



PCA Case No. IR-2009/1

**IN THE MATTER OF A CHALLENGE TO BE DECIDED BY THE SECRETARY-
GENERAL OF THE PERMANENT COURT OF ARBITRATION PURSUANT TO AN
AGREEMENT CONCLUDED ON OCTOBER 2, 2008 IN ICSID CASE NO. ARB/08/6**

- between -

PERENCO ECUADOR LIMITED

(“Claimant”)

- and -

**THE REPUBLIC OF ECUADOR & EMPRESA ESTATAL
PERTOLEOS DEL ECUADOR (“PETROECUADOR”)**

(“Respondents,” and together with Claimant, the “Parties”)

DECISION ON CHALLENGE TO ARBITRATOR

December 8, 2009

I. INTRODUCTION

1. This challenge procedure arises out of a pending International Centre for Settlement of Investment Disputes (“**ICSID**”) arbitration between a French company, Perenco Ecuador Limited (“**Perenco**” or “**Claimant**”) and the Republic of Ecuador (“**Ecuador**”) and its state-owned oil company, Empresa Estatal Petroleos del Ecuador (“**Petroecuador**,” together with Ecuador, “**Respondents**.”)
2. Claimant and Respondents (the “**Parties**”) had, in October 2008, agreed that any arbitrator challenges in this case would be resolved by the Secretary-General of the Permanent Court of Arbitration (“**PCA**”), applying the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”).
3. In August 2009, Respondents became aware of a published interview given by the Hon. Charles N. Brower (“**Judge Brower**”), the arbitrator appointed by Claimant, in which he made comments about Ecuador and about the pending ICSID proceedings. Those comments gave rise to Respondents’ request, on September 19, 2009, that Judge Brower be disqualified.
4. The relevant question in resolving this challenge under the IBA Guidelines is whether the interview comments constitute circumstances that, “from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence.”

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

5. The below summary is based on the factual background and procedural history as described by the Parties and Judge Brower to the PCA in this challenge proceeding.

A. The ICSID Arbitration

6. In September 2002, Perenco and its consortium partner, Burlington Resources Oriente Limited (“**Burlington**”), entered into participation contracts with Respondents to operate certain oil fields in Ecuador’s Amazon region (“**Participation Contracts**”). Under the Participation Contracts, the consortium carries out oil exploration and production activities in return for which it is entitled to a specified share in the production, known as “participation.” Under the Participation Contracts, Perenco is entitled to approximately 77% of the production, and Ecuador to about 23%.
7. Amid rising oil prices in 2006, the Ecuadorean Congress passed Law No. 2006-42 (“**Law 42**”), which significantly increased the percentage of Ecuador’s participation and entitlement to the income from oil sales. Perenco considered Law 42 to be a violation of the 1994 Treaty between France and Ecuador concerning the Encouragement and Reciprocal Protection of Investment (“**Treaty**”). On April 30, 2008, pursuant to the Treaty, Perenco filed a request for arbitration with ICSID, alleging, among other things, that Ecuador’s measures had the effect of expropriating Perenco’s investment. Burlington started a similar arbitration under the US-Ecuador BIT.

8. On July 18, 2008, Claimant nominated Judge Brower as arbitrator.
9. Through a series of three letters, dated September 19, September 30 and October 2, 2008, the Parties entered into an agreement about constitution of the Tribunal (the “**October 2008 Agreement**”), which provided, at paragraph 3, as follows:

Each party shall have the right to challenge an arbitrator within a sixty-day period from the date on which such party learned of the alleged cause for the challenge, regardless of whether such date is before or after the execution of the agreement. The right to request a challenge expires after the sixty-day period. In case such challenge occurs, the parties agree that it shall be resolved by the Secretary-General of the Permanent Court of Arbitration at The Hague and that the IBA Guidelines on Conflicts of Interest in International Arbitration shall apply.

