meeting, Presentation, Day 1 (28 May 2020), Claimants’ slides 69-72; Partial Award on Track I, paras. 102, 106, 108; Track II Award, paras. 5.121, 5.123; Decision on Track I(B), para. 156; **R-2021**, “colectivo,” *Asociación de Academias de la Lengua Española* (available at <https://dle.rae.es/colectivo>); **C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, 14 February 2011, at 8:37 a.m., pp. 33, 186; **C-1975**, Cassation Decision (Ecuadorian National Court Judgment), 12 November 2013, pp. 6, 50, 72, 106-107, 185-190. In any event, the statements of Ecuadorian courts, the Ecuadorian legislation or the statements made by the Respondent are not decisions of the Tribunal and accordingly they cannot give rise to a claim for *res judicata*. See Respondent’s Response, paras. 124-125.

¹⁵⁶ Respondent’s Response, paras. 133-134; Respondent’s Second Submission, paras. 150-151; Partial Award on Track I, para. 112(3); Decision on Track I(B), para. 177-178, 180.

¹⁵⁷ Respondent’s Response, paras. 136-139; Respondent’s Second Submission, paras. 153-154; Counter-Memorial, paras. 988-991; **RE-41**, Expert Report of Dr. Verónica Arias Cabanilla, 20 February 2020, para. 26.

¹⁵⁸ Respondent’s Second Submission, paras. 155-157. See PO 67, para. 6; Letter from the Claimants to the Tribunal, 14 September 2020, pp. 35-36; Second Procedural Meeting, Transcript, Day 1 (28 May 2020), pp. 95:22-23, 114:1-5, 118:6-9, 15-17.

for personal harm by each individual LAP (by virtue of his/her membership to those communities) and thus are not among those settled by the Respondent.¹⁵⁹ Referring again to the Tribunal’s treatment of the claims in the *Aguinda* complaint, it explains that the LAPs, as members of their individual communities, “personally suffered harms that were distinct from, and more acute than,” any harm suffered by the entire Ecuadorian community, and their claims sought to address such harms.¹⁶⁰

76. In this vein, the Respondent also rejects the Claimants’ concept of “non-individual rights” and contends that there was a collective right to a healthy environment under Ecuadorian law at the time of the execution of the Settlement Agreement, which, unlike diffuse rights, cannot be disposed of by the State or its subdivisions and therefore was not settled.¹⁶¹ Not only did Ecuadorian law distinguish between the diffuse and collective rights to a healthy environment, as the Claimants have previously acknowledged, but the two other categories of collective rights identified by the Respondent would also be outside the scope of the Settlement and Release Agreements.¹⁶² Lastly, the Respondent denies that the Claimants would be “forced to continue litigating the same non-individual rights and claims in perpetuity”, noting that (i) a judgment in an action for collective rights is binding on all members of the collective, such that successive claims based on the same right of the same community would be barred; (ii) no new collective subgroups could be formed so as to bring claims against Chevron, since “a prior legal link” is required between its

¹⁵⁹ Respondent’s Response, paras. 128, 138; Respondent’s Second Submission, paras. 158-159; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, paras. 9, 50; **RE-49**, Second Expert Report of Dr. Luis Sergio Parraguez Ruiz, 13 January 2021, paras. 43-44, 47, 55; **RE-41**, Expert Report of Dr. Verónica Arias Cabanilla, 20 February 2020, para. 26, fn. 24; Partial Award on Track I, paras. 101, 112(3), Decision on Track I(B), para. 174.

¹⁶⁰ Respondent’s Second Submission, paras. 160-161; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, para. 16; Decision on Track I(B), paras. 174-175, 177, 179; **RLA-527**, *Leo v. General Elec. Co.*, 145 A.D.2d 291, 293-294 (N.Y. App. Div. 1989).

¹⁶¹ Respondent’s Second Submission, paras. 162-164; **RE-49**, Second Expert Report of Dr. Luis Sergio Parraguez Ruiz, 13 January 2021, paras. 22-24, 29-30, 40-53, 63-67; Eighth Expert Report of Dr. César Coronel Jones, 1 October 2020, para. 18; Partial Award on Track I, para. 102.

¹⁶² Respondent’s Second Submission, paras. 165-167; **RE-49**, Second Expert Report of Dr. Luis Sergio Parraguez Ruiz, 13 January 2021, paras. 11, 13-17; Counter-Memorial, paras. 988-989; Eighth Expert Report of Dr. César Coronel Jones, 1 October 2020, para. 29; Hearing on Track I(B), Day 1 (28 April 2014), pp. 29:9-11, 35:6-10 (Coriell). The two additional types of collective rights identified by the Respondent are the “collective property rights of the indigenous communities of Rumipamba and San Pablo de Aguatico” and the “collective rights that the indigenous LAPs are entitled to under Article 84 of the 1998 Constitution”.

members; and (iii) once a particular collective right is vindicated, there would no longer be a harm to that right stemming from the environmental contamination to be remedied.¹⁶³

V. QUESTION #3

77. Question #3 is as follows:

If any hypothetical “but-for” scenario offset were permitted here, would it be limited to the confines of those claims actually pursued by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record?¹⁶⁴

A. THE CLAIMANTS’ POSITION

78. Without prejudice to Questions #1 and #2, which if answered affirmatively would dismiss the Respondent’s offset defense, the Claimants submit that any but-for analysis of the Lago Agrio case must be limited to the claims pleaded and evidence adduced by the 48 plaintiffs in the actual Lago Agrio Litigation record, and conclude that, since no such evidence exists, the Respondent’s proposed “but-for” scenario would be entirely speculative, as well as counter-factual and contrary to the Tribunal’s prior awards, and thus should be rejected.¹⁶⁵

(1) Whether any But-For Scenario Should be Limited to the Pursued Claims and Underlying Record of the Lago Agrio Litigation

79. The Claimants first argue that the Respondent bears the burden of proof on its proposed hypothetical scenario, observing that (i) the difficulties in constructing such but-for world are a direct consequence of the Respondent’s own wrongs; (ii) forcing Claimants to disprove these but-for scenarios would allow the Respondent to benefit from its own wrongs; and (iii) tribunals may shift the burden of proof in circumstances where the impossibility or difficulty in proving the act of the damage is due to the breaching party’s own conduct.¹⁶⁶

¹⁶³ Respondent’s Second Submission, paras. 168-170; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, para. 9; **RE-41**, Expert Report of Dr. Verónica Arias Cabanilla, 20 February 2020, para. 29, fn. 25; Partial Award on Track I, para. 107.

¹⁶⁴ Claimants’ Request, para. 13; Claimants’ Second Submission, para. 5.

¹⁶⁵ Claimants’ Request, paras. 126-128, 146-147; Claimants’ Second Submission, paras. 154-158, 195.

¹⁶⁶ Claimants’ Second Submission, paras. 159-163; **CLA-664**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award, 18 April 2017, para. 224; **CLA-658**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. & Talsud, S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, para. 13-99.

80. Indeed, as illustrated in *Chevron I* and *Amco II*, a but-for damage scenario in a denial of justice case can only be constructed when there is a fully developed and reliable record from the underlying proceeding, such that any but-for analysis must be limited to the confines of such record.¹⁶⁷ More generally, tribunals have uniformly rejected fraudulent and illegally obtained evidence, the record of the Lago Agrio Litigation being “pervaded by fraud and corruption.”¹⁶⁸
81. In this context, the Claimants contend that any but-for analysis must be based on the case and claims that the LAPs actually brought against the Claimants, and not on hypothetical claims that hypothetical plaintiffs might have brought, meaning that the inquiry would focus on whether the evidence in the Lago Agrio Litigation record demonstrates personal harm to the 48 plaintiffs involved.¹⁶⁹ Precisely, they explain that the LAPs elected to pursue only diffuse or collective environmental claims and not individual claims for personal harm, as reflected in the statements of the LAPs’ lawyers, and accordingly, the plaintiffs did not submit evidence of individual harm, as recognized by the decisions of Ecuadorian courts and the Respondent during the Track II hearing.¹⁷⁰ In its Track III Counter-Memorial, the Claimants note, the Respondent does not rely on the record of the Lago Agrio Litigation to substantiate the viability of individual claims and instead improperly attempts to introduce new purported environmental evidence, which is irrelevant and misrepresented.¹⁷¹

¹⁶⁷ Claimants’ Request, paras. 129-131; Claimants’ Second Submission, paras. 164-166; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010, para. 546; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990, paras. 12, 23, 81-88, 143, 174.

¹⁶⁸ Claimants’ Request, para. 132; Claimants’ Second Submission, paras. 167-168; **CLA-513**, *Methanex Corporation v. United States of America*, NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, The USA’s Application for the Exclusion of Certain of Methanex’s Evidence, para. 59.

¹⁶⁹ Claimants’ Request, paras. 133-134; Claimants’ Second Submission, paras. 169-170, 178.

¹⁷⁰ Claimants’ Request, paras. 135-137; Claimants’ Second Submission, paras. 171-173; **C-287**, *Discussion with Xavier Lasso*, Ecuador TV, 22 April 2008, pp. 6, 11; **C-285**, Interview of Julio Prieto, *Informativo Cristalino 10h00*, Radio Cristal, 11 September 2009, p. 3; **C-286**, Interview of Steven Donziger, Donziger & Associates, Corporate Crime Reporter, 9 November 2009, p. 4; **C-2122**, Interview of Pablo Fajardo, *El Poder de la Palabra*, Ecuador Inmediato Radio, p. 4; Track II Award, paras. 5.121-5.122, 5.128-5.129, 5.166; **C-931**, First Instance Judgment by the Lago Agrio Court, *Aguinda v. Chevron*, 14 February 2011, at 8:37 a.m., pp. 138, 152; Track II Hearing on the Merits, Transcript, Day 1 (21 April 2015), pp. 268:5-19 (Mr. Leonard), 288:7-8, 17-22 (Ms. Silver), Day 9 (1 May 2015), p. 2015:8-14 (cross-examination of Dr. Harley Strauss).

¹⁷¹ Claimants’ Request, paras. 138-139; Claimants’ Second Submission, paras. 171, 174-177; Counter-Memorial, paras. 981-983, 1004-1158, fn. 1922; **RE-34**, Expert Report of Tod Delaney (of First Environment), 28 February 2020.

82. Similarly, the Claimants posit that any but-for scenario must be limited to the individual claims of the 48 named LAPs, since the Tribunal has already held that there is no class action procedure in Ecuador allowing an individual plaintiff to represent others in claims for personal harm.¹⁷² They reject that “untold numbers of hypothesized plaintiffs” should be considered to this effect and add that there would be no remand to allow the 48 LAPs to pursue individual claims that they had already elected not to pursue, to the extent that the Respondent’s Treaty breaches had nothing to do with such decision.¹⁷³

(2) The Respondent’s Proposed But-For Scenario

83. The Claimants criticize that the Respondent has not provided any legal or economic data to support the argument that a but-for world can be modeled or that its proposed hypotheticals are the most likely events to have taken place, observing that (i) the Respondent has not explained how the Tribunal can determine what the LAPs would have done on remand; (ii) the LAPs may have chosen not to pursue individual claims at all or may have been unable to do so; and (iii) the Respondent ignores a number of other possible but-for scenarios.¹⁷⁴
84. The Claimants stress that any but-for scenario must necessarily be “the most likely scenario” and built on reasonable assumptions, and that the only scenario that can be built in that way is that, in absence of a treaty breach, the Claimants would not have incurred the costs they incurred in litigating the fraudulent proceeding.¹⁷⁵
85. Further, the Claimants argue that the Respondent’s but-for scenario involving individual claims is counter-factual because the LAPs did not actually pursue their individual claims, even though nothing (including the Respondent’s breaches) prevented the LAPs or any

¹⁷² Claimants’ Request, para. 140; Claimants’ Second Submission, para. 179; **C-71**, *Lawsuit for Alleged Damages filed before the President of the Superior Court of “Nueva Loja,” in Lago Agrio, Province of Sucumbios; on May 7, 2003, by 48 Inhabitants of the Orellana and the Sucumbios Province*, Superior Court of Nueva Loja, Complaint, pp. 2-3; Track II Award, para. 9.71; Second Procedural Meeting, Transcript, Day 2 (29 May 2020), p. 426:4-10; Decision on Track I(B), para. 146.

¹⁷³ Claimants’ Request, paras. 141-142; Claimants’ Second Submission, paras. 180-182; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020; **RE-41**, Expert Report of Dr. Verónica Arias Cabanilla, 20 February 2020; Counter-Memorial, paras. 986-995.

¹⁷⁴ Claimants’ Second Submission, paras. 184-186.

¹⁷⁵ Claimants’ Second Submission, paras. 183, 187 (emphasis omitted).

other individuals from timely pursuing such claims, which were excluded from the scope of the Settlement and Release Agreements.¹⁷⁶

86. In any event, the Claimants recall that TexPet actually litigated seven individual lawsuits for personal harm, which would provide the only available real-world evidence of the possible amounts in controversy, as well as the likelihood that the plaintiffs might have prevailed.¹⁷⁷ While TexPet prevailed on all seven cases, assuming similar amounts at issue in 48 hypothetical individual-claims cases filed by the LAPs, TexPet would have faced USD 23,237,472 in total potential liability, compared to the amount of up to USD 1.6 billion that the Respondent claims TexPet could have been liable for or incurred in legal fees alone.¹⁷⁸

B. THE RESPONDENT'S POSITION

87. The Respondent submits that Question #3 should be answered in the negative, as there is no legal basis for limiting what the Tribunal may consider in determining what probably would have occurred but for the Treaty breaches.¹⁷⁹ It argues that its but-for argument is based on the non-diffuse claims asserted in the Lago Agrio Complaint and relies primarily on the evidence generated by Chevron and introduced in the Lago Agrio court proceedings, which is not tainted by fraud.¹⁸⁰

(1) Whether Any But-For Scenario Should be Limited to the Pursued Claims and Underlying Record of the Lago Agrio Litigation

88. On the one hand, the Respondent contends that there is no requirement under international law that the but-for analysis should be limited to the claims “actually pursued” by the LAPs or to some particular degree of activity taken by the plaintiffs in the actual litigation.¹⁸¹ While clarifying that its but-for argument is based on the “claims pleaded”

¹⁷⁶ Claimants' Request, paras. 143-145; Claimants' Second Submission, paras. 188-189; First Witness Statement of Ricardo Reis Veiga, 27 August 2010, para. 22; Track II Award, para. 5.223.

