# Perenco v. Ecuador: Was there a valid arbitrator challenge under the ICSID Convention?

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**By Federico Campolieti* and Nicholas Lawn****

*Introduction*

In a recent decision related to the ICSID case *Perenco Ecuador Limited v. The Republic of Ecuador* [1], the Secretary-General of the Permanent Court of Arbitration at The Hague ("PCA") has upheld a challenge against a leading arbitrator, Judge Charles N. Brower, on the basis that from the point of view of *"a reasonable third person having knowledge of the relevant facts"*, the comments made by the arbitrator in a published interview constituted circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence [2].

The PCA accepted jurisdiction to decide upon the challenge made by Ecuador, based on a previous agreement executed by the parties in dispute, thereby seeking to side-step the regular disqualification procedure established in Articles 57 and 58 of the ICSID Convention. On the basis of the same agreement, the PCA also applied the test set out in the IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), rather than the standard provided for in Article 14 of the ICSID Convention [3].

However, this is to overlook the fact that the provisions of the ICSID Convention regarding the challenge of an arbitrator are, by nature, mandatory international law and parties are not free to resile from those provisions even by agreement. From the point of view of ICSID procedure, the PCA's decision has no effect. Indeed, arguably there was never a valid challenge to Judge Brower in this arbitration.

*The PCA's Decision*

In September 2009, Ecuador challenged Judge Brower (the arbitrator appointed by the investor *Perenco Ecuador Limited*), alleging that his statements during an interview later published in the Metropolitan Corporate Counsel in August 2009 gave rise to a strong appearance of bias. The two main arguments were that the interview gave rise to doubts both as to the arbitrator's impartiality and as to whether he had prejudged the case.

The PCA considered that the combination of words used by Judge Brower in the article and the

context in which they were used had 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"*. The reference in the article to *"recalcitrant host countries"*, which was to be considered pejorative, should reasonably be taken to be referring to Ecuador. Further, the comments which followed in relation to Libya, suggested an unfavourable view of Ecuador. In particular, if investors in Ecuador are considered to be in the same position as investors in Libya in the 1970s, they are considered to be investors subject to expropriation.

In response to Ecuador's argument that the comments made give rise to justifiable doubts that the arbitrator had prejudged the case, the PCA did not accept that Judge Brower had prejudged the binding nature of the tribunal's requests for provisional measures: *"Rather than prejudging the question, Judge Brower was merely repeating what the Tribunal has already judged"*. However, the PCA was not convinced that a distinction could be drawn between an analogy as to liability for expropriation and an analogy based on possible investor reaction, such that the juxtaposed references to Ecuador and Libya would lead to justifiable doubts as to the arbitrator's pre-judgment on the issue of expropriation.

Leaving aside any comments on the reasoning of the decision, there are two important points which should be noted.

(1) *The procedure that the challenge should have followed*

According to Articles 57 and 58 of the ICSID Convention, a proposal for disqualification should be made to the tribunal itself and it is for the remaining members of the tribunal to decide on such proposal. Where, however, they are equally divided or in the case of a proposal to disqualify the majority of the arbitrators or a sole arbitrator, the Chairman of the Administrative Council shall decide on the proposal.

The PCA has been involved in a number of previous ICSID arbitrator challenges. For example, in cases where the unchallenged arbitrators submit separate and dissenting opinions concerning a proposal for disqualification, the practice has developed that the Chairman of the ICSID Administrative Council may, in cases where there may be a conflict of interest, ask the PCA to provide an independent opinion on the disqualification. Such decisions are in the form of non-binding "recommendations" to the Chairman, whose ultimate responsibility it still is to decide requests for disqualification. In some cases, the PCA has not even provided reasons for its decision.

The decision in *Perenco* is, however, not simply a recommendation. It is a decision made by the Secretary-General acting in his own capacity on the basis of an agreement between the parties.

While the parties can make any agreement which they wish, it should be clear that the mechanism for challenging an arbitrator under ICSID cannot be side-stepped by agreement. Unless otherwise stated, the express provisions of the Convention are mandatory. The proposal to disqualify Judge Brower should therefore, in the first instance, have been submitted to and heard by Lord Bingham and J. Christopher Thomas. To the extent that the PCA became involved, it should only have been, after arbitrator disagreement, to offer a recommendation to the Chairman, if so required.

(2) *The Standard that should have been applied to the challenge*

The parties also agreed to apply the IBA Guidelines to any arbitrator challenge and the PCA followed this agreement in making its decision.

According to the second general standard contained in the IBA Guidelines, conflicts of interest arise when *"…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"* or when *"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"* [4].

In interpreting these Guidelines, the IBA Working Group decided that the proper standard to be met for disqualifying an arbitrator, as reflected in the Guidelines, is an *"objective **appearance** of bias"*. Accordingly, a challenge to the impartiality and independence of an arbitrator depends on the *appearance* of bias and not *actual* bias.

