

**International Centre for Settlement of Investment Disputes
Washington, D.C.**

**EDF International S.A.
SAUR International S.A.
León Participaciones Argentinas S.A.**
(Claimants)

v.

Argentine Republic
(Respondent)

ICSID Case No. ARB/03/23

Challenge Decision

Regarding Professor Gabrielle Kaufmann-Kohler

**Professor William W. Park, President
Professor Jesús Remón, Arbitrator**

Secretary of the Tribunal
Ms. Claudia Frutos-Peterson

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Date: 25 June 2008

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I. Introduction

1. On 29 November 2007, Respondent filed with the ICSID Secretariat a challenge to Professor Gabrielle Kaufman-Kohler, citing both Article 57 of the ICSID Convention and Rule 9 of the ICSID Arbitration Rules. The Argentine Republic also made reference to Rules 10, 11 and 12, which address other procedural matters arising during and after a tribunal vacancy.
2. Article 57 of the ICSID Convention provides that a party may propose disqualification of a tribunal member on account of “any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14”.
3. Article 14 requires *inter alia* that persons designated to serve may be relied upon to “exercise independent judgment.”
4. Rule 9 of the ICSID Arbitration Rules provides in pertinent part that the arbitrator to whom a disqualification proposal relates may “furnish explanations” and that the other members of the tribunal shall promptly consider and vote on the proposal in the absence of the arbitrator concerned.
5. On 4 December 2007, the President of the Tribunal invited Professor Gabrielle Kaufmann-Kohler and counsel for the Claimants to submit any observations on the matter by 21 December 2007, and granted both sides an opportunity to comment on Professor Gabrielle Kaufmann-Kohler’s observations by 16 January 2008.
6. Professor Kaufmann-Kohler presented her comments in a letter dated 21 December 2007 addressed to Mr. Gonzalo Flores. Arnold & Porter, counsel for Claimants, set forth its position in a letter of even date addressed to Ms. Claudia Frutos-Peterson. On 16 January 2008 Claimants and Respondent filed with ICSID

their respective observations on the comments made by Professor Kaufmann-Kohler. On 11 February 2008 Claimants filed observations on Respondent's comments dated 16 January 2008. On 29 February 2008 Respondent replied to Claimants' letter, attaching an expert report of Professor Charles W. Wolfram of Cornell Law School.

7. Pursuant to ICSID Arbitration Rule 9(4), the remaining members of the Tribunal, Professor Park and Professor Remón, have carefully considered Respondent's contentions, as well as the comments by Professor Kaufmann-Kohler and the position of Claimants.
8. For the reasons set forth below, the challenge must be rejected.

II. The Parties' Positions

A. Respondent

1. Challenge of 29 November 2007

a) Overview

9. In its Challenge, the Argentine Republic addressed not only the present arbitration (ICSID Case No. ARB/03/23), but also Professor Kaufmann-Kohler's service in the following other cases:
 - i. ICSID Case No. ARB/03/17 with Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales del Agua S.A.;
 - ii. ICSID Case No. ARB/03/19 with Suez, Vivendi Universal S.A. and Sociedad General de Aguas de Barcelona S.A.;
 - iii. ICSID Case No. ARB/03/22 with Electricidad Argentina S.A. and EDFI S.A.; and
 - iv. UNCITRAL Arbitration with Anglian Water Ltd.
10. This Challenge Decision takes no position on any of the other proceedings, which must each be addressed on its own merits.