10. Pursuant to the October 2008 Agreement, Respondents appointed Dr. J. Christopher Thomas QC as arbitrator. On November 5, 2008, ICSID informed the Parties that, in accordance with the method agreed by the Parties, the Rt. Hon. Lord Bingham of Cornhill had been appointed as the presiding arbitrator.
11. At the time of accepting his appointment in October 2008, Judge Brower submitted a declaration under ICSID Arbitration Rule 6(2). A series of follow-up emails ensued in February and March of 2009, in which Judge Brower acknowledged Ecuador’s desire to be “reassured as to the independence and impartiality of any arbitrator appointed in this case” and agreed with Ecuador’s sentiment that transparency and impartiality concerns are particularly significant in investor-State proceedings. On March 26, 2009, Ecuador acknowledged that the information provided by Judge Brower was “in accordance with the IBA Guidelines [and] has allowed the Republic of Ecuador to be fully satisfied that this matter will be decided by an independent and impartial arbitral tribunal.”
12. Perenco ceased making payments under Law 42 when it commenced the arbitration.
13. On February 14, 2009, Ecuador’s President announced that Ecuador would take coercive measures against Perenco and Burlington because they had failed to make payments under Law 42. The President announced that the country would “not pay attention to extra-regional authorities that attempt to tell us what to do nor not to do.”
14. On February 18, 2009, Respondents advised the Tribunal that it would initiate a *coactiva* process against Perenco and Burlington to demand approximately US\$327 million allegedly owing under Law 42. The *coactiva* notices, issued the next day, warned that failure to pay would result in Perenco’s assets being seized.
15. On February 19, 2009, Perenco submitted a request for provisional measures, requesting the Tribunal to enjoin Respondents from forcibly collecting any of the Law 42 assessments and to otherwise preserve the *status quo* between the Parties. Perenco also sought a temporary restraining order.

16. On February 24, the Tribunal issued a temporary restraint finding it “necessary to request the parties to refrain from initiating or continuing any action . . . including any attempt to seize any assets of claimant, until it has had an opportunity to further hear from the parties.”
17. On February 26, 2009, Ecuador’s counsel informed the Tribunal that it was unable to comply with the Tribunal’s “request” and gave notice that, “charged with the obligation of applying its validly enacted laws,” it could not guarantee that steps would not be taken to forcibly collect the Law 42 debts. The Tribunal stated the following day that it “regrets the stance adopted by respondent and must necessarily take a serious view of any failure to comply with its request of February 24, 2009.”
18. On March 3, 2009, Respondents seized Perenco’s crude production and instructed that Perenco’s oil be retained in custody. The Tribunal, on March 5, 2009, wrote that it “wishes to make it clear that its February 24, 2009 *request* had and continues to have the same authority as a *recommendation*, as envisaged in Article 47 of the ICSID Convention” Respondents reserved their rights in respect of this communication and stated that the Tribunal could not “retrospectively recharacterize its request as a recommendation under Article 47.” Respondents went ahead with the *coactiva* actions and seized Perenco’s oil.
19. On March 19, 2009, the Tribunal conducted a hearing on the provisional measures application.
20. On May 8, 2009, the Tribunal issued a decision recommending provisional measures restraining Respondents from demanding Perenco pay any amounts owed under Law 42, from pursuing actions to collect payments from Perenco or from unilaterally amending the Participation Contracts. The Tribunal explained that its recommendation imposed an international obligation on Ecuador to comply with the provisional measures. The tribunal in the Burlington case issued similar provisional measures.
21. In a letter dated May 15, 2009, Ecuador maintained its view that the Tribunal’s recommendation of provisional measures was not “binding” as a matter of international law but noted that “Ecuador intends to carry out the enforcement of Law 42 in such a way as to avoid any disruption of Perenco’s business.”
22. Ecuador’s reaction to the provisional measures was widely publicized. On May 15, 2009, Petroecuador held the first of several auctions of the crude oil it had seized from Claimant.
23. A hearing on jurisdiction in the ICSID arbitration is scheduled for February 2010.
24. In the meantime, Perenco has suspended operations and Respondents are now in control of the oil fields. On May 30, 2009, the President of Ecuador announced that Ecuador would denounce the ICSID Convention, which it formally did on July 6, 2009.

