

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 InterAguas Servicios Integrales del Agua S.A.

(Claimants)

and

The Argentine Republic  
(Respondent)

ICSID Case No. ARB/03/17

and

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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

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

AWG Group (Claimant)

and

The Argentine Republic (Respondent)

**Date: October 22, 2007**

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

### **I. Background**

1. On April 17, 2003, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received a Request for Arbitration (“the Request” or “the first Request”) against the Argentine Republic (“the Respondent” or “Argentina”) from Aguas Argentinas S.A. (“AASA”), Suez, Sociedad General de Aguas de Barcelona S.A. (“AGBAR”), Vivendi Universal S.A. (“Vivendi”) and AWG Group Ltd (“AWG”), (together, “the Claimants”). AASA was a company incorporated in Argentina. Suez, and Vivendi, both incorporated in France, AGBAR, incorporated in Spain, and AWG, incorporated in the United Kingdom, were shareholders in AASA. The Request concerned the Claimants’ investments in a concession for water distribution and waste water treatment services in the city of Buenos Aires and some surrounding municipalities and a series of alleged acts and omissions by Argentina, including Argentina’s alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.<sup>1</sup>

2. Also on April 17, 2003, the Centre received a second Request for Arbitration (“the Request” or “the second Request”) against the Argentine Republic from Aguas Provinciales de Santa Fe S.A. (“APSF”), Suez, Sociedad General de Aguas de Barcelona S.A. (“AGBAR”) and InterAguas Servicios Integrales del Agua S.A. (“InterAguas” together, “the Claimants”). APSF was a company incorporated in Argentina. Suez, incorporated in France, and AGBAR and InterAguas, both incorporated in Spain, were major shareholders in APSF. This second Request concerned the Claimants’ investments in a concession for water distribution and waste water treatment in the Argentine Province of Santa Fe and a series of alleged acts and omissions by Argentina, including

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<sup>1</sup> On the same date, the Centre received a further request for arbitration under the ICSID Convention regarding water concessions in Argentina from Aguas Cordobesas S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. As explained below, this request would later be registered by the Centre and submitted by agreement of the parties to one same Tribunal, but that proceeding would eventually be discontinued following an agreement between the parties.

Argentina's alleged failure or refusal to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms.

3. In the first Request, Claimants Suez and Vivendi, invoked Argentina's consent to dispute settlement through ICSID arbitration provided in the 1991 Bilateral Investment Treaty between France and the Argentine Republic (the "Argentina–France BIT")<sup>2</sup> and AGBAR relied on Argentina's consent in the 1991 Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain (the "Argentina-Spain BIT")<sup>3</sup>. Claimant AWG invoked Argentina's consent to arbitrate investment disputes under the 1990 Bilateral Investment Treaty between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland (the "Argentina-UK BIT")<sup>4</sup>, which provides in Article 8(3) that in the event an investment dispute is subject to international arbitration Argentina and the investor concerned may agree to refer their dispute either to ICSID arbitration or to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") and that failing such agreement after a period of three months the parties are bound to submit their dispute to UNCITRAL Rules arbitration. Although the required three months had elapsed without agreement, AWG in its Request for Arbitration invited Argentina to agree to extend ICSID arbitration to AGW's claims under the Argentina-UK BIT.

4. In the second Request, the Claimants invoked Argentina's consent to dispute settlement through ICSID arbitration provided in the 1991 Bilateral Investment Treaty

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<sup>2</sup> Accord entre le Gouvernement de la République Française et le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements (Agreement between the Government of the Republic of France and the Government of the Republic of Argentina for the Promotion and Reciprocal Protection of Investments), signed on 3 July 1991 and in force since 3 March 1993; 1728 UNTS 298.

<sup>3</sup> Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina (Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic), signed in Buenos Aires on 3 October 1991 and in force since 28 September 1992; 1699 UNTS 202.