11. For the sake of good order, we note that the same President chairs both the present arbitration and ICSID Case No. ARB/03/22. Nevertheless, the challenge in the other proceeding will be addressed only after (i) termination of the stay in that case and (ii) appointment of a successor arbitrator to Professor de Trazegnies Granda.

b) Specific Assertions

12. On 19 April 2006, Professor Kaufmann-Kohler was appointed to the Board of Directors at the Swiss banking establishment, UBS A.G. In this connection, Respondent put forth the following contentions:
- i. UBS recommends that its customers invest in Eléctricité de France (“EDF”), the parent corporation of EDF International, one of the Claimants in this arbitration.
 - ii. UBS and EDF have a common interest in the company AEM Milan (“AEM”), in that UBS held 5.32% of the shares of that company, and that EDF effectively controlled AEM through the intermediary company Transalpina de Energía.
 - iii. UBS and EDF have a common interest in the Swiss entity Motor Columbus. EDF acquired share capital in that company from UBS in a proportion of 17.3% in October 2005 and another 17.32% in March 2006.
 - iv. In October 2005 EDF placed a share offer in the French financial market with the assistance of UBS Limited.
 - v. UBS Investment Foundation lists EDF securities (asserted to amount to 3% of the EDF shares) within its foreign obligations denominated in Swiss francs.

c) Applicable Standard

13. The Argentine Republic stresses that Article 14 of the ICSID Convention requires that an arbitrator must be someone who “may be relied upon to exercise independent judgment”. By its express terms, Article 14 applies to “persons designated to serve on the Panels” of ICSID. However, Article 57 makes reference

to Article 14 in connection with disqualification of any member of an arbitral tribunal (whether on the Panel or not) who evidences a “manifest lack of the qualities” required by Article 14.

14. Respondent mentions Articles 9 and 10 of the UNCITRAL Arbitration Rules, which speak of “justifiable doubts” with respect to impartiality or independence. We understand that reference to apply to the Anglian Water case conducted under the UNCITRAL Rules (not subject to this Challenge Decision) but with suggested persuasive value for this present arbitration.
15. Professor Schreuer is cited for the proposition that the “manifest” nature of any lack in the qualifies required under Article 14 should be defined as “easily understood or recognized by the mind.”¹
16. Under the standards of Article 14, Respondent argues that Professor Kaufmann-Kohler failed to report the existence of facts that raise questions about her impartiality and independence.
17. In support of its contentions, Respondent also provides an extensive discussion of the *Guidelines on Conflicts of Interest in International Arbitration* approved by the International Bar Association in 2004.
18. The Argentine Republic supplements its arguments with reference cases decided by national courts. These include *inter alia* the United States Supreme Court decision in *Commonwealth Coatings v. Continental Casualty*, 393 U.S. 145 (1968). From the United Kingdom, Respondent cites House of Lords decisions in *The Pinochet Case* (17 December 1998 and 15 January 1999) and the other in *Magill v. Porter* (2001

¹ See Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, 2001), at 932.

UKHL 67).

19. The 2003 report by the United Nations Conference on Trade and Development is cited for the proposition that a financial interest may be indirect, but nevertheless damaging to the integrity of the arbitral process.²
20. Finally, Respondent also draws our attention to the writings of other eminent authorities on arbitration, including Professor Carlo Santulli and Professor Albert Jan van den Berg.

2. Observations of 16 January 2008

21. Respondent on 16 January 2008 presented Observations on Professor Kaufmann-Kohler's comments dated 21 December 2007. The Argentine Republic compares the alleged conflict of interest to the offense of a motorist who ignores a red light, or a judge to decide a case in which his daughter acts as counsel. The behavior is wrong *per se* in all instances.
22. The Argentine Republic also cites at length several authorities on conflicts of interest, including the work of Professor Carrie Menkel-Meadow, *Ethical Issues in Arbitration and Related Dispute Resolution Processes*.³
23. Respondent's Observations reject the view put forward by Claimants' lawyers to the effect that the attempt to disqualify Professor Kaufmann-Kohler represents disruptive and dilatory behaviour.

a) Dealings Between UBS with EDF

24. Respondent presents additional arguments with respect to the various alleged

² UNCTAD, Dispute Settlement, International Commercial Arbitration, Section 5.3 (2003).