¹⁷⁷ Claimants' Second Submission, para. 191; First Witness Statement of Ricardo Reis Veiga, 27 August 2010, para. 22.

¹⁷⁸ Claimants' Second Submission, paras. 190, 192-194, Appendix B: Summaries of Seven Individual Rights Cases.

¹⁷⁹ Respondent's Second Submission, paras. 173-174, 176-178.

¹⁸⁰ Respondent's Second Submission, para. 259.

¹⁸¹ Respondent's Second Submission, para. 179.

by the LAPs in the Lago Agrio Complaint, it explains that the Claimants’ distinction between such claims and those “actually pursued” is irrelevant for this purpose, since a Treaty-compliant Ecuadorian court could not have deemed any claims pleaded in the Lago Agrio Complaint to have been “abandoned” or “not pursued”, and would have adjudicated them.¹⁸²

89. On the other hand, the Respondent denies that there exists any rule that the but-for analysis must be limited to the underlying record or contemporaneous documents and warns that the tribunal in *Chevron Commercial Cases* did consider additional evidence beyond the briefs submitted to the domestic courts, including evidence submitted by Chevron in the arbitration.¹⁸³ In fact, other tribunals have considered evidence beyond the record from the underlying proceeding in the context of a but-for analysis, including expert testimony.¹⁸⁴ The Respondent adds that arbitral practice validates the use of expert testimony and external evidence when assessing damages in the but-for context, noting that there is no support for the proposition that denial of justice claims are to be treated differently in this respect.¹⁸⁵

(2) The Respondent’s Proposed But-For Scenario

90. The Respondent asserts that the majority of the Claimants’ arguments under Question #3 go far beyond the question posed and overstep the limits set in Procedural Order No. 67, stressing that the merits of the environmental but-for scenario are not presently before the

¹⁸² Respondent’s Second Submission, paras. 179-181; **RE-48**; Fifth Expert Report of Fabián Andrade Narváez, 14 January 2021, paras. 10, 16, 19.

¹⁸³ Respondent’s Response, paras. 184, 186; Respondent’s Second Submission, paras. 182-183, 188; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010, paras. 408, 410, 432, 477, 556. See also Respondent’s Second Submission, fn. 319.

¹⁸⁴ Respondent’s Response, paras. 185, 187; Respondent’s Second Submission, paras. 184-185; **RLA-900**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Counter-Memorial on Damages, 9 June 2017; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 155-167, 276; **RLA-709**, *Sramek v. Austria*, ECHR App No. 8790/79, Judgment, 22 October 1984, paras. 27-28, 46.

¹⁸⁵ Respondent’s Response, para. 188; Respondent’s Second Submission, paras. 186-187; **RLA-843**, David Saunders & Joe Skilton, *The Applicable Valuation Approach*, in THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (2018); **RLA-433**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, paras. 195, 244; **CLA-653**, *Dunkeld International Investment Limited. v. Government of Belize*, PCA Case No. 2010-13, Award, 28 June 2016, para. 271; Track II Award, para. 10.5.

Tribunal for its decision.¹⁸⁶ In any event, the Respondent preliminarily addresses, and disputes, the Claimants' arguments.¹⁸⁷

91. *First*, the Respondent underscores that the Claimants bear the burden of proving their losses, as confirmed by extensive case law, meaning that they must prove what legal expenses Chevron would “in all probability” or to a “sufficient degree of certainty” have incurred in the but-for situation.¹⁸⁸ It argues that the Claimants have not even attempted to meet this burden because they cannot prove their “zero legal fees *but-for* scenario” or disprove the Respondent’s but-for argument; in this sense, the Respondent states that (i) the but-for argument only applies when there are treaty breaches and necessarily entails a scenario that is not based on what actually happened; (ii) *Gavazzi v. Romania* was not a denial of justice case and did not address the general burden of proof (from which the claimants were not exempted as far as causation is concerned), but the “evidential burden regarding uncertainty”; and (iii) the tribunal in *Gemplus v. United Mexican States* only held that, in the circumstances of that case, the burden of proof did not rest “exclusively” with the claimants, but did not relieve them of it entirely.¹⁸⁹ For the same reasons that tribunals have engaged in some “speculation” about the monetary value of the loss when addressing “loss of opportunity”, the Respondent opines that it would be

¹⁸⁶ Respondent’s Second Submission, paras. 175, 189; PO 67, para. 4.

¹⁸⁷ Respondent’s Second Submission, paras. 190-195.

¹⁸⁸ Respondent’s Second Submission, paras. 196-198; Counter-Memorial, Section III(F)(c); **RLA-753**, *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 237; **RLA-738**, Sergey Ripinsky & Kevin Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 162; **RLA-811**, *South American Silver Limited (Bermuda) v. Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, para. 824; **CLA-692**, *Víctor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016, para. 205; **CLA-642**, *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 190; **CLA-655**, *Autopista Concesionada de Venezuela, CA (“Aucoven”) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, para. 351; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 110.

¹⁸⁹ Respondent’s Second Submission, paras. 199-208; Counter-Memorial, paras. 963-970; **CLA-664**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Award, 18 April 2017, paras. 1, 86-87, 120-121, 126-198, 224, 232-233, 269; **RLA-443**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, para. 246; **CLA-658**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. & Talsud, S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, paras. 13-95-13-97, 13-99.

appropriate for the Tribunal to hypothesize about the but-for scenario in the absence of Treaty breaches.¹⁹⁰

92. *Second*, the Respondent insists that its but-for argument is actually based on the claims asserted in the Lago Agrio Complaint and on a procedure that would have applied in the but-for scenario, which in turn would have to be premised on the Constitutional Court issuing judicial remedies for Chevron’s complaints of procedural fraud and the case being remanded as a result to the trial court for the taking of evidence and adjudication.¹⁹¹ Contrary to the Claimants’ allegations, under Ecuadorian procedural law, the LAPs never “abandoned” any of their individual and diffuse claims asserted in the Lago Agrio Complaint, which remained pending until the court’s final adjudication.¹⁹² The Respondent explains that its but-for analysis is based on the non-diffuse claims that the 48 LAPs brought in the Lago Agrio Litigation, which they would have had the opportunity to support with both the evidence available in the Lago Agrio record and further new evidence.¹⁹³
93. *Third*, while acknowledging that the LAPs’ individual claims asserted in the Lago Agrio Complaint were not narrower types of personal injury claims, the Respondent contends, with regard to their comments on the new evidence submitted with the Counter-Memorial, that the Claimants (i) assert that the Tribunal may look only to the Lago Agrio litigation for evidence while claiming that such evidence is irretrievably tainted, even if they are responsible for the bulk of that evidence; (ii) are asking the Tribunal to ignore

¹⁹⁰ Respondent’s Second Submission, paras. 209-210; **RLA-962**, Jan Paulsson, *The Expectation Model*, in *EVALUATION OF DAMAGES IN INTERNATIONAL ARBITRATION* (Yves Derains and Richard Kreindler eds., 2006), p. 66.

¹⁹¹ Respondent’s Response, paras. 189-191; Respondent’s Second Submission, paras. 211-213; Counter-Memorial, Section IV.F.4.a-b; **RE-46**, Fourth Expert Report of Fabián Andrade Narváez, 28 February 2020, paras. 13-14, 27-35, 44-47; Fifth Expert Report of Dr. César Coronel Jones, 3 June 2013, para. 108; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 161.

¹⁹² Respondent’s Second Submission, para. 214; **RE-48**, Fifth Expert Report of Fabián Andrade Narváez, 14 January 2021, paras. 10, 17-23, 26; Decision on Track I(B), paras. 181, 186(1).

¹⁹³ Respondent’s Second Submission, paras. 215-216; Counter-Memorial, paras. 972, 986-995; **RE-46**, Fourth Expert Report of Fabián Andrade Narváez, 28 February 2020, paras. 13, 27-35; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, para. 161.

and discount evidence generated by the Claimants; and (iii) cannot insist that the Tribunal accept no expert guidance as to what the evidence in the Lago Agrio record means.¹⁹⁴

94. The Respondent explains that its expert Dr. Delaney has relied upon sources and documents generated by TexPet and submitted in the Lago Agrio Litigation, as well as on the work of the Respondent's prior experts (which in turn relied on sources in the Lago Agrio record), with the goal of corroborating and contextualizing the existing information and indicating what the evidence of environmental contamination in the Lago Agrio record means.¹⁹⁵ In fact, the Tribunal already reviewed this kind of evidence in Track II of this proceeding, including expert reports from both Parties.¹⁹⁶ According to the Respondent, arbitral practice fully accepts reliance on expert testimony and external or corroborating evidence to assess damages associated with a but-for scenario, including both evidence that would have been available to the LAPs and information that was not necessarily part of the underlying record.¹⁹⁷ Lastly, the Claimants' concerns regarding causation would also be unfounded, given that (i) Ecuadorian law provides for joint and several liability when more than one tortfeasor causes harm, and in any event TexPet could have been held liable for all of it; and (ii) litigating any "severe causation issues" would itself have caused great expense to TexPet.¹⁹⁸

¹⁹⁴ Respondent's Second Submission, paras. 217-222; **C-286**, Interview of Steven Donziger, Donziger & Associates, Corporate Crime Reporter, 9 November 2009, p. 4.

¹⁹⁵ Respondent's Response, paras. 177-178; Respondent's Second Submission, paras. 223-233; **RE-34**, Expert Report of Tod Delaney (of First Environment), 28 February 2020, pp. 8, 17-25, 39-43, 64-65, 75-79; **RE-10**, First LBG Expert Report, 18 February 2013, Sections 2.5, 3.2.2-3.2.7, 3.3.1, pp. 19-29, 43-46; **C-72**, *Lawsuit for Alleged Damages filed before the President of the Superior Court of "Nueva Loja," in Lago Agrio, Province of Sucumbíos; on May 7, 2003, by 48 Inhabitants of the Orellana and the Sucumbíos Province*, Superior Court of Nueva Loja, Chevron Answer to Lago Agrio Complaint, 21 October 2003.

¹⁹⁶ Respondent's Second Submission, paras. 234-235; Claimants' Memorial on the Merits, 6 September 2010, Section II(D)(6).

¹⁹⁷ Respondent's Response, paras. 179-183; Respondent's Second Submission, paras. 241-246; **RE-34**, Expert Report of Tod Delaney (of First Environment), 28 February 2020, pp. 44-56, 64-66; **RLA-903**, Alexander Demuth, *Income Approach and the Discounted Cash Flow Methodology*, in GLOBAL ARBITRATION REVIEW, THE GUIDE TO DAMAGES IN INTERNATIONAL ARBITRATION (John Trenor ed., 2018), pp. 210-212; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages, 10 January 2019, paras. 155-167; **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010, paras. 408, 410, 432, 477; **RLA-789**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 875-876.

¹⁹⁸ Respondent's Second Submission, paras. 236-240; **RE-20**, Second Expert Report of Fabián Andrade Narváez, 7 November 2014, paras. 20-26; **RE-27**, Third Expert Report of Fabián Andrade Narváez, 16 March 2015, paras. 17-25; **RLA-163**, Civil Code of Ecuador, Codification, Official Registry Supplement No. 46, 24 June 2005, Art. 2217.

95. *Fourth*, the Respondent refers to the Claimants’ arguments that its but-for scenario is too “speculative” and “inappropriately counterfactual”, which they warn are not preliminary but go to the merits of the arguments.¹⁹⁹ While the Claimants have not cited a single authority or provided “legal or economic data” to support their positions, the Respondent notes, its environmental but-for argument is supported with “sound” expert testimony.²⁰⁰ Moreover, in light of significant evidence of pollution, reasonable grounds in Ecuadorian law to prevail and “the history of their zealous decades-long pursuit of their claims” it is more likely than not that the LAPs would not have “abandoned” their non-diffuse claims on remand, while the Respondent would not have to address every other possible scenario.²⁰¹ It also reiterates that the LAPs did not abandon or fail to “pursue” their individual claims and recalls that the Tribunal held that the Lago Agrio Complaint, which is at the heart of the but-for analysis, sought redress for claims based on both diffuse and individual rights.²⁰²
96. *Fifth* and last, in response to the Claimants’ argument that its but-for scenario is out of proportion, the Respondent clarifies that it argued that in a Treaty-compliant proceeding Chevron would have incurred legal fees and expenses “comparable to that which Claimants claim to have actually incurred”.²⁰³ In particular, it contends that the seven individual lawsuits cited by the Claimants are not adequate comparators and do not limit the potential damages described in the Respondent’s but-for scenario, to the extent that (i) the plaintiffs involved sought to vindicate limited personal injury-type claims and damages to proprietary rights, and hence (except for one lawsuit) did not seek injunctive relief; (ii) they do not prove that the Lago Agrio court could not have ordered broad environmental remediation as a remedy for violations to the right to a healthy environment (although they do demonstrate that claims for such individual rights could

¹⁹⁹ Respondent’s Second Submission, paras. 247-248; PO 67, para. 6.

²⁰⁰ Respondent’s Second Submission, paras. 249-250, 252.

²⁰¹ Respondent’s Second Submission, paras. 251-252; Counter-Memorial, Section IV.F.4, paras. 93-105; Track II Award, Section IV.G.1; **C-65**, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002), p. 476; **R-247**, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), pp. 3, 7.

²⁰² Respondent’s Second Submission, para. 253; Track II Award, paras. 5.121-5.133, 9.68-9.69; Partial Award on Track I, paras. 108, 112(3); Decision on Track I(B), paras. 181, 183, 186(1).

