CORTE PERMANENTE DE ARBITRAJE  PERMANENT COURT OF ARBITRATION

PCA Case No. AA442

IN THE MATTER OF AN ARBITRATION UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ECUADOR CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

- and -

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976

- between -

MERCK SHARP & DOHME (I.A.) CORPORATION

- and -

THE REPUBLIC OF ECUADOR

DECISION ON CHALLENGE TO ARBITRATOR

JUDGE STEPHEN M. SCHWEBEL

April 12, 2012

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I. PROCEDURAL HISTORY

1. This challenge arises out of an arbitration between Merck Sharp & Dohme (I.A.) Corporation (the "Claimant") and the Republic of Ecuador (the "Respondent") under the Arbitration Rules of the United Nations Commission on International Trade Law, December 15, 1976 (the "UNCITRAL Arbitration Rules" or "Rules") pursuant to the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed on August 27, 1993 and entered into force on May 11, 1997 (the "Treaty").

2. The Claimant is represented in this case by Mr. Gary B. Born, Mr. David W. Ogden, and Ms. Rachael D. Kent of Wilmer Cutler Pickering Hale and Dorr LLP. The Respondent is represented by Dr. Diego García Carrión, Dra. Christel Gaibor, Ms. Diana Terán, and Mr. Juan Francisco Martínez as well as by Mr. Mark Clodfelter, Mr. Ronald Goodman, Mr. Paul Reichler, and Mr. Alberto Wray of Foley Hoag LLP.

3. By a Notice of Arbitration dated November 29, 2011 and received by the Respondent on December 2, 2011, the Claimant commenced an arbitration against the Respondent pursuant to Article VI(3)(a)(iii) of the Treaty and Article 3 of the UNCITRAL Arbitration Rules. The Claimant, a company incorporated under the laws of the state of Delaware, claims that Ecuador breached the Treaty with respect to the Claimant's investment in the pharmaceutical industry. In its Notice, the Claimant appointed Judge Stephen M. Schwebel as arbitrator.

4. By letter dated December 30, 2011, the Respondent appointed Judge Bruno Simma as arbitrator.

5. By letters dated February 14, 2012, the Claimant and the Respondent jointly requested that the Secretary-General of the Permanent Court of Arbitration act as appointing authority to appoint a presiding arbitrator.

6. The Respondent subsequently challenged the Claimant's appointment of Judge Schwebel under Article 10 of the UNCITRAL Arbitration Rules in a letter to the Claimant dated February 23, 2012.

7. On the same date, the Respondent asked the PCA Secretary-General to suspend the process for the appointment of the presiding arbitrator until the challenge to Judge Schwebel had been resolved. The Claimant expressed its opposition to the Respondent's request for a suspension by letter dated February 25, 2012.

8. The PCA Secretary-General elected to suspend the appointment process until the resolution of the challenge in a letter dated February 27, 2012.

9. By letter dated February 29, 2012, Judge Schwebel acknowledged receipt of the notice of challenge and declined to withdraw as arbitrator.

10. By letter dated March 1, 2012, the Claimant responded to the Respondent's challenge of Judge Schwebel, declining to agree to his removal from the Tribunal.

11. By letter dated March 15, 2012, the Respondent requested that the PCA Secretary-General decide its challenge to the Claimant's appointment of Judge Schwebel ("Respondent's Request") pursuant to Article 12(1)(b) of the UNCITRAL Arbitration Rules.

12. By letter dated March 16, 2012, the PCA acknowledged receipt of the Respondent's Request and established a schedule for further submissions on the challenge.

13. By letter dated March 26, 2012, the Claimant submitted its Response to the Respondent's Request ("Claimant's Response").

14. By letter dated March 27, 2012, Judge Schwebel submitted his comments on the challenge ("Judge Schwebel's Comments").

15. By letter dated April 3, 2012, the Respondent submitted its rebuttal to the Claimant's Response ("Respondent's Rebuttal").

