ENCANA CORPORATION

v.

GOVERNMENT OF THE REPUBLIC OF ECUADOR

Interim Award

Request for Interim Measures of Protection

Introduction

1. By e-mail dated 8 January 2004, the Claimant raised with the Tribunal the need for an urgent hearing of an application for interim relief concerning certain enforcement measures taken by the Respondent in respect of money allegedly owed by a subsidiary of the Claimant as reimbursement of value-added tax (VAT) incorrectly refunded.

2. Subsequently by submissions of 12 January 2004 the Claimant set out the basis of this request. On 6 January 2004, it stated, the Inland Revenue Service of Ecuador (IRS) froze the bank accounts of its subsidiary, AEC Ecuador Ltd (AEC), and of Dr. Roque Bustamante, the Legal Representative of AEC in Ecuador and counsel for AEC before the Quito District Tax Court in earlier proceedings concerning this issue, as well as demanding the hand-over of an office building. The IRC's action was taken in order to recover approximately $7.5 million claimed to be owing by AEC to the IRS as a result of incorrect refunds of VAT. The Claimant noted that it had provided security by way of a letter of credit in the amount of US$10 million, representing the disputed amount plus interest, but that the IRS had refused to accept this. Subsequently, after an Official Demand for Payment had been issued against AEC in September 2003,[1] AEC made a further offer of alternative payment terms (the transfer of the office building plus payment by instalments secured against a bank bond). At the time the accounts were frozen, according to the Claimant, IRC had not communicated its rejection of this further offer.

3. By letter of 12 January 2004, counsel for the Respondent made initial comments on the request. In particular, the Respondent stated that: (a) enforcement action was taken in respect of the $7.5 million said to be owing, excluding interest; (b) it was taken in accordance with the provisions of Ecuadorian law; (c) the action taken against Dr. Bustamante was taken by reason of his capacity as legal representative of AEC and not because he was a lawyer or attorney in any litigation; (d) the IRS Resolution allowing enforcement action had been suspended while it was under challenge from AEC, but

[1] This was reissued, after correction of a clerical error, in October 2003.

AEC had filed a waiver in the Ecuadorian court at the time the present arbitration was commenced and the Resolution was consequently reinstated in April 2003; (e) pursuant to the Resolution, a demand for payment had been served on Dr. Bustamante as legal representative of AEC on 1 October 2003; (f) IRS had accepted the building tendered as part payment, but in December 2003 declined to accept the schedule of instalment payments proposed by AEC; the resulting precautionary measures were taken pursuant to Articles 165 and 25 of the Ecuadorian Tax Code; (g) in fact, advance notice of the freezing orders had been given to AEC and Dr. Bustamante, though this was not required by law. The letter expressed regret at "not providing a courtesy notice to the Tribunal of the taking of these actions, in light of the coincidence in timing" but noted that "the filing of such a claim under the Treaty does not prevent the respondent Government from continuing to enforce its laws while the matter is under arbitration, nor does this action prejudice the outcome of the Treaty proceeding".

4. The Tribunal held a telecon with the parties on 13 January 2004, at which counsel for both parties outlined their positions with respect to the measures taken. An audio file of the telecon was subsequently distributed to the Tribunal and the Parties.

5. The Claimant seeks interim measures of protection pursuant to Article 26 of the UNCITRAL Rules and Article XIII(8) of the Canada-Ecuador Agreement for the Promotion and Reciprocal Protection of Investments, concluded on 29 April 1996 (the BIT).[2]. Specifically, it seeks measures to prevent freezing of assets of EnCana subsidiaries and its legal representative pending resolution of the dispute by the present Tribunal.

6. The Respondent accepted that it was unfortunate that the measures complained of were taken shortly after the jurisdictional hearing held in London on 5 January 2004, and without prior notice to the Tribunal. However it argued, as stated in its letter of 12 January 2004, that the measures were regularly taken within the framework of Ecuadorian law.

7. At the telecon on 13 January 2004 subsequently confirmed in writing, the Tribunal asked the Respondent certain questions concerning the possibility of challenge of the measures taken Specifically the Tribunal asked:

(a) whether the Respondent would be prepared to forgo reliance on the terms of any waiver made in the discontinued proceedings by EnCana subsidiaries, with a view to ensuring that those subsidiaries are able to challenge any interim measures of enforcement (freezing of accounts, etc.) taken by the taxation authorities on such grounds as may be available to them under the law of Ecuador;

(b) whether the Respondent would regard Dr Bustamante as equally able to challenge such interim measures on grounds available under the law of Ecuador,

---

2 2027 UNTS 196 (in force, 6 June 1997).

notwithstanding the terms of any waiver made by EnCana or its subsidiaries; and

(c) whether Ecuador would itself waive any question of time limits to such challenges, provided action were to be taken promptly now.

In each case it was understood that the issue concerned only the challenge to interim measures and not to the underlying question of the liability of EnCana or its subsidiaries to retain the refunds, and that any response given by the Respondent would be without prejudice to its position in the arbitration.

8. By letter of 22 January 2004, the Respondent replied to these questions. As to the first two questions, it stated that:

> "Ecuador would not contest, as a violation of the Treaty obligation to provide a waiver or as a violation of the actual waivers provided by AEC, an action brought by AEC or by Dr. Bustamante individually, or both, a challenge in domestic proceedings against the SRI's Order, provided that neither contests the underlying liability under Ecuadorian law for the amounts sought. Ecuador accordingly agrees that such actions by AEC or Dr. Bustamante will not affect the question of EnCana's right to initiate or pursue this Treaty proceeding."