³ Professor Carrie Menkel-Meadow, Ethical Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not, 56 U. Miami L. Rev. 949 (2002).

disqualifying relationships involving UBS and EDF, including *inter alia* the AEM ownership and the recommendation of EDF shares.

b) Duty to Disclosure Appointment to UBS Board

25. Respondent argues that both Professor Kaufmann-Kohler and Claimants were required to disclose to the Argentine Republic any relationship between the Professor and Claimants. Respondent also contends that Professor Kaufmann-Kohler was subject to a duty to investigate any potential conflict of interest, which according to Respondent included membership in the UBS Board. Respondent states that this asserted duty has been memorialized in General Principles 3 and 7 of the IBA Guidelines on Conflicts of Interest.

c) UBS Board Responsibilities

26. The Argentine Republic emphasizes the duties of a UBS board member, even one who is non-executive. Citations are presented from the UBS Handbook, the UBS Charter for Directors, the Organization Regulations of UBS and the UBS Articles of Association, showing that the Board of Directors has ultimate responsibility of management of the corporation.

d) Access to Information

27. Respondent further cites portions of the UBS sources listed above in order to show the extent of information made available to members of the Board of Directors. In Respondent's view, it is difficult to defend an argument that Professor Kaufmann-Kohler lacked knowledge of the controverted transactions.

e) Remuneration

28. As pointed out by Respondent, the UBS Handbook states that a Board member

receives a base fee of FS 300 thousand, paid 50% in cash and 50% in restricted UBS shares.⁴ Non-executive Board members may elect to receive their remuneration entirely in restricted UBS shares.

f) Appearance of Impropriety

29. Respondent emphasizes several recent disqualification cases in which arbitrators have been held to a high standard of avoiding any appearance of impropriety. In particular, the Argentine Republic discusses *SGS v. Pakistan*,⁵ and the decision on disqualification in *Vivendi v. Argentine Republic*.⁶
30. Respondent also invokes standards set forth in the UCITRAL Rules, which address “justifiable doubts” with respect to an arbitrator’s impartiality and independence.

3. Reply to Claimants’ February Letter and Wolfram Report

31. On 14 February 2008, the Tribunal invited Respondent to comment on Claimants’ letter of 11 February 2008.
32. The Respondent filed its observations on 29 February 2008, attaching an expert report of Charles W. Wolfram, Emeritus Professor at Cornell Law School, but now living in retirement in Berkeley, California.
33. We note in passing that Professor Wolfram makes no claim to have any experience with arbitration, whether international or domestic. Instead, his work has addressed professional ethics in the context of American practice, which is to say,

⁴ Respondent’s Objections to the Comments by Mrs. Kauffman-Kohler and Comments by Claimants of 16 January 2008, para. 66, citing the 2006/2007 UBS Handbook, at 136, filed as Respondent’s Annex XXVI.

⁵ *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 19 December 2002, 8 *ICSID Rep.* 398 (2005).

⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Challenge to the President of the Committee of 3 October 2001, [English original] 17 *ICSID Rev.—FILJ* 168 (2002); 6 *ICSID Rep.* 330 (2004); 125 *I.L.R.* 46 (2004); [Spanish original] 17 *ICSID Rev.—FILJ* 182 (2002), also available at <www.worldbank.org/icsid>.

the principles applicable to the bar and the bench within the United States. Thus we understand his opinion to be offered for its analogies between judges and arbitrators, but not any specialization in arbitration.

34. Apart from the ICSID Convention and Rules themselves, the legal authority cited in support of his conclusions appears limited to two sources: (a) the U.S. Supreme Court decision in *Commonwealth Coatings v. Continental Casualty*⁷; and (b) the IBA Guidelines on Conflict of Interests (2004).⁸
35. Professor Wolfram concludes that Professor Kaufmann-Kohler demonstrated a manifest lack of the qualities required of arbitrators under the ICSID Convention in joining the UBS Board in failing to disclose that association. Because UBS holds stock in EDF, and recommends EDF to clients, Professor Wolfram considers that there exists an economic incentive for UBS to favor Claimants, and consequently that Professor Kaufmann-Kohler's "loyalty interests" will lead her to follow suit in this proceeding.
36. Professor Wolfram's report suggests that the relative size of the UBS holdings in EDF is not material for purposes of challenge to Professor Kaufmann-Kohler. In paragraph 9 (quoted by Respondent on page 2 of its submission of 29 February 2008), Professor Wolfram proposed a "thought experiment" in which a small bank holds 10% of its assets in EDF and other Claimants. In this scenario, Professor Kaufmann-Kohler would be disqualified.
37. Professor Wolfram then takes the next step of asking rhetorically whether the size of UBS holdings becomes immaterial "...merely because UBS is not a small bank,

⁷ *Commonwealth Coatings Corp. v. Continental Casualty Co. et al.*, 393 U.S. 145 (1968).