16. By letter dated April 9, 2012, the Claimant submitted its reply to the Respondent's Rebuttal ("Claimant's Reply").

II. THE CHALLENGE TO JUDGE SCHWEBEL

a. The Respondent's Position

17. The Respondent's challenge to Judge Schwebel's appointment arises out of a recent publication by Judge Schwebel in which he "makes a number of statements that give rise to justifiable doubts as to his impartiality to serve as arbitrator in the present case."[1] The publication is a four-page "Editorial Comment" ("Editorial Comment" or "Comment") entitled "Celebrating a Fraud on the Court"[2] which makes reference to a June 2011 conference commemorating the twenty-fifth anniversary of the judgment of the International Court of Justice in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*.[3] One of the Respondent's counsel in the present arbitration, Mr. Paul Reichler, served on Nicaragua's legal team in that case. The Respondent asserts that the Editorial Comment evidences bias against Mr. Reichler based on which an informed third person could reasonably conclude that Judge Schwebel would "be influenced . . . by factors other than the merits of the present case."[4]

18. In the Respondent's view, the purpose of Judge Schwebel's comment is to depict the conference as a celebration of fraudulent behavior on the part of Nicaragua during the ICJ proceedings.[5] In particular, Judge Schwebel writes that facts emerging after the issuance of the ICJ's judgment "proved" that an affidavit submitted by the Nicaraguan foreign minister was false and that "the Sandinista government of Nicaragua grossly misled the Court."[6]

19. The Respondent's challenge is grounded primarily on Judge Schwebel's statement that the conference was "arranged with the participation of individuals involved in the formulation and presentation of Nicaragua's case"[7] and an accompanying footnote referencing a law review

[1] Respondent's Request, p. 2.

[2] 106 Am. J. Int'l L. 102 (2012).

[3] *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 ICJ Rep. 14 (June 27).

[4] Respondent's Request, p. 2.

[5] Respondent's Rebuttal, p. 1.

[6] Respondent's Request, p. 3, citing Editorial Comment at 103.

[7] Respondent's Request, p. 3.

article[8] by Mr. Reichler which Judge Schwebel characterizes in a parenthetical as "describing roles in proposing, developing, and arguing Nicaragua's case."[9]

20. From this footnote, the title and the overall content and tone of the Comment, the Respondent challenges Judge Schwebel's participation as arbitrator in these proceedings under the UNCITRAL Arbitration Rules.

1. Justifiable doubts arising from the Editorial Comment

21. The Respondent first argues that Judge Schwebel's Comment taken as a whole gives rise to justifiable doubts regarding his impartiality. Focusing on the totality of the views and statements advanced by Judge Schwebel, the Respondent believes the Comment implies that the "Respondent's counsel was directly or indirectly associated with a fraud on the ICJ, through his role as a leading force behind the case."[10] Thus, the Respondent asserts, an objective third party would reasonably believe that Judge Schwebel could be influenced by his "unfavorable view of [the] Respondent's counsel."[11] For example, the Respondent points to Judge Schwebel's remark that the conference was arranged "with the participation of individuals involved in the formulation and presentation of Nicaragua's case," whereas, according to the Respondent, the conference was sponsored by four organizations.[12] In the Respondent's view, Judge Schwebel's emphasis on individual participation, rather than the four entities, indicates his perception that the Respondent's counsel was directly involved in celebrating the anniversary of the case.

22. The Respondent further submits that Judge Schwebel "singled out" Mr. Reichler by referencing Mr. Reichler's 2001 article and describing that article as "developing" Nicaragua's case, which Judge Schwebel describes as having been tainted by fraud.[13] According to the Respondent, this reference to Mr. Reichler's article and the assertion that Nicaragua committed a fraud before the ICJ as well as the proximity of the two references could reasonably be viewed as suggesting that Mr. Reichler participated in or facilitated an alleged fraud or neglected his professional or ethical duties.[14]

23. To further emphasize the import of Judge Schwebel's reference to Mr. Reichler's article, the Respondent notes that the article identifies Mr. Reichler as having "worked very closely with the foreign minister" of Nicaragua.[15] Whereas Judge Schwebel's 1986 dissent in the *Nicaragua* case expressed disapproval of Nicaragua's behavior, the Respondent maintains that the 2012 Comment raises the issue of fraud for the first time and draws new links between Nicaragua's actions and its counsel.[16]

[8] Paul S. Reichler, *Holding America to Its Own Best Standards: Abe Chayes and Nicaragua in the World Court*, 42 Harv. Int'l L.J. 15 (2001).

[9] Respondent's Request, p. 3.

[10] Respondent's Request, p. 5.

[11] Respondent's Request, p. 6.

[12] Respondent's Request, p. 6.

[13] Respondent's Request, p. 3 & p. 6.

[14] Respondent's Request, p. 7.

[15] Respondent's Request, p. 8.

[16] Respondent's Rebuttal, pp. 6-7; Respondent's Request, p. 9, n.32.

