Arbitration pursuant to the
Canada-Ecuador Bilateral Investment Treaty
and the UNCITRAL Rules

EnCana Corporation

(Claimant)

versus

Republic of Ecuador

(Respondent)

Partial Award on Jurisdiction

Professor James Crawford, President
Mr. Horacio Grigera Naón
Mr. Patrick Barrera Sweeney

Secretariat

London Court of International Arbitration

27 February 2004

Partial Award on Jurisdiction

A. Introduction

1. By Notice of Arbitration dated 14 March 2003, EnCana Corporation (Encana) commenced these proceedings against the Government of the Republic of Ecuador pursuant to Article XIII(2) of the Canada-Ecuador Agreement for the Promotion and Reciprocal Protection of Investments, concluded on 29 April 1996 (the BIT).[1] In its Notice, Encana alleged that Ecuador's action in denying certain value added tax (VAT) relief to certain of its subsidiaries violated provisions of the BIT.[2] It sought declarations to that effect as well as consequential relief, including reimbursement of tax credits already denied or which might be denied in future as a result of Ecuador's policy.

2. Article XIII of the BIT provides for disputes concerning covered investments to be submitted, at the investor's election, to arbitration under the ICSID Convention (if both the Respondent State and the State of the investor's nationality are parties to the Convention), under the ICSID Additional Facility Rules (if only one is a party), or under the UNCITRAL Arbitration Rules. Ecuador is but Canada is not a party to the ICSID Convention. EnCana elected UNCITRAL arbitration.

3. At an initial teleconference held on 4 September 2003 between the Members of the Tribunal and the parties, agreement was reached on a number of issues related to the conduct of the arbitration. These were embodied in Procedural Order No. 1 of 9 September 2003. In particular it was agreed (a) that the place of arbitration would be London, without prejudice to the power of the Tribunal to hold hearings and to deliberate in any other appropriate place, in accordance with Article 16 of the Rules;

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[1] 2027 UNTS 196 (in force, 6 June 1997).

[2] The two subsidiaries are AEC Ecuador Ltd. ("AEC") and City Oriente Ltd. ("Oriente"). Both are Bermudan corporations, described by the Claimant as "indirect wholly owned subsidiaries of EnCana": Notice of Arbitration, para. 7.

(b) that the Registrar would be the London Court of International Arbitration, (c) that the languages of the arbitration would be English and Spanish, and (d) that the Respondent would file a summary Statement of Defence, and a detailed statement of its Preliminary Objections, by 27 October 2003. This was duly done. Subsequently, in accordance with a further procedural order, the Claimant on 8 December 2003 filed its Written Observations on the Respondent's Jurisdictional Objections.

4. Following the filing of written pleadings on the jurisdictional objections, the Tribunal held a hearing at the premises of the LCIA in London on 5 January 2004. The Parties were represented as follows:

For the Claimant:

Mr Michael Barrack
Mr Riyaz Dattu
McCarthy Tétrault LLP
Box 48, Suite 4700, Toronto Dominion Bank Tower,
Toronto, Ontario, Canada M5K 1E6

Mr Barry Gilchrist, EnCana, Vice-President, Commercial Services
Mr John Keplinger, EnCanEcuador, General Manager
Mr John V Harries, QC, Senior Legal Advisor, Offshore & International Operations, Encana Corporation

For the Respondent:

Mr Eric Ordway
Mr Charles E Roh, Jr
Weil, Gotshal & Manges, LLP
2 Rue De La Baume,
Paris 75008, France

Mr Augustin Hurtado Larrea, Bustamante & Bustamante,
Ms Elsa De Mena, Director General, Servicio de Rentas Internas

5. Immediately after the jurisdictional hearing, certain measures were taken by the Respondent to enforce recovery of approximately $7.5 m. in respect of VAT refunds alleged to have been wrongly made. EnCana immediately sought provisional measures. Written submissions were made by both parties and a telecon held on 13 January 2004 to deal with the request for provisional measures. After receiving certain

clarifications as to the capacity of the relevant EnCana subsidiary and of its legal representative to contest the measures taken, the Tribunal ruled that there was no necessity to indicate provisional measures in order to protect the rights at stake in this arbitration from irreparable harm. In these circumstances, the Tribunal noted, it did not need to determine whether there was an apparent basis for jurisdiction in respect of EnCana's claim.[3]

6. In light of the arguments of the parties, it is necessary to consider first the questions concerning consent to arbitration and waiver of domestic proceedings (Section B). The Tribunal will then turn to the question of its subject matter jurisdiction, in particular as it concerns the exception for revenue measures in Article XII of the BIT (Section C). Finally it will deal with certain outstanding procedural issues (Section D).

