

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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In the proceedings between

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A.  
(Claimants)

and

The Argentine Republic  
(Respondent)

ICSID Case No. ARB/03/19

and

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales  
del Agua S.A.  
(Claimants)

and

The Argentine Republic  
(Respondent)

ICSID Case No. ARB/03/17

and

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In the arbitration under the Rules of the  
United Nations Commission on International Trade Law between

AWG Group Limited  
(Claimant)

and

The Argentine Republic  
(Respondent)

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Date of decision: May 12, 2008

## **DECISION ON A SECOND PROPOSAL FOR THE DISQUALIFICATION OF A MEMBER OF THE ARBITRAL TRIBUNAL**

### **I. Background**

1. This decision responds to a second proposal, filed by the Respondent on November 29, 2007, to disqualify Professor Gabrielle Kaufmann-Kohler as a member of the Tribunal. The Respondent's first proposal, filed on October 20, 2007 and alleging different grounds for disqualification from the ones raised in the present proposal, was rejected by the Tribunal in its Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal of October 22, 2007.<sup>1</sup>

2. That Decision recited at length the procedural background of the cases being heard by this Tribunal; consequently, it is not necessary to repeat that background in all its detail in the present decision. The following paragraphs will merely summarize the procedural steps in these cases to the extent that they are relevant to the issues raised by the Respondent's proposal.

3. Following registration with the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") on July 17, 2003 of the above entitled ICSID cases, the Claimants appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator, and the Respondent Argentine Republic in turn appointed as arbitrator Professor Pedro Nikken, a national of Venezuela. In the absence of an agreement between the parties on the presiding arbitrator, on October 21, 2003 the Claimants, invoking Article 38 of the Convention for the Settlement of Investment Disputes Between States and the Nationals of Other States (hereinafter the "ICSID Convention") and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), requested the Centre to make this appointment. With the agreement of both parties, the Centre appointed Professor Jeswald W. Salacuse, a national of the United States of America, as the President of the Tribunal. The parties agreed that the same Tribunal

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<sup>1</sup> See Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, available at [www.worldbank.org/icsid](http://www.worldbank.org/icsid)

would hear all three cases indicated above, in addition to a fourth case<sup>2</sup> against Argentina involving the privatization of the water system in the Province of Cordoba, which was subsequently settled.

4. On February 17, 2004, the Deputy Secretary-General of ICSID, in accordance with ICSID Arbitration Rule 6(1), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. In connection with their appointment, each member of the Tribunal made declarations pursuant to Rule 6 of the ICSID Arbitration Rules with respect to circumstances affecting their reliability for independent judgment.

5. On June 7, 2004, the Tribunal held a session with the parties at the seat of the Centre in Washington, D.C. During the session, the parties in the ICSID cases confirmed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect. Similarly, in the case of *AWG Group Limited v. The Argentine Republic*, governed by the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), the parties also agreed that the Tribunal had been properly constituted.

6. Having been duly constituted, the Tribunal under both ICSID and UNCITRAL Rules proceeded to hear the above entitled cases and to make a series of decisions concerning their timetables and procedures on submission of documents, the jurisdiction of the tribunal<sup>3</sup>, requests by a group of nongovernmental organization to participate as *amicus curiae*<sup>4</sup>, the withdrawal of certain parties, and various other matters concerning

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<sup>2</sup> ICSID Case No. ARB/03/18.

<sup>3</sup> Decisions on Jurisdiction of May 16 (ICSID Case No. ARB/03/17) and August 3, 2006 (ICSID Case No. ARB/03/19 and UNCITRAL Arbitration), available at [www.worldbank.org/icsid](http://www.worldbank.org/icsid).

<sup>4</sup> Order in Response to a Petition by Five Non-Governmental Organizations for Permission to make an *Amicus Curiae* Submission of February 12, 2007 (ICSID Case No. ARB/03/19) and Order in Response

the orderly management and processing of the arbitral proceedings. From May 28 to June 1, 2007, the Tribunal, with the full participation of the parties, held a hearing on the merits in ICSID Case No. ARB/03/17. With respect to ICSID Case No. ARB/03/19 and the case of *AWG Group Limited v. the Argentine Republic*, subject to UNCITRAL Arbitration Rules, upon the completion of the various phases for the submission of documents, the Tribunal with the agreement of the parties fixed the dates for a hearing on the merits in these cases for the period October 29 to November 8, 2007, at the offices of the Centre in Washington, DC.

7. On October 12, 2007, the Respondent filed with the Secretary of the Tribunal a Proposal (hereinafter “Respondent’s First Proposal”) under Article 57 of the Convention and Rule 9 of the ICSID Arbitration Rules to disqualify Professor Gabrielle Kaufmann-Kohler as a member of the Tribunal “... by virtue of the objective existence of justified doubts with respect to her impartiality.” (para. 1) (“...*en virtud de la existencia objetiva de dudas justificadas respecto de su imparcialidad.*”) The alleged basis for this request arose out of the fact that Professor Kaufman-Kohler had been a member of an ICSID tribunal in the case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*<sup>5</sup>, hereinafter referred to as the *Aguas del Aconquija* case, which had rendered an award against Argentina on August 20, 2007.

8. Once the Tribunal became aware of the Respondent’s First Proposal, Professor Kaufmann-Kohler immediately withdrew from Tribunal deliberations, and the two remaining Tribunal members suspended proceedings in the three above-entitled cases on October 15, 2007, forwarded the Respondent’s Proposal to the Claimants with a request for their observations, and invited Professor Kaufmann-Kohler to furnish any explanations that she may have wished to make. After receiving submissions from the parties and from Professor Kaufmann-Kohler, the two remaining members of the Tribunal deliberated and, on October 22, 2007, made a Decision in Response to the

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to a Petition for Participation as *Amicus Curiae* of March 17 2006 (ICSID Case No. ARB/03/17), available at [www.worldbank.org/icsid](http://www.worldbank.org/icsid).

<sup>5</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3.

Proposal to Disqualify a Member of the Tribunal, rejecting the Respondent's First Proposal, directing that the state of suspension of the proceedings in the above entitled cases be terminated, and affirming the schedule of hearings fixed by agreement of the parties to be held from October 28, 2007 through November 8, 2007 at the offices of the Centre in Washington, D.C. The hearings on the merits in Case No.ARB/03/19 and the arbitration under the UNCITRAL Rules between AWG Group Limited and the Argentine Republic did in fact take place during that specified period.