24. The Respondent stresses that the title, primary thesis, and tone of the Comment, taken together with the reference to Mr. Reichler in particular could lead an informed third party to reasonably conclude that Judge Schwebel is incapable of separating his view of the Respondent's counsel from the merits of the present case and that Judge Schwebel might doubt the integrity or veracity of the Respondent's counsel.[17] The Respondent further suggests that it is irrelevant whether there is any relationship between the Comment and the issues and Parties in this case.[18]

25. Relying on Section 3.3.3 of the IBA Guidelines on Conflicts of Interest in International Arbitration Orange List which cautions as to the possibility of justifiable doubts arising from a "close personal friendship" between an arbitrator and counsel, the Respondent maintains that "publicly expressed ill will" by an arbitrator toward counsel will equally give rise to doubts about that arbitrator's impartiality.[19]

26. In its Rebuttal, the Respondent remarks on Judge Schwebel's Comments submitted to the PCA as part of these challenge proceedings and notes that Judge Schwebel did not in those Comments disavow himself from any negative association with the Respondent's counsel. The Respondent argues that Judge Schwebel's failure to deny any ill will toward Mr. Reichler supports its position, noting that in *Perenco v. Ecuador*, a challenge was sustained even where the challenged arbitrator denied any unfavorable view toward the challenging party.[20]

27. The Respondent also asserts in its Rebuttal that its right to select counsel of its own choosing supersedes the Claimant's right to select an arbitrator of its own choosing on the basis of Articles 4, 7 and 10 of the Rules.[21]

28. Finally, the Respondent contends that its challenge ought to be sustained as a precautionary measure to "protect" the integrity of the proceedings, stating that "where matters are evenly balanced, it may be advisable to err on the side of admission of a challenge brought early in the arbitral proceedings."[22]

2. Bias as a result of the Comment's inaccuracies

29. According to the Respondent, the inaccuracy of the facts on which Judge Schwebel relies further substantiates its view that Judge Schwebel is biased against the Respondent's counsel. The Respondent argues that Judge Schwebel misconstrued the reasoning of the ICJ, presented witness testimony in a misleading manner, and made unreasonable assertions in the absence of relevant evidence in his depiction of the judgment and the proceedings in the *Nicaragua* case.[23]

3. Non-disclosure of the Comment

30. The Respondent contends that Judge Schwebel's failure to disclose his Editorial Comment or his views toward counsel at the time he learned that Mr. Reichler would serve on the Respondent's legal team corroborates its position that an objective third party could maintain

[17] Respondent's Request, pp. 8-9.

[18] Respondent's Request, p. 9.

[19] Respondent's Request, p. 9.

[20] Respondent's Rebuttal, p. 6.

[21] Respondent's Rebuttal, p. 7.

[22] Respondent's Rebuttal, p. 7.

[23] Respondent's Request, pp. 11-13.

justifiable doubts as to his impartiality.[24] The Respondent states that "[i]t is very likely that Judge Schwebel was informed of Mr. Reichler's participation in the case very soon after [January 9, 2012]."[25] At the latest, Judge Schwebel was made aware of Mr. Reichler's participation on January 26, 2012, when Mr. Reichler expressly noted his representation in a letter to the two party-appointed arbitrators.[26] Judge Schwebel acknowledged receipt of Mr. Reichler's letter the following day.[27]

31. The Respondent cites Article 9 of the UNCITRAL Arbitration Rules which requires an arbitrator to disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." Pointing to *Alpha Projektholding GMBH v. Ukraine* in which an ICSID tribunal stated that certain facts or circumstances "are of such a magnitude that failure to disclose them . . . [could] in and of itself indicate a manifest lack of reliability of a person to exercise independent and impartial judgment,"[28] the Respondent argues that Judge Schwebel's failure to disclose the publication of his Editorial Comment demonstrates his lack of impartiality.

b. The Claimant's Position

32. According to the Claimant, the challenge should be dismissed for four reasons: first, the Editorial Comment has no relation to the present case, the Parties, or the issues; second, the Editorial Comment does not evidence a negative view of the Respondent's counsel or his suitability as counsel; third, the Editorial Comment takes no position on Mr. Reichler's role or conduct in the *Nicaragua* case; and, fourth, the Respondent "manufactured" this challenge by adding Mr. Reichler to its legal team after Judge Schwebel, whose views on the *Nicaragua* case are well known, had been appointed.