B. Issues of Consent and Waiver

7. Article XIII of the BIT provides in part as follows:

> *Article XIII*
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> *Settlement of Disputes between an Investor and the Host Contracting Party*
>
> 1. Any dispute between one Contracting Party and an investor of the other Contracting Party, relating to a claim by the investor that a measure taken or not taken by the former Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach, shall, to the extent possible, be settled amicably between them.
>
> 2. If a dispute has not been settled amicably within a period of six months from the date on which it was initiated, it may be submitted by the investor to arbitration in accordance with paragraph (4). For the purposes of this paragraph, a dispute is considered to be initiated when the investor of one Contracting Party has delivered notice in writing to the other Contracting Party alleging that a measure taken or not taken by

[3] Request for Interim Measures of Protection, Interim Award, 31 January 2004, paras. 19. 20.

the latter Contracting Party is in breach of this Agreement, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

3. An investor may submit a dispute as referred to in paragraph (1) to arbitration in accordance with paragraph (4) only if:
(a) The investor has consented in writing thereto;
(b) The investor has waived its right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind;
(c) If the matter involves taxation, the conditions specified in paragraph 5 of Article XII have been fulfilled; and
(d) Not more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

4. The dispute may, at the election of the investor concerned, be submitted to arbitration under:
(a) The International Centre for the Settlement of Investment Disputes (ICSID), established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington 18 March, 19651 (ICSID Convention), provided that both the disputing Contracting Party and the Contracting Party of the investor are parties to the ICSID Convention;
or
(b) The Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the investor, but not both, is a party to the ICSID Convention;
or
(c) An international arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

5. Each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.
...

12. (a) A claim that a Contracting Party is in breach of this Agreement, and that an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of that Contracting Party has incurred loss or damage by reason of, or arising out of, that breach, may be brought by an investor of the other Contracting Party acting on behalf of an enterprise which the investor owns or controls directly or indirectly. In such a case:

(i) Any award shall be made to the affected enterprise;

(ii) The consent to arbitration of both the investor and the enterprise shall be required;

(iii) Both the investor and enterprise must waive any right to initiate or continue any other proceedings in relation to the measure that is alleged to be in breach of this Agreement before the courts or tribunals of the Contracting Party concerned or in a dispute settlement procedure of any kind; and

(iv) The investor may not make a claim if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.

(b) Notwithstanding subparagraph 12(a), where a disputing Contracting Party has deprived a disputing investor of control of an enterprise, the following shall not be required:

(i) A consent to arbitration by the enterprise under 12(a)(ii); and

(ii) A waiver from the enterprise under 12(a)(iii)."

8. Article I sets out certain definitions:

"(b) 'Enterprise' means

(i) Any entity constituted or organized under applicable law, whether or not for profit, whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association; and

(ii) A branch of any such entity;

...

(g) 'Investment' means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes:

(i) Movable and immovable property and any related property rights, such as mortgages, liens or pledges;

(ii) Shares, stock, bonds and debentures or any other form of participation in a company, business enterprise or joint venture;

(iii) Money, claims to money, and claims to performance under contract having a financial value;

(iv) Goodwill;

(v) Intellectual property rights;

(vi) Rights, conferred by law or under contract, to undertake any economic and commercial activity, including any rights to search for, cultivate, extract or exploit natural resources, but does not mean real estate or other property, tangible or intangible, not

> acquired in the expectation or used for the purpose of economic benefit or other business purposes.
>
> Any change in the form of an investment does not affect its character as an investment.
>
> (h) 'Investor' means
>
> In the case of Canada:
>
> (i) Any natural person possessing the citizenship of or permanently residing in Canada in accordance with its laws; or
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> (ii) Any enterprise incorporated or duly constituted in accordance with applicable laws of Canada, who makes the investment in the territory of the Republic of Ecuador; and
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> In the case of the Republic of Ecuador:
>
> (i) Any natural person who is a national of Ecuador pursuant to its legislation; or
>
> (ii) Any enterprise organized in accordance with the laws and regulations of Ecuador, with domicile in the territory of Ecuador who makes the investment in the territory of Canada and who does not possess the citizenship of Canada;".