B. The Challenge to Judge Brower

25. In an article entitled “A World-Class Arbitrator Speaks!” in the August 2009 issue of *The Metropolitan Corporate Counsel*, Judge Brower was interviewed about a wide variety of topics including his current docket of appointments, his opinion on arbitral rules, recent developments in international arbitration, the current status of the Iran-United States Claims Tribunal and issues surrounding enforcement of arbitral awards.
26. In an early part of the interview, which is *not* the subject of the present challenge, the Editor remarked to Judge Brower that “Ecuador has recently announced that it’s denouncing its BITs.” Judge Brower responded to this observation as follows:

Brower: It has already given notice to ICSID that it is denouncing that Convention, so during the six months from the date notice was given, they may expect a last minute rush of new claims. Either it or Venezuela has denounced its bilateral investment treaty with The Netherlands. Ecuador has spoken of the possibility of denouncing its BIT with the United States, but as far as I know that hasn’t been done. Bolivia is the other country that has denounced ICSID, but that doesn’t solve its problem, since bilateral investment treaties usually provide for the alternative of the UNCITRAL Rules, so they’d have to go around denouncing all of their bilateral investment treaties, and I think that’s a much different and bigger step.

27. The following exchange appears two questions later and it *does* contain the comments that gave rise to Respondents’ challenge of Judge Brower:

Editor: Tell us what you see as the most pressing issues in international arbitration.

Brower: There is an issue of acceptance and the willingness to continue participating in it, as exemplified by what Bolivia has done and what Ecuador is doing. Ecuador currently is expressly declining to comply with the orders of two ICSID tribunals with very stiff interim provisional measures, but they just say they have to enforce their national law and the orders don’t make any difference. But when recalcitrant host countries find out that claimants are going to act like those who were expropriated in Libya, start bringing hot oil litigation and chasing cargos, doing detective work looking for people who will invoke cross-default clauses in loan agreements, etc., the politics may change. After a certain point, no one will invest without having something to rely on.

28. Respondents became aware of the interview on August 20, 2009 from the electronic Translational Dispute Management News Digest.
29. On September 19, 2009, Respondents timely submitted a Request for Disqualification of Judge Brower by the PCA Secretary-General, pursuant to the Parties’ October 2008 Agreement.

30. In a letter dated September 21, 2009, Claimant expressed its view that the challenge was meritless and sought expeditious resolution of the challenge by the PCA Secretary-General.
31. On October 13, 2009, following a series of communications among ICSID, the PCA, members of the Tribunal and the Parties, the PCA communicated that I accepted the responsibility conferred on me by the Parties' October 2008 Agreement, and invited the Parties to propose a timetable for submissions of comments in relation to the Request for Disqualification.
32. On October 16, 2009, the Parties jointly wrote to the PCA Secretary-General setting out their proposed timetable for further submissions.
33. On October 19, 2009, Claimant submitted its Response to Respondents' Request for Disqualification.
34. On October 23, 2009, Judge Brower submitted his Statement in Respect of Respondents' Request for Disqualification.
35. On October 30, 2009, Respondents submitted their Reply in Support of their Request for Disqualification.
36. On November 6, 2009, Claimant submitted its Rejoinder to Respondents' Request for Disqualification.
37. The above-listed submissions were accompanied by legal authorities, exhibits from the ICSID proceedings and documents in the public domain, including media reports.

III. THE STANDARD UNDER THE IBA GUIDELINES

38. The IBA Guidelines, published by the International Bar Association in 2004, were developed by a Working Group of experts and based on an understanding of the best current international practice firmly rooted in the principles expressed in the General Standards.
39. The first General Standard, entitled "General Principle," provides as follows:

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.

[emphasis added]
40. According to the Explanation to General Standard 1, the Working Group was "guided by the fundamental principle in international arbitration that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings."

41. The second General Standard, entitled “Conflict of Interest” provides as follows:

- (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent
- (b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator’s impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).
- (c) Doubts are justifiable if a reasonable person and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

[. . .]