## **II. Respondent's Second Proposal to Disqualify Professor Kaufmann-Kohler**

9. On November 29, 2007, before the time for the filing of the parties' post-hearing submissions in Case No. ARB/03/19 and the UNCITRAL Arbitration Proceeding had passed, the Respondent filed with the Tribunal a second proposal to disqualify Professor Kaufmann-Kohler (hereinafter "Respondent's Second Proposal") under Article 57 of the Convention and Rule 9 of the ICSID Arbitration Rules "...on the basis that Mrs. Kaufmann-Kohler does not meet the conditions required to be an arbitrator in the above mentioned proceedings, pursuant to the provisions set forth in Article 14(1) of the ICSID Convention." Specifically, the Respondent alleged that "...Mrs. Kaufmann-Kohler cannot be 'relied upon to exercise independent judgment,'... since [she] holds the position of Director of the UBS group." Moreover, the Respondent asserted that Professor Kaufmann-Kohler failed to disclose this fact to the parties and to ICSID as is required by the ICSID Rules. The Respondent's Second Proposal also extended to two other ICSID cases, not subject to the jurisdiction of this Tribunal, in which Professor Kaufmann-Kohler is also serving as an arbitrator.<sup>6</sup>

10. The UBS Group, with headquarters in Switzerland, is among the world's largest financial services companies, with operations in over fifty countries, some 80,000 employees, and over 200,000 registered shareholders.<sup>7</sup> Among its multifaceted financial

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<sup>6</sup> *Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/22) and *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23).

<sup>7</sup> For information on the UBS group, see its web site at [www.ubs.com](http://www.ubs.com).

activities, UBS is the market leader in commercial and retail banking in Switzerland, a major participant in investment banking on an international scale, and one of the world's leading asset managers.

11. On April 19, 2006, some two years after the Tribunal in the above-entitled cases was constituted, the annual meeting of the shareholders of UBS elected Professor Gabrielle Kaufmann-Kohler a member of the corporation's board of directors for a three-year term. Professor Kaufmann-Kohler did not inform the parties or her co-arbitrators of the fact of her election to that position. The Respondent states that it learned of this fact on November 22, 2007 and that immediately thereafter it promptly filed this Second Proposal to disqualify Professor Kaufmann-Kohler.

12. The Respondent alleges that Professor Kaufmann-Kohler's impartiality and independence of judgment are negatively affected because of the activities of UBS with respect to the parties in this case. In particular, UBS is a shareholder in two of the Claimants, Suez and Vivendi. According to the Vivendi web site, UBS was a "main investor" in the corporation, holding 2.38% of its registered voting stock as of March 31, 2007. UBS also held some 2.1% of the voting shares of Suez as of March 7, 2007. In addition to share ownership, the Respondent points to other UBS activities that affect the parties: UBS does research on and makes recommendations with respect to investments in the water sector, a sector in which the Claimants operate, and UBS has developed financial products that it sells to investors to permit them to invest in the water sector on a global basis. Moreover, pursuant to corporate policy, UBS pays Professor Kaufmann-Kohler a portion of her director's compensation in UBS stock. She is therefore a shareholder in UBS, which in turn owns stock in two of the Claimants in these cases. Moreover, the Respondent alleges that Professor Kaufmann-Kohler failed to disclose these relationships as is required by both the ICSID and UNCITRAL arbitration rules.

13. Upon the receipt by the Tribunal of the Respondent's Second Proposal, Professor Kaufmann-Kohler withdrew from Tribunal deliberations, and the two remaining

members suspended proceedings (including the date for the filing of post-hearing submissions) in the three above-entitled cases on December 4, 2007, forwarded the Respondent's Second Proposal to the Claimants with a request for their observations, and invited Professor Kaufmann-Kohler to furnish any explanations that she wished to make. By letter of December 4, 2007 to the parties, the two remaining members of the Tribunal expressed their understanding that in keeping with the parties' agreement that a single tribunal was to hear all three of the above-entitled cases the parties were bestowing on the remaining members the authority to decide the challenge under the UNCITRAL Rules in the case of *AWG Group Limited v. the Argentine Republic*. Neither party expressed any objection to the Tribunal's proceeding on this basis.

14. By letter of December 21, 2007, Professor Kaufmann-Kohler, while declining to comment on the merits of the Respondent's Second Proposal, offered certain "factual clarifications." She stated: 1) that she had no knowledge of the business relations alleged to exist between the Claimants and UBS before reading the Respondent's Second Proposal; 2) that after reading the Respondent's Second Proposal she requested UBS to verify the accuracy of the UBS shareholdings in the Claimants and was informed by the UBS Corporate Group General Counsel that UBS held 2.38% of the shares and voting rights of Vivendi Universal on March 31, 2007 and 2.13% of Suez' share capital on March 7, 2007 and 1.3% on April 18, 2006, submitting a copy of the UBS communication of December 20, 2007 to her; 3) that UBS, as a global financial institution, has many business relationships with many corporations and states worldwide but that she as an independent, non-executive director has no involvement in individual investment decisions and did not receive any information about such individual investment decisions; 4) that as a result she always considered that the business relationships of UBS did not affect her impartiality and independence as an arbitrator; 5) that at the time of her appointment as a UBS director she submitted on a confidential basis a list of all her arbitrations to UBS and was subsequently informed by UBS that there were no conflicts of interest, except with respect to her position as a member of the America Cup Jury (since UBS sponsored a yacht in that competition), from which she resigned; and 6) that non-executive directors do not deal with individual UBS client

matters or transactions. With respect to UBS shareholdings in the Claimants, which are a fundamental basis for the Respondent's challenge to Professor Kaufmann-Kohler, the communication of December 20, 2007 to Professor Kaufmann-Kohler signed by UBS' General Counsel and another Legal Advisor stated:

“We would like to add that all these shareholdings are fairly small, if not fractional. They do not have a strategic meaning of any kind. UBS would invest in hundreds, if not thousands of commercial enterprises around the globe in a similar way. Investment of this magnitude lies within the ordinary course of business of our bank.”