9. In its Notice of Arbitration, the Claimant asserted that "this Notice of Arbitration and Statement of Claim constitutes EnCana's consent to and demand for such arbitration under the UNCITRAL Arbitration Rules" (para. 4); further, that "EnCana has waived its right to initiate or continue any other proceedings" under Article XIII(3)(b) of the Treaty" (para. 5). No separate instrument of waiver was tendered.

10. The Respondent argued that the consent and waiver required by Article XIII(3) of the BIT are effectively conditions precedent to submission to arbitration, and that these could not be validly given in the Notice of Arbitration itself but must take the form of separate documents duly executed.

11. It is necessary to deal separately with this argument as it concerns consent and waiver.

(i) Claimant's Consent to Arbitration under Article XIII(3)(a)

12. Article XIII(3)(a) provides that a dispute may be submitted to arbitration "only if" the investor "has consented in writing thereto" ("solamente si... el inversionista ha

dado su consentimiento por escrito a dicho trámite"). The question is whether consent can be given in the Notice of Arbitration itself or whether it is a distinct condition precedent to the filing of such a Notice. Article XIII does not provide a direct answer to that question. The use of the past tense ("has consented"/"ha dado su consentimiento") might suggest that consent must be given prior to submission. On the other hand the investor must authorize the filing of the Notice, and thus any temporal implication of the term "has consented" would be fulfilled in any event.

13. In the Tribunal's view the decisive consideration is that consent to arbitrate under Article XIII of the BIT is given vis-à-vis the Tribunal itself, by an instrument which (assuming it has been properly authorised, proof of which can be required in case of doubt) is by definition opposable to the Claimant for the purposes of the proceedings. The Tribunal has authority to determine its jurisdiction under the UNCITRAL Rules,[4] something it would have in any event under general international law.[5] Unless otherwise specifically provided in the BIT, one would normally look for a statement of consent to arbitrate in the Notice of Arbitration itself, the document by which the arbitration is commenced.

14. It may be noted that Chapter 11 of NAFTA has a specific provision dealing with the procedure by which consent to arbitration is to be given. In accordance with Article 1121(3) the consent "shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of the claim to arbitration". Yet even under Article 1121, which specifies that consent is one of the "conditions precedent" to submission of a claim to arbitration and which requires a separate delivery of the consent to the disputing party, it has been held that expression of consent to arbitrate contained in the Notice of Arbitration is sufficient. As the Tribunal said in the *Ethyl* case:

> "It is clear that Ethyl has consented to this arbitration by the very act of commencing it. Normally such act is taken as consent to the arbitration thereby initiated."[6]

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4 UNCITRAL Rules, Art. 21(1) & (2).

5 Cf. Article XIII(7) of the BIT.

6 *Ethyl Corporation v Government of Canada (Award on Jurisdiction)* (1999) 38 ILM 708, 734 (para 59) citing Schreuer...

15. It is significant that there is no equivalent to Article 1121(3) in the BIT, which in other respects draws rather extensively on the language of Chapter 11. In the absence of any provision to the contrary in the governing instrument, consent to arbitration given in the Notice of Arbitration is binding on the Claimant. The Tribunal concludes that Article XIII(3)(a) is satisfied in this case.

(ii) Claimant's Waiver of Further Proceedings under Article XIII(3)(b)

16. At the time it commenced this arbitration the Claimant decided to waive further proceedings before Ecuadorian courts, both with respect to itself and its two subsidiaries, AEC and Oriente. Once again, this waiver was expressed only in the Notice of Arbitration, not in a separately executed instrument, although subsequently the Claimant took steps to withdraw pending proceedings of the subsidiaries acting on the basis of its decision to waive. Again the Respondent objects that the waiver by the Claimant was not in conformity with Article XIII(3)(b) of the BIT.