[emphasis added]

42. Paragraph (b) is concerned with “justifiable doubts” from a “reasonable third person” perspective. The Explanation to General Standard 2 describes this as “an appearance test” to be applied “objectively.”

43. A 2004 paper written by members of the Working Group entitled “Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration” (“**Background Information**”) explains that the Guidelines start from “the widely accepted premise that an arbitrator must be independent and impartial, that is, without bias.” In all of the jurisdictions considered by the Working Group in formulating the Guidelines, there was agreement “that a challenge to the impartiality and independence of an arbitrator depends on the *appearance* of bias and not actual bias.” The Background Information proceeds to explain that:

Based on the virtual consensus of the national reports and the discussions of national law, the Working Group decided that the proper standard for a challenge is an “objective” appearance of bias, so that an arbitrator shall decline appointment or refuse to continue to act as an arbitrator if facts or circumstances exist that form a reasonable third person’s point of view having knowledge of the relevant facts give rise to justifiable doubts as to the arbitrator’s impartiality or independence. If an arbitrator chooses to accept or continue with an appointment once such bias has been brought to light, disqualification is appropriate and a challenge to the appointment should succeed.

44. Accordingly, a finding that Judge Brower is *actually biased* against Ecuador or has actually prejudged the merits of the dispute is not necessary in order for the challenge to be sustained under the IBA Guidelines. Applying the *appearance of bias* test, Judge Brower would be disqualified if “circumstances . . . have arisen since the appointment, that, from a reasonable third person’s point of view having knowledge of the relevant facts, give rise to justifiable doubts” as to Judge Brower’s impartiality or independence.

45. The IBA Guidelines note that “most laws and rules that apply the standard of justifiable doubts do not further define that standard.” The Working Group regards paragraph (c) of General Standard 2 as “provid[ing] some context for making this determination” by explaining that “doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.”

IV. APPLICATION OF THE IBA GUIDELINES TO THE PRESENT CHALLENGE

46. The question to be resolved is whether, from a reasonable third person’s point of view having knowledge of the relevant facts, Judge Brower’s comments give rise to justifiable doubts as to his impartiality or independence. Stated in another way, could a reasonable and informed third party conclude that there is a likelihood that Judge Brower may be influenced by factors other than the merits of the case as presented by the parties in reaching his decision?
47. This question is answered with respect to each of the Parties’ arguments below.

A. The appearance of bias

48. Respondent argues that Judge Brower’s interview gives rise to a strong appearance of bias. Claimant argues that the interview contained an innocuous summary of publicly known facts. It is true that a fully informed third party would know that Ecuador has in fact denounced the ICSID Convention and has in fact taken actions in the Perenco dispute that do not comply with the provisional measures recommended by the ICSID Tribunal. However, the combination of the words chosen by Judge Brower and the context in which he used them have the overall effect of painting an unfavourable view of Ecuador in such a way as to give a reasonable and informed third party justifiable doubts as to Judge Brower’s impartiality.
49. It is reasonable to interpret the sentence beginning “But when recalcitrant host countries . . .” as a reference to Ecuador. Even though, as Judge Brower points out, the sentence itself does not contain the word “Ecuador” or any names of the parties to the ICSID arbitration, its proximity immediately following two sentences about Ecuador, and in the same answer to the same interview question, makes it reasonable to associate the term “recalcitrant” with Ecuador. Respondents argue that the word “recalcitrant” is pejorative in nature. Claimant argues that because the word “recalcitrant” is an accurate description of Ecuador’s obstinate disobedience, it cannot give rise to justifiable doubts. Judge Brower notably does not discuss the import of the word “recalcitrant.” The dictionary source on which he relies for the definition of another word (www.dictionary.com), defines “recalcitrant” as “1. resisting authority or control; not obedient or compliant; refractory; 2. hard to deal with, manage or operate” and “marked by stubborn resistance to and defiance of authority or guidance.” The use of the word “recalcitrant” has negative connotations beyond the mere recounting of a party’s actions and would contribute to a reasonable person forming a justifiable doubt, particularly when taken in combination with the following factors.