²⁰³ Respondent’s Second Submission, paras. 254-255.

have formed part of the but-for scenario); and (iii) the Respondent’s experts have shown that evidence of contamination would have been available to the LAPs.²⁰⁴

VI. QUESTION #4

97. Question #4 is as follows:

Do the Tribunal’s prior rulings preclude Ecuador’s argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law?²⁰⁵

A. THE CLAIMANTS’ POSITION

98. According to the Claimants, the Respondent is attempting to re-litigate the issue of exhaustion of local remedies (a defence from Track II) “under the façade of an argument that Claimants failed to mitigate their damages by pursuing those exact...remedies.”²⁰⁶ The Claimants recall that the Track II Award rejected “the Respondent’s objections, both as to jurisdiction and admissibility, based on Chevron’s failure to exhaust local remedies or to satisfy the requirement of judicial finality for its claims of denial of justice,”²⁰⁷ a decision that was upheld by the District Court of The Hague in its 16 September 2020 Decision.²⁰⁸ As such, the Claimants consider that the Respondent’s mitigation argument is barred under the doctrine of *res judicata*.²⁰⁹
99. First, the Claimants submit that the Respondent’s “mitigation” theory of local remedies in Track III is subject to the same legal standard as the exhaustion requirement in Track

²⁰⁴ Respondent’s Second Submission, paras. 256-258; Counter-Memorial, paras. 1012, 1113, 1131; **C-3148**, *Bonilla Quelal v. Texaco Petroleum Company*, Case No. 35-97, Complaint, 5 May 1997, Civ. Ct. of La Joya de Los Sachas; **C-3149a**, *Molina Melo v. Texaco Petroleum Company*, Case No. 97-97, Judgment, 14 February 2003, Civ. Ct. of La Joya de Los Sachas; **C-3150**, *Tulcán Molina v. Texaco Petroleum Company*, Case No. 107-97, Judgment, 11 February 2003, Civ. Ct. of La Joya de Los Sachas; **C-1512**, *Ordóñez Merino v. Texaco Petroleum Company*, Case No. 84-98, Civ. Ct. of Sucumbíos; **C-3151**, *Torres Merizalde v. Texaco Petroleum Company*, Case No. 120-2000, Judgment, 6 February 2003, Civ. Ct. of La Joya de Los Sachas; **C-3153**, *Torres Merizalde v. Texaco Petroleum Company*, Case No. 132-2000, Judgment, 7 April 2003, Civ. Ct. of La Joya de Los Sachas; **C-3158**, *Para Granda v. Texaco Petroleum Company*, Case No. 21331-2013-1341, Amended Complaint, 12 October 2011, Civ. Ct. Sucumbíos; **C-3149**, *Bonilla Quelal v. Texaco Petroleum Company*, Case No. 35-97, Judgment, 25 July 2002, Civ. Ct. of La Joya de Los Sachas.

²⁰⁵ Claimants’ Request, para. 13; Claimants’ Second Submission, para. 5.

²⁰⁶ Claimants’ Request, para. 148; Claimants’ Second Submission, para. 196; Counter-Memorial, para. 1202.

²⁰⁷ Claimants’ Request, paras. 149-153; Claimants’ Second Submission, para. 196; Track II Award, paras. 7.119, 7.123, 7.154.

²⁰⁸ Claimants’ Second Submission, para. 221; **C-3147**, *Republic of Ecuador v. Chevron Corporation et al.*, C/09/570029 / HA ZA 19-268, Judgment, 16 September 2020.

²⁰⁹ Claimants’ Second Submission, para. 196.

II.²¹⁰ It is “irrelevant”, in the Claimants’ view, that exhaustion and mitigation are different legal theories, seeing that here both theories depend on the same single element: “whether it was ‘reasonable’ to expect Chevron to engage any of the mechanisms that Ecuador suggests would have remedied the harm or mitigated the damage from that harm.”²¹¹ According to the Claimants, “[i]f it was unreasonable to expect Chevron to exhaust these mechanisms as remedies ‘at the relevant time’ and ‘applied to the present case’, then it was unreasonable to expect Claimants to exercise them as mitigation devices at the same relevant time and applied to the same case.”²¹²

100. *Second*, the Claimants argue that the Tribunal has already ruled that they were not required to exhaust local remedies.²¹³ It did so on the basis that “the local remedy must be available as ‘an effective and adequate appeal within the State’s legal system’ [and] [i]t clearly does not include any ineffective or inadequate or, equally, any untimely remedy,”²¹⁴ meaning that a party need not pursue a judicial remedy “in the absence of a reasonable possibility of effective redress.”²¹⁵ In particular, the Claimants characterize the Respondent’s Track II exhaustion defence as based on the Claimants’ failure to:

- (i) Post a bond to suspend the enforceability of the Lago Agrio Judgment.²¹⁶ The Tribunal rejected the Respondent’s arguments on the bond issue on the basis that (a) Ecuador failed to suspend enforcement of the Judgment under the interim awards before the Claimants would have been required to post a bond; (b) any appeals were likely to be ineffective; and (c) it would have been unreasonable to require the Claimants to post a bond of the requested size (i.e. between US\$ 180 million and US\$ 14.6 billion) so as to suspend enforcement.²¹⁷

²¹⁰ Claimants’ Second Submission, Section VII.A.

²¹¹ Claimants’ Second Submission, paras. 198-200; Track II Award, paras. 7.122-7.123.

²¹² Claimants’ Second Submission, para. 201.

²¹³ Claimants’ Request, para. 154; Claimants’ Second Submission, Section VII.B.

²¹⁴ Claimants’ Request, para. 154; Claimants’ Second Submission, para. 206; Track II Award, para. 7.121-7.122.

²¹⁵ Claimants’ Request, para. 155; Claimants’ Second Submission, para. 207; Track II Award, paras. 7.120, 7.123.

²¹⁶ Claimants’ Second Submission, para. 208.

²¹⁷ Claimants’ Request, para. 156; Claimants’ Second Submission, para. 208; Track II Award, paras. 7.132-7.135.

- (ii) File an action under the Collusion Prosecution Act (the “CPA”), which, according to the Respondent, would have allowed the Claimants to request nullification of the Lago Agrio Judgment and assist their case against enforcement of the Judgment in other jurisdictions.²¹⁸ The Tribunal deemed that any proceedings under the CPA would have been “ineffective”, while also observing that “the State cannot leave remedial action to the efforts of private litigants.”²¹⁹
- (iii) Recuse Judge Zambrano,²²⁰ which, the Claimants assert, was deemed an ineffective remedy by the Tribunal.²²¹
- (iv) File a petition before the Constitutional Court in respect of the alleged errors in the Lago Agrio Judgment.²²² The Tribunal concluded that such action “did not offer to Chevron any timely and effective remedy for the Lago Agrio Judgment within the Ecuadorian legal system.”²²³

101. *Third*, the Claimants assert that the Respondent’s “local remedies” mitigation argument is precluded by the Tribunal’s prior rulings.²²⁴ In particular, the Claimants observe that such argument is based on the Claimants’ alleged failure to pursue three of the exact same remedies at issue in Track II:²²⁵

- (i) In respect of the posting of a bond, the Claimants reject the Respondent’s argument that the Tribunal, in its Track II Award, “did not take into account all of the evidence in the record relating to potential amounts that Chevron would have to post to stay the judgment,” which it now claims could have been as low as “approximately US\$ 3 million.”²²⁶ According to the Claimant, the Tribunal

²¹⁸ Claimants’ Request, paras. 151, 157; Claimants’ Second Submission, paras. 203, 209.

²¹⁹ Claimants’ Request, paras. 157-158; Claimants’ Second Submission, paras. 209-210; Track II Award, paras. 7.145-7.147.

²²⁰ Claimants’ Request, paras. 152; Claimants’ Second Submission, para. 204.

²²¹ Claimants’ Request, paras. 160; Claimants’ Second Submission, para. 212; Track II Award, para. 7.154.

²²² Claimants’ Request, para. 153; Claimants’ Second Submission, para. 205.

²²³ Claimants’ Request, para. 159; Claimants’ Second Submission, para. 211; Track II Award, para. 7.152.

²²⁴ Claimants’ Request, Section VIII.B; Claimants’ Second Submission, Section VII.C.

²²⁵ Claimants’ Request, para. 161; Claimants’ Second Submission, para. 213.

²²⁶ Claimants’ Request, para. 162; Claimants’ Second Submission, para. 214; Counter-Memorial, paras. 1168, 1179-1181.

concluded that damages resulting from the enforcement of the Lago Agrio Judgement following the Appellate Court’s decision affirming that judgment “are the result of Ecuador’s failure to suspend enforcement of the Lago Agrio Judgment—and are not the result of Chevron’s failure to ‘mitigate damages’.”²²⁷

- (ii) The Claimants further reject the Respondent’s argument that the Track II Award “did not address the fact that the CPA proceedings may well have ended the status of enforceability of the Lago Agrio Judgment even prior to the date when the LAPs sought its first enforcement outside of Ecuador” in 2012.²²⁸ In this respect, the Claimants recall the Tribunal’s finding that an action under the CPA “was not appropriate under the facts of the Lago Agrio case”, since the State “cannot leave remedial action to the efforts of private litigants.”²²⁹
- (iii) As to the Claimants’ failure to file a recusal motion against Judge Zambrano, while the Tribunal did not expressly refer to this question in its analysis of exhaustion of local remedies, it did reject all of Ecuador’s “local remedies” arguments in its Track II Award.²³⁰

B. THE RESPONDENT’S POSITION

102. The Respondent rejects the Claimants’ assertion that it is attempting to “repackage” its Track II exhaustion of local remedies defence and retorts that it is not barred by *res judicata* “from raising different arguments regarding different defenses based on the same or similar facts.”²³¹

²²⁷ Claimants’ Request, para. 163; Claimants’ Second Submission, para. 215; Track II Award, paras. 7.132, 7.134.

²²⁸ Claimants’ Request, para. 164; Claimants’ Second Submission, para. 216; Counter-Memorial, paras. 1168, 1185, 1188-1189.

²²⁹ Claimants’ Request, para. 165; Claimants’ Second Submission, para. 217; Track II Award, paras. 7.145-7.148.

²³⁰ Claimants’ Request, paras. 166-168; Claimants’ Second Submission, paras. 218-220; Counter-Memorial, para. 1169; Track II Award, paras. 2.11, 7.122-7.123, 7.145, 7.147.

²³¹ Respondent’s Response, paras. 192-193; Respondent’s Second Submission, paras. 260-261, **RLA-887**, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Joint Dissenting Opinion of Judges Ranjeva, Shi and Koroma, 26 February 2007, ICJ Reports 2007, para. 9.

103. First, the Respondent acknowledges that its mitigation arguments in Track III “rely on some facts presented in Track II but for a fundamentally different purpose, to support mitigation defences that could not have been raised, and were not raised, much less adjudicated, in Track II.”²³² In this regard, the Respondent invokes the *Pey Casado v. Chile (I)* test for assessment of harm and subsequent reparation under international law for breach of an international obligation, which includes three consecutive steps: “(1) ‘establishment of breach;’ (2) ‘ascertainment of the injury caused by the breach;’ and (3) ‘determination of the appropriate compensation for that injury’.”²³³ According to the Respondent, the Tribunal embarked upon step (1) in Track II when it addressed the exhaustion of local remedies as a question of jurisdiction, admissibility and determining whether there was a Treaty breach, while the defence to mitigate can only be invoked at step (3) for determining compensation.²³⁴
104. The Respondent also rejects the Claimants’ suggestion that it is “irrelevant” that exhaustion and mitigation are different legal theories because both defences require the application of a reasonableness test, seeing that one element does not constitute a legal standard and the tests under each standard are distinguishable.²³⁵ In particular, the Respondent notes that the Track II Award determined that the Claimants could not have reasonably been required at the time to pursue any local remedy to seek “*protection against the enforcement of the Lago Agrio Judgment*”, i.e. to avoid a Treaty breach. By contrast, “failure to mitigate requires consideration of whether such pursuit would reasonably have reduced Chevron’s alleged legal expense losses.”²³⁶ The Respondent is also of the view that the reasonable test for exhaustion of local remedies is a necessarily stricter legal standard than the test employed for mitigation, since the first requires “a very good prospect that resorting to the local remedy would avoid the Treaty breach

²³² Respondent’s Response, paras. 199-200; Respondent’s Second Submission, paras. 261, 270-271.

²³³ Respondent’s Response, para. 195; Respondent’s Second Submission, para. 263; **RLA-899**, *Víctor Pey Casado and Foundation “President Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 13 September 2016, para. 217.

²³⁴ Respondent’s Response, paras. 195-196; Respondent’s Second Submission, para. 263; Counter-Memorial, paras. 218-222; **CLA-575**, *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Final Award, 14 March 2003, para. 482; **CLA-242**, *Middle East Cement Shipping and Handling Co. SA v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Final Award, 12 April 2002, para. 167.

²³⁵ Respondent’s Second Submission, paras. 263-266.

²³⁶ Respondent’s Second Submission, para. 267; Track II Award, paras. 7.122-7.123 (Claimants’ emphasis); **CLA-44**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, para. 169.

altogether”, while the assessment of a mitigation defence requires a less stringent calculation.²³⁷

105. *Second*, the Respondent’s rejects the notion that the Claimants have established that the factual underpinnings of its defence have been finally determined by the Tribunal, such that it would be precluded from raising this defence:

- (i) The Respondent underscores that the recusal of Judge Zambrano was not addressed in the Track II Award, meaning that “nothing the Tribunal said, nor any principle of preclusion, supports the view that non-existent determinations can be impliedly ‘subsumed’ in an award and, on that basis, be afforded *res judicata* effect.”²³⁸
- (ii) In respect of the posting of a bond, the Respondent clarifies that its mitigation argument is that “even if Chevron did not have to post a bond to claim a denial of justice, posting the bond would have resulted in delaying the enforcement of the Lago Agrio Judgment and the initiation of all the recognition proceedings.”²³⁹ Whether damages resulting from the enforcement of the said judgment are the result of Ecuador’s failure to suspend enforcement of the judgment misses the point, in the Respondent’s view, as “[f]ailure to mitigate does not require that the damage flow from the investor’s actions, only that the investor did not reasonably attempt to stem it.”²⁴⁰ As to the amount of the bond, the Respondent insists that there is evidence that the price of a bond could have been “as low as 0.016 percent of the lower instance’s court US\$ 18.6 billion judgment—*i.e.* approximately US\$ 3 million,”²⁴¹ meaning that it would have been reasonable for the Claimants to incur this relatively small amount and delay enforceability of the Lago Agrio Judgment.

²³⁷ Respondent’s Second Submission, para. 268.

²³⁸ Respondent’s Response, paras. 201-203; Respondent’s Second Submission, paras. 273-274.

²³⁹ Respondent’s Response, para. 205; Respondent’s Second Submission, paras. 276-277; Track II Award, para. 7.135.

²⁴⁰ Respondent’s Second Submission, para. 277.

²⁴¹ Respondent’s Second Submission, para. 278; **RE-20**, Second Expert Report of Fabián Andrade Narváez, 7 November 2014, p. 3; **R-1993**, Court of Appeals Order of 25 October 2001, *NIFA v. MSDIA*.