<sup>4</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, signed 11 December 1990, and in force since 19 February 1993; Treaty Series No. 41 (1993).

between France and the Argentine Republic (the “Argentina–France BIT”)<sup>5</sup> and in the 1991 Bilateral Investment Treaty between the Argentine Republic and the Kingdom of Spain (the “Argentina-Spain BIT”).<sup>6</sup>

5. On April 17, 2003, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt and transmitted a copy of both Requests to the Argentine Republic and to the Argentine Embassy in Washington D.C.

6. On July 17, 2003, the Acting Secretary-General of the Centre registered both Requests, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention” or “the Convention”). The case relating to the first Request was registered as ICSID Case No. ARB/03/19 with the formal heading of Aguas Argentinas, Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic. On that same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal. Argentina did not agree to extend ICSID jurisdiction to the claims of AWG but it did agree to allow the case, although subject to UNCITRAL rules, to be administered by ICSID. Also on July 17, 2003, the Acting Secretary-General of the Centre registered the second Request, pursuant to Article 36(3) of the Convention. This case was registered as ICSID Case No. ARB/03/17 with the formal heading of Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A. v. Argentine Republic.

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<sup>5</sup> Accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l’encouragement et la protection réciproques des investissements (Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments), signed on 3 July 1991 and in force since 3 March 1993; 1728 UNTS 298.

<sup>6</sup> Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina (Agreement on the Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Argentine Republic), signed in Buenos Aires on 3 October 1991 and in force since 28 September 1992; 1699 UNTS 202.

7. The parties could not reach an agreement on the number of arbitrators to comprise the arbitral tribunals in these cases nor on the method for their appointment. Accordingly, on September 22, 2003, the Claimants requested the relevant Tribunals to be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention; *i.e.* one arbitrator appointed by each party, and the third arbitrator, who would serve as president of the tribunal, to be appointed by agreement of the parties. The Claimants appointed Professor Gabrielle Kaufmann-Kohler, a Swiss national, as arbitrator. The Argentine Republic in turn appointed as arbitrator Professor Pedro Nikken, a national of Venezuela.

8. In the absence of an agreement between the parties on the name of the presiding arbitrator, on October 21, 2003 the Claimants, invoking Article 38 of 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 would hear all three cases indicated above, in addition to a fourth case<sup>7</sup> against Argentina involving the privatization of the water system in the Province of Cordoba, which was subsequently discontinued following an agreement between the parties.

9. 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 reliability for exercising independent judgment.

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<sup>7</sup> ICSID Case No. ARB/03/18.

10. 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 governed by the UNCITRAL Rules, AWG and Argentina also agreed that the Tribunal had been properly constituted.

11. 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 important decisions concerning their timetables and procedures on submission of documents, the jurisdiction of the tribunal<sup>8</sup>, requests by a group of non-governmental organization to participate as *amicus curiae*<sup>9</sup>, the withdrawal of certain parties, and various other matters concerning 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 subject to UNCITRAL Rules, with 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.

## **II. The Proposal for the Disqualification of Professor Gabrielle Kaufmann-Kohler**

12. On October 12, 2007, the Respondent filed with the Secretary of the Tribunal a Proposal (hereinafter “Respondent’s Proposal”) under Article 57 of the Convention and Rule 9 of the ICSID Arbitration Rules to disqualify Professor Gabrielle Kauffman-Kohler

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<sup>8</sup> Decision on Jurisdiction, May 16, 2006.

<sup>9</sup> Order in response to a Petition for Participation as *Amicus Curiae*, March 17, 2006.

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>10</sup>, hereinafter referred to as the *Aguas del Aconquija* case, which had rendered an award against Argentina on August 20, 2007.