⁸ See Expert Report of Charles W. Wolfram, 29 February 2008, footnote 12.

but instead is ... the 9th largest publicly traded enterprise in the world?” Rather than answering the question directly, the legal opinion asserts that “...somewhere and at some level of responsibility within the UBS bureaucracy were managers who...well might have been motivated to attempt [to] influence [Professor Kaufmann-Kohler]...”.⁹

38. The legal opinion goes on to contend that Professor Kaufmann-Kohler would be motivated to advance the interests of UBS in a way that should cause her disqualification as an arbitrator in this case. Such motivation allegedly arises from her institutional loyalty, as a part of the UBS team, and her economic self-interest, from her compensation as a UBS director.
39. Professor Wolfram also makes comments on the alleged “campaign” of Argentina to disrupt the proceedings. Given that we find no evidence of any such intent to interrupt or frustrate this process (see discussion *supra*), that consideration need not be addressed.
40. Argentina’s submission builds upon many of the themes raised in the opinion of Professor Wolfram. Respondent argues that the ties between UBS and EDF give rise to an objective conflict for Professor Kaufmann-Kohler, regardless of the size of the EDF holdings.
41. In addition, Argentina argues that the ownership of EDF is significant even for a financial institution of the size of UBS. Respondent contends that UBS would benefit economically by favorable client referrals and industry rankings, which would cause Professor Kaufmann-Kohler to favor Claimants both from

⁹ *Id.*, para. 9.

institutional loyalty and the hope of greater economic remuneration.

42. Respondent considers that Professor Kaufmann-Kohler's relationship with UBS does not inspire confidence in her independence. In this connection, they stress "appearance of bias" regardless of whether actual bias exists.
43. Argentina lays great stress on the general proposition that arbitrators must disclose circumstances likely to give rise to justifiable doubts about impartiality or independence.¹⁰ We agree with this statement, but must note the entirety of the principle. The question is not whether doubts exist, but whether they are "justifiable" doubts. On the facts of this case, we cannot find any such doubts to be justified.

4. Submission with respect to *New Regency v. Nippon Herald*

44. On 25 April 2008 Respondent submitted a copy of the decision of the United States Court of Appeals decision in *New Regency Productions Ind., v. Nippon Herald Films, Inc.*, 501 F. 3d 111 (9th Cir. 2007).
45. Argentina drew the Tribunal's attention to what it considered to be a similarity of facts in *New Regency v. Nippon Herald* and the scenario which gives rise to Respondent's request for disqualification of Professor Kaufmann-Kohler. In Part IV of this Decision, we analyze *New Regency v. Nippon Herald* and its applicability to this challenge.

5. Argentina's Letter of 14 May 2008

46. On 14 May 2008, Argentina sent a final letter attaching a press article suggesting a decisive influence ("una influencia aún más decisiva") exercised by Professor

¹⁰ See the penultimate sentence of point 5 of Argentina's submission of 29 February 2008.

Kaufmann-Kohler on the UBS Board of Directors. *See* Respondent's letter of 14 May 2008, and its Annex 1, "Une Genevoise commence à faire le ménage à la tête d'UBS" in *24 Heures* (9 May 2008), which outlines the work of Professor Kaufmann-Kohler in eliminating certain individuals from the UBS Board following certain problems at that bank.