- (iii) Lastly, the Respondent notes that there is no finding in the Track II Award “indicating that an action under the CPA would not have *suspended the enforceability* of the Lago Agrio Judgment”, which would have reduced the Claimants’ alleged damages.²⁴²

VII. THE TRIBUNAL’S ANALYSIS

106. In this Partial Award, the Tribunal is called upon to determine, on the basis of four preliminary questions, whether the Respondent’s “but-for” and mitigation defences in Track III of this arbitration are barred, in whole or in part, by the Tribunal’s prior rulings or international law. The Tribunal’s task is unusual in that it is requested to dismiss certain defences on quantum outright even before they have been fully aired before it. The Tribunal must do so, the Claimants say, primarily because such defences are nothing but a rehash of arguments raised by the Respondent in prior phases of this arbitration which have already been rejected by the Tribunal; notably, the Respondent’s environmental “cross-claim” (now recast as an offset claim) and the Respondent’s “exhaustion of local remedies” defence (now recast as a mitigation defence).
107. Before delving into the enquiry before it, the Tribunal feels compelled to recall that this Partial Award follows six other Awards and a Decision made in these arbitration proceedings.²⁴³ Most recently, in its Track II Award, the Tribunal found that the Respondent had wrongfully committed a denial of justice, as well as several other breaches of the Treaty, and declared that the Respondent is liable to make reparations to the Claimants for such breaches in the form of compensation. Determining the extent of such compensation, together with other matters identified in Part X of the Second Partial Award and further confirmed in Procedural Order No. 55, is the sole focus of Track III of the arbitration. The Tribunal, as a matter of the good administration of justice, cannot allow Track III to be used to relitigate issues that were already heard and decided, at great effort and expense, in prior stages of this already twelve-year old arbitration.

²⁴² Respondent’s Response, paras. 208-209; Respondent’s Second Submission, paras. 280-281 (emphasis in original); Track II Award, paras. 7.143, 7.145.

²⁴³ First Interim Award on Interim Measures, 25 January 2012; Second Interim Award on Interim Measures, 16 February 2012; Third Interim Award on Jurisdiction and Admissibility, 27 February 2012; Fourth Interim Award on Interim Measures, 7 February 2013; Partial Award on Track I; Decision on Track I(B); Track II Award.

108. It is with this consideration in mind that the Tribunal has agreed to consider the Claimants' four preliminary questions in this Partial Award. It remains mindful, however, that it has been requested as part of that inquiry to determine whether the purported overlap between the Respondent's offset and mitigation defences and the Tribunal's past findings would preclude the Respondent from raising such defences in Track III, be it as a matter of *res judicata*, issue estoppel or otherwise. Such an exercise requires a heightened level of caution from the Tribunal. It is worth recalling that the Respondent's but-for and mitigation defences are not yet fully ripe for a decision on their merits. Considerations of due process caution against dismissing those defences on a preliminary basis unless the Tribunal can conclude on firm ground that each of them is precluded by the Tribunal's past rulings, by international law or for another sufficiently definitive reason.
109. Thus, it is important for the Tribunal to focus primarily on elucidating that which it has decided in prior decisions and with which it intends to remain consistent in future decisions. Whether it concludes that it must do so as a matter of *res judicata*, issue estoppel or simply the good administration of justice, the Tribunal will strive to provide guidance to the Parties for their further submissions in Track III, as was provided in Procedural Order No. 67.²⁴⁴
110. In any event, the Tribunal considers that the Parties would be astute not to pursue lines of argument in their upcoming submissions that will duplicate past efforts and inevitably result in unnecessary delay and expense.
111. With that preamble, the Tribunal reproduces once again the four questions it has undertaken to answer:

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

Question #2: Do the Tribunal's prior rulings regarding the scope and effects of the 1995 and 1998 Settlement and Release Agreements, as well as its rulings on its own jurisdiction,

²⁴⁴ PO 67, para. 4: "... the Tribunal notes that the Claimants' arguments, aside from raising issues of fairness going to the root of the doctrine of *res judicata* (and issue estoppel) in international law, highlight the many conjectures that will be involved in assessing the but-for counterfactual posited by the Respondent, if such an exercise is even admitted by the Tribunal. The Tribunal is thus persuaded that answering the preliminary questions put forward by the Claimants, assuming that they do not altogether rule out the Respondent's but-for defence, will nevertheless help to frame and narrow the but-for exercise, and in particular the scope of relevant and material evidence bearing upon that analysis."

preclude both the claims that Ecuador's Counter-Memorial on Damages refers to as "collective" claims and any offset based on individual claims?

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

Question #4: Do the Tribunal's prior rulings preclude Ecuador's argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law?²⁴⁵

112. The Tribunal will endeavour to address each question in turn, notwithstanding the substantial overlap between several of the questions and underlying issues.

A. QUESTION #1

113. The Tribunal is first requested to answer whether the Respondent's but-for defence is barred "by the Tribunal's Track II finding that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption." On the basis that Question #1 should be answered in the affirmative, the Claimants request that the Tribunal dismiss the Respondent's offset defence on three separate grounds. First, relying on *Amco v. Indonesia II* and the maxim *fraus omnia vitiae*, the Claimants assert that in circumstances where fraud pervades the underlying record no offset is possible under international law. Second, they argue that, in any event, the overall fraud "so thoroughly infected the underlying Lago Agrio record such that there is no evidentiary basis for any offset in the first place."²⁴⁶ Lastly, the Claimants posit that no offset is permissible where, as here, the Tribunal has ruled that it does not have jurisdiction over all relevant parties.

114. The Tribunal considers it appropriate to consider the argument concerning its lack of jurisdiction over third parties as part of its analysis of Question #2 below. It will now consider the two remaining grounds under Question #1 together.

115. The operative part of the Track II Award contains no declaration concerning the degree to which fraud pervaded the Lago Agrio record or the extent to which the evidence it contains is reliable. In respect of the denial of justice committed by the Respondent, the Track II Award provides:

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

²⁴⁵ Claimants' Request, para. 13; Claimants' Second Submission, para. 5.

²⁴⁶ Claimants' Second Submission, para. 68.

Lago Agrio Plaintiffs’ representatives in return for a promise by such representative(s) to pay to Judge Zambrano a bribe from the proceeds of the Lago Agrio Judgment’s enforcement by the Lago Agrio Plaintiffs;

10.5 The Tribunal declares that the Respondent, by issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) and knowingly facilitating its enforcement outside Ecuador, wrongfully committed a denial of justice under the standards both for fair and equitable treatment and for treatment required by customary international law under Article II(3)(a) of the Treaty;²⁴⁷

116. The Tribunal’s finding of denial of justice is twofold. At paragraph 10.4, the Tribunal makes a factual finding in respect of the Lago Agrio Judgment: material parts thereof were corruptly ‘ghostwritten’ for Judge Zambrano by one or more of the Lago Agrio Plaintiffs’ representatives. At paragraph 10.5, the Tribunal makes a further factual and legal finding: the Respondent’s “issuing, rendering enforceable, maintaining the enforceability and executing the Lago Agrio Judgment” and “knowingly facilitating its enforcement outside Ecuador” constitutes a denial of justice. As such, the ‘ghostwriting’ of the Lago Agrio Judgment and the Respondent’s failure to correct the corrupt Judgment are the factual centrepieces of the Tribunal’s finding of denial of justice. No findings are made there in respect of other aspects of the Lago Agrio Litigation, the Tribunal having expressly stated that “[s]ave as aforesaid, the requests for relief made by the [Parties] for decision in this Track II are not granted”.²⁴⁸

117. The Claimants nonetheless invite the Tribunal to look beyond the operative part of the Track II Award and the aspects of the fraud which the Tribunal directly attributed to the Respondent. In particular, they urge the Tribunal not to ignore “proven elements of the fraud that are attributable to ‘third parties’”, i.e. the conduct of some of the LAPs’ representatives and other actors.²⁴⁹

118. In this respect, the Track II Award draws a clear distinction between the fraudulent conduct of Judge Zambrano (who was “cloaked with governmental authority” and was thus acting in the name of the Respondent)²⁵⁰ and that of third parties. In Part IV of the Track II Award, the Tribunal noted that the focus of its inquiry on the alleged judicial

²⁴⁷ Track II Award, paras. 10.4-10.5.

²⁴⁸ Track II Award, para. 10.23.

²⁴⁹ Claimants’ Second Submission, paras. 66-67.

²⁵⁰ Track II Award, para. 8.50.

misconduct, improper intervention by the Government and the ‘ghostwriting’ of the Lago Agrio Judgment

*is the conduct of the Respondent acting through its judicial branch, in the form of the Lago Agrio Court, the Lago Agrio Appellate Court, the Cassation Court and the Constitutional Court, and through its executive branch. To that inquiry, the conduct of the Lago Agrio Plaintiffs’ representatives is incidental, albeit relevant as part of the factual background to the conduct of the Respondent’s Courts and Government.*²⁵¹

119. Following such inquiry, the Tribunal reached certain conclusions of fact in Part V of the Track II Award. In respect of the actions of third parties, its assessment began with the conduct of certain of the LAPs’ representatives, especially Mr. Steven Donziger and Mr. Pablo Fajardo:

The evidence before this Tribunal points clearly to the conclusion that they engaged in prolonged, malign conduct towards the Respondent’s legal system generally and, particularly, the Lago Agrio Court in a manner that almost beggars belief in its arrogant contempt for elemental principles of truth and justice. *It is pointless here to characterise such conduct any further, because these individuals are not the object of the exercise required for this Award under the Treaty applying international law.* Such conduct, as related above, also speaks for itself. Moreover, others unknown were also involved in the ‘ghostwriting’ exercise. Whilst not attributable to the Respondent under international law, their collective misconduct nevertheless remains relevant because it was a *necessary condition* for what happened; but it was not the immediate cause of the Claimants’ injuries.

That *cause* came from Judge Zambrano.²⁵²

120. The actions of Dr. Guerra were also characterized by the Tribunal as a likely “necessary condition” – but not a cause – of the ‘ghostwriting’ exercise by Judge Zambrano:

such misconduct by Dr Guerra took place at an earlier time than the ‘ghostwriting’ of the Lago Agrio Judgment during Judge Zambrano’s return to the Lago Agrio Litigation (October 2010 - March 2011). This later ‘ghostwriting’ exercise was of a different and much greater order of misconduct by Judge Zambrano, and as the action of a judge within the scope of his professional duties it was plainly conduct attributable to the Respondent. It subsumed any earlier, lesser misconduct by Judge Zambrano. Whilst it is possible, or even likely, that the earlier misconduct by both Dr Guerra and Judge Zambrano formed a *necessary condition* for the subsequent ‘ghostwriting’ exercise by Judge Zambrano, it was *not its cause*.²⁵³

121. A similar conclusion was reached in respect of the actions of Mr. Cabrera:

As a factual matter, Mr Cabrera’s improper conduct severely prejudiced the presentation of Chevron’s case in the Lago Agrio Litigation.

Again, whilst it is possible, or even likely, that this earlier misconduct formed a *necessary condition* for the subsequent ‘ghostwriting’ of the Lago Agrio Judgment, it was *not its cause*. To the extent (as the Tribunal finds) that the Cabrera Report influenced in part the result of

²⁵¹ Track II Award, para. 4.5 (emphasis added).

²⁵² Track II Award, paras. 5.229-5.230 (emphasis added).

²⁵³ Track II Award, para. 5.244 (emphasis added).

the Lago Agrio Judgment, the Tribunal considers that *this factor forms part of the ‘ghostwriting’ exercise as a whole.*²⁵⁴

122. And of Judge Yáñez, the Tribunal wrote:

As a factual matter, the misconduct of Judge Yáñez severely prejudiced the presentation of Chevron’s case in the Lago Agrio Litigation. Although it was a *necessary condition* for what happened subsequently in the Lago Agrio Litigation, *his misconduct was not the cause of the ‘ghostwriting’ of the Lago Agrio Judgment.*²⁵⁵

123. In Part VIII of the Track II Award, the Tribunal analysed these factual conclusions in the aggregate for the purposes of its denial of justice analysis under the heading “The ‘Ghostwriting’ of the Lago Agrio Judgment”:

The facts established on the factual, expert and forensic evidence speak for themselves, as set out at length in Parts IV, V and VI above.

As there explained, the details as to how exactly all or material parts of the Lago Agrio Judgment came to be written, corruptly by certain of the Lago Agrio Plaintiffs’ representatives for Judge Zambrano, remain incomplete. The missing factual and forensic evidence is likely available only in Ecuador, if it still exists at all. Yet the *circumstantial and other evidence adduced in this arbitration is overwhelming*. Short of a signed confession by the miscreants, as rightly submitted by the Claimants at the end of the Track II Hearing, the *evidence establishing ‘ghostwriting’* in this arbitration “must be the most thorough documentary, video, and testimonial proof of fraud ever put before an arbitral tribunal.”

As found by the Tribunal in Parts IV and V above, two of the Lago Agrio Plaintiffs’ representatives who were privy to the ‘ghostwriting’ exercise were Mr Donziger and Mr Fajardo. As the Respondent acknowledged at the Track II Hearing, the participation of Mr Fajardo in ‘ghostwriting’ for Judge Zambrano, if correct (which the Respondent denies), would suffice to support the Claimants’ claims for denial of justice. The Tribunal agrees: the Claimants’ inability to identify by name with sufficient probability others of the Lago Agrio Plaintiffs’ representatives, also involved in ‘ghostwriting’ (in addition to Mr Donziger), cannot by itself exculpate the Respondent from liability for denial of justice. If it were otherwise, the more successful the ghostwriting exercise, the less culpability would result. *In any event, for denial of justice, the relevant actor is Judge Zambrano; and his participation in the ‘ghostwriting’ of the Lago Agrio Judgment is firmly established on the evidence before this Tribunal.*

*On such evidence, the Tribunal has found that Judge Zambrano acted corruptly, in return for a bribe promised to him by certain of the Lago Agrio Plaintiffs’ representatives. Judge Zambrano’s collusive conduct in the ‘ghostwriting’ of the Lago Agrio Judgment was not authorised under Ecuadorian law. Nor was it under judicial standards long established under international law. He was far from acting as an independent or impartial judge deciding the Lago Agrio Litigation fairly between the parties, under minimum standards for judicial conduct long recognized under international law.*²⁵⁶

124. In sum, while the Tribunal deemed proven the improper conduct of the LAPs’ representatives and other related actors in the above excerpts of the Track II Award, it

²⁵⁴ Track II Award, paras. 5.246-5.247 (emphasis added).