As to the third question, the Respondent stated that:

> "The Ecuadorian Administration, including SRI, will not oppose an action brought by AEC or Dr. Bustamante in Ecuadorian courts challenging the SRI's Order, on grounds of time limits for such action and Ecuador will agree to argue that, for purposes of any such time limits, the date of SRI's order should be deemed to be the date of the Tribunal's upcoming order addressing these issues. However, the administration and enforcement of time limits for commencing of legal actions falls exclusively within the authority of the Ecuadorian courts. The SRI can only agree to waive its right to object on the ground that time limits have lapsed; it cannot assure the agreement of the Ecuadorian courts."

9. In the light or the oral and written submissions of the Parties, the Tribunal considers that it is in a position to deal with the request.

The Claim for Interim Measures

10. Two different provisions are potentially relevant to an order for interim measures of protection in the present case, Article 26 of the UNCITRAL Rules and Article XIII(8) of the BIT. As a specific provision applicable to investments by

Canadian corporations in Ecuador, Article XIII(8) must prevail over the general power in Article 26 of the UNCITRAL Rules.

11. Article XIII(8) provides:

> "A tribunal may order an interim measure of protection to preserve the rights or a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession of control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach of this Agreement. For purposes of this paragraph, an order includes a recommendation."

12. Under Article 26 of the UNCITRAL Rules, by contrast, there is no exclusion of interim measures enjoining "the application of the measure alleged to constitute a breach of this Agreement". Article 26(1) simply provides that the arbitral tribunal may at the request of either party take "any interim measures it deems necessary in respect of the subject matter of the dispute". Such measures "may be established in the form of an interim award", and security for the costs of taking such measures may be required (Article 26(2)).

13. In the Tribunal's view, three conditions ought in principle to be met before interim measures are established, whether under Article XIII(8) of the BIT or Article 26 of the UNCITRAL Rules. First, there must be an apparent basis of jurisdiction. Second, the measure sought must be urgent. Third, the basis for establishing provisional measures must be that otherwise irreparable damage could be caused to the requesting party.

14. In the present circumstances the Tribunal is satisfied that the measures taken give rise to a situation of urgency. They involve the freezing of accounts and the attempted attachment of substantial sums which are in dispute. The second condition is accordingly fulfilled.

15. Turning to the third condition, it is necessary to consider separately the measures taken against AEC, the EnCana subsidiary, and those taken against Mr. Bustamante, the Respondent's legal representative in Ecuador.

16. As to the measures taken against AEC, in the light of the information before it the Tribunal must proceed on the basis that the measures of enforcement are taken by the IRS within the framework of Ecuadorian law in order to recover back monies said to have been wrongly paid out by way of VAT refunds. The Tribunal notes that according to the Respondent, it is open to the parties against whom the measures have been taken to challenge them in the Ecuadorian tax courts or within IRS's administrative processes,

on grounds which are independent of the resolution of the underlying issues in dispute in the present proceedings.

17. AEC is not a Canadian corporation and is not a party to the present arbitration. On the other hand it is part of the EnCana group, a substantial Canadian concern, and it appears that in bringing the present proceedings EnCana is seeking to protect the interests of its subsidiaries. In the circumstances the measures taken by the IRS are no doubt inconvenient, but they are open to challenge before the tax courts of Ecuador, which have shown themselves to be independent of the IRS in decisions so far reached. Ultimately any inconvenience can be addressed by AEC (or EnCana on behalf of AEC) paying the amounts in dispute. The question whether the amounts are actually due is not prejudged by the measures themselves, and would not be prejudged by the return of the amounts refunded. Eventually, if jurisdiction is upheld, it would be open to this Tribunal to provide redress to the Claimant for any losses suffered by enforcement action taken in breach of the BIT, including by payment of interest on sums refunded. In these circumstances there is no necessity to order the withdrawal of IRS's measures against AEC in order to protect the rights at stake in this arbitration from irreparable harm.

18. The position with the measures taken against Dr. Bustamante is not necessarily the same. Circumstances could be imagined where measures of enforcement taken against the legal representative of a party would amount to a form of harassment or an attempt to limit or deny the exercise of due process rights, thereby raising issues under the BIT. Even if the substantive dispute concerned taxation measures within the meaning of Article XII(1), this would not necessarily exempt such conduct from the scope of the BIT, in particular Article II. But the Tribunal is not persuaded, in the light of the information provided to it, that this is the case here. Action has been taken against Mr Bustamante as the general representative of AEC in Ecuador and not by reason of his acting for EnCana or its subsidiaries in relation to the dispute. The measures were taken within the framework of general provisions of Ecuadorian law, and it is open to Mr. Bustamante to challenge them before the Ecuadorian courts. Since these measures too appear to have been taken by way of enforcement action in relation to the VAT refund in dispute, there is no reason to treat them any differently than the measures taken against AEC.

19. In these circumstances the Tribunal is not persuaded that there is any necessity for the measures requested in terms of protecting the rights claimed by EnCana in the present proceedings. This finding is in no way intended to prejudge any issue that may arise before the Ecuadorian courts as to the measures taken.

20. Accordingly the Tribunal need not decide whether there is an apparent basis for jurisdiction in respect of EnCana's underlying claim, or whether the power to establish interim measures is constrained by Article XII(1) or XIII(8) of the BIT, even if there is apparent jurisdiction over the dispute as such.

Conclusion

For these reasons the Tribunal, unanimously:

(a) rejects the request for provisional measures;

(b) decides that the costs of the present request will be determined as part of the costs in the arbitration.

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

Professor James Crawford
President of the Tribunal

Mr. Horacio Grigera Naón
Member

Mr. Patrick Barrera Sweeney
Member

31 January 2004