17. There is no relevant difference between the language of sub-paragraphs (a) and (b) of Article XIII(3): in both the past tense is used ("has consented in writing thereto..."; "has waived its right to initiate or continue any other proceedings"/"ha dado su consentimiento por escrito a dicho trámite"; "ha renunciado a su derecho a iniciar o continuar cualquier otro procedimiento"). But there is an important difference between the two requirements in terms of their context. In the case of arbitration under the BIT the Notice of Arbitration is integral to the proceedings of the Tribunal. In the case of waiver of alternative remedies, the waiver has to be effective vis-à-vis the other court or tribunal concerned, and the case for a distinct, formally-executed document is stronger. Furthermore the waiver will continue to have effect even after the international arbitration is concluded. It is not temporary.

18. Thus it is arguable that the waiver required by Article XIII(3)(b) should take the form of a separate legal instrument. It is true that (as the Tribunal in *Waste*

Management (No. 1) noted[7]) what use the parties make of the waiver and the effect given to it are not this Tribunal's business. But as a condition for the commencement of the present arbitration the waiver must be in a form which is capable of being given effect to in other tribunals. The Respondent thus has good grounds for seeking a separate formal instrument duly attested by the Claimant and not merely a statement in pleadings signed by counsel retained in the arbitration.

19. But the Respondent does not argue that the absence of a separate instrument affects the jurisdiction of this Tribunal and it is therefore unnecessary to ask the question which arose in *Waste Management (No. 1)*—a case which was anyway very different on the facts—whether a defective waiver invalidates the Request for Arbitration.[8] The Respondent merely asks that if the matter is to proceed to the merits, a separate formal instrument be required. In the Tribunal's view this is a reasonable stipulation.

20. In the course of oral argument the Claimant clarified that the present arbitration is not brought by it on behalf of its two subsidiaries under Article XIII(12)(a). The reason is obvious enough: the subsidiaries are Bermudan, not Ecuadorian corporations. Article XIII(12) only applies to claims for loss to "an enterprise that is a juridical person incorporated or duly constituted in accordance with applicable laws of" the Respondent State. The Claimant brings these proceedings in its own right as an investor, on the basis that it holds assets in Ecuador "indirectly through an investor of a third State", i.e. through its Bermudan subsidiaries (see the definition of "investment" in Article I(g)). It might be thought anomalous that subsidiaries incorporated in the host State must waive local remedies while subsidiaries incorporated in a third State need not do so. This may have been why the subsidiaries have themselves acted in accordance with the waiver by terminating local proceedings. But the contrast between the language of Article XIII(12)(a) and Article I(g) is clear and must be respected. The waiver or discontinuance of further proceedings by AEC and Oriente was not necessary

[7] *Waste Management, Inc. v. United Mexican States*, Award of 2 June 2000, 5 ICSID Reports 442, 453 (para. 15).

in terms of the BIT, and it has no relevance so far as concerns the Tribunal's jurisdiction over these proceedings.

C. The Tribunal's Subject Matter Jurisdiction over the Present Dispute

21. The Tribunal turns to the considerably more difficult group of questions concerning its subject-matter jurisdiction over the present dispute.

22. The principles to be applied in determining whether a claim brought under a treaty fall within the jurisdiction of a tribunal established by the treaty are well known and do not seem to be disputed between the parties.

23. In the first place, the Treaty itself must be applied in accordance with normal principles of treaty interpretation, since it is by reference to the treaty that the consent of the parties to arbitrate must have been given, if jurisdiction exists at all.

24. Secondly, at the jurisdictional stage the Tribunal should in principle take the Claimant's case as pleaded, although it is entitled to take into account other facts not in dispute which bear on any question of characterisation of the dispute.