²⁵⁵ Track II Award, para. 5.249 (emphasis added).

²⁵⁶ Track II Award, paras. 8.53-8.56 (emphasis added).

attributed no significance to their actions other than as background elements of the Respondent's denial of justice; indeed, the Tribunal laid emphasis upon the fact that (i) such individuals "[were] not the object of the exercise required for [the Track II Award] under the Treaty applying international law";²⁵⁷ and (ii) their conduct was not the cause of the Claimants' injuries – it was at most a "necessary condition". As such, the conduct of those third parties is solely "evidence establishing 'ghostwriting'", that is, proven facts upon which the Tribunal drew the conclusion that the Lago Agrio Judgment was 'ghostwritten', which is the factual underpinning of the Respondent's Treaty breach.

125. Thus, when asserting that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption, or that the Lago Agrio record is inherently unreliable in its entirety by reason of such fraud, the Claimants are not referring to a ruling in the Track II Award – they are effectively *drawing inferences* from certain facts that were deemed proven in the Award but were relied upon by the Tribunal to reach an entirely different and far more carefully circumscribed conclusion. While such inferences would not seem incompatible with the proven misconduct of the LAPs' representatives and other third parties, or with the finding that the Lago Agrio Judgment was 'ghostwritten', they do not form part of a ruling encompassed within the Track II Award, whether express or by necessary implication. Whether such inferences are *warranted* is, in turn, a matter beyond the scope of Question #1 and thus of this Partial Award.
126. The Parties have also addressed the Tribunal on whether, as a matter of international law, a damages offset is possible where fraud pervades the proceedings underlying a denial of justice. In view of the Tribunal's conclusion that the Track II Award contains no such finding, the Tribunal considers it unnecessary to decide that point of law at this juncture.
127. *Determination on Question #1:* For the foregoing reasons, the Tribunal declares incorrect the predicate underlying Question #1, which is that the Track II Award contains a finding that "that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption". Question #1 is thus answered in the negative. The Tribunal therefore rejects the Claimants' request that the Respondent's offset defence be rejected at this stage of the proceedings on such grounds, as well as on the grounds that the Tribunal "cannot rule on the basis of the corrupt Lago Agrio record".

²⁵⁷ Track II Award, para. 5.229.

B. QUESTION #2

128. Question #2 asks whether the Tribunal’s prior rulings “preclude both the claims that Ecuador’s Counter-Memorial on Damages refers to as ‘collective’ claims and any offset based on individual claims”. Question #2 is prompted by the Ecuadorian law claims which the Respondent asserts would have been adjudicated ‘in all probability’ by a Treaty-compliant Lago Agrio Court in a but-for scenario under the *Chorzów Factory* standard. Such claims would in its view include (i) individual claims based upon *individual* rights for personal harm;²⁵⁸ and (ii) individual claims based upon *collective* rights (as opposed to “*diffuse* rights”) for personal harm.²⁵⁹ As further argued by the Respondent:

Claimants cannot prove that, even if the breaches had not occurred, Chevron would not have incurred legal expenses and other losses of a comparable magnitude. This is because, had the Ecuadorian courts acted to prevent the defects of the first instance judgment from consummating a Treaty breach, Chevron would still have had to defend against the individual claims of the LAPs for violations of their individual and collective rights as asserted in the Lago Agrio Complaint. A decision of either the Constitutional Court or NCJ to nullify the judgment, as sought by Claimants, due to the improper rendering of the judgment, and the application of the 1995 Settlement Agreement to the LAPs’ diffuse claims, would have avoided the Treaty breaches found by the Tribunal and resulted in litigation and adjudication of those individual claims.²⁶⁰

129. In essence, the Claimants reply that the Tribunal’s prior rulings on the scope and effects of the 1995 and 1998 Settlement and Release Agreements, as well as its rulings on its own jurisdiction, preclude an offset based on either type of claim.
130. By reason of their importance within the Parties’ pleadings, the Tribunal considers it appropriate to address first the extent to which the Tribunal’s prior rulings address individual claims based upon individual rights (hereinafter “individual claims” and “individual rights” respectively). It will then address individual claims based upon collective rights as defined by the Respondent (hereinafter “collective claims” and correlatively “collective rights” for shorthand).
131. *Individual claims*: The Tribunal in its prior rulings determined that the Lago Agrio Complaint, as an initial pleading, included individual claims resting upon individual

²⁵⁸ Counter-Memorial, paras. 980-984.

²⁵⁹ Counter-Memorial, paras. 985-995; Transcript of the Hearing on a Partial Award (“**HPA Transcript**”), Day 1 (16 March 2021), p. 186.

²⁶⁰ Counter-Memorial, para. 967.

rights under Ecuadorian law, not falling within the scope of the 1995 Settlement Agreement.²⁶¹ That individual claims are not barred by the releases is not in dispute between the Parties.²⁶² The crux of the Parties' disagreement is whether the Respondent may legitimately request an offset on the basis of such claims in view of the Tribunal's decision that it has no jurisdiction to decide upon the LAPs' individual claims, as well as its subsequent decision to reject the Respondent's cross-claim for environmental damage.

132. As summarized by the Tribunal in its Track II Award, in respect of its cross-claim, the Respondent argued that

Chevron's claims against the Respondent impugning the Lago Agrio Judgment under the Treaty could, if successful in this arbitration, gravely prejudice these Lago Agrio Plaintiffs. It could even require the Lago Agrio Plaintiffs to begin new legal proceedings in Ecuador, or elsewhere. The Respondent, therefore, advances in this arbitration a 'cross-claim' for environmental damage against Chevron, by way of an "offset" (or set-off), unjust enrichment, causation and contributory fault under Article 39 of the ILC Articles on State Responsibility...²⁶³

133. As part of its analysis of the cross-claim, the Tribunal made it clear that its decisions had left intact the LAPs individual claims, as it had no jurisdiction to decide upon them:

[The Tribunal] does not consider that any of its decisions made in this arbitration can be legally binding upon any of the Lago Agrio Plaintiffs. This Tribunal has no jurisdiction to decide upon the individual claims for personal harm (not being diffuse claims) of the Lago Agrio Plaintiffs; and it has not sought to exercise any such jurisdiction in this arbitration.²⁶⁴

134. For the reason that individual claims can only properly be asserted by the individual LAPs and the plaintiffs in the Aguinda Litigation, the Tribunal likewise determined that the Respondent had no standing to assert those claims in its own right in this arbitration:

In the Tribunal's view, therefore, it remains clear that individual claims for personal harm from environmental damage, made by the Aguinda Plaintiffs in the Aguinda Litigation in New York or similar claims for personal harm (not being diffuse claims) made by the Lago Agrio Plaintiffs in the Lago Agrio Litigation, are not and cannot be claims asserted by the Respondent in its own right against Chevron (or TexPet) in this arbitration.²⁶⁵

135. As a result, the Tribunal determined that the Respondent had no standing to bring such cross-claim in this arbitration:

²⁶¹ Decision on Track I(B), para. 186(1); Track II Award, para. 10.7.

²⁶² HPA Transcript, Day 1 (16 March 2021), pp. 146, 181.

²⁶³ Track II Award, para. 7.30.

²⁶⁴ Track II Award, para. 7.36.

²⁶⁵ Track II Award, para. 7.39.

Thus, whatever right is here being asserted by the Respondent for its cross-claim alleging environmental damage, it is a right belonging only to these individual plaintiffs alleging personal harm. It is not a right belonging to the Respondent. If it were otherwise, the Respondent's cross-claim could only be a diffuse claim. However, the Respondent cannot assert a diffuse claim against Chevron (or TexPet) without the Respondent violating the effect of the 1995 Settlement Agreement, as decided by this Tribunal. There is therefore no safe passage for the Respondent's cross-claim between Scylla and Charybdis.

In the circumstances, the Tribunal does not consider that the Respondent's cross-claim impugns its jurisdiction (or, as regards admissibility, the exercise of its jurisdiction) to decide other issues between the Claimants and the Respondent in this arbitration.

Conversely, the Tribunal has jurisdiction over the Respondent's cross-claim; and, in the exercise of such jurisdiction, it decides that the Respondent has no standing or right to bring such a cross-claim. Moreover, in a case (such as this) where the claimant's alleged liability to a cross-claim would result from a court judgment impugned by the claimant, the Tribunal considers that the respondent cannot rely upon that judgment to shift the legal burden of proof to the claimant; and that, in this case, the Respondent has not discharged its legal burden of proving its cross-claim.²⁶⁶

136. In the Claimants' view, the "same logic" applies in the context of a but-for scenario in which the Tribunal would be issuing findings on those very same individual claims, just in a different context.²⁶⁷
137. The Tribunal has some difficulty with that proposition. It agrees with the Claimants to the extent that the Respondent has no standing to assert such individual claims in its own right in this arbitration. By the same token, the Tribunal considers itself without jurisdiction to rule upon the merits of the individual claims, even within a hypothetical scenario before a Treaty-compliant Lago Agrio Court. Neither proposition applies, however, where the but-for analysis is limited to determining the extent of the *legal costs* that the Claimants would in all probability have incurred in defending themselves against those individual claims in the but-for world. The Tribunal can make that determination without deciding the hypothetical outcome of a Treaty-compliant Lago Agrio Litigation.
138. The Respondent's but-for argument goes nonetheless beyond such determination, as explained by the Respondent in its submissions:

Respondent's Track III *but-for* argument has two aspects, each a defense to a different component of Claimants' proposed relief. The first relates to Claimants' proposed relief of damages for their *legal costs* caused by the Treaty breaches. In particular, the *but-for* argument on legal costs is that Claimants have not proven, and cannot prove, that they would not in all probability have incurred legal fees and expenses in the *but-for* scenario comparable to those they incurred in the actual scenario. The second aspect of the *but-for* argument relates to Claimants' requested relief for an order of *indemnification* by Respondent in the event the LAPs enforce the Lago Agrio Judgment. Respondent argues that Claimants have not proven,

²⁶⁶ Track II Award, paras. 7.42-7.44.

²⁶⁷ HPA Transcript, Day 1 (16 March 2021), p. 147.

and cannot prove, that they would not have faced potential liability for the claims asserted in the Lago Agrio Complaint that were not extinguished by the 1995 Settlement Agreement in a Treaty-compliant scenario, and hence that they are entitled to full indemnification should the Lago Agrio Judgment be enforced.²⁶⁸

139. Thus, while the first aspect of the Respondent’s but-for argument as described above is not precluded by the Tribunal’s past determinations, the second aspect merits a separate analysis. At the Hearing on a Partial Award, Counsel for the Respondent clarified that its argument concerning indemnification was a different form of offset against legal costs and should not be understood as a request for an offset for the *environmental liability* that the Claimants would have faced in the but-for scenario:

So, here is our position. We’re not seeking any offset against their legal costs damages claim for any environmental liability. We do have an argument about their request for an order on indemnification, that’s different, but I can confirm that we’re not seeking an offset against their legal costs claim for any environmental liability....²⁶⁹

I’m happy to explain the issue regarding the Order of Indemnification, it’s that *if they can’t prove they would never face liability, there must be some uncertainty discount on the amount of the indemnification*. That’s a different kind of argument. But in terms of the offset, it’s offset of the legal fees--or legal costs against legal costs.²⁷⁰

140. According to the Respondent, in deciding this argument the Tribunal may “remain neutral” as to who would have prevailed in a Treaty-compliant litigation because

the *but-for* argument on indemnification only requires the Tribunal to determine whether Claimants have shown that they *would likely have avoided a judicial order for remediation* in a Treaty-compliant Lago Agrio litigation, and hence that they are entitled to full indemnification.²⁷¹

141. Regardless of whether it is framed as an offset against legal costs or against environmental liability, the Tribunal cannot accept this argument. As a logical proposition, a determination that the Claimants would *not* have faced potential liability for the individual claims vindicated in the Lago Agrio Complaint, even when framed in terms of probability, would necessarily be premised on an analysis of the potential outcome of the Lago Agrio Litigation, which the Tribunal has concluded it cannot perform without adjudicating claims that are either barred or beyond its jurisdiction. Even if the notion of burden of proof could somehow chart safe passage between Scylla and Charybdis for the purposes of Track III, the Tribunal does not consider it feasible, or appropriate, to decide

²⁶⁸ Respondent’s Second Submission, para. 81 (emphasis in original).

²⁶⁹ HPA Transcript, Day 2 (17 March 2021), p. 482.

²⁷⁰ HPA Transcript, Day 2 (17 March 2021), p. 484 (emphasis added).

²⁷¹ Respondent’s Second Submission, para. 84 (emphasis added).

on such basis whether the Claimants would have obtained full indemnification under the *Chorzów Factory* standard, much less so by forcing the Claimants to prove a negative in a manner not unlike the shifting of the burden of proof that the Tribunal already rejected in its Track II Award.²⁷²

142. In sum, the Tribunal determines that its prior rulings do not preclude an offset based upon individual claims insofar as it is limited to the legal costs that the Claimants would in all probability have incurred in defending themselves against such individual claims in a hypothetical Treaty-compliant Lago Agrio Litigation. However, the Tribunal's past findings do preclude an offset based on an indemnification order, as described above. These conclusions extend equally to an offset based on collective claims, as further elaborated below.
143. *Collective claims:* The Parties' disagreement in respect of collective claims is centred on whether the Tribunal's findings contemplate a binary distinction between what the Claimants consider are two mutually exclusive categories: (i) individual claims arising from personal harm caused to individuals and (ii) diffuse claims, which would encompass all representative claims on behalf of the community or on behalf of a collective.²⁷³
144. According to the Claimants, the Tribunal's finding that the Respondent settled all diffuse claims relating to environmental claims against the Claimants through the Settlement and Release Agreements also extends to so-called collective claims, meaning that a Treaty-compliant Lago Agrio Court in a but-for world could not decide such claims without breaching the Treaty. The Respondent sees diffuse claims and collective claims as two distinct categories, the latter not being covered by the Settlement and Release Agreements.
145. It is appropriate to ascertain first the key features of collective claims and rights as particularized by the Respondent in its submissions in Track III.²⁷⁴ Prof. Parraguez, expert on behalf of the Respondent, describes collective rights as follows:

²⁷² Track II Award, paras. 7.42-7.44.