15. On December 24, 2007, the Claimants filed their comments on the Respondent's Second Challenge to Professor Kaufmann-Kohler, in which they rejected each of the Respondent's arguments and requested the Tribunal to dismiss this Second Proposal. The Claimants' arguments may be summarized as follows: 1) Professor Kaufmann-Kohler is a fully independent, non-executive director of UBS, without any material involvement or interest in UBS's financial performance; 2) UBS participation in Suez and Vivendi is mainly indirect as an investment manager and is in any case immaterial; 3) the Respondent made no allegations with regard to UBS participation or relationships with Claimants Sociedad General de Aguas S.A., Interaguas Servicios Integrales de Agua S.A. or AWG Group Limited, and therefore the challenge must fail as to those Claimants; 4) UBS's investment research reports with regard to some of the Claimants are independent and not based on any financial interest in those companies; 5) UBS also gave advice to and had a client relationship with the Respondent Argentina; 6) the Respondent did not address the standard required for a successful challenge to an arbitrator, *i.e.* whether there is a real risk that Professor Kaufmann-Kohler may be truly biased and that Argentina failed to show that Professor Kaufmann-Kohler's independence and impartiality is affected by her directorship in UBS; and 7) Professor Kaufmann-Kohler had no duty to disclose her appointment as a UBS director since that fact was notorious and in any case irrelevant to her independence and impartiality in the present cases.

16. Subsequent to the dates established by the Tribunal for the submission of pleadings on this Second Proposal, and while the remaining members of the Tribunal



were in the process of deliberation, the Respondent filed on February 29, 2008 an Expert Report of Professor Charles W. Wolfram, Frank Reavis, Sr. Professor Emeritus of Law at Cornell University Law School, supporting the Respondent's proposal to disqualify Professor Kaufman-Kohler, which Expert Report had been prepared in connection with the case of *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23). By letters of March 5 and 10, 2008, the Claimants protested the introduction of this document on grounds that its submission was untimely, that it was prepared in connection with another case in which the Claimants were not parties, and that the Expert made various legal and factual errors. The remaining members of the Tribunal informed the parties on March 12, 2008 that they would withhold judgment on the admissibility of the Wolfram report until they had considered all the pleadings in the matter of this Second Proposal.

17. In the meanwhile, the remaining members of the Tribunal determined that they would like additional clarifications from Professor Kaufmann-Kohler. The President of the Tribunal therefore requested the Secretary to invite Professor Kaufmann-Kohler, by letter of March 3, 2008, to further elaborate on a) the reasons why she disclosed certain information on her arbitrations to UBS and b) the reasons why she did not disclose the fact of her appointment as a UBS director to the parties in the above-entitled cases.

18. Professor Kaufmann-Kohler responded to these questions in a letter of March 13, 2008. With regard to the first question, she stated that she provided the information as part of the process of her selection as a UBS board member. Relevant rules of corporate governance established by the Swiss Stock Exchange, the New York Stock Exchange, and the Swiss Code of Best Practices require that UBS ascertain that a prospective director meets specified independence and disclosure requirements. The submission of the list of her arbitrations was also intended to ascertain whether any connection existed between UBS and any parties in those arbitrations. With regard to the second question, she responded that she did not disclose the fact of her appointment as a UBS director to the parties because the Swiss banking law imposed a strict separation between the management and supervision of a bank through two distinct bodies – one for

management and one for supervision and control — and that as a director her responsibilities were limited to supervision and control. As a member of the supervisory body, she was not involved in the management of the bank’s business, had no indication of any connections between the bank and a party in any of her arbitrations, and had never come across any indication of such a connection in her activities as a UBS director. She therefore saw no reason to advise all the parties in her pending arbitrations of an unrelated appointment as a UBS board member.

19. Subsequent to receiving this letter, the remaining members of the Tribunal asked for observations on the letter from the parties. The parties did provide such observations but they were to a significant extent based in the same arguments that they had previously advanced in earlier pleadings, reformulated in the light of Professor Kaufmann-Kohler’s letter. The Respondent included in its observations a document entitled “Reply Expert Report of Charles W. Wolfram” in which Professor Wolfram commented on Professor Kaufmann-Kohler’s letter of March 13, 2008. The Claimants objected to the admission of such document as being outside the scope of the Tribunal’s request for observations from the parties. The remaining members of the Tribunal reserved the right to decide on the admissibility of the Wolfram Reports and directed both parties to cease filing submissions on the Respondent’s Second Proposal to disqualify Professor Kaufmann-Kohler since the remaining members considered that all issues relating to the challenge had been fully argued.

20. ICSID Arbitration Rule 9(4) requires that in the event of a challenge to one member of an arbitral tribunal, “...the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned.” Professor Kaufman-Kohler having withdrawn from all deliberations of the Tribunal until the matter of the challenge against her is resolved, the undersigned remaining Tribunal members have considered the various documents submitted in this case, including the “Wolfram Reports” as well as the relevant legal authorities, and have arrived at the following decision.

21. The Respondent has made a single proposal requesting the disqualification of Professor Kaufmann-Kohler in all three of the cases that the Tribunal was constituted to hear. In deciding on the proposal to disqualify Professor Kaufmann-Kohler, it is necessary to treat the case of *AWG Group Limited v. The Argentine Republic* separately from the other two cases. Such separate treatment is justified for two reasons. First, the *AWG Case* is governed by the UNCITRAL Arbitration Rules, while the other two cases are governed by the ICSID Convention and Arbitration Rules. Second, the facts alleged with respect to Professor Kaufmann-Kohler's independence and impartiality differ from those alleged in the other two cases in that UBS is not a shareholder in the Claimant AWG Group Limited. At the same time, we recognize the possibility of a connection between the *AWG case* and the other two cases in the sense that if it were established that Professor Kaufmann-Kohler were predisposed to favor the Claimants in the ICSID cases such predisposition would also favor AWG Group Limited which is a partner with the other Claimants in the Buenos Aires water privatization that is at the heart of the dispute in both ICSID Case no. ARB/03/19 and the *AWG Case*. We deal first with the *AWG Case*.