25. Thirdly, the test for jurisdiction is in principle objective and does not depend on the disputed assertion of the Claimant that an issue under one or another provision of the BIT is raised. As an ICSID Tribunal recently put it:

> "It is not enough that the Claimant raises an issue under one or more provisions of the BIT which the Respondent disputes. To adapt the words of the International Court in the *Oil Platforms* case, the Tribunal 'must ascertain whether the violations of the [BIT] pleaded by [the Claimant] do or do not fall within the provisions of the Treaty and

[8] See the discussion in *Waste Management, Inc. v. United Mexican States (No. 2)*, Decision on Preliminary Objection, 26 June 2002, 6 ICSID Reports 549, 552-3 (paras. 12-14).

> whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain' pursuant to... the BIT."[9]

In performing this task the tribunal is entitled to give a definitive interpretation of the treaty if doing so will resolve the question of jurisdiction one way or another.

26. Fourthly, the tribunal should definitively resolve jurisdictional issues if it is possible to do so at the preliminary stage. In the words of Article 21(4) of the UNCITRAL Rules:

> "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."

Reasons for joining jurisdiction to the merits may include the existence of factual disputes relevant to issues of legal characterisation and thus to jurisdiction. But a respondent should only be required to go to the cost and expense of defending the merits of a claim (in a case where jurisdiction has not yet been established) if there is a reasonable prospect that jurisdiction will be held to exist. In this regard the injunction as to costs in Article 40(1) of the UNCITRAL Rules takes on additional significance.

(1) The Claimant's case

27. The Claimant through its subsidiaries is a party to a series of oil contracts with the Ecuadorian State Petroleum Company, Petroecuador. These entitle the subsidiaries to a share of oil produced from each field covered by the contracts. The amount of this share depends on the amount of oil produced and is determined on the basis of a negotiated formula, with higher shares associated with higher production. But in relation to several fields no share was negotiated for production above 15,000 barrels per day (bpd). At the time the contracts were concluded these fields were producing much less than that. Subsequently, however, production increased dramatically and

[9] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ARB 02/06), decision of 31 January 2004, para. 26, citing *Case concerning Oil Platforms. Islamic Republic of Iran v. United States of America*, ICJ Reports 1996 p. 803 at 810 (para. 16).

now exceeds 42,000 bpd. In 1999 and 2001, respectively, two of the contracts were renegotiated to include a participation factor based on this higher production.

28. The nub of the Claimant's grievance is that, shortly after the contracts were so amended, the Ecuadorian tax service (IRS) changed the way in which it allows VAT rebates for goods and services used in connection with the production of oil for export. The effect was to disentitle the subsidiaries and other foreign oil companies from reclaiming VAT on purchases as they had formerly done.[10] According to the Claimant the change amounts to the imposition of a new tax on the inputs of oil companies (but not on the producers of other goods for export) and has the effect of negating the advantages reasonably expected to derive from the newly negotiated participation factors in the contracts. In substance the Claimants allege that the Government, having with one hand granted a benefit related to the fruits of their substantial investment in the Ecuadorian oil industry, then acted with another hand to withdraw much or all of the benefit granted, and that doing so is a breach of the BIT.

29. In addition to denying VAT rebates on future acquisitions, IRS has also acted to reclaim VAT refunds in its view wrongly paid. Certain enforcement action taken in this respect was the subject of the provisional measures application dealt with in the Tribunal's decision of 31 January 2004.[11] However the Claimant does not take any separate point as to the substance of the refund issue, the merits of which appear to stand or fall with its general case on treatment.

30. The Respondent rejects the claim on a variety of grounds and disputes its factual basis. In particular, it denies that the participation factor under the contracts has any relevance to liability to VAT or entitlement to VAT refunds. This is in its view a pure question of internal tax law, and it stresses that this Tribunal is not a court of appeal from the decisions of the tax courts of Ecuador.

[10] The only domestic Ecuadorian oil company is Petroecuador, which as a public sector entity is not liable to VAT.

[11] See paragraph 5 above.