50. A reasonable third party would read the juxtaposition of the sentences about Ecuador with the comments about Libya as likening Ecuador's current conduct with that of Libya in the 1970s. Unless the Libya reference is tied to the current Ecuador conduct, Judge Brower's remarks about notorious events in the 1970s would make no sense as part of an answer to the question "what do you see as the most pressing issues in international arbitration?"
51. An informed third person could reasonably conclude that Judge Brower's comments about Libya in the 1970s, uttered in such close connection to his comments about Ecuador, evince the appearance of two unfavourable views of Ecuador. First, that investors today in Ecuador are similar to investors in Libya in the 1970s in the sense that they have been subject to expropriation. Second, that investors in Ecuador today are similar to investors in Libya in the 1970s in the sense that they may need to resort to various measures of enforcing awards against the expropriating state because the State cannot be trusted to abide by an arbitral award.
52. Moreover, the comments were given in response to a question about what Judge Brower believes to be "the most pressing issue" in international arbitration. In this context, a reasonable third party may consider that Judge Brower views the behavior of Ecuador as of such gravity as to warrant its characterization as one of the most pressing issues in international arbitration.
53. The above interpretation is of course not the *only* interpretation of Judge Brower's comments and it is not *in fact* what Judge Brower subjectively intended by his comments, as he explained in his Statement. But it is a reasonable interpretation of Judge Brower's comments and, applying the IBA Guidelines, would give rise to justifiable doubts about his impartiality.

B. The risk of prejudgment

54. Respondents argue that Judge Brower's comments show justifiable doubts that he has prejudged the case in two respects. First, Respondents argue he has prejudged the "live issue" of whether provisional measures under Article 47 of the ICSID Convention are legally binding. Second, Respondents argue he has prejudged the ultimate issue to be determined on the merits of the case, namely whether Ecuador is liable for having expropriated Perenco's investment.
55. As to alleged prejudgment of the issue of the binding nature of the Tribunal's provisional measures recommendations, Respondents' argument fails because it has not shown that this issue is a "live one." Rather than *prejudging* the question, Judge Brower was merely repeating what the Tribunal has *already judged*. On May 8, 2009, months before Judge Brower's interview, the Tribunal issued its decision on provisional measures in which it made clear its view that provisional measures were tantamount to orders and that "Ecuador has an international obligation to comply with what the tribunal issues as provisional measures."

56. There is, however, merit in Respondents' argument that Judge Brower's comments suggest that he has prejudged the question of whether Ecuador's actions constitute an expropriation. By invoking the example of "those who were expropriated in Libya" immediately after a reference to Ecuador's attitude to investment arbitration generally, and its conduct in this ICSID case in particular, it is reasonable to infer that Judge Brower is drawing an analogy between Ecuador and Libya in the famous nationalizations of oil companies in the 1970s. While Judge Brower explains his belief that the sentences are unrelated and the Libya example is given as a general hypothesis only, a reasonable reader would nevertheless view the sentences, in response to the same question, as related.
57. Claimant admits that Judge Brower's Libya comments provide "a trenchant and illuminating historical analogy" between Libya and the Perenco dispute with Ecuador. Claimant argues that the analogy is not with respect to *liability* for expropriation but an analogy with respect to possible *investor reaction*. This is an unconvincing distinction because any such analogy to investor reaction would only make sense if the hypothetical investors were reacting to a State's refusal to honour an award for expropriation. The mention of different types of enforcement actions (hot oil litigation, chasing cargoes, detective work, invoking loan agreements, etc.) in the context of the remarks about Ecuador would lead a reasonable third party observer to have justifiable doubts about Judge Brower's prejudgment on the question of expropriation and also Ecuador's likely conduct in relation to Claimant's future attempts to enforce any award for expropriation.
58. Again, the above does not amount to a finding that Judge Brower has *actually* prejudged the issue of expropriation. However, from a reasonable third person's point of view, the comments do give rise to an *appearance* that Judge Brower has prejudged the issue.