### **III. The Challenge in the Case of *AWG Group Limited v. The Argentine Republic***

22. Under Article 10(1) of the UNCITRAL Arbitration Rules: "An arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." The words "justifiable doubt" clearly indicate that Article 10(1) establishes an objective, rather than a subjective standard for determining the existence of a circumstance that creates justifiable doubts as to an arbitrator's impartiality and independence.<sup>8</sup> Thus, as we stated in our previous Decision in Response to a Proposal to Disqualify a Member of the Arbitral Tribunal, it is not sufficient that such doubt exist in the mind of a party. Such doubt must be justifiable from an objective point

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<sup>8</sup> See David D. Caron, Lee M Caplan, and Matti Pellonpaa, *The UNCITRAL Arbitration Rules: A Commentary* (2005), who state at page 210:

"The inclusion of the word "justifiable in Article 10(1) to define the kind of doubt required to sustain a challenge reflects UNCITRAL's clear intention of establishing an objective standard for impartiality and independence."

of view. The application of such standard in the particular case requires an answer to the following question: Would a reasonable, informed person viewing the facts be led to conclude that there is a justifiable doubt as to the challenged arbitrator's independence and impartiality?<sup>9</sup> Moreover, the party challenging the arbitrator has the burden of proving that such justifiable doubt exists.

23. What then is the "circumstance" in the case of *AWG Group Limited v. The Argentine Republic* that the Respondent alleges gives rise to a justifiable doubt as to the impartiality or independence of Professor Kaufmann-Kohler? The Respondent's submissions, which it must be acknowledged tend to focus more heavily on the circumstances in the other two cases, point to the fact that Professor-Kauffman-Kohler is a director of UBS and that UBS has engaged in certain research activities in the water sector and has developed financial products to allow its clients to invest in the water sector. At paragraph 29 of its Second Proposal, the Respondent refers to one such product, the UBS Global Water Utilities Index TR-Index-Zertificat (UBOWAS), which includes "... 12 companies, mostly British .."; however, the Respondent does not allege that AWG Group Limited is among the twelve or even that companies in which UBS conducts research or the financial products developed by UBS include investments in AWG Group Limited. Indeed, the Respondent does not specifically allege the existence any sort of a business relationship, direct or indirect, between UBS and AWG Group Limited. In particular, the Respondent does not assert that UBS owns shares in or has any other type of financial connection to AWG Group Limited. Moreover, as will be discussed more extensively below, Professor Kaufmann-Kohler states that as a director of UBS she is not involved in the management of UBS business, does not participate in the development and management of the company's financial products or its research activities, and indeed was unaware of its activities with respect to the water sector. The Respondent offers no evidence to the contrary.

24. Thus the only connection, if one may call it that, between Professor Kaufmann-Kohler and the Claimant AWG Group Limited is the fact that she is a director of UBS

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<sup>9</sup> Ibid., citing Challenge Decision of January 11, 1995, para 23, reprinted in (1997) XXII YCA 227, 234.

and that UBS, among its many other activities and interests throughout the world, conducts research and develops financial products related to the water sector. The existence of such purported connection is not enough to establish a “circumstance” giving rise to justifiable doubts as to an arbitrator’s independence and impartiality. Such a connection must be significant and direct, such as an economic relationship causing an arbitrator to be dependent in some way on a party. Such connection between Professor Kaufmann-Kohler and AWG Group Limited, as suggested though not specifically alleged by the Respondent, is too remote and tenuous as to hardly be called a connection or relationship at all. An objective analysis of the facts as alleged by the Respondent does not establish a circumstance that would lead a reasonable, informed person to conclude that a justifiable doubt exists as to Professor Kaufmann-Kohler’s impartiality or independence in the case of *AWG Group Limited v. The Argentine Republic*.

25. The Respondent also alleges that Professor Kaufmann-Kohler had a duty to disclose to the parties in the *AWG Case* that she was a director of UBS and that UBS carried out certain activities relating to the international water sector. Does her failure to disclose these facts also create a “circumstance” that raises a justifiable doubt as to her impartiality or independence? Article 9 of the UNCITRAL Arbitration Rules states an arbitrator’s obligations of disclosure to the parties. It provides: “A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.” Thus, Article 9 makes clear that Professor Kaufmann-Kohler, once appointed in the *AGW Case*, had a continuing obligation to disclose to the parties any circumstances that may subsequently arise, which would be likely to give rise to justifiable doubts as to her impartiality.

26. We interpret Article 9 to require disclosure of such facts that if disclosed might give rise to justifiable doubts as to impartiality and that an arbitrator has no obligation to

disclose facts which do not meet this test.<sup>10</sup> Having decided that Professor Kaufmann-Kohler's appointment as a director of UBS did not create a circumstance giving rise to justifiable doubts as to her impartiality or independence in the *AWG Case*, because of the lack of any business relationship between UBS or Professor Kaufmann-Kohler on the one hand and AWG Group Limited on the other, we also conclude that she had no obligation under Article 9 of the UNCITRAL Arbitration Rules to disclose the fact of her directorship in UBS to the parties in the *AWG Case*. In view of the foregoing, the remaining members of the Tribunal have concluded that the Respondent has not established the existence of circumstances in the *AWG Case* that give rise to justifiable doubts as to Professor Kaufmann-Kohler's impartiality and independence and that Respondent's proposal to disqualify her as an arbitrator in that case must be dismissed.

#### **IV. The Challenges in ICSID Cases No. ARB/03/17 and ARB/03/19**

27. With respect to the two ICSID cases, the applicable rules and standards governing the independence and impartiality of arbitrators are to be found in the ICSID Convention and Arbitration Rules. Article 57 of the ICSID Convention provides that a party may “propose ...the disqualification of any arbitrator on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.” (emphasis added). Article 14 of the ICSID Convention requires as a quality of an arbitrator that he or she be a person “who may be relied upon to exercise independent judgment.” Thus, the English version of the ICSID Convention makes no specific reference to the requirement of impartiality: however, the Spanish-language version of ICSID Convention Article 14(1) does embody the concept of impartiality, for it refers to a person who “...*inspira[r] plena confianza en su imparcialidad de juicio.* (i.e. who inspires full confidence in his impartiality of judgment.) Since the treaty by its terms makes both language versions equally authentic, in deciding on this challenge as in the previous challenge, we will

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<sup>10</sup> See also David D. Caron, Lee M Caplan, and Matti Pellonpaa, *The UNCITRAL Arbitration Rules: A Commentary* (2005), who state at page 202: “The circumstances which should be disclosed are those which are ‘likely’ to give rise to ‘justifiable doubts as to his impartiality or independence,’ and thus constitute the bases for challenge under Article 10(1) of the Rules. Article 9 thus implicitly recognizes that although there can be many relationships between the arbitrator and the parties, the duty to disclose does not require disclosure of *all* circumstances which might support a challenge under Article 10. Rather the duty extends only to those circumstances which more likely than not would support a challenge.”

apply the two standards of independence and impartiality of judgment in making our decisions. Such an approach accords with that found in many arbitration rules which require arbitrators to be both independent *and* impartial.<sup>11</sup>

28. The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp.<sup>12</sup> Generally speaking, independence relates to the lack of relations with a party that might influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties. For example, Webster's *Unabridged Dictionary* defines 'impartiality' as "freedom from favoritism, not biased in favor of one party more than another."<sup>13</sup> Thus it is theoretically possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial.