13. The *Aguas del Aconquija* case, which concerned a conflict between the parties arising out of the privatization of the water and sewage system in the Argentine province of Tucumán in 1995, had a protracted history beginning with an ICSID arbitration initiated in 1996 which resulted in a an award in 2000, which was subsequently subject to a decision on annulment in 2002<sup>11</sup> which in turn led to the constitution of a new tribunal in April 2004, of which Professor Kaufmann-Kohler, having been appointed by the claimants in the case, was a member. It was this tribunal that would render an award of \$105,000,000, plus interests and costs, in favor of the claimants and against Argentina on August 20, 2007, and which has caused Argentina to seek to disqualify Professor Kaufmann-Kohler as an arbitrator in the three cases being considered by the present Tribunal. Argentina’s Proposal, which will be discussed at length later in this decision, argues that the award in the *Aguas del Aconquija* case is so flawed, particularly in its findings of fact and its appraisal of the evidence, that Professor Kaufmann-Kohler’s very participation in that decision “... reveals a prima facie lack of impartiality of the above mentioned arbitrator, made evident through the most prominent inconsistencies of the award that result in the total lack of reliability towards Ms Gabrielle Kaufmann-Kohler.” (Respondent Proposal para. 8).

14. Once the Tribunal became aware of the Respondent’s Proposal, Professor Kaufmann-Kohler immediately withdrew from Tribunal deliberations, and the two

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<sup>10</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3.

<sup>11</sup> Decision on Annulment, July 3, 2002 (English) (Spanish).

remaining members suspended proceedings in three above-entitled cases pursuant to Rule 9 of the ICSID Arbitration Rules 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 wished to make, in accordance with ICSID Arbitration Rule 9(3).

15. By letter of October 16, 2007, Professor Kaufmann-Kohler responded in part as follows:

"I do not wish to comment on the merits of the proposal, but to state that I have always considered it my duty as an arbitrator to be impartial and exercise independent judgment and that I intend to comply with such duty in these arbitrations as in all others in which I serve."

The Tribunal also forwarded Professor Kaufmann-Kohler's explanation to the parties for any comment they wished to make.

16. On October 17, 2007, the Claimants submitted a letter in which they requested that Argentina's challenge be dismissed and that the scheduled dates for the hearings on the merits be maintained. On October 17, 2007, Argentina submitted a new letter reaffirming its Proposal in the light of Professor Kaufmann-Kohler's statement.

17. 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 other Tribunal members have considered the various documents submitted in this case, as well as the relevant legal authorities, and have arrived at the following decision.

### III. Timeliness of the Respondent's Proposal

18. An orderly and fair arbitration proceeding while permitting challenges to arbitrators on specified grounds also normally requires that such challenges be made in a timely fashion. As Prof. Albert Jan van den Berg has stated in his Report on Challenge Procedure, cited by Argentina in its proposal (footnote 39), handling challenges involves a balancing of interests the first of which is that "... the arbitration should take place with due dispatch and the possibility of delaying tactics should be reduced to a minimum."<sup>12</sup> Recognizing that such challenges may be abused, arbitration rules normally provide that challenges that are not timely should not be considered. In the three cases for which this Tribunal is responsible, two different sets of rules are applicable: the ICSID Convention and Rules in Case Nos. ARB/03/17 and ARB/03/19 and the UNCITRAL Rules in *Anglian Water Limited (AWG) v. The Argentine Republic*. We consider first the application of the UNCITRAL rules to the last-mentioned case.

19. Article 11 of the UNCITRAL Rules governs challenges to arbitrators. Paragraph 1 of that article provides:

A party who intends to challenge an arbitrator shall send notice of his challenge with 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 the party.

20. The circumstances referred to in articles 9 and 10 are "... any circumstances likely to give rise to justifiable doubts as to his [*i.e.* the challenged arbitrator's] impartiality or independence."

21. According to Argentina's Proposal, the circumstance that gave rise to such doubts was the issuance of the award in the *Aguas del Aconquija* case on August 20, 2007. It is undisputed that Argentina had knowledge of that award on that date. Therefore, under

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<sup>12</sup> Reprinted in T. Varady *et al.*, *International Commercial Arbitration: A Transnational Perspective* (2<sup>nd</sup> ed, 2003) p. 381.

UNCITRAL Rules, the very latest that Argentina might have lodged a challenge against Professor Kaufmann-Kohler based on knowledge of that circumstance was September 4, 2007. Since the Tribunal did not receive Argentina's Proposal to challenge Professor Kaufmann-Kohler until October 12, 2007, some fifty-two days after Argentina had knowledge of the decision in the *Aguas del Aconquija* case and some thirty-eight days after the deadline specified by article 11(1) of the UNCITRAL Rules, its Proposal may not be considered under the UNCITRAL Rules and we therefore dismiss its challenge in the *Anglian Water Group (AWG) v. Argentina* case as being untimely.

22. With respect to the two ICSID cases to be decided by the Tribunal, neither the ICSID Convention nor the ICSID Rules specify a definite, quantifiable deadline beyond which a challenge is not to be considered. However, ICSID Rules are not without limits with respect to time. Article 9(1) of the ICSID Rules provides that:

A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General stating its reasons therefore. (emphasis supplied)

The Spanish language version of Rule 9 requires the challenging party to file its proposal "*sin demora*," *i.e.* without delay. In the same vein, according to the French version of Rule 9, the proposal should be filed "*dans les plus brefs délais*." The application of Rule 9(1) raises the question of whether Argentina filed its proposal "promptly" or "without delay."

23. The word "promptly" is defined by the Oxford English Dictionary as "readily, quickly, directly at once, without a moment's delay."<sup>13</sup> Webster's Unabridged Dictionary (2nd ed) in similar vein defines the term as "readily, quickly, expeditiously."<sup>14</sup> In his

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<sup>13</sup> Oxford English Dictionary (Oxford: Clarendon Press; New York: Oxford University Press, 1989) p. 620.

<sup>14</sup> Webster's Unabridged Dictionary (New World Dictionaries/Simon and Schuster, 2<sup>nd</sup> ed, 1979) p. 1441.

authoritative work on the ICSID Convention, Prof. Christoph Schreuer specifically addresses the question of the meaning of “promptly” with respect to challenges to disqualify an arbitrator. He states:

Promptly means that the proposal to disqualify must be made as soon as the party concerned learns of the grounds for a possible disqualification.<sup>15</sup>

Under the ICSID Rules, the sanction for the failure to object promptly is waiver of the right to make an objection. Thus, Schreuer also writes:

Under Arbitration Rule 27, a party that fails to object promptly to a violation of a relevant rule is deemed to have waived its rights to object.<sup>16</sup>

24. Did Argentina act promptly in making its proposal to disqualify Professor Kaufman-Kohler as an arbitrator in the two cases governed by ICSID Rules? In paragraph 3 of its Proposal, Argentina defends the timing of its submission in the following terms:

“In spite of its submission being timely, the Republic of Argentina asserts that it attempted to make this proposal more time in advance. But one thing is the simple understanding of the arbitrariness committed in the award that concludes proceeding by some one who participates therein, and a very different one is to prepare a written submission for that understanding to be reached with certainty by someone who has not known the case.”

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<sup>15</sup> C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p.1198 (§10).

<sup>16</sup> *Ibid.* §10.

Article 27 of the ICSID Arbitration Rules provides:

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

25. In its letter of October 17 2007, Argentina added, as justification for its delay in filing the Proposal, that it needed some time for the analysis of the *Aguas del Aconquija* award and that:

“...the Argentine Republic had to file the request for challenge while, at the same time, preparing for the hearing of this case, which entailed a major effort.”

26. We can appreciate that an analysis of the award in the *Aguas del Aconquija* case, a decision of 265 pages, as well as a review of the transcript and other documents, is a task that might require more than a day or two. On the other hand, Argentina’s delay of fifty-three days in submitting its Proposal, a document of just 23 pages, does not constitute acting promptly given the nature of the case and the fact that hearings on the merits were scheduled to take place within two weeks of the submission. The Respondent’s proposal does not develop elaborate legal arguments that would have necessitated extensive legal research and the selection of various errors from the hearing transcript is also not a task that would reasonably require nearly two months to be achieved. Moreover, to facilitate the efficient functioning of the arbitration, Argentina might have notified the Tribunal much earlier than it did of its intention to challenge one of the arbitrators, setting out its basic case on that issue, with supporting documents to follow at a later time. Taking all of these factors into consideration, we conclude that Argentina did not file its Proposal to disqualify Professor Kaufmann-Kohler “promptly” within the meaning of Article 9(1) of the ICSID rules and that therefore it has waived such objection under Article 27.

#### **IV. A Consideration of the Substance of the Respondent’s Proposal of Disqualification**

27. Article 56 of the ICSID Convention governs the process of challenging arbitrators. It provides that a party may propose the disqualification of a member of the

Tribunal on account of any fact indicating a *manifest* lack of the qualities required by paragraph (1) of Article 14. (Emphasis added). Article 14 (1) states the qualities that an ICSID arbitrator must meet. It provides:

Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment.* (Emphasis added)

28. Thus, for purposes of deciding on Argentina's Proposal, it is essential to determine whether Professor Kaufmann-Kohler manifestly lacks the quality of being a person who may be relied upon to exercise independent judgment, as Argentina seems to allege. Although Argentina did not point to this fact, the Spanish language version of the Convention Article 14(1) appears to be slightly different from that of the English language version. The Spanish version of Article 14(1) refers to a person who "...inspira[r] plena confianza en su imparcialidad de juicio. (*i.e.* who inspires full confidence in his impartiality of judgement.) Since the treaty by its terms makes both language versions equally authentic, we will apply the two standards of independence and impartiality 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>17</sup>

29. 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>18</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

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<sup>17</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>18</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.

of a bias or predisposition toward one of the parties. Thus Webster's Unabridged Dictionary defines 'impartiality' as "freedom from favoritism, not biased in favor of one party more than another."<sup>19</sup> Thus it is possible in certain situations for a judge or arbitrator to be independent of the parties but not impartial.

30. Independence and impartiality are states of mind. Neither the Respondent, the two members of this tribunal, or any another body is capable of probing the inner workings of any arbitrator's mind to determine with perfect accuracy whether that person is independent or impartial. Such state of mind can only be inferred from conduct either by the arbitrator in question or persons connected to him or her. It is for that reason that Article 57 requires a showing by a challenging party of any fact indicating a manifest lack of impartiality or independence.

31. What is the fact that Respondent alleges that manifestly demonstrates Professor Kaufmann-Kohler's lack of independence and impartiality? The only fact alleged in support of that conclusion is that Professor Kaufmann-Kohler participated in and signed the award in the *Aguas del Aconquija* case, which was rendered on August 20, 2007. In that respect, Argentina's challenge to an arbitrator in this case is unlike such challenges in other many other cases.

32. Many, if not most, prior ICSID cases concerning challenges to arbitrators are based on some alleged professional or business relation between the challenged arbitrator or one of his or her associates and a party in the case.<sup>20</sup> That situation does not exist in the present case. The Respondent does not allege and certainly does not offer any evidence that Professor Kaufmann-Kohler, her legal and professional associates, or anyone connected to her have or had any kind of a relationship at all with any of the parties in the case, let alone a relationship that might taint her independence as an arbitrator. As recognized by the other members of this Tribunal, as well as her

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<sup>19</sup> Webster's Unabridged Dictionary (New World Dictionaries/Simon and Schuster, 2<sup>nd</sup> ed, 1979), p. 911.

<sup>20</sup> See for example Decision on the Challenge to the President of the Committee, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), available online at <http://www.worldbank.org/icsid/cases/9deci-e.pdf>

professional associates, Professor Kaufman-Kohler is known as a distinguished university academic, lawyer, and arbitrator of the highest professional standing, and the Respondent offers no evidence or facts to challenge her reputation and standing, except for the fact that she was a member of the tribunal that unanimously rendered an award in the *Aguas del Aconquija* case.

33. Moreover, it should also be noted that the Tribunal in the present case was constituted on February 17, 2004 and has functioned without objection from any of the parties for nearly four years in what was originally four and ultimately became three complicated cases. During that time, the Tribunal has held three hearings with the parties, made decisions on numerous requests and petitions, and has had countless interactions together and with the parties in order to carry out its functions according to the treaties and rules that govern its operations. Argentina offers no evidence whatsoever with respect to Professor Kaufman-Kohler's comportment during that period of time of any act or fact that would bring into question her independence or impartiality. Indeed, there can be none. On that score, the undersigned member of the Tribunal affirm in the strongest possible way based on their own knowledge and observation throughout that time that since the constitution of the Tribunal on February 17, 2004 Professor Gabrielle Kaufmann-Kohler has conducted herself in accordance with the highest professional standards and with absolutely strict and uncompromising independence and impartiality.

34. Thus the only fact from which Argentina seeks to draw an inference of lack of impartiality and independence is that Professor Kaufmann-Kohler participated in and signed the award against Argentina in the *Aguas del Aconquija*. We turn now to consider the implications of that fact. At the outset, it must be recalled that Article 57 of the ICSID Convention requires a "manifest lack of the qualities required" of an arbitrator. The term "manifest" means "obvious" or "evident." Christoph Schreuer, in his *Commentary*, observes that the wording *manifest* imposes a "relatively heavy burden of proof on the party making the proposal..." to disqualify an arbitrator.<sup>21</sup> Thus, in order to

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<sup>21</sup> C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p.1200 (§16).

conclude that Professor Kaufmann-Kohler lacks independence or impartiality, we would have to find that participation in the award was in and of itself obvious evidence of such a state of mind. We have reviewed the award in the *Aguas del Aconquija* case but can find no evidence from its text of a lack of impartiality or independence by Professor Kaufmann-Kohler. The award was a unanimous decision rendered by three distinguished arbitrators, including one appointed by Argentina. In its Proposal, Argentina contests many of the findings of fact by that tribunal and it argues that because the tribunal's interpretations of the facts and evaluation of the evidence is, in the Argentinean view, so wrong, the tribunal, or at least Professor Kaufmann-Kohler, could not have acted independently and impartially in arriving at such a decision.

35. With respect to the basis of Argentina's argument, it must be pointed out that a difference of opinion over an interpretation of a set of facts is not in and of itself evidence of lack of independence or impartiality. It is certainly common throughout the world for judges and arbitrators in carrying out their functions honestly to make determinations of fact or law with which one of the parties may disagree. The existence of such disagreement itself is by no means manifest evidence that such judge or arbitrator lacked independence or impartiality. Even if an appellate body should ultimately reverse such determination, that reversal in and of itself would by no means be evidence of a failure of impartiality or independence. A judge or arbitrator may be wrong on a point of law or wrong on a finding of fact but still be independent and impartial. We are in no way suggesting that we accept or dismiss any of Argentina's various challenges to the facts determined by the tribunal in the *Aguas del Aconquija* case. We are not equipped to make such a determination. We have not reviewed the thousands of pages of documents in that case, and we have not listened to the testimony of witnesses over eleven days as did the tribunal in the case. Determinations of facts in an arbitral or judicial proceeding are crucially dependent on an evaluation of the credibility of witnesses. The only persons capable of making that determination in the *Aguas del Aconquija* case were the three arbitrators who participated in the hearings and actually listened to the witnesses. While we, as two members of the Tribunal, have jurisdiction to judge the independence and

impartiality of Professor Kaufmann-Kohler, we have no jurisdiction to review the substance of the *Aguas del Aconquija* award.

36. Even though Professor Kaufman-Kohler is independent of the parties, is it still possible to conclude that she is not impartial toward the parties, and specifically Argentina, because of her participation in the *Aguas del Aconquija* award? In more general terms, does the fact that an arbitrator or a judge has made a decision that a party in one case interprets as against its interests mean that such judge or arbitrator cannot be impartial to that party in another case? Further, does the fact that a judge or arbitrator had made a determination of law or a finding of fact in one case mean that such judge cannot decide the law and the facts impartially in another case? We believe that the answer to all three questions is no. A finding of an arbitrator's or a judge's lack of impartiality requires far stronger evidence than that such arbitrator participated in a unanimous decision with two other arbitrators in a case in which a party in that case is currently a party in a case now being heard by that arbitrator or judge. To hold otherwise would have serious negative consequences for any adjudicatory system.

37. It is also important to underscore that although the *Aguas del Aconquija* case and the cases being heard by the present Tribunal all involve Argentina as a respondent and arose out of the privatization of water and sewage systems in that country, the two situations are distinctly different. For one thing, the cases being heard by the present Tribunal are linked to the measures and actions taken by the Argentine government to deal with the serious crisis that struck the country in 2001. Those measures and actions were not in any way involved in the *Aguas del Aconquija* case, which arose out of events some five years earlier. Secondly, the present Tribunal will be required to apply Argentina's bilateral investment treaties with Spain and the United Kingdom, neither of which was applicable in the *Aguas del Aconquija*. And finally, the application of general international legal principles, as well as the determination of damages (if any), are highly fact-specific, and the facts in the cases being heard by the present Tribunal are far different from those found in the *Aguas del Aconquija* case.

38. After analyzing Argentina's various contentions in its Proposal, we find only Argentina's belief, unsubstantiated by objective evidence, that the award in the *Aguas del Aconquija* case, because of alleged improper findings of fact, is sufficient to demonstrate Professor Kaufmann-Kohler's lack of independence and impartiality. Paragraph 47 of Argentina's Proposal states: "Based on all the considerations hereinabove stated, the Republic of Argentina asserts that it is manifest that Mrs. Kaufmann-Kohler may not be relied upon to exercise independent judgment with respect to the Claimants' claim."

39. Although Argentina does not ask the question specifically in its Proposal, the above-quoted statement raises the question of whether, in applying the standards of Article 14 of the Convention to challenges, one is to use a subjective standard based on the belief of the complaining party or an objective standard based on a reasonable evaluation of the evidence by a third party. In other words, when the English version of article 14 calls for a person "...who may be relied upon to exercise independent judgment" and the Spanish versions requires one "...who inspires full confidence in his impartiality of judgment" are we to look only to the challenger's belief or lack thereof in the presence of that quality or are we to require a showing of evidence that a reasonable person would accept as establishing the absence of the qualities required by Article 14? We have concluded that an objective standard is required by the Convention.

40. Implicit in Article 57 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 challenge of the contest 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>22</sup> confirmed this view in the following terms:

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<sup>22</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13). Decision on Claimant's Proposal to Disqualify Arbitrator of December 19, 2002, 8 *ICSID Rep.* 398 (2005)

[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>23</sup>

41. Two arbitrators in *Amco Asia Corp. v. Indonesia*<sup>24</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>25</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 that the challenging party shall rely on established facts and “not on any mere speculation or inference.”<sup>26</sup>

Indeed, the application of a subjective, self-judging standard instead of an objective would enable any party in arbitration who becomes discontented with the process for any reason to end it at any time at its sole discretion simply by claiming that an arbitrator is not independent or impartial, a result that would undermine and indeed destroy the system of investor-State arbitration that was so carefully established by the states that have agreed to the Convention.

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<sup>23</sup> SGS Challenge Decision, page 5.

<sup>24</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>25</sup> Ibid. p.45 (Decision at p.8).

<sup>26</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.

42. After carefully examining the various allegations contained in Argentina's Proposal, we find no evidence whatsoever that indicates in any way that Professor Gabrielle Kaufmann-Kohler is not independent and impartial in the above-entitled cases. We therefore hold that the Proposal by Argentina to disqualify her is without foundation.

#### **IV. Conclusion**

43. We conclude that the Proposal by Argentina to disqualify Professor Gabrielle Kaufmann-Kohler must be dismissed because it was not filed in a timely manner and because it failed to prove any fact indicating a manifest of lack of independence or impartiality. In making this decision, we have been mindful both of the sincerity with which Argentina has advanced and argued its Proposal and the duty imposed on us by the ICSID Convention and Rules to decide this matter fairly and promptly in accordance with the prevailing law.

44. As from today, we terminate the state of suspension of the proceedings in the above entitled cases and affirm 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.

[Signature]

Professor Jeswald W. Salacuse  
President

[Signature]

Professor Pedro Nikken  
Arbitrator