C. The mere fact of Judge Brower "going public"

59. Respondents argue that the very fact that Judge Brower "decided to go public" with his comments in a published interview, against the background of the escalating dispute between Perenco and Ecuador, demonstrates a lack of impartiality. Respondents cite authorities concerning the standards of American judges in support of this argument.
60. The Background Information to the IBA Guidelines notes that the Working Group determined that the Guidelines "should reflect best international practice without reference to particular national practices."
61. There is no general or absolute prohibition in the IBA Guidelines against international arbitrators speaking with the press or making public statements about pending cases. The IBA Guidelines instead focus on an inquiry into justifiable doubts brought about by *particular* "facts or circumstances" in any given challenge. Obviously, if an arbitrator chooses to discuss a pending case with the press, he or she risks opening up the possibility of making statements that could give rise to justifiable doubts about his or her impartiality. But there is no basis in the IBA Guidelines on which to accept Respondent's argument that Judge Brower's decision to give the interview *in and of itself* should lead to his disqualification.

D. The experience and reputation of Judge Brower

62. Claimant argues that Judge Brower's "experience and standing are relevant when evaluating his independence and impartiality." The justifiable doubts test is objective and applies universally to all arbitrators, irrespective of whether they are chairs, sole arbitrators or party-appointed arbitrators (see General Standard 5). There is nothing in the IBA Guidelines that supports a special deference to the subjective positions of arbitrators based on their level of experience or standing in the international community. Judge Brower no doubt has extensive experience in international arbitration and is highly regarded in the field, but this fact is irrelevant in applying the IBA.
63. Indeed, given Judge Brower's experience and reputation, it can be assumed that he must have been aware of the risks his interview could entail as far as raising justifiable doubts regarding his impartiality or independence.

E. The stage of the proceedings

64. The Parties agree that the IBA Guidelines express clearly the requirement that an arbitrator must remain impartial and independent "during the entire course of the arbitration proceedings." Respondents nevertheless intimate that because the arbitration is at a very early stage of proceedings, disqualification would cause minimal disruption.
65. As Judge Brower points out, the stage of proceedings (which are neither at a very early, or a very late stage) is "wholly irrelevant" to this challenge.
66. Applying the IBA Guidelines, I have not taken the stage of proceedings into account in determining this challenge.

F. Breach of confidentiality

67. Respondents raise breach of confidentiality as a separate ground for disqualifying Judge Brower. Although the findings set out above are sufficient to dispose of the challenge, I briefly address the confidentiality argument given the seriousness of the allegations.
68. The IBA Guidelines do not provide for breach of confidentiality as a ground for disqualification of an arbitrator. In any event, having reviewed the documents provided by both Parties and Judge Brower, it is clear that Judge Brower did not say anything in the interview that revealed confidential information from the arbitration. Ecuador's withdrawal from the ICSID Convention is public knowledge. The fact of Perenco's dispute with Ecuador is public knowledge. The provisional measures decisions by the tribunals in the Perenco and Burlington ICSID arbitrations are publicly available on the ICSID website and have been the subject of media attention. The Parties' public statements and conduct in reaction to the decisions have also been widely covered by the international media and oil industry press.

V. DECISION

NOW THEREFORE, I, Christiaan M.J. Kröner, Secretary-General of the Permanent Court of Arbitration, having considered the comments submitted by the Parties and by Judge Brower, and having established to my satisfaction my competence to decide this challenge applying the IBA Guidelines in accordance with the October 2008 Agreement between the Parties,

HEREBY SUSTAIN the challenge against the Hon. Charles N. Brower as arbitrator in the above-referenced matter for the reason that, from the point of view of a reasonable third person having knowledge of the relevant facts, the comments made by Judge Brower in an interview published in the August 2009 edition of *The Metropolitan Corporate Counsel* constitute circumstances that give rise to justifiable doubts as to Judge Brower's impartiality or independence.

Done at The Hague on December 8, 2009.

A handwritten signature in black ink, appearing to be 'C.M.J. Kröner', with a long horizontal flourish extending to the right.

Christiaan M.J. Kröner
Secretary-General, PCA