29. The Respondent has the burden of proof to establish the existence of the required fact or facts and to prove that such fact or facts indicate a "manifest lack" of the quality required of an arbitrator, that is, that such arbitrator lacks the quality of being a person who can be relied upon to exercise independent judgment and impartiality of judgment. The term "manifest" means "obvious" or evident. Christoph Schreuer, in his *Commentary on the ICSID Convention* observes that the word manifest imposes "... a relatively heavy burden on the party making the proposal ..." to disqualify an arbitrator.<sup>14</sup>

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<sup>11</sup> The Rules of the London Court of International Arbitration (LCIA) state that arbitrators "shall be and remain at all times impartial and independent of the parties." The International Arbitration Rules of the American Arbitration Association (AAA) state that "[a]rbitrators acting under these rules shall be impartial and independent." The UNCITRAL Arbitration Rules also emphasize the importance of both concepts, in relation to the appointing authority's obligations concerning selection of arbitrators, an arbitrator's duty of disclosure, and in relation to grounds for challenge.

<sup>12</sup> On this point, see Jean-Francois Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet and Maxwell, 2007 (translated by Berti & Ponti)), p. 348. See also, David D. Caron, Lee M Caplan, and Matti Pellonpaa, *The UNCITRAL Arbitration Rules: A Commentary* 215 (2005).

<sup>13</sup> Webster's Unabridged Dictionary (New World Dictionaries/Simon and Schuster, 2<sup>nd</sup> ed, 1979), p. 911.

<sup>14</sup> C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p.1200 (§16).

In our Decision on the Respondent's First Proposal to Disqualify Professor Kaufmann-Kohler, we stated at paragraph 40:

Implicit in Article 56 and its requirement for a challenger to allege a fact indicating a *manifest* lack of the qualities required of an arbitrator by Article 14 is the requirement that such lack be proven by objective evidence and that the mere belief by the challenger of the contested arbitrator's lack of independence or impartiality is not sufficient to disqualify the contested arbitrator. Previous ICSID decisions on challenges to arbitrators support our position. For example, the Challenge Decision in the *SGS v. Pakistan* case<sup>15</sup> [Footnote 22 in original] confirmed this view in the following terms:

[T]he 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."<sup>16</sup> [Footnote 23 in original]

Other ICSID cases support this interpretation of the burden of proof imposed upon a party who challenges an arbitrator. Two arbitrators in *Amco Asia Corp. v. Indonesia*<sup>17</sup> held that mere appearance of partiality was not a sufficient ground for disqualification of the arbitrator. The challenging party must prove not only facts indicating the lack of independence, but also that the lack is 'manifest' or 'highly probable', not just 'possible' or 'quasi-certain'.<sup>18</sup> The decision on the challenge to the President of the Annulment Committee in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) took a similar approach in stating that the

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<sup>15</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (Case No. ARB/01/13).

<sup>16</sup> *SGS Challenge Decision*, page 5.

<sup>17</sup> ICSID Case ARB/81/1, *Decision on the Proposal to Disqualify an Arbitrator* (June 24, 1982) (unreported). Referred to in M.W. Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration" 38 Int'l & Comp. L.Q. 44 (1989) p.44. The case is also referred to in C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p.1200 (§18).

<sup>18</sup> *Ibid.* p.45 (Decision at p.8).



challenging party shall rely on established facts and “not on any mere speculation or inference.”<sup>19</sup> Thus, in this Second Proposal to Disqualify Professor Kaufmann-Kohler, the Respondent to succeed must prove such facts that would lead an informed reasonable person to conclude that Professor Kaufmann-Kohler *clearly* or *obviously* lacks the quality of being able to exercise independent judgment and impartiality in the two above entitled ICSID cases. It is important to emphasize that the language of Article 57 places a heavy burden of proof on the Respondent to establish facts that make it obvious and highly probable, *not just possible*, that Professor Kaufmann-Kohler is a person who may not be relied upon to exercise independent and impartial judgment.

30. What, then, are the facts alleged by the Respondent that indicate a manifest lack on the part of Professor Kaufmann-Kohler of the qualities needed of an ICSID arbitrator? Basically there are two such facts: 1) that Professor Kaufman-Kohler is a director of UBS, which is a shareholder in two of the Claimants and also engages in certain activities relating to the water sector, a business area in which the Claimants are involved; and 2) that Professor Kaufmann-Kohler failed to disclose the fact of her UBS directorship to the Tribunal and the parties as she is required to do under ICSID rules. We shall examine the existence and implication of each of these facts in turn.

#### **A. The Effect of Professor Kaufmann-Kohler’s Directorship in UBS**

31. Professor Kaufmann-Kohler is a member of the board of directors of UBS, but that fact, in and of itself, would not raise concerns about her impartiality or independence as an arbitrator. The essence of the problem, according to Respondent’s Second Proposal, is the *connection* between Professor Kaufman-Kohler and the Claimants by reason of the fact that she is a UBS directors and that UBS is a shareholder in the Claimants Suez and Vivendi and engages in certain other activities in the water sector, including, as alleged at paragraph 33 of the Respondent’s Second Proposal, recommending the purchase of Claimant Vivendi’s shares to its clients. It is that

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<sup>19</sup> Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic (ICSID Case No. ARB/97/3), Decision on Challenge to the President of the Committee, para. 25.

connection, according to the Respondent, that raises doubts about her impartiality or independence.