1. The Comment does not give rise to justifiable doubts

33. The Claimant denies that the Editorial Comment gives rise to justifiable doubts as to Judge Schwebel's impartiality. It argues that the footnote on which the Respondent relies is "devoid of any criticism, express or implied, of Mr. Reichler."[29] Further, the Claimant disagrees that the Editorial Comment taken as a whole implies that Mr. Reichler committed any fraud or other misdeed; rather, in the Claimant's view, the Editorial Comment's reference to the role of the Nicaraguan Foreign Minister cannot substantiate the Respondent's argument that Judge Schwebel intended to imply that Mr. Reichler had committed any wrongdoing.[30]

34. The Claimant likewise dismisses the Respondent's argument that Judge Schwebel's Comment "singles out" Mr. Reichler. By contrast, the Claimant characterizes the citation to Mr. Reichler's article as a reasonable reference for discussing the roles of the members of the Nicaraguan legal team.

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[24] Respondent's Request, p. 13; Respondent's Rebuttal, p. 10.

[25] Respondent's Request, pp. 13-14.

[26] Respondent's Request, p. 14.

[27] Respondent's Request, p. 14.

[28] Respondent's Request, p. 15, n. 48, citing *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz (Mar. 19, 2010).

[29] Claimant's Response, p. 3.

[30] Claimant's Response, p. 4.

35. The Claimant also rejects the allegation that Judge Schwebel's Comment implicitly criticizes the organizers of the conference, including Mr. Reichler's firm, Foley Hoag LLP, representing the Respondent. It asserts that Judge Schwebel does not denigrate the event or its organizers in any way. The Claimant notes that Mr. Reichler was not affiliated with Foley Hoag at the time of the *Nicaragua* case and that the firm had no role in the ICJ proceedings.

36. Turning to the legal basis for the Respondent's challenge, the Claimant argues that the two cases on which the Respondent relies for the proposition that public comments made by an arbitrator could give rise to a challenge are inapposite. According to the Claimant, in those cases, the challenged arbitrator "(i) made critical comments about one of the parties . . . and (ii) arguably prejudged the merits of the arbitration."[31] The Claimant observes that the public comments in both *Perenco v. Ecuador* and *Canfor v. United States* concerned the specific parties and the specific issues before the respective tribunals. Moreover, the Claimant submits that in four of the five other challenge decisions to which the Respondent refers, the challenge to the arbitrator was rejected. It distinguishes the fifth, *ICS v. Argentina*, on its facts, highlighting that the challenged arbitrator was simultaneously serving as counsel against the same respondent.[32]

37. In response to the Respondent's reference to the Orange List of the IBA Guidelines, the Claimant argues that Judge Schwebel's Comment conveys no ill will toward Mr. Reichler and that nothing in the Guidelines suggests that disagreements or dislike toward counsel constitute a basis for challenge of an arbitrator.[33]

38. The Claimant concludes that Ecuador has "cited no authority to support its contention than an arbitrator's alleged negative view of a party's counsel, even if proven, would sustain a challenge to an arbitrator."[34]

39. Likewise, the Claimant asserts that there is no legal basis for the Respondent's suggestion that a challenge brought early in the proceedings should be sustained as a precautionary measure.[35]

2. Judge Schwebel did not rely on factual inaccuracies

40. In response to the Respondent's argument that Judge Schwebel's criticisms of Nicaragua's factual representations in that case were unfounded, the Claimant points to statements in Mr. Reichler's article that, it argues, conflict with Nicaragua's representations before the Court and corroborate Judge Schwebel's criticisms.[36]

3. The temporal aspect of the challenge

41. Regarding Mr. Reichler's appointment in this case, the Claimant contends that the Respondent's addition of Mr. Reichler to its legal team after the Claimant's appointment of Judge Schwebel cannot create a conflict requiring Judge Schwebel's recusal because the circumstances of the

[31] Claimant's Response, p. 7.

[32] Claimant's Response, p. 8.

[33] Claimant's Response, p. 9.

[34] Claimant's Reply, p. 1.

[35] Claimant's Reply, p. 6.

[36] Claimant's Response, pp. 5-7.

alleged conflict were known to the Respondent when Mr. Reichler was instructed. The Claimant asserts that the position taken by Judge Schwebel in his Comment adds nothing of relevance to what was already publicly known about Judge Schwebel's position in the *Nicaragua* case. In particular, the Claimant maintains that the Respondent and its counsel were "necessarily on notice" of Judge Schwebel's views of that case at the time Mr. Reichler was appointed as counsel and that the falsity of the Nicaraguan affidavit was noted in Judge Schwebel's dissent.[37]

42. The Claimant further states that Mr. Reichler was not granted power of attorney by the Respondent until after the Respondent learned about Judge Schwebel's Editorial Comment. While acknowledging that under the UNCITRAL Arbitration Rules a party is free to appoint counsel of its own choosing, the Claimant argues that the Respondent added Mr. Reichler to its legal team only to contest the Claimant's choice of arbitrator.