²⁷³ HPA Transcript, Day 1 (16 March 2021), p. 94.

²⁷⁴ It is recalled that such rights include (i) the collective rights to a healthy and ecologically balanced environment held by each of the three discrete communities to which the LAPs belong (Pimampiro, Rumipamba and San Pablo de Aguarico); (ii) the collective property rights of the indigenous communities of Rumipamba and

Collective rights, on the other hand, are those that corresponds to a collectivity identifiable by its group purpose and common interests and are protected by the legal system as the group's private rights. An important part of these groups are the indigenous communities that the Ecuadorian Constitution has been particularly concerned about, but they are not the only ones, since there are other segments of the population, for example, villages or other communities of different kinds, that fall within this concept, whose *essential elements are the group context and the fact that the right is granted to the particular group and not to other people*. This was recognized by the Constitutional Court of Ecuador, citing its judgment 001-10-SIN-CC of March 18, 2010, in which it said that they are “*those legal powers that belong to or are can be exercised by a particular collective owner; these rights are recognized for a specific segment of the population, not for the citizens in general.*” From a procedural point of view, an action is collective when “*the right protected in a lawsuit belongs to a group of people and where the judgment is binding on all the members of that group.* The type of representative is only an incidental feature of the concept of collective action.” That said however, it is obvious that the violation of a collective right (for example, an indigenous people's right to identity), to the extent that it affects the entire human group in question, also involves personal harm to each of its members.²⁷⁵

146. One can extract four distinctive features of collective rights from this paragraph. First, collective rights as there described are held by a specific, determinable segment of the population, not by citizens in general. Second, the violation of a collective right involves personal harm to each member of the population in question. Third, judicial decisions concerning a collective right are binding on each member of the collective. Lastly, any “particular collective owner” (but not the State)²⁷⁶ may assert a collective right.
147. The Respondent's characterization of collective claims under Ecuadorian law is not one that the Tribunal needs to test comprehensively in this Partial Award. The exercise required from the Tribunal under Question #2 in respect of collective claims is narrower: it must take “the claims that Ecuador's Counter-Memorial on Damages refers to as ‘collective’ claims” as pleaded and determine whether such claims could be asserted in a but-for world without contradicting the Tribunal's prior rulings in this arbitration.
148. It is necessary first to place the Tribunal's past findings in their proper context. Critically, as a matter of record, the full question of the distinction between diffuse and collective rights was not effectively and distinctly put at issue before the Tribunal until the Respondent filed its Track I Supplemental Counter-Memorial on the Merits in March

San Pablo de Aguatico; and (iii) collective rights that the indigenous LAPs are entitled to under Article 84 of the 1998 Constitution (Counter Memorial, paras. 986-990; Respondent's Second Submission, paras. 127-128).

²⁷⁵ **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, para. 9 (emphasis added).

²⁷⁶ Counter-Memorial, para. 993; **RE-40**, First Expert Report of Dr. Luis Sergio Parraguez Ruiz, 22 February 2020, para. 8; HPA Transcript, Day 1 (16 March 2021), pp. 203-211.

2014,²⁷⁷ which post-dates the September 2013 Partial Award on Track I. The Parties' submissions leading to the Partial Award on Track I did not frame diffuse and collective rights as a dichotomy that was dispositive of an issue in dispute within Track I. Such terms were principally juxtaposed to provide the context for the Parties' discussion on whether Ecuadorian law effectively recognized "diffuse" and "collective" rights as of the date of the 1995 Settlement Agreement – and, as part of that debate, whether the notion of *collective* rights was introduced for the first time in the 1998 Constitution and whether the notion of *diffuse* rights was first introduced in the 1999 Environmental Management Act.²⁷⁸ While the implications of this timeline were discussed at length between the Parties, the distinctive use of each term in Ecuadorian law did not elicit any significant discussion; indeed, both terms were used interchangeably by the Parties and their experts on occasion.²⁷⁹ The dichotomy at issue in Track I was between *diffuse* rights and *individual* rights.²⁸⁰

²⁷⁷ Respondent's Track I Supplemental Counter-Memorial on the Merits, 31 March 2014, paras. 9, 72-75; Track I(B) Hearing Transcript, Day 1 (28 April 2014), pp. 34-39 (Coriell), 177, 180, 210-213 (Douglas).

²⁷⁸ Track I Hearing Transcript, Day 1 (26 November 2012), p. 73 (Douglas); Respondent's Track I Rejoinder on the Merits, 26 October 2012, paras. 20-21: "The constitutional reform of 1998 for the first time introduced the notion of 'collective rights' into the Ecuadorian Constitution and the Ecuadorian legal system in general... The notion of a 'diffuse interest,' on the other hand, was introduced into Ecuadorian law only at the time of the enactment of the EMA in 1999."

²⁷⁹ Claimants' Memorial on the Merits, 6 September 2010, para. 390: "Diffuse rights are public, collective non-individual rights that belong to everyone, such as the right to live in a clean environment and the right to have buildings of cultural and historical significance preserved"; Claimants' Reply Memorial on the Merits Track I, 29 August 2012, para. 23: "Diffuse rights are collective rights that belong equally to everyone, such as the right to live in a clean environment and the right to preserve buildings of cultural and historical significance"; Track I Hearing Transcript, Day 1 (26 November 2012), p. 65 (Douglas): "And of course, the related issue, as the Claimant put it, is whether or not the scope of the 95 agreement extends to collective or diffuse rights, and whether or not such a concept, indeed, existed under Ecuadorian law in 1995... If we can demonstrate that the Lago Agrio complaint rests upon either exclusively individual rights or at least both individual rights and collective or diffuse rights, then they lose"; Track I Hearing Transcript, Day 1 (26 November 2012), p. 188 (Coriell, Eguiguren): "Q. (Coriell) You also testified that collective rights did not exist under Ecuadorian law until 1998; is that right? A. (Eguiguren) That's correct, yes. Q. (Coriell) And, in that sense, you mean the same thing by collective and diffuse rights? You're talking about the same thing? A. (Eguiguren) Generally speaking, they used this indistinctively, one or the other term, the concept to refer to the same notion."

²⁸⁰ *Id.* See also Claimants' Reply Memorial on the Merits Track I, 29 August 2012, Section II.A. "Ecuador's *Res Judicata* Arguments Ignore the Distinction Between Diffuse and Individual Rights"; Respondent's Track I Rejoinder on the Merits, 26 October 2012, paras. 116-117: "To the extent the *relief* — as opposed to the claims — sought by the Lago Agrio Plaintiffs can be characterized as collective rather than diffuse, this distinction is irrelevant... Claimants' dichotomy between diffuse *rights* and individual *damages* is faulty. The correct dichotomy is between diffuse *rights* and individual *rights*. As shown above, it is indisputable that the Lago Agrio Plaintiffs asserted individual rights in their Complaint" (emphasis in original).

149. It is against this background that the Tribunal discussed, in its Partial Award on Track I, the capacity of the Respondent as regards “diffuse” or “collective” claims at the time of the 1995 Settlement Agreement:

The words “diffuse” and collective” do not appear in the 1995 Settlement Agreement. However, as recorded in Paragraph 63 above, the Parties’ expert witnesses agree that the laws of Ecuador when the 1995 Settlement Agreement was executed are incorporated into the Settlement Agreement pursuant to Article 7, number eighteen, of the Civil Code. In their joint expert report dated 7 August 2012, Professors Le Chatelier and Oquendo agreed the following legal definition of *diffuse rights*: “Diffuse rights are indivisible entitlements that pertain to the community as a whole, such as the community’s collective right to live in a healthy and uncontaminated environment ...”. Although these two experts cite as references (inter alia) Ecuadorian laws subsequent to 1995 (including the 1999 Environmental Management Act), the Tribunal considers that this agreed definition is equally appropriate at the time when the 1995 Settlement Agreement was made as regards Ecuadorian law incorporated into the 1995 Settlement Agreement. *For present purposes, the Tribunal sees no material distinction between the terms “diffuse” and “collective” rights, here preferring to use the former term only.*²⁸¹

150. It follows that the Tribunal’s decision to use the terms “diffuse” and “collective” rights interchangeably in the Partial Award on Track I is reflective of the fact that such dichotomy was not in dispute between the Parties at the time. The Tribunal’s findings in the Partial Award on Track I must therefore be understood to refer to diffuse rights as jointly defined by the Parties’ experts and accepted by the Tribunal, that is, “indivisible entitlements that pertain to the community as a whole”. It was under that definition that the Partial Award on Track I finally decided that (i) individual claims for personal harm in respect of that individual’s rights are beyond the scope of release of the Settlement and Release Agreements, and (ii) the Settlement and Release Agreements preclude two categories of claims: any “diffuse” claims against the Claimants under Article 19-2 of the Constitution made by the Respondent, and claims made by any individual not claiming personal harm (actual or threatened).²⁸²

151. It is clear that any claims bearing the traits set out in item (ii) of the preceding paragraph would be precluded in the Respondent’s asserted but-for scenario. However, collective claims as pleaded in the Counter-Memorial on Damages cannot be subsumed into either claims category, as they concern personal harm and cannot be asserted by the Ecuadorian government. Collective claims are thus not precluded by the Tribunal’s findings in the Partial Award on Track I.

²⁸¹ Partial Award on Track I, para. 97 (emphasis added).

²⁸² Partial Award on Track I, para. 112(3).

152. As mentioned above, it was only during Track I(B) that a dispute crystallized concerning the distinction between diffuse claims and collective claims. It is useful to cite here certain key excerpts of the Parties' submissions on this matter. In its Track I Supplemental Counter-Memorial on the Merits, as part of its submission that the Lago Agrio Complaint concerned aggregated individual rights, the Respondent argued:

Accordingly, the National Court in its Cassation Decision found that the claims in the Lago Agrio Litigation vindicated the aggregated individual rights (which the Court refers to as "collective" rights) of those who live in the Concession Area and who are directly affected by the existing contamination. In so doing, the National Court also drew a clear distinction between "collective" and "diffuse" rights or interests. It found that the claims asserted in the Lago Agrio Litigation were not diffuse rights claims asserted by citizens to protect some general public interest in the environment *per se*. They were instead claims to vindicate individual rights brought by citizens in the affected region who claim that they are *personally* threatened by Chevron's contamination and who seek to protect their own lives, health, and property. As such, the National Court concluded that these individual rights claims could not be disposed of by the Government through the 1995 Settlement Agreement...²⁸³

153. At the Track I(B) Hearing, Counsel for the Claimants addressed this argument as follows:

Now, as I mentioned earlier, Ecuador in this Supplemental Counter-Memorial has attempted to say that collective rights and diffuse rights are not the same. And when the casación decision refers to the Lago Agrio claim as being based on collective rights, what it really means is aggregated individual rights. And so the reason that Ecuador's put in a position where it has to make that argument is because of the combined effect of your First Partial Award which says diffuse claims under 19.2 are barred and of the casación decision that came out a couple of months later that refers to the Lago Agrio claim as being a collective rights claim. That doesn't leave it much room unless it can convince you that diffuse and collective rights, for purposes of this case, are not the same. But they are the same. And Ecuador's actually always understood that they have been the same for this purpose, until last fall when it was put into this difficult position.

Now, I will note that *in the Ecuadorian legal literature, collective rights are often referred to as indivisible rights that are owned by a particular community, like a particular cultural group, whereas diffuse rights are considered indivisible rights that are owned by the entire citizenry of Ecuador as a community. But for purposes of this case, we're talking about those rights having the same types of characteristics. They are indivisible. They are brought by a representative. When they're decided, they're decided against everyone in the community, whether that's the cultural community in specific or the overall community of Ecuador. And Ecuador in this arbitration has always understood that this was the case until it was put in this bind by your Partial Award and by the casación decision.*²⁸⁴

154. Arbitrator Lowe then enquired as to the relevance of the distinction between collective and diffuse rights for the purposes of Track I(B):

ARBITRATOR LOWE: So the [Constitutional] Court in the first paragraph that you've got set out there says these rights--these are rights recognized to a specific segment of the

²⁸³ Respondent's Track I Supplemental Counter-Memorial on the Merits, 31 March 2014, para. 72 (emphasis in original). See also Track I(B) Hearing Transcript, Day 1 (28 April 2014), pp. 177, 180, 210-213 (Douglas); Decision on Track I(B), paras. 131-133.

²⁸⁴ Track I(B) Hearing Transcript, Day 1 (28 April 2014), pp. 34-35 (Coriell) (emphasis added).

population, not to the general public, which seems to be drawing the same distinction between diffuse and collective rights, as the Respondents have raised.

What's your position on this? Are you saying that the courts are wrong in saying that and that the Tribunal is right or that that distinction is not relevant for the questions that the Tribunal has to address? Can you just explain precisely what your position is on the relevance of the question?

MR. CORIELL: *Yes. I think the distinction you just raised is not relevant, Professor Lowe, in the [context] of the Lago Agrio Case. I do not think that that is the distinction that the Respondent is attempting to make. Because we would agree that, when these terms are not used interchangeably in Ecuadorian law, the concept of diffuse refers to the entire Ecuadorian community, and the concept of collective refers to a diffuse interest within a particular subgroup.*

So, for example, you could have the people of a particular region. You could have a particular cultural group. We accept that distinction, but it's not relevant here because the characteristics of the substantive right in each of those instances are the same as the four that I walked you through: They're indivisible; they're brought by a representative; the relief is indivisible; and if you adjudicate them, you get an effect that's *res judicata erga omnes*. So with respect to Lago Agrio, you've got the same thing. You've got those same characteristics whether you call it diffuse or collective.

I think what the Respondent is trying to say is that collective means aggregation of individual rights. So, for example, Mr. Bishop, Mr. Pate, and I could aggregate our individual rights, but the three of us don't form a diffuse community or a collective community like a particular cultural group. We're just aggregating our rights.²⁸⁵

155. The Tribunal noted again the diffuse/collective dichotomy in its summary of the Parties' arguments in the Track I(B) Decision.²⁸⁶ However, the analytical framework of the Track I(B) decision is based on the same dichotomy that was originally drawn in Track I, namely, "whether or not the claims pleaded by the Lago Agrio Plaintiffs rest upon *individual rights, as distinct from "collective" or "diffuse" rights*".²⁸⁷ The Tribunal there defined "individual claims" and "diffuse claims" for the purposes of its decision:

The Tribunal's first decision in [] Paragraph 112(3) [of the Partial Award on Track I] - that the scope of the releases *does not* extend to any environmental claims made by an individual in respect of personal harm (or damage to personal property) violating that individual's rights, separate and different from the Respondent - identifies a category of claims that will be here referred to as "individual" claims. Under Ecuadorian law, an individual claim belongs to that individual with the remedy personal to that individual; and it is not a diffuse claim.