This does not, however, precisely reflect the test under the ICSID Convention. Article 57 requires a *"manifest lack"* of the qualities required for an arbitrator in order for the challenge to be successful. Such qualities under Article 14 of the Convention include that the arbitrator *"…may be relied upon to exercise independent judgment"* [5].

Thus although, under the ICSID Convention, the test is also objective, the mere appearance of bias is not the standard. It is qualified. The lack of reliability as to the arbitrator's independence must be "manifest", not just "possible", "quasi-certain" or "apparent".

As the unchallenged arbitrators of the Tribunal in *SGS v. Pakistan* [6] and the remaining annulment Committee members in *Vivendi v. Argentina* [7] decided, mere speculation as to bias is not sufficient to meet the ICSID test. Facts must be established which give rise to a real risk of a lack of impartiality.

The requirement that the lack of qualities must be "manifest" imposes a relatively heavy burden of proof on the party making the proposal [8]. Obviously, there is no need to prove a "manifest" lack of independence because, the mere lack of independence is sufficient to remove the challenged arbitrator, whether it is manifest or not. What should be *"manifest"* is the lack of reliability as to the independent judgement, not that the arbitrator is actually or partially dependent. The manifest absence of reliability should be discernible from the facts.

This standard contrasts with the arguably lower standard under the IBA Guidelines which provide only that there must be *"facts or circumstances"* giving rise to *"justifiable doubts as to the arbitrator's impartiality or independence"*. Arguably therefore a challenge under the IBA Guidelines may be successful if based on circumstantial inferences. Further, the Working Group's explanation 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…"* suggests a lower standard than a "real risk".

Thus, the challenge to Judge Brower was not only decided by an authority different from the competent one (i.e. the unchallenged arbitrators or ultimately the Chairman of ICSID Administrative Council) but also by substituting the ICSID standard on disqualification for a lower one.

*Conclusions*

It is clear that the challenge to Judge Brower was not a proper one under the ICSID Convention. From an ICSID perspective, the decision of the PCA is a nullity. Indeed, the fact that Judge Brower had to resign voluntarily from his appointment as arbitrator after the PCA's decision was rendered speaks volumes as to the validity of such proceedings. In fact, to the extent that Judge Brower had refused to resign, it is difficult to see how Ecuador would have had any remedy other than to start again and to propose his disqualification in accordance with Articles 57 and 58 of the Convention, which in turn would have provided a higher hurdle to overcome.

While this decision highlights that parties can make whatever agreements they want as to arbitrator challenges, and that such agreements may in practice be effective, it does not set a precedent for an

alternative procedure and standard to that under the Convention. In terms of ICSID procedure, Articles 14, 57 and 58 of the ICSID Convention (together with the relevant Rules) alone set the standard and the procedure to seek to disqualify an arbitrator. In terms of the ICSID procedural history of this case, the Claimant's appointed arbitrator has simply resigned [9]; there has been no valid challenge in these proceedings.

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[1] *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6. While the Tribunal is yet to rule on jurisdiction, it has already issued two preliminary decisions as to provisional measures which Ecuador has ignored claiming that they are not binding as a matter of international law. The original tribunal consisted of Lord Bingham, Judge Charles N. Brower, J. Christopher Thomas Q.C.

[2] PCA Case No. IR-2009/1, Decision dated December 8, 2009.

[3] On October 2008, Perenco and Ecuador had agreed that any arbitrator challenges would be resolved by the PCA, applying the International Bar Association Guidelines.

[4] The first general standard of the IBA Guidelines provides *"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"*.

[5] English version of Article 14 of the ICSID Convention. The Spanish version states *"inspirar plena confianza en su imparcialidad de juicio"* (Inspire full confidence in their impartiality of judgement) and the French version demands *"offrir toute garantie d'indépendance dans l'exercice de leurs fonctions"* (Offer every guarantee of independence in the exercise of their functions), both of which versions are equally authentic. While the language used in the three versions of the text is different, it is accepted that no difference in meaning was intended.

[6] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Claimant's Proposal to Disqualify Arbitrator (December 19, 2002) 8 ICSID Rep. 398, 402 (2005), *"…The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made. The first requisite that facts must be established by the party proposing disqualification is in effect a prescription that mere speculation or inference cannot be a substitute for such facts.1 The second requisite of course essentially consists of an inference, but that inference must rest upon, or be anchored to, the facts established. An arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences"*.

[7] *Compañia de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (October 3, 2001), at paragraph 25: *"…The term* [manifest] *must exclude reliance on speculative assumptions or arguments… But in cases where (as here) the facts are established and no further inference of impropriety is sought to be derived from them, the question seems to us to be whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party. If (and only if) the answer is yes can it be said that the arbitrator may not be relied on to exercise independent judgment. That is to say, the circumstances actually established (and not*

*merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality…"*.

[8] Christoph H. Schreuer, **The ICSID Convention: A Commentary**, Cambridge University Press, Second Edition, at page 1202. See, also, *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, (May 12, 2008), at paragraph 41.

[9] Following the resignation of Judge Brower, the Tribunal was reconstituted and Neil Kaplan was appointed as arbitrator.

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