4. Disclosure was not required

43. Finally, the Claimant disputes the Respondent's argument that Judge Schwebel's non-disclosure of his Editorial Comment gives rise to justifiable doubts regarding his impartiality. The Claimant stresses that the Comment does not relate to the Parties or the issues in the present case nor does it, in the Claimant's opinion, espouse any personal views toward Respondent's counsel. In the absence of any relationship between the substance of the Comment and the present case, Judge Schwebel's non-disclosure does not "raise obvious questions" about Judge Schwebel's impartiality.[38] Moreover, the Claimant observes that the IBA Guidelines Working Group has noted that non-disclosure "cannot make an arbitrator partial . . . ; only the facts or circumstances that he or she did not disclose can do so."[39]

c. Judge Schwebel's Comments

44. In his comments dated March 27, 2012, Judge Schwebel states first that he voted with the majority of the Court on a number of issues in *Nicaragua v. United States.* He dissented in part from the Court's Order for Provisional Measures and from its Order on the Declaration for Intervention of El Salvador before dissenting also from the judgment. He further notes that the position of the dissenting judges was supported during the 2011 conference by a highly respected ICJ advocate and legal scholar, Professor James Crawford.[40]

45. Because the parties in the *Nicaragua* case largely agreed on the "essential question of law," Judge Schwebel observes that he focused his dissent and its 132-page appendix on the factual claims made by Nicaragua which he believed to be false. He points out that the appendix to his dissent refers to statements made by three members of Nicaragua's four-member legal team, including to an interview Mr. Reichler gave to *The New York Times.* Judge Schwebel goes on to observe that he has not been challenged as judge or arbitrator when the other three members of the team served as counsel in cases before him.[41]

[37] Claimant's Response, p. 3; Claimant's Reply, p. 3.

[38] Claimant's Response, p. 11.

[39] Claimant's Response, p. 12.

[40] Judge Schwebel's Comments, p. 2.

[41] Judge Schwebel's Comments, pp. 3-4.

46. In Judge Schwebel's view, a stronger basis for a challenge, if one were to be made, against his participation in the present case would be his lengthy and detailed dissenting opinion. He maintains that his Editorial Comment repeats the "essence" of his dissent, including new information that came to light in 1993 after the conclusion of the case.[42]

47. In response to the Respondent's principal assertions, Judge Schwebel replies that his Comment does not make any reference "to any knowledge or activity of Mr. Reichler" in the alleged fraud.[43] Rather, Judge Schwebel describes the footnote citing Mr. Reichler's article as "tangential" to his thesis.[44]

48. Judge Schwebel submits that no reasonable, informed third party would believe him to be influenced by factors other than the merits of the present case as nothing in the body of the Editorial Comment or in the aforementioned footnote suggests that Mr. Reichler is responsible for the attestation of the Nicaraguan Foreign Minister or that Judge Schwebel harbors any ill will toward Mr. Reichler.

49. Finally, Judge Schwebel notes that, although the Respondent asserts that Judge Schwebel "rejected" an invitation to attend the conference, he clarifies that he declined to attend but indicated that he would be prepared to transmit a statement to be read out at the conference.[45]

III. REASONING

a. Legal Standard

50. The Parties agree that the applicable standard for the resolution of the Respondent's challenge is found in the UNCITRAL Arbitration Rules.

51. Article 9 of the Rules requires an arbitrator to disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." Article 10(1) states that an "arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence."

52. In evaluating a challenge to an arbitrator arising under Articles 9 and 10 of the Rules, the appointing authority must determine whether a reasonable, fair-minded and informed person would have justifiable doubts about the arbitrator's independence or impartiality.[46] The IBA Guidelines, to which both Parties refer, state 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."[47]

[42] Judge Schwebel's Comments, p. 2.

[43] Judge Schwebel's Comments, p. 4.

[44] Judge Schwebel's Comments, p. 4.

[45] Judge Schwebel's Comments, p. 4.

[46] *National Grid PLC v. Republic of Argentina*, LCIA Case No. UN 7949, Decision on the Challenge to Mr. Judd L. Kessler (Dec. 3, 2007).

[47] General Standard 2(c).