31. Moreover Ecuador says that the dispute concerns taxation measures and as such is exempted from the scope of the BIT by Article XII(1) unless it involves either the breach of an agreement with a central government authority of the host State (Article XII(3)) or conduct tantamount to expropriation (Article XII(4)). The Claimant does not allege breach of an agreement covered by Article XII(3), and although it does allege an expropriation, in the Respondent's view the latter claim is unsustainable on the facts and should be dismissed forthwith. The Respondent concludes that the Tribunal lacks subject matter jurisdiction over the Claimant's case in its entirety.

(2) Relevant provisions of the BIT

32. Before addressing these issues it is necessary to set out the relevant provisions of the BIT, which are as follows:

> "*Article I. Definitions*
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> For the purpose of this Agreement:
>
> ...
>
> (i) 'Measure' includes any law, regulation, procedure, requirement, or practice; ...
>
> *Article II. Establishment, Acquisition and Protection of Investments*
>
> 2. Each Contracting Party shall accord investments or returns of investors of the other Contracting Party:
>
> (a) Fair and equitable treatment in accordance with principles of international law, and
>
> (b) Full protection and security.
>
> *Article VIII. Expropriation*
>
> 1. Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public

knowledge, whichever is the earlier, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable.

Article XII. Taxation Measures

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

2. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention apply to the extent of the inconsistency.

3. Subject to paragraph (2), a claim by an investor that a tax measure of a Contracting Party is in breach of an agreement between the central government authorities of a Contracting Party and the investor concerning an investment shall be considered a claim for breach of this Agreement unless the taxation authorities of the Contracting Parties, no later than six months after being notified of the claim by the investor, jointly determine that the measure does not contravene such agreement.

4. Article VIII may be applied to a taxation measure unless the taxation authorities of the Contracting Parties, no later than six months after being notified by an investor that he disputes a taxation measure, jointly determine that the measure is not an expropriation.

5. If the taxation authorities of the Contracting Parties fail to reach the joint determinations specified in paragraphs (3) and (4) within six months after being notified, the investor may submit its claim for resolution under Article XIII."

33. Before commencing this arbitration the Claimant gave notice to the taxation authorities of the Contracting Parties and no joint determination was made by them within 6 months under Article XII(4). This is a simple fact from which the Tribunal draws no conclusion, one way or another, as to its jurisdiction. An investor's referral of a matter to the taxation authorities may be made out of an abundance of caution. Those authorities may refrain from making a joint determination, whether because the issue is best left to the Tribunal or for some other reason. The only point is that in the present case the procedural requirements of Articles XII(5) and XIII(3)(c) have been satisfied.

(3) The issues for the Tribunal

34. Turning to the issues before the Tribunal, the positions of the parties as to the characterisation of the present claim are sharply opposed. According to the Claimant, the essential dispute concerns the meaning of the participation factors agreed under the oil contracts; in particular, whether they were concluded on the assumption of a certain fiscal balance concerning the existing practice of VAT recovery. At most, in the Claimant's view, the dispute concerns the relationship between the participation factors and VAT liability, and therefore falls partly within and partly outside the scope of Article XII(1): "the measures in issue involve conduct on the part of Ecuador which is both inside and outside the VAT regime... The conduct outside the VAT regime constitutes measures and those measures are not taxation measures."[12] The Claimant makes what is perhaps the same point in another way: it argues that there is agreement at the level of principle "that EnCana is entitled to be reimbursed in respect of VAT paid in respect of inputs to exports", and the only disagreement concerns whether the participation factors already allow for these costs.[13] A dispute as to the content and meaning of the oil contracts is not a dispute, or at least not exclusively a dispute, as to a taxation measure within the meaning of the BIT.

35. By contrast the Respondent denies that the participation factors have any relevance whatever to VAT liability, which depends on nothing but the interpretation of the tax laws of Ecuador. Accordingly the dispute falls squarely within the exemption for taxation measures in Article XIII(1).

36. At the stage of jurisdiction this Tribunal would have to be clear that the characterisation offered by the Respondent is plainly correct. Subject to what is said in paragraphs 23-26 above, a claimant is entitled to a decision on the merits of its claim if its characterisation of the dispute—being a characterisation relevant to jurisdiction—is reasonably arguable, whether or not it is the preferable characterisation and whether or not the tribunal (if it had to make an immediate decision on the point) would be

12 Transcript, 5 January 2004, 48.
13 Ibid., 48-9.

inclined to accept it. In this respect the Tribunal would note that it does not have before it expert evidence of Ecuadorian law, and that the meaning of relevant terms in the Ecuadorian tax laws, to which reference has been made, would appear to be at least arguable.