In contrast, the Tribunal's second decision in this Paragraph 112(3) - that the scope of the releases *does* have legal effect under Ecuadorian law precluding any diffuse claims against the First and Second Claimants under Article 19-2 of the Constitution, made by the Respondent and also made by any individual not claiming personal harm or damage to personal property (actual or threatened) - identifies a category of claims that will be here referred to as "diffuse" claims. Under Ecuadorian law, a diffuse claim may belong to a

²⁸⁵ Track I(B) Hearing Transcript, Day 1 (28 April 2014), pp. 38-39 (emphasis added).

²⁸⁶ Decision on Track I(B), paras. 66, 130-135.

²⁸⁷ Decision on Track I(B), para. 152 (emphasis added).

community of indeterminate people with the remedy indivisible; and it is not an individual claim.

The Tribunal emphasises that the terms “individual” claims and “diffuse” claims are used in this decision to denote categories of claims that the Tribunal has identified as relevant to its legal analysis of the Parties’ respective cases in this decision. These English linguistic (but not legal) terms, as here used, are not otherwise intended by themselves to bear any definitive technical meaning under Ecuadorian, international law or any other law.²⁸⁸

156. In these paragraphs, the Tribunal effectively incorporated the Track I diffuse/individual claims distinction into its Track I(B) analysis. It did not consider it necessary to address the newly raised diffuse/collective dichotomy under Ecuadorian law; rather, it continued to rely on the same two English linguistic terms that it crafted in Track I for the purposes of these proceedings. Thus, the Track I(B) Decision provides no guidance in regard of collective claims as described in Question #2.
157. The same conclusion can be drawn from the Track II Award, where the Tribunal again re-stated and applied the diffuse/individual claims distinction set out in its Partial Award on Track I, irrespective of the use ascribed by the Ecuadorian Constitutional Court to the terms “diffuse” and “collective”:

In its Judgment, the Constitutional Court accepts the validity and effectiveness of the 1995 Settlement Agreement, as between (inter alios) TexPet, Texaco, Chevron and the Respondent. The Constitutional Court also sets out the terms of Article 19.2 of the 1978 Constitution, being part of the release from liability expressly granted to Chevron by the Respondent under Article 5 of the 1995 Settlement Agreement (as also expressly set out). In describing the environmental rights for which Chevron was adjudged liable in the Lago Agrio Judgment (as also decided by the Lago Agrio Appellate and Cassation Courts), the Constitutional Court uses synonymously the terms “diffuse right” and “collective rights”; in the original Spanish text, respectively, “un derecho difuso” and “los derechos colectivos.” It is clear that the Constitutional Court treats the rights of the Lago Agrio Plaintiffs, as also decided by the Cassation, Lago Agrio Appellate and Lago Agrio Courts, as constituting a diffuse right, in the words of the Constitutional Court “a constitutional and collective right”.

*The Tribunal re-states the distinction, as set out in its First Partial Award dated 17 September 2013, between an individual claim for personal harm by a Lago Agrio Plaintiff (not being a diffuse claim) and a diffuse (or collective) claim. The former is not affected by the 1995 Settlement Agreement; but the 1995 Settlement Agreement precludes the latter, expressly so in regard to Article 19.2 of the 1978 Constitution....*²⁸⁹

158. Indeed, the Tribunal was never required to decide the question of whether a category of non-diffuse “collective” claims might exist under Ecuadorian law. Notwithstanding the Tribunal’s finding that “the Lago Agrio Complaint was not wholly barred at its inception by res judicata under Ecuadorian law, by virtue of the 1995 Settlement Agreement”, the

²⁸⁸ Decision on Track I(B), paras. 155-157 (emphasis in original).

²⁸⁹ Track II Award, paras. 5.222-5.223 (emphasis added).

Tribunal was satisfied that the “Lago Agrio Judgment (as also decided by the Lago Agrio Appellate, Cassation and Constitutional Courts) decided only diffuse claims as distinct from individual claims for personal harm by the Lago Agrio Plaintiffs, whereby the Respondent violated its obligations towards the First Claimant and the Second Claimant as ‘Releasees’ under the 1995 Settlement Agreement”.²⁹⁰ Whatever the role of such an alleged third category of non-diffuse “collective” claims in Track I(B), it ultimately proved immaterial to the Tribunal’s conclusions in Track II.

159. In sum, the Tribunal concludes that its prior decisions do not, whether expressly or by necessary implication, dispositively equate diffuse claims (in the sense in which this term is used by the Tribunal in its decisions) and collective claims (as defined in Question #2). In particular, they do not resolve the question as to whether a collective right is simply a diffuse right within a particular subgroup or an altogether separate category of right.
160. In the Tribunal’s view, the disagreement between the Parties as regards the diffuse/collective dichotomy arises fundamentally as a matter of Ecuadorian law. It may be potentially resolved by reference to whether (i) collective rights effectively constitute a distinctive category of rights under Ecuadorian law separate from diffuse rights; (ii) collective claims constitute individual claims for personal harm; and (iii) the Ecuadorian State enjoys standing to assert a collective right.²⁹¹ However, the Tribunal must suspend its further analysis at this juncture, as such matters are beyond the scope of Question #2 and thus of this Partial Award.
161. In reaching this conclusion, however, the Tribunal remains mindful of the implications that may arise from a finding that diffuse and collective claims constitute separate, self-contained categories of claims, as noted by the Claimants during the Hearing on a Partial Award:

So, I will conclude on this point just by saying that Ecuador’s individual claims for collective rights, really once you see all of that, it really makes a mockery of finality, and your understanding of finality and its importance and relevance, was set out eight years ago at Paragraph 107 of the first Partial Award in Track I. I won’t go through it again but you talked about “settled forever.” “It’s not juridically possible to exercise a right that no longer exists.” That gets back to Mr. President’s question about the standing change. The diffuse right was indivisible, settled in full or not at all. And you rejected “entirely the third possibility that the same diffuse right can exist in separate parts, to be exercised by multiple Claimants,” in other

²⁹⁰ Track II Award, paras. 10.7-10.8.

²⁹¹ See HPA Transcript, Day 1 (16 March 2021), pp. 193-194 (Ettinger).

words, multiple representatives with standing, “at different times with successive diffuse claims,” thereby making any “final settlement or adjudication illusory.”...

And what I would leave you with on this point is just to think about Maria Aguinda and the implications of their theory with respect to how these releases and finality works. Their theory is that Maria Aguinda can bring a diffuse--forget the 1995 Settlement Agreement. Let's say that didn't exist. Maria Aguinda can bring a diffuse claim in her capacity as a citizen of Ecuador entirely. She can settle that claim and the settlement can involve generalized remediation to the whole Amazon, yet she can come back a few years later and file another case in her own name but say she is vindicating a collective right on the part of the particular indigenous community of which she is part, and seek generalized remediation again. That's the implication. It makes a mockery of finality. It is nonsense. But most importantly for your task with respect to Question 2, it has been argued extensively, as I hope I've shown, and it has been decided.²⁹²

162. Counsel for the Claimants refers here to the Tribunal's determination that the Ecuadorian Government could, and in fact did, settle the diffuse right under Article 19-2 of the 1978 Ecuadorian Constitution upon executing the 1995 Settlement Agreement:

In the Tribunal's view, under Ecuadorian law as at the time when the 1995 Settlement Agreement was executed (i.e. before the 1999 Act), only the Respondent could bring a *diffuse claim under Article 19-2 to safeguard the right of citizens to live in an environment free from contamination*. At that time, no other person could bring such a claim. No instance of the Respondent bringing or settling such a claim (other than this case) and no decisive provision of Ecuadorian law was brought to the attention of the Tribunal. Nonetheless, it must follow from the circumstances prevailing in 1995 that the Respondent, and *only the Respondent, had the legal capacity to make and settle a diffuse claim under Article 19-2*. If the Respondent could not make and then settle a diffuse claim under Article 19-2, no-one else could. The Tribunal is therefore persuaded by the analysis submitted by the Claimants' expert witnesses on this point, namely that in 1995 the Respondent (acting by its Government) could settle a diffuse claim under Article 19-2 “forever” against the Releasees; and that accordingly no such diffuse claim could be made in the future against any Releasee.

After 1995, the Tribunal considers that the same situation prevailed: the right to make an environmental claim based upon the diffuse right under Article 19-2 against the Releasees remained settled “forever”. The new factor, confirmed by the 1999 Environmental Management Act, that one or more private individuals now had standing to bring a claim asserting diffuse rights could not revive the diffuse right under Article 19-2 which had already been extinguished by the 1995 Settlement Agreement. It is not juridically possible for a person to exercise a right which no longer exists, even if, were that right to remain in existence, that person has newly acquired the right to exercise it. As agreed by the Parties' experts, *that diffuse right under Article 19-2 was “indivisible”: it was either settled in full or not at all. The Tribunal has rejected the latter possibility; and it decides upon the former. It rejects entirely the third possibility that the same diffuse right in Article 19-2 can exist in separate parts, to be exercised by multiple claimants at different times with successive diffuse claims, thereby making any effective final settlement or adjudication of such claims illusory.*²⁹³

163. Later, in its Track II Award, the Tribunal found that the Lago Agrio Judgment adjudicated the same diffuse claims that had been extinguished by the 1995 Settlement Agreement,

²⁹² HPA Transcript, Day 2 (17 March 2021), pp. 377-379 (Coriell).

²⁹³ Partial Award on Track I, paras. 106-107 (emphasis added).

thereby breaching the umbrella clause of the Treaty. As part of its determination, the Tribunal re-stated and applied its Track I finding in respect of such settlement:

The Tribunal re-states the distinction, as set out in its First Partial Award dated 17 September 2013, between an individual claim for personal harm by a Lago Agrio Plaintiff (not being a diffuse claim) and a diffuse (or collective) claim. The former is not affected by the 1995 Settlement Agreement; but the 1995 Settlement Agreement precludes the latter, expressly so in regard to Article 19.2 of the 1978 Constitution. Accordingly, the Tribunal concludes that the Constitutional Court's interpretation of Article 5 of the 1995 Settlement Agreement deprives that settlement of any practical meaning, making it a one-sided and open-ended commitment undertaken unilaterally by TexPet and Texaco, which (as decided by all four Ecuadorian Courts) Chevron inherited based upon its "merger" between Chevron and Texaco. The Tribunal re-states its reasons for its conclusion as also set out in its First Partial Award.

In the circumstances, on the basis of the submissions and expert evidence on Ecuadorian law adduced before the Tribunal in this arbitration, the Tribunal is driven to conclude, as regards the interpretation and application of the 1995 Settlement Agreement to the Lago Agrio Judgment, that the decision of the Constitutional Court is inconsistent with the effect that the Treaty requires to be given to the 1995 Settlement Agreement.²⁹⁴

164. The Tribunal confirms that, whether as a matter of strict legal obligation arising from *res judicata* or simply as a matter of the good administration of justice, it intends to decide Track III in a manner consistent with its prior determination that the diffuse right under Article 19-2 of the 1998 Constitution was settled in full. It will under no circumstances accept a but-for scenario in which such settlement is rendered illusory. However, it is not prepared to determine at this juncture the extent to which the collective rights purportedly vindicated in the Lago Agrio Complaint may overlap with the diffuse right asserted therein, or, more generally, the extent to which collective rights and claims are distinct from diffuse rights and claims under Ecuadorian law, which is beyond the scope of the Track III proceedings as determined under Procedural Orders No. 52 and 55.
165. Thus, for the aforementioned reason that it would require consideration of substantive Ecuadorian law,²⁹⁵ the Tribunal does not consider it right to resolve here the Claimants' argument that they would be forced to continue litigating the same non-individual rights and claims if diffuse and collective rights are not treated the same.²⁹⁶
166. The Tribunal therefore concludes that its prior rulings do not preclude an offset based on the claims that Ecuador's Counter-Memorial on Damages refers to as "collective" claims.

²⁹⁴ Track II Award, paras. 5.223-5.224.

²⁹⁵ See para. 160 above.

²⁹⁶ Claimants' Second Submission, paras. 140-143; HPA Transcript, Day 2 (17 March 2021), pp. 377-379 (Coriell).

The Tribunal recalls, however, that such offset is only permissible to the extent that it refers to the *legal and other litigation costs* (including fees for accountants and other technical experts) that the Claimants would in all probability have incurred in defending themselves against those collective claims in the but-for world, as explained in the prior section: it does not include any element of damages that the Claimants might have been ordered to pay.

167. *Determination on Question #2:* In sum, the Tribunal declares that its prior rulings do not preclude an offset based on individual claims or collective claims, to the extent that it refers to the legal costs that the Claimants would in all probability have incurred in defending themselves against those claims in a Treaty-compliant Lago Agrio Litigation. To that extent, Question #2 is answered in the negative.

C. QUESTION #3

168. Based on the assumption that the Tribunal will allow the Respondent's but-for defence to proceed, Question #3 requires a determination from the Tribunal concerning the scope of the but-for scenario: "would it be limited to the confines of those claims actually pursued by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record?" This question was prompted by the Claimants' argument that

Ecuador's but-for scenario is a *counter-factual*. Ecuador's counsel admitted during the procedural hearing that its but-for world is not based on actual, real-world facts, claiming that "this contradicts what the but-for analysis aims to accomplish." Instead, it imagines a class action procedure that did not exist in Ecuador. It also imagines tens of thousands of new plaintiffs who were not part of the Lago Agrio Litigation and thousands of pages of new purported environmental evidence, including site investigation reports and aerial studies from the year 2020—decades after the end of TexPet's operations in 1990—that were never before the Lago Agrio Court when it issued its judgment in 2011. And it imagines the litigation of claims that were pleaded but not prosecuted in the Lago Agrio Litigation for reasons that had nothing to do with Ecuador's treaty breaches. This kind of imaginary world-building is far too speculative and attenuated to form the basis for a proper damage analysis in this case.²⁹⁷

169. Unlike Questions #1 and #2, Question #3 is not necessarily concerned with the Tribunal's past findings; rather, it is international law that is said to govern the outer limits of the but-for counterfactual. In envisaging where such limits might lie, the Tribunal remains mindful that the Respondent's but-for defence has not yet been fully pleaded. The Tribunal need not and will not decide upon the merits of the defence at this juncture. It considers it appropriate, however, to address certain matters within the limited scope of

²⁹⁷ Claimants' Second Submission, para. 158 (emphasis in original).