32. But the fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator's impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions. It has been asserted by some scholars that there are only "six degrees of separation" between one person and any other person on earth. The theory of six degrees of separation holds that if a person is one step or "degree" away from each person he or she knows and two steps or two degrees away from each person known by one of the people he or she knows, then everyone is an average of six steps or six degrees away from each person on the globe. While the validity of this theory certainly remains to be proven, its application does demonstrate how easily one may make connections between one person and another through the process of identifying real or alleged links (It is interesting to note that Respondent, at paragraph 30 of its Second Proposal, seems to be using this same approach in creating a chain linking Professor Kaufmann-Kohler to Claimant Agbar by asserting that UBS recommended investment in Inversiones Aguas Metropolitanas, Chile, in which Agbar owns a 56.6% interest).

33. Such connections are increasingly easy to make as globalization of modern life rapidly advances and countless institutions engage in activities that are global in scope. At the same time, it is perfectly possible for a person to be unaware of the links that connect him or her to others or at least to be unaware of their full implications. For example, arbitrators in this case might unknowingly have a connection to UBS by virtue of the fact that their law firms have bank accounts with a UBS foreign branch, that their university pension fund is managed by UBS, or that they or their family members own shares in mutual funds which in turn hold UBS securities. In each of these situations, a resourceful party might challenge an arbitrator on the grounds that such arbitrator had a

connection to UBS and therefore to the Claimants Vivendi and Suez since in theory the financial fortunes of UBS would have some consequence on the financial standing of the arbitrator; however, none of these facts would reasonably lead to the conclusion that such arbitrator is unable to exercise independent and impartial judgment. Thus, the fact of an alleged connection between Professor Kaufmann-Kohler and two of the Claimants is not sufficient, in and of itself, to establish a fact that manifestly impairs her ability to act independently and impartially. That alleged connection must be evaluated *qualitatively* in order to decide whether it constitutes a fact indicating a manifest lack of the quality of independence of judgment and impartiality required of an ICSID arbitrator.

34. The ICSID Convention and Arbitration Rules do not provide guidance, let alone a rigorous methodology, for evaluating such connections. The Respondent has offered none but rather seems to suggest that the very existence of such connections suffices to disqualify an arbitrator. The five reported ICSID cases (in addition to our own decision on the Respondent's First Proposal) that have applied the relevant provisions of the Convention and Rules are limited in number and deal with situations dissimilar from the one we are facing. None of them deals with an arbitrator who is a director of a firm that is a portfolio investor in a party.

35. In seeking criteria for the evaluation of such alleged connection between a party and an arbitrator and its effect on that arbitrator's independence and impartiality, we identify four that we think are particularly important. They are as follows:

**Proximity:** How closely connected is the challenged arbitrator to one of the parties by reason of the alleged connection? The closer the connection between an arbitrator and a party, the more likely that the relationship may influence an arbitrator's independence of judgment and impartiality;

**Intensity:** How intense and frequent are the interactions between challenged arbitrator and one of the parties as a result of the alleged connection? The more frequent and intense the interaction by virtue of the relationship between an arbitrator and a party

the more probable that such relationship will affect the arbitrator's independence of judgment and impartiality;

**Dependence:** To what extent is the challenged arbitrator dependent on one of the parties for benefits as a result of the connection? The more an arbitrator is dependent on a relationship for benefits or advantages the more likely that the relationship may influence the arbitrator's independence of judgment and impartiality; and

**Materiality:** To what extent are any benefits accruing to the challenged arbitrator as a result of the alleged connection significant and therefore likely to influence in some way the arbitrator's judgment? Obviously significant benefits derived from a relationship will be more likely to influence an arbitrator's judgment and impartiality than negligible or insignificant benefits.

36. An application of these criteria in the present case requires first a clear understanding of the facts of the situation which allegedly impair the independence of judgment of Professor-Kaufmann-Kohler. UBS is indeed a shareholder in Claimants Vivendi and Suez. While the market value of such shareholdings may seem large in absolute terms, they are not significant in relative terms, bearing in mind that UBS manages hundred of billions of dollars in assets. At paragraph 53 of its Second Proposal, Respondent alleges that by virtue of its shareholdings UBS "... is an active part of Suez and Vivendi.." and that UBS is a "strategic investor." We do not agree. Despite the size of its holdings, UBS is a passive, portfolio investor in both companies. It does not have representation on the board of directors of either company and does not participate in any way in their management. While a part of such shares are held for UBS's own account, a large portion is managed on behalf of clients. Moreover, the precise amount of shares held by UBS is subject to change and depends on such factors as market conditions, client objectives and needs, and the existence of other investment opportunities, among others. As a portfolio investor, UBS and its clients profit from their holdings in the two claimants largely in two ways: through the receipt of dividends and by market changes in the share price. While the Respondent would argue that the market price of those shares and therefore the fortunes of UBS are crucially dependent on the results of this

arbitration, they have not offered convincing evidence to support that contention. Indeed, the Respondent, having had ample opportunity to present its arguments on this matter, offered no quantitative evidence at all as to the potential effect of an award in favor of the Claimants on the price of their shares or the nature of their dividend distributions. Indeed, given the size and scope of activities of both companies and the countless factors that may influence share prices on a stock market, it is more likely that this arbitration, whatever its outcome, will have a negligible effect on the share price of Vivendi and Suez and certainly on the financial fortunes of UBS. With respect to any alleged benefit flowing to UBS as a result of this arbitration, it should be pointed out that UBS's holding in Suez and Vivendi would have an insignificant effect on UBS profitability given the enormous size and scope of UBS global operations. Thus we do not find that the relationship between UBS and the Claimants is as strong and direct as the Respondent contends.

37. It is also necessary to understand the role of Professor Kaufmann-Kohler as a member of the board of directors of UBS. The Swiss Code of Obligations governs the organization and operation of Swiss corporations. §716 of the Code provides that the Board of Directors has authority to manage the business of the company insofar as it has not delegated it to the management. But UBS as a bank is also subject to the Swiss Banking Law. Article 3.2.a. of the Swiss Banking Law prescribes that where the scope or the importance of the business activities is significant, the bank must create separate bodies for the management of its activities on the one hand and for the direction, supervision and control of the corporation on the other. Moreover, the authorities of these bodies must be segregated in a manner so as to ensure the effective supervision of the bank's management. Swiss law therefore requires the establishment of two separate bodies.