37. But however that may be, it emerges that the Supreme Court of Ecuador (Tax Chamber) has left open the relationship between VAT liability and the participation factors. In a decision of 13 November 2003 in proceedings brought by a United States oil company, Bellwhether International Inc., the Court decided to set aside a decision dated 18 November 2002 from the First Tax Court, which had upheld a Ruling from the Ecuadorean General Director of the IRS denying a VAT tax refund to the claimant. The reason why the Supreme Court set aside the decision was that the First Tax Court failed to properly take into account the claimant's argument that, contrary to the IRS's understanding, the VAT payments made by the claimant had not been refunded through the reimbursement of costs and expenses the claimant was entitled to through its share in the hydrocarbons extracted as a result of its oil operations in Ecuador. Accordingly, the Ecuadorean Supreme Court remitted the case to the First Tax Court for it to revisit the merits of its decision by properly taking into account this issue and any facts related thereto and to render a new decision on the claimant's VAT refund claims. It emerges from this decision that, also from the perspective of Ecuador's highest court, the questions whether oil and gas operators exporting hydrocarbons from Ecuador are entitled to be compensated for VAT tax refunds through their share in extracted hydrocarbons, whether such share fully covers such tax refunds, and whether Ecuador is bound by undertakings within or without the tax system to maintain oil and gas operators exporting hydrocarbons whole in respect of VAT tax payments, are issues that still remain open. It follows that the Respondent's characterisation of the present dispute as one related exclusively to taxation measures cannot be upheld, at this stage of the procedure, as clearly correct. In the absence of clearer evidence and fuller argument on the point, it remains open for the issues to be considered by this Arbitral Tribunal according to the provisions of the BIT and applicable rules of international law (Article XIII(7) of the BIT).

38. For these reasons the Tribunal is not satisfied that it has sufficient material before it to enable it to definitively decide the disputed issue of characterisation on which its jurisdiction depends. To put it another way, it is arguable that at least certain aspects of the claim are not exempted from the scope of the BIT by Article XII(1), yet on the material available to it the Tribunal is not able to determine whether or to what extent this is so. In these circumstances the Tribunal does not think it desirable to discuss the meaning of the relevant provisions in detail, and in particular the meaning of the term "taxation measures" in Article XII(1). These must be a matter for subsequent briefing and argument.

39. Nor does the Tribunal think that it should express any view on the Claimant's alternative argument, which is that even if the dispute falls entirely within the scope of Article XII(1), the conduct of the Respondent is tantamount to expropriation and thus falls within the scope of the BIT by reason of Article XII(4). It notes that according to at least one definition of indirect expropriation, there is a close connection between that concept and the "reasonably-to-be-expected economic benefit" which would flow from an investment in given circumstances.[14] It notes further that VAT in Ecuador, although charged at a rate which is well within the normal range for that tax internationally, is charged on inputs not profits, and that within the context of a VAT system a refusal to allow VAT rebates on inputs is capable of having a disproportionate effect on an enterprise. Whether or not that is true in the present case may be doubted, as the Respondent notes. But the impact of a measure as discriminatory or as tantamount to expropriation does not necessarily depend on the overall profitability of the enterprise in question—and certainly not for jurisdictional purposes. In a case where the fundamental issue of characterisation must anyway be dealt with as part of the merits, it is appropriate in the Tribunal's view to deal with all issues of combined jurisdiction and merits at the same time and as part of the same process.[15]

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[14] *Metalclad Corporation v. United Mexican States*, Award of 30 August 2000, 5 ICSID Reports 209, 230 (para. 103).

40. For these reasons, pursuant to Article 21(4) of the UNCITRAL Rules the Tribunal decides to proceed with the arbitration and to rule on the Respondent's jurisdictional plea in its final award.