Question #3. Such an exercise is justified, in part, by the vast amount of evidence that would need to be presented by the Parties and considered by the Tribunal if such defence were to proceed in full in its current form. The potential for overlap between the but-for scenario and matters that lie beyond the Tribunal's jurisdiction likewise does not escape the Tribunal's attention. Thereby, as already stated previously, the Tribunal sees fit to frame and narrow the but-for exercise in so far as it reasonably can at this preliminary juncture, and in particular the scope of relevant and material evidence bearing upon that analysis.

170. It is common ground between the Parties that the limits of the but-for scenario should be addressed by reference to international law, in particular by reference to the full reparation standard set forth in *Chorzów Factory*, which applies as a matter of customary international law.²⁹⁸ As articulated by the PCIJ, 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.”²⁹⁹
171. The Tribunal observes that *Chorzów Factory* did not concern full reparation arising from an international denial of justice within the context of a domestic litigation. Thus, it did not directly address whether the “situation which would, in all probability, have existed” if the denial of justice had not occurred should be circumscribed to the claims as put before the domestic court and the underlying record of the litigation. The Tribunal has been assisted by argument from both sides on this question, but remains convinced that *Chorzów Factory* provides the applicable rule of decision under international law. While the legal authorities cited by the Parties could potentially provide guidance to the Tribunal at the stage of assessing the full merits of the but-for scenario, none of them purports to restate the *Chorzów Factory* standard under the paradigm of denial of justice or articulate an alternative rule by which to assess proximate causation in such a scenario.³⁰⁰

²⁹⁸ HPA Transcript, Day 1 (16 March 2021), pp. 214 (Renfroe), 252 (Tsutieva).

²⁹⁹ **CLA-406**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, Judgment, 13 September 1928, p. 47.

³⁰⁰ See e.g. **CLA-47**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (Chevron Commercial Cases)*, PCA Case No. 2007-02, Partial Award on the Merits, 30 March 2010; **CLA-447**, *Amco Asia Corp. and others v. Republic of Indonesia (Amco II)*, ICSID Case No. ARB/81/1, Award, 31 May 1990; **RLA-813**, *William Richard Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Damages,

172. Therefore, the question before the Tribunal is whether it should restrict its but-for analysis to the “claims actually pursued by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record” to establish “the situation which would, in all probability, have existed” if the Treaty had not been breached by the Respondent.
173. Inevitably, the Tribunal’s but-for analysis must depart from the factual matrix that led to the international delict that did in fact occur, as it provides the vantage point from which the Tribunal can discern that which would ‘in all probability’ have occurred, absent a Treaty breach, from other scenarios that arise only as a matter of possibility. In this case, the filing of the Lago Agrio Complaint, which the Tribunal has determined was not wholly barred at its inception by *res judicata*,³⁰¹ is the triggering event of the Lago Agrio Litigation, which culminated in the Respondent’s denial of justice. As such, the Lago Agrio Complaint constitutes a central and irremovable element of the chain of causation of the Treaty breach.
174. From this standpoint, the Tribunal is not persuaded that a but-for exercise envisaging a complaint of a materially different magnitude than the one that was in fact presented before the Lago Agrio Court is a useful heuristic for proximate causation in this instance. Alternative scenarios envisaging substantially different theories of the case, numbers of plaintiffs or bodies of evidence than those that can be expected from the original complaint and surrounding circumstances pertain to the realm of possibility, but they are not effective depictions of that which would have occurred “in all probability” but-for the Treaty breach as required under *Chorzów Factory*. Such hypotheticals are too far removed from the factual matrix of the case to amount to anything other than speculation unconstrained by the actual historical record. In particular, the Tribunal will not countenance a but-for scenario that involves the protracted assertion of rights that did not survive the Settlement and Release Agreements as determined in the Tribunal’s previous decisions, or plaintiffs beyond the original 48 LAPs.
175. While this provides a broadly affirmative answer to Question #3, the Tribunal is conscious that it has not yet considered the full merits of the Respondent’s but-for scenario. It is thus not prepared to determine at this stage that the Respondent is fully

10 January 2019; **RLA-709**, *Sramek v. Austria*, ECHR App No. 8790/79, Judgment, 22 October 1984; **RLA-433**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011.

³⁰¹ Decision on Track I(B), para. 186(2); Track II Award, para. 10(7).

precluded from asserting any deviation from the Lago Agrio Complaint and Lago Agrio Litigation record. The Tribunal expects, however, that the Respondent will take account of the Tribunal's considerations in this Partial Award in its upcoming submissions.

176. Lastly, having answered Question #3, the Tribunal declines to address the Parties' arguments any further. In particular, the Tribunal leaves for further determination the Claimants' arguments concerning (i) the LAPs' decision not to pursue their individual claims for personal harm after the filing of the Lago Agrio Complaint; (ii) other aspects in which the Respondent's but-for scenario could be considered speculative under the *Chorzów Factory* standard; and (iii) the risk that considering the Respondent's but-for scenario may amount to a re-trial of the Lago Agrio case.³⁰²
177. *Determination on Question #3:* For the above reasons, the Tribunal declares 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. To that extent, Question #3 is answered in the affirmative. The Tribunal makes no findings here in respect of the Claimants' argument that the but-for scenario must be limited to those claims that were actually *pursued* by the LAPs.

D. QUESTION #4

178. Question #4 asks whether "the Tribunal's prior rulings preclude Ecuador's argument that Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law?" Unlike Questions #1 through #3, which pertain to the Respondent's but-for defence, Question #4 arises in connection with the Respondent's mitigation of damages defence,³⁰³ which it summarizes in its submissions as follows:

At different points in the Lago Agrio Litigation, Chevron had the means to avoid the alleged harm from happening: it could have sought to recuse Judge Zambrano; it could have posted a *supersedeas* bond to suspend the enforcement of the Lago Agrio Judgment; it could have pursued remedies under Ecuadorian law to nullify the judgment based on the evidence of fraud; and it could have defended itself in enforcement proceedings as opposed to bringing the RICO case. It consciously chose to take a different course of action in pursuit of its own scorched-earth strategy, which generated exorbitant amounts of legal fees incurred by Chevron. Seen through the lens of Claimants' duty to mitigate, however, Chevron's failures to take actions to avert the harm from taking place must be taken into consideration in the assessment of the gargantuan damages it is now seeking to recover.

³⁰² HPA Transcript, Day 1 (16 March 2021), pp. 213-214, 223-247 (Renfroe).

³⁰³ Counter-Memorial, paras. 1167-1202.

179. As mentioned above, the Claimants consider that the mitigation defence is precluded by the Tribunal’s Track II findings as regards exhaustion of local remedies and judicial finality as requirements for a claim of denial of justice. In sum, they argue that the Respondent is attempting to re-litigate these issues under the façade of an argument that the Claimants failed to mitigate their damages by failing to pursue those same remedies.
180. In its Track II Award, the Tribunal rejected the Respondent’s argument that Chevron had failed to meet the requirement of judicial finality. Guided by the rationale adopted in *Loewen v. USA*, *Jan de Nul v. Egypt* and *Pantechniki v. Albania*, the Tribunal concluded that it would have been wrong to require Chevron to have pursued at the time certain local remedies in Ecuador that lacked any reasonable prospect of a timely, effective and adequate protection against the enforcement of the Lago Agrio Judgment, referring, in particular, to Chevron’s failure to (i) to post a bond to suspend the enforceability of the Judgment pending its cassation appeal with the Appellate Court; (ii) file an action under the CPA to request nullification of the Judgment; and (iii) await a decision from the Constitutional Court on its “extraordinary action for protection” impugning the Judgment before pursuing its claims in this arbitration.³⁰⁴
181. According to the Claimants, the standards applicable to exhaustion of local remedies and to mitigation of damages in this case are the same, seeing that they both refer to the same remedies and depend on the same single element: “whether it was ‘reasonable’ to expect Chevron to engage any of the mechanisms that Ecuador suggests would have remedied the harm or mitigated the damage from that harm.”³⁰⁵
182. In the Tribunal’s view, it would be misguided to conflate the standards for mitigation and exhaustion of local remedies as the Claimants suggest. While it is true that both standards contain a requirement of reasonableness, a determination of what conduct can be considered reasonable is always context-dependent. It is informed, amongst other things, by the objective pursued by the conduct in question. Exhaustion of local remedies requires that reasonable steps be taken to remedy a judicial wrong – in this case, to prevent the finality and enforceability of the Lago Agrio Judgment within and without Ecuador. Mitigation, on the other hand, requires the wronged party not to exacerbate the damage

³⁰⁴ Track II Award, paras. 7.116-7.154.

³⁰⁵ Claimants’ Second Submission, paras. 198-200.

(here, the incurring of legal costs) and to take positive steps to minimize its effects. Conduct reasonably geared towards preventing the enforcement of a fraudulent judgment may also be deemed a reasonable means to reduce the legal costs arising from the threat of such enforcement, but not necessarily. There may be substantial overlap between the two analyses, but they remain legally distinct questions and are not coextensive. Whereas the exhaustion of local remedies focuses on avoiding the consummation of the wrongful conduct itself, mitigation of damages focuses on minimizing its effects.

183. It is thus not possible for the Tribunal to conclude in the abstract that its findings on exhaustion of local remedies and judicial finality apply without more to the Respondent's mitigation defence. It will be necessary to hear the Parties' arguments on mitigation in full before reaching a decision. The Tribunal does not exclude, however, that certain factual and logical parallels between its decisions on judicial finality and the mitigation defence may inform its analysis of the latter, including in respect of what conduct may be deemed reasonable under the applicable mitigation standard.
184. *Determination on Question #4:* In conclusion, the Tribunal declares that the Tribunal's prior rulings do not preclude the Respondent's argument that the Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law. Question #4 is thus answered in the negative.

E. ADDENDUM: ENVIRONMENTAL EVIDENCE

185. At the conclusion of the Hearing on a Partial Award, Counsel for the Claimants sought clarification from the Respondent as to whether it was seeking an offset "for any potential environmental liability".³⁰⁶ Counsel for the Respondent confirmed that it is "not seeking any offset against [the Claimants'] legal costs damages claim for any environmental liability."³⁰⁷ The Tribunal invited the Parties to confer and attempt to agree upon a common formulation of this understanding. The Parties thereafter submitted written briefs on this question on 31 March and 7 April 2021. While the Parties were not able to agree on a common formulation, the terms of the Respondent's clarification in respect of the scope of its proposed offset remain unchanged.

³⁰⁶ HPA Transcript, Day 2 (17 March 2021), p. 480 (Bishop).

³⁰⁷ HPA Transcript, Day 2 (17 March 2021), p. 482 (Clodfelter).

186. Considering that the Respondent is neither seeking a determination on the Claimants' environmental liability, nor to offset any such environmental liability, the Tribunal is of the view that it would unnecessarily expand the scope of these Track III proceedings if it were to allow the introduction of further environmental evidence. In view of the findings in this Partial Award regarding the proper scope and construction of the counter-factual regarding what would have "in all probability" transpired in the Lago Agrio Litigation but for the breaches of the Treaty, the Tribunal also believes that any further environmental evidence going beyond that already on record does not appear to be *prima facie* relevant for the Tribunal's decision on the Respondent's request for an offset, inasmuch as it is limited to the legal fees incurred by the Claimants in the but-for scenario.³⁰⁸

187. For these reasons, the Tribunal decides not to allow the introduction of any further environmental evidence in these proceedings. As a result, the Tribunal vacates its Decision on the Parties' Document Production Requests in relation to requests concerning environmental matters, as originally set out in Procedural Order No. 66 and stayed by paragraph 7 of Procedural Order No. 67.

VIII. THE TRIBUNAL'S DECISION

188. For the reasons set out above, the Tribunal:

- (i) Declares, in respect of Question #1, that there is no finding in the Tribunal's Track II Award that the entire Lago Agrio proceeding was pervaded by a denial of justice comprised of fraud and corruption;
- (ii) Declares, in respect of Question #2, that its prior rulings do not preclude an offset based on individual claims or collective claims, to the extent that it refers to the legal costs that the Claimants would in all probability have incurred in defending themselves against those claims in a Treaty-compliant Lago Agrio Litigation;
- (iii) Declares in respect of Question #3, that any hypothetical but-for scenario offset should in principle at least be limited to the confines of the claims actually

³⁰⁸ Counter Memorial, para. 943: "The issues that would have remained for decision include the LAPs' individual claims for non-diffuse rights harmed and threatened by environmental contamination. *And it is clear that, on those issues, there would have been sufficient evidence available to the LAPs to warrant a judgment providing substantial remedies for injury to those rights.*" (emphasis added)

pleaded by the 48 named Lago Agrio Plaintiffs and to the actual Lago Agrio Litigation record;

- (iv) Declares, in respect of Question #4, that the Tribunal's prior rulings do not preclude the Respondent's argument that the Claimants failed to mitigate their damages by not pursuing local remedies under Ecuadorian law;
- (v) Vacates its Decision on the Parties' Document Production Requests in relation to requests concerning environmental matters, as originally set out in Procedural Order No. 66 and stayed by paragraph 7 of Procedural Order No. 67;
- (vi) Rejects the Parties' claims and requests to the extent that they contradict the Tribunal's decisions in this Partial Award; and
- (vii) Reserves its decision on all other claims and requests for subsequent determination.

PLACE OF ARBITRATION: THE HAGUE, THE NETHERLANDS

DATE: 30 June 2021

A handwritten signature in blue ink, appearing to be 'H. Grigera Naón', written in a cursive style.

Dr. Horacio A. Grigera Naón:

A handwritten signature in blue ink, appearing to be 'V. Lowe', written in a cursive style.

Professor Vaughan Lowe QC:

A handwritten signature in blue ink, appearing to be 'A. van den Berg', written in a cursive style.

Professor Albert Jan van den Berg (President):