38. In compliance with Swiss law, UBS established a corporate structure to institutionalize this prescribed separation of functions. The UBS Articles of Association provide for four "corporate bodies" to carry out the corporation's activities: A) the General Meeting of Shareholders; B) the Board of Directors; C) the Group Executive

Board; and D) Statutory and Group Auditors. According to Article 23 of UBS Articles of Association, “the Board of Directors has (A) ultimate responsibility for the management of the Corporation<sup>20</sup> and (B) the supervision and control of its executive management<sup>21</sup>,” whereas the responsibility for the management of the UBS is delegated to the Group Executive Board. According to Article 30 of the Articles of Association, the Group Executive Board is “the “supreme executive body” as defined by the Swiss Federal Law on Banks and Savings Banks.” It implements the Group strategy decided by the Board of Directors and ensures the execution of the decisions of the Board of Directors and the Chairman’s Office. Moreover, pursuant to the Implementing Ordinance on Banks and Savings Banks, no member of the board of directors may belong to the bank’s management. Furthermore, various stock exchange rules require directors to be independent of a corporation’s management. Because of these requirements concerning a director’s independence from management, it was important for UBS to confirm Professor Kaufman-Kohler’s independent status prior to her appointment as a director. It was as part of that process that she submitted her list of arbitrations to UBS for a determination of possible conflicts of independence.

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<sup>20</sup> Article 24 of the Articles of Association specifies that the ultimate responsibility for the management of the corporation comprises among other things:

“ ...

d) *Decisions on Group strategy* and other matters reserved to the Board of Directors under the Organization Regulations.

...

f) Decisions on increasing the share capital, to the extent this falls within the authority of the Board of Directors (Art. 651 paragraph 4 of the Swiss Code of Obligations), on the report concerning an increase in capital (Art. 652e of the Swiss Code of Obligations) and on the ascertainment of capital increases and the corresponding amendments to the Articles of Association.”

<sup>21</sup> According to Article 25 of the Articles of Association supervision and control of the business management comprises in particular the following:

a) Review of the annual report, consolidated and parent company financial statements as well as quarterly financial statements;

b) Acceptance of regular reports covering the course of business and the position of the Group, the status and development of country, counter-party and market risks and the extent to which equity and risk capital are tied up due to business operations;

c) Consideration of reports prepared by the Statutory and Group Auditors concerning the annual financial statements.

39. Thus pursuant to Swiss law and UBS Articles of Association, UBS has a Board of Directors consisting of independent directors – that is, persons who are not part of UBS corporate management, and a Group Executive Board consisting a full-time managers. The directors are not full-time employees of the corporations, are not in continuous session, and exercise largely a supervisory function over the activities of the corporation. As a result, Professor Kaufmann-Kohler is not involved in the day-to-day management of the corporation, such as selecting investments or preparing research reports, does not have responsibilities over the investment and management of corporate or client assets, and in fact was unaware until reading the Respondent’s Second Proposal for her disqualification that UBS owned shares in Vivendi or Suez. Professor Kaufmann-Kohler does not participate in the selection and monitoring of individual UBS investments, nor was she kept informed of individual UBS securities holdings. Respondent offered no evidence to the contrary with regard to Professor Kaufmann-Kohler’s specific duties and responsibilities as a member of the UBS board of directors.

40. With the above understanding of the facts, we now proceed to evaluate the alleged connection between Professor Kaufmann-Kohler and the Claimants by applying the four criteria suggested above: proximity, intensity, dependence, and materiality. First, with regard to proximity, the facts as discussed above indicate that any connection between Professor Kaufmann-Kohler and the Claimants Vivendi and Suez is remote and certainly not direct. Professor Kaufmann-Kohler has no direct relationship with the claimants by reason of her directorship. She was unaware of the shareholdings and did not participate in their selection and monitoring. Second, the alleged connection does not demonstrate or represent any frequency of interaction or contact between Professor Kaufmann-Kohler and the Claimants. Indeed, there is no interaction at all between Professor Kaufmann-Kohler and the Claimants by virtue of her UBS directorship. Third, Professor Kaufmann-Kohler derives no benefits or advantages from and is in no way dependent on the Claimants as a result of the alleged connection. Fourth, UBS shareholdings in Claimants Vivendi and Suez are not material to UBS financial performance, profitability, or share price and in no way affect the compensation that Professor Kaufmann-Kohler earns as a director of UBS. Professor Kaufmann-Kohler derives no economic benefit from the

alleged connection between her and the Claimants. We therefore conclude that the alleged connection asserted by Respondent between Professor Kaufmann-Kohler and the Claimants does not create a fact indicating a manifest lack of the quality of being a person of independent judgment and impartiality of judgment.

**B. The Effect of Professor Kaufman-Kohler’s Failure to Disclose the Fact of her UBS Directorship to the parties and the Tribunal**

41. The Respondent alleges that Professor Kaufmann-Kohler had a duty to disclose the fact of her UBS directorship to the Tribunal and the parties, and that her failure to do so is a fact indicating a manifest lack of being a person of independent judgment. The Claimants contend that she had no duty to inform the parties of her appointment as a director since this fact was “notorious” and in any case irrelevant to her independence and impartiality.

42. The version of ICSID Arbitration Rule 6 applicable to the above-indicated cases requires arbitrators at the time the tribunal is constituted to make a declaration concerning: “...any past and present professional, business, and other relationships (if any) with the parties and (b) any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party.” This provision contains no specific language requiring disclosure of facts, such as the election of Professor Kaufmann-Kohler to the UBS board in April 2006, that arise after the constitution of a tribunal.