B. Claimants

1. Submission of 21 December 2007

47. In its submission of 21 December 2007, Claimants argue that any link between EDF and UBS is so tenuous as to be immaterial.
48. In support of their argument, Claimants suggest that the ICSID disqualification standards focus on factors such as financial dependency, employment relationships, subordination relationships between a party and an arbitrator.
49. In Claimants' view, it is vital to remember that UBS has no equity interest in EDF. Under the circumstances, no threat can exist with respect to the independence and impartiality of Professor Kaufmann-Kohler.
50. Claimants assert that the IBA Guidelines on Conflicts of Interest do not apply in this ICSID arbitration. Even if they did apply, Claimants argue that the Guidelines provide no basis for disqualification.
51. Likewise, Claimants contest application of the new ICSID Rules (entered into force in April 2006) which contain provisions for arbitrator disclosure of relationships that might cause a party to question an arbitrator's reliability for independent judgment.
52. Finally, the legal framework for ICSID arbitration imposes no duty of disclosure on

parties to an ICSID. According to Claimants, the imposition of any such obligation would be unworkable and unrealistic.

2. Observations of 16 January 2008

53. In response to Professor Kaufmann-Kohler's comments of 21 December 2007, Respondent sent a brief letter noting the following:

- Professor Kaufmann-Kohler confirmed that she was not aware of the alleged business relationship between UBS and EDF;
- Professor Kaufmann-Kohler confirmed that her position at UBS was without any involvement in individual business decision; and
- Professor Kaufmann-Kohler clarified that UBS business relationships did not affect her independence and impartiality as an arbitrator.

54. In consequence, Claimants concluded that the comments by Professor Kaufmann-Kohler were entirely consistent with the analysis in their letter of 21 December 2007, and underscored their views that no basis exists to support a finding of manifest lack of the qualities required under Article 14 of the ICSID Convention.

3. Letter of 11 February 2008

55. In an unsolicited letter of 11 February 2008, Claimants filed comments in response to the observations filed by Respondent on 16 January 2008.

56. Claimants note that Professor Kaufmann-Kohler only became aware of the UBS Foundation's interest in EDF subsequent to the filing of the Argentine challenge. Moreover, Claimants emphasize the size of UBS, with approximately US\$ 3 trillion of assets under management.

57. Claimants emphasize again the lack of actual knowledge by Professor Kaufmann-Kohler, and in this connection discuss internal UBS guidelines. They stress that Board members may not assume day-to-day management responsibility.

58. Finally, Claimants note that the remuneration of non-executive directors, even if paid in restricted stock, is not dependent on the UBS Group's financial performance and that restricted stock may not be sold for four (4) years. In Claimants' view, this state of facts prevents the success or failure of EDF in the present arbitration from having any material effect on Professor Kaufmann-Kohler's ability to exercise independent judgment.

III. Comments by Professor Kaufmann-Kohler

59. On 21 December 2007, Professor Kaufmann-Kohler wrote to Mr. Gonzalo Flores at ICSID. While not wishing to comment on the merits of the challenge, she provided five (5) clarifications with respect to her relationship with UBS. These were set forth as follows:

(i) Except with respect to Motor Columbus, Professor Kaufmann-Kohler had no knowledge of the business relationship between UBS and EDF prior to the challenge. With respect to Motor Columbus, Professor Kaufmann-Kohler had knowledge of the holdings. By the time she was appointed to the Board, she also knew that UBS had divested itself of the investment.

(ii) After seeing the challenge, Professor Kaufmann-Kohler asked UBS to verify the accuracy of allegations with respect to shareholdings relevant to Respondent's allegations. The replies were attached to her letter. Professor Kaufmann-Kohler added that she did not regard these facts as relevant to her independence and impartiality.

(iii) As an independent non-executive Board member, Professor Kaufmann-Kohler had no involvement in individual business decision of UBS, and did not receive information related thereto. Consequently, she did not

consider those business relationships to affect her independence and impartiality.

(iv) At the time of her appointment to the UBS Board, Professor Kaufmann-Kohler from an abundance of caution submitted a confidential list of pending arbitrations, including the two proceedings implicating the EDF group. She was told by UBