INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

In the arbitration under the Rules of the United Nations Commission on International Trade Law between
AWG Group Limited (Claimant)
The Argentine Republic (Respondent)
Date of decision: May 12, 2008
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.8 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 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?9 Moreover, the party challenging the arbitrator has the burden of proving that such justifiable doubt exists.

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

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A. The Effect of Professor Kaufmann-Kohler's Directorship in UBS

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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 judgement 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.

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8 See David D. Caron, Lee M Caplan, and Matti Pellonpaa, The UNCITRAL Arbitration Rules: À 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."


Referring Principles:

- XIII.2.3 - Grounds for challenge of an arbitrator