43. Subsequent to the commencement of the proceedings in the above-entitled cases, ICSID Arbitration Rule 6 was amended to provide that arbitrators, once appointed, have “...a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during ...[a] proceeding..” While this amendment does not itself apply to this case, it does raise an interpretation question with respect to the prior version of the Rule. Specifically, are we to interpret old Rule 6 as implicitly containing an obligation of continuing disclosure and that the new version of Rule 6 has simply made that obligation explicit? Or, are we to interpret the old



version of Rule 6 as not including a continuing obligation of disclosure? We think that the correct approach is to hold that the old version contained implicitly a continuing obligation of disclosure and that Professor Kaufmann-Kohler and the other members of the Tribunal had a continuing obligation of disclosure in the above-entitled cases.<sup>22</sup> Commentators agree with this interpretation of the original Arbitration Rule 6.<sup>23</sup>

44. The ICSID Arbitration Rules also do not state the consequence of the arbitrator's failure to disclose a relevant fact affecting independence or impartiality of judgment. According to one source commenting on the UNCITRAL Rules, "a failure to disclose *may give rise* to justifiable doubts but does not, per se, establish such justifiable doubts."<sup>24</sup> According to another, also discussing the UNCITRAL Rules, failure to disclose *may nonetheless give rise to doubts* as to an arbitrator's impartiality,<sup>25</sup> however, whether nondisclosure raises such doubts depends on whether the failure to disclose was inadvertent or intentional, whether it was the result of an honest exercise of discretion, whether the facts that were not disclosed raised obvious questions about impartiality and independence, and whether the nondisclosure is an aberration on the part of the conscientious arbitrator or part of a pattern of circumstances raising doubts as to

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<sup>22</sup> See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*:

... Arbitration Rule 6 of the ICSID Arbitration Rules ... imposes the obligation to declare "past and present *professional, business and other relationships* (if any) with the parties". The *fundamental principle* is that arbitrators *shall be and remain* independent and impartial; in terms of Article 14 (1) of the Convention, they must be able to be "relied on to exercise independent judgment".

<sup>23</sup> See C.H. Schreuer, *The ICSID Convention: A Commentary* (2001), p.516, §23; "Arbitrators have an affirmative duty to inform themselves of any possible conflicting interests or relationships. This duty of disclosure is an ongoing duty for an arbitrator that continues throughout the proceedings." See also, I. Shihata, "The Experience of ICSID and the Selection of Arbitrators," *News from ICSID*, Vol.6/1 (1989) 5-6. "If the facts that could cast doubt on the arbitrator's independence and impartiality arise during the course of the proceeding, the arbitrator is to reveal them promptly."

<sup>24</sup> D. Caron, L. Caplan, M. Pellonpää, *The UNCITRAL Arbitration Rules: a Commentary* (2006) 226

<sup>25</sup> S. Baker, M Davis, *The UNCITRAL arbitration rules in practice: the experience of the Iran-United States Claims Tribunal* (1992) 50.

impartiality, and this balancing is for the deciding authority (in the present case, the remaining arbitrators) to perform in each particular case.<sup>26</sup>

45. Did Professor Kaufmann-Kohler have a duty to disclose to the parties and the Tribunal her election as director of UBS at the time she accepted that position? We do not accept the Claimants' contention that the fact of her directorship was "notorious," by which the Claimants mean that the Respondent knew or should have known of this fact. While the identity of directors of a publicly traded company, such as UBS, is a matter of public record, the knowledge of the fact that Professor Kaufmann-Kohler was a UBS director is not so public and wide-spread that one can reasonably assume that the Respondent actually knew or should have known of that fact.

46. A reasonable interpretation of ICSID Arbitration Rule 6 is that an arbitrator is required to disclose a fact only if he or she reasonably believes that such fact would reasonably cause his or her reliability for independent judgment to be questioned by a reasonable person. The ground of the Respondent's challenge is not Professor Kaufmann-Kohler's directorship, but the fact that UBS is a shareholder in Suez and in Vivendi. If UBS did not have shareholdings in the Claimants, Professor Kaufmann-Kohler would not have been required to disclose her appointment as director since the mere fact of her directorship in UBS would be irrelevant as to her independence. It is the fact that UBS holds shares in the Claimants that causes the Respondent to challenge her. But Professor Kaufmann-Kohler states that she did not know that UBS held shares in the Claimants. Can she be required to disclose a fact that she does not know? The answer to that question is plainly "no." But one may ask a further question: Even though Professor Kaufmann-Kohler may not have actually known of UBS shareholdings, *should* she have known about them? Or at least did she have an obligation to inquire as to whether UBS had shareholdings in or relationships with the Claimants at the time she became a director? Did she make sufficient efforts to determine the existence of possible compromising relationships between UBS on the one hand and Suez and Vivendi on the other?

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<sup>26</sup> Ibid.

47. On this question, the ICSID Arbitration Rules offer little guidance. They require only the making of a declaration. They contain no specific requirement that an arbitrator is to make an investigation of possible compromising circumstances and they prescribe no standards as to the extent and nature of such investigation. However, if an arbitrator has no reasons to conjecture that a possible compromising situation exists, it would not be reasonable to impose on him or her the duty to disclose. Moreover, in this case, Professor Kaufmann Kohler informed UBS, as part of the process of determining her status as a potentially independent director, of the arbitrations in which she was engaged to determine whether any of such arbitrations conflicted with her future responsibilities as a UBS director. After reviewing this information, UBS informed her that only her position as an arbitrator for the America Cup races presented a problem. As a result, she resigned her position as an America Cup arbitrator. That resignation was reasonable as was her abstention from any other action related to potential incompatibilities of which she was not aware.

48. We believe that she had reason to rely on the UBS examination of this question since UBS, under Swiss banking law and the corporate and stock exchange rules to which it is subject, had a strong incentive to ascertain her independence because the company would have encountered legal and regulatory difficulties should it represent her as an independent director and later find that a court, regulatory agency, or stock exchange had determined her to be non-independent director of the UBS board of directors. It was therefore reasonable to rely on the investigation by UBS that no conflict existed between Professor Kaufmann-Kohler and the parties in any of her arbitrations (with the exception of the America Cup) as a result of becoming a UBS director. Consequently, we do not believe that she had a duty to inquire further. Moreover, even if it were established that she did have such an obligation (which we do not believe is the case), her failure to do was in our opinion the result of an honest exercise of judgment and was not part of a pattern of circumstances raising doubts about impartiality. We therefore conclude that Professor-Kaufmann-Kohler did not violate ICSID Arbitration Rule 6 with respect of her obligations of disclosure to the parties in these cases.

## **V. Conclusion**

1. We conclude that the Respondent's Second Proposal by Argentina to disqualify Professor Gabrielle Kaufmann-Kohler must be dismissed because it failed to prove any fact indicating a manifest lack of independence or impartiality.
2. As from today, we terminate the state of suspension of the proceedings in the above entitled cases.

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Professor Jeswald W. Salacuse, President

[Signature]

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Professor Pedro Nikken, Arbitrator