53. A party need not demonstrate actual bias or prejudgment for a challenge to be sustained.[48] "Justifiable doubts" may therefore arise in the absence of persuasive evidence that the challenged arbitrator in fact lacks independence or has acted in a partial manner.

54. Finally, the UNCITRAL Arbitration Rules set time limits for a party to raise a challenge under Articles 9 and 10. Article 11 requires that a party "send notice of [its] challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party."

b. The Respondent's Challenge to Judge Schwebel

55. The Respondent challenges Judge Schwebel's impartiality, not his independence. The main contention that underlies the Respondent's challenge is that Judge Schwebel has such a negative pre-existing view of one of the Respondent's counsel, Mr. Paul Reichler, that he is likely to "be incapable of separating his subjective, negative view from the facts of the present case."[49]

56. According to the Respondent, it first became aware of Judge Schwebel's "negative view" of Mr. Reichler on February 15, 2012, when it learned of Judge Schwebel's Editorial Comment regarding the conference on the twenty-fifth anniversary of ICJ's judgment in the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*. The Respondent relies exclusively on the content and tone of the Editorial Comment to support its challenge against Judge Schwebel. Given that the Respondent learned of the Comment on February 15, 2012, the challenge, viewed on its face, meets the timeliness requirements of the UNCITRAL Arbitration Rules.

57. Specifically, the Respondent argues that (i) the Comment's title refers to a "fraud" on the ICJ by Nicaragua, although no such fraud took place, (ii) in its second footnote, following a reference to the conference participants, the Comment cites a law review article by Mr. Reichler recounting his involvement in preparing and presenting Nicaragua's case before the ICJ—a citation that insinuates Mr. Reichler's complicity in the alleged "fraud", (iii) the Comment characterizes the conference's mood as "celebratory" in an attempt to criticize and show disdain toward the conference and its organizers, which included Mr. Reichler, and, (iv) the Comment's overall "denigrating tenor" is meant to convey Judge Schwebel's "negative view" of Mr. Reichler.

58. In evaluating this challenge, I have considered all the submissions of the Parties and the comments of Judge Schwebel. In ruling on the challenge, I address only the issues that I consider necessary to arrive at my decision.

59. The Comment's reference to Mr. Reichler is limited to mentioning his role in the "formulation and presentation" of Nicaragua's case and in "proposing, developing and arguing" that case. The *Nicaragua* case arose from a complex dispute. Its resolution on the merits required sixteen separate (and often split) holdings by the ICJ, and resulted in seven separate opinions and three dissents on various points of fact and law, in addition to the Court's 135-page judgment. Given the number and breadth of issues that were before the ICJ, a general reference to Mr. Reichler's

[48] *Perenco Ecuador Ltd. v. Republic of Ecuador*, PCA Case No. 2009/1, Decision on Challenge to Arbitrator Brower (Dec. 8, 2009).

[49] Respondent's Request, p. 8.

article cannot reasonably be seen to imply that Mr. Reichler had knowledge of and/or enabled allegedly false testimony by Nicaraguan officials on certain factual points.

60. The available evidence also suggests that, among the former members of Nicaragua's legal team present at the conference, only Mr. Reichler published an article in a prestigious American law journal specifically dedicated to the experiences of the Nicaraguan legal team. By citing Mr. Reichler's article in his Comment, Judge Schwebel followed the common practice among authors in prominent publications of citing relevant sources in other similarly credible and high-profile publications.

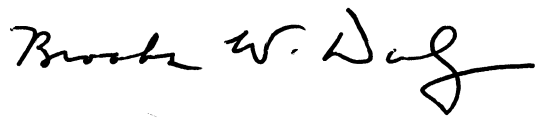
61. Judge Schwebel's Editorial Comment is undoubtedly critical of certain alleged conduct by Nicaragua. However, I find insufficient grounds to support the view that Judge Schwebel has attributed this alleged conduct to Mr. Reichler. Accordingly, I find no justifiable doubts arising from the Editorial Comment that could sustain a challenge to Judge Schwebel.

IV. DECISION

NOW THEREFORE, I, Brooks W. Daly, Acting Secretary-General of the Permanent Court of Arbitration, having considered the submissions of the Parties and the comments of Judge Schwebel, and having established to my satisfaction my competence to decide this challenge in accordance with the UNCITRAL Arbitration Rules,

HEREBY REJECT the challenge brought against Judge Stephen M. Schwebel under Article 10(1) of the UNCITRAL Arbitration Rules.

Done at The Hague on April 12, 2012.



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