D. Other Matters

41. It is not appropriate to deal with costs separately from the outcome of this arbitration as a whole. The costs and expenses of the Tribunal in relation to this phase of the proceedings are accordingly reserved, and will be dealt with at the merits stage in light of Article 40 of the UNCITRAL Rules.

42. As to the further procedure in this arbitration, the Tribunal requests the Parties to discuss with a view to agreeing on an expeditious pleading schedule covering the remaining issues, and to report to the Tribunal, jointly or separately, not later than Friday 12 March 2004. If no schedule is agreed the Tribunal will decide.

43. As to the question of the confidentiality of pleadings in the parallel arbitration under the United States-Ecuador Treaty, the Tribunal notes that the Respondent has chosen the same arbitrator in the two proceedings, as it was entitled to do under Article 7(1) of the UNCITRAL Rules. Furthermore the fact of holding a joint appointment in related disputes would not, in and of itself, be grounds for challenge under Article 10(1). The Respondent is also represented by the same legal firm, again something which is a matter for it to decide. Evidently the Respondent and its legal advisers have a synoptic view of the various disputes related to the oil industry in Ecuador which may be denied to the Claimant and its legal advisers. But that is a natural inequality as between private companies and a host State, one which arises from their respective status and roles and which cannot be reversed *en tant que tel.*

44. A problem of procedural equality could nonetheless arise. In this respect the Tribunal notes the requirements of Article 15(1) and (3) of the UNCITRAL Rules.

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[15] The Respondent did not argue that, even if the Claimant is right on the issue of characterisation,

Under Article 15(1) the tribunal must treat the parties with equality; under Article 15(3) all documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated to the other party. The Tribunal accepts that the supply by Ecuador of documents or information to the members of the Tribunal in the United States-Ecuador arbitration, including the member common to the two Tribunals, does not fall literally within the scope of Article 15(3). Pleadings or information provided by Ecuador to Dr. Barrera in his capacity as a member of the other Tribunal are not thereby provided to this Tribunal. Moreover this Tribunal has no authority over the documents and information tendered to another Tribunal; it can only decide the present case in the light of the information tendered to it.

45. On the other hand, as soon as Dr. Barrera uses information gained from the other Tribunal in relation to the present arbitration, a problem arises with respect to the equality of the parties. Furthermore Dr. Barrera cannot reasonably be asked to maintain a "Chinese wall" in his own mind: his understanding of the situation may well be affected by information acquired in the other arbitration. The most he can be asked to do is to disclose facts so derived whenever they appear to be relevant to any issue before this Tribunal.

46. The Tribunal does not propose to deal with this question in a categorical way by ordering full advance disclosure to the Claimant of the pleadings in the other arbitration. Even assuming it has authority to do so, it is not persuaded that such an order is necessary. In particular it notes that the joined issues of jurisdiction and merits in the other arbitration have recently been the subject of an oral hearing, and that the decision of that Tribunal may be expected to become available before the pleadings in the present case are closed. It does however believe that the award of the other Tribunal should be made available to the Claimant as soon as may be after it is issued, and it calls on the Respondent to do what it can to ensure that this happens.[16] If extra time is needed for the Claimant to respond to such award, it may request this.

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nontheless no issue is raised as to the application of Article II(2) of the BIT.

[16] The final award in the present arbitration will not be confidential; the Tribunal understands that the same rule is being applied in the United States-Ecuador arbitration.

DECISION

For the foregoing reasons, the Tribunal unanimously DECIDES:

(a) The Respondent's objection that the Claimant did not consent to the present proceedings pursuant to Article 13(3)(a) of the BIT is rejected;

(b) The Claimant shall serve on the Respondent within 30 days of this decision a waiver duly executed by the appropriate corporate officer of EnCana Cororation which complies with Article 13(3)(b) of the BIT;

(c) Pursuant to Article 21(4) of the UNCITRAL Rules, the remaining jurisdictional issues are joined to the merits.

Done at London in English and Spanish, both versions being equally authoritative.

Professor James Crawford
President of the Tribunal

Dr. Horatio Grigera Naón
Member

Dr. Patrick Barrera Sweeney
Member

27 February 2004

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