

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 ("Chevron")
2. TEXACO PETROLEUM COMPANY ("TexPet")

(both of the United States of America)

The First and Second Claimants

- and -

THE REPUBLIC OF ECUADOR

The Respondent

Note of Dissent

1. My distinguished colleagues on the Arbitral Tribunal hearing the present case are issuing by majority vote a "Decision on Track I B" dated 12 March 2015 (the "Decision") in respect of which this Note of Dissent is made.
2. I am fully aware of the particular and limited nature of the Decision, which, as the Decision itself states (paras. 6, 183, 184, 185), is not an award, is merely of interim nature, may be re-visited in full or in part later in this arbitration, and is only concerned with the discrete analysis of the complaint filed on 7 May 2003 with the *Corte Superior de Justicia de Nueva Loja* by the Lago Agrio plaintiffs as the initiation of the Lago Agrio lawsuit against Texaco Inc. (the "Complaint"). I am equally aware that the Decision in principle distances itself from any specific or technical analysis under Ecuadorian law of the questions subject to the Decision and indicates that it considers such questions strictly from the perspective of an international tribunal under the Ecuador-U.S.A. Treaty for the Encouragement and Reciprocal Protection of Investment.
3. Notwithstanding the foregoing, the Decision advances in its paragraphs 183 and 186, however interim or preliminary, substantive determinations of issues at the center of the

Parties' disputes. Even on such interim or preliminary bases, I am unable to agree at the present juncture that such determinations are supported by the reasons given for them in the Decision and, therefore, I must dissent. Necessarily, this dissent cannot be of more definitive nature than the Decision, nor may address legal and factual issues exceeding the self-imposed limits of the Decision, although part of the problem is indeed that the Decision prematurely advances determinations concerning crucial matters after circumscribing the legal and factual elements to be considered to such effect and limiting the analysis to the Complaint. However, at this stage, since it obviously cannot go beyond the self-traced boundaries of the Decision itself, this Note of Dissent shares the Decision's interim nature, and is made from the perspective of an international arbitral tribunal without, as the Decision states (paras. 157-158), being bound by any legal technicalities inherent to any applicable law, including Ecuadorian law.

4. Despite the above *caveat*, since the Respondent has laid great emphasis in support of its position regarding the questions addressed by the Decision on the Delfina Ecuadorian Supreme Court decision ("Delfina"), and also with the intention of unraveling the ambiguities under Ecuadorian law posed by the matters to be resolved (Decision, para. 166), the Decision rightly refers to Delfina at length (Decision's paras. 173-174). According to Delfina, an individual claim is a claim requesting relief for harm individually suffered in the form of pecuniary compensation or reparation in kind of such specific harm, and irrespective of whether such claimant is a physical person or a legal entity.
5. Delfina concerned an individual claim by the "*Comité Delfina Torres Vda. De Concha*" legal entity characterized as a "*persona jurídica, corporación de derecho privado*"¹, which was set forth by its legal representative. This legal entity was awarded economic compensation amounting to US\$ 11,000,000.00 that it chose (as it was its right absent any valid opposition raised by the respondent and accepted by a court of law) to transform into a reparation in kind. As decided by the Ecuadorian Supreme Court the reparation in kind was anyway not to exceed the amount of US\$ 11,000,000.00 of the entity's pecuniary claim as awarded by the Supreme Court (initially, the entity sought compensation amounting to US\$ 35,000,000.00²). It should then be concluded that such relief remains an individual relief even if it has the parallel or side effect of benefiting third parties including, in the case of a legal entity, persons comprised or not by it.

¹ Delfina, *TERCERO*, at 2 (Spanish original).

² Delfina complaint (Exhibit R-1188).

6. As the Decision properly emphasizes, attention should be paid to the substance and not merely to the form of pleadings to elucidate the nature of the claims contained in the Complaint (para. 158). This approach is pertinent when looking at the Complaint against the backdrop of Delfina. However, following such approach raises the always difficult – and often debated - issue of the dividing line between a substantive claim and the corresponding remedy. In this connection, not infrequently the conclusion is that substance and remedy indissolubly go together, and that the latter may fashion the former.
7. Such is the case of the Complaint. Nothing in the Complaint (as summarized in part in paras. 159-164 of the Decision) shows that it seeks individual relief in the sense understood in Delfina. None of the claims in the Complaint identifies a person or entity (including the persons formulating the Complaint) claiming compensation (pecuniary or in kind) specifically remedying the damage suffered by any such person or his or her property. Even if Delfina were not used as a yardstick, how can a claim seeking relief benefitting entire communities be equated as to its substance, effects and possibly economic dimension, with claims seeking particularized relief for the discrete harm individually proven and suffered by each claimant? In order to be consistent with the concern of privileging substance over form, the merely formal aspects of the formulation of the Complaint (e.g., coincidence of the persons making the Complaint and the Aguinda U.S. complaint and the fact that the same attorney represented the complainants in both cases, referred to in para. 165 of the Decision) cannot be privileged over the characteristics of the claims under the Complaint which, as indicated above, in their substance are not individual claims.
8. Indeed, rather than supporting the characterization of the Complaint as an individual claim or individual claims, by suggesting that Article 23 (27) of the Ecuadorian Constitution³ may allow claims on behalf of *third parties determined or undetermined*⁴, Delfina appears to place the discussion and the issues to be decided on the plane the Parties themselves seem to have now placed them: rather than as a differentiation between “individual” and “diffuse” claims, as a differentiation between “collective” claims (as pleaded by the Respondent) and “diffuse” claims (as pleaded by the Claimants) or, as also pleaded by the Claimants, as claims that, irrespective of their

³ This provision includes within the civil rights granted to any Ecuadorian “*el derecho al debido proceso y a una justicia sin dilaciones*” (the rights to due process and prompt access to justice [my informal translation]).

⁴ Delfina, page 5 (Spanish), referring to “..... *toda clase de pretensiones, fundada o infundadamente, para sí o para terceros determinados o indeterminados...*”

characterization as “collective” or “diffuse”, do not show any meaningful difference for the purpose of deciding the issues before the Arbitral Tribunal.

9. For the above reasons, I respectfully disagree with the Decision and its conclusions, including that the Complaint does not fall within the scope of the 1995 Settlement Agreement, consider that it is premature to address in any way at the present stage, on the basis of a limited record, and without simultaneously taking into account the circumstances mentioned in paras. 140-142 of the Decision, whether the Lago Agrio claims are or are not covered by the 1995 Settlement Agreement, and further also consider that the issues raised by the nature or characterization of the Lago Agrio claims and whether they are encompassed or not by the 1995 Settlement Agreement require being addressed in Track 2 of this arbitration in the light of the Parties’ pleadings as to the “collective” or “diffuse” nature of such claims and the factors alluded to in the Decision’s paras. 140-142.

12 March 2015.



Horacio A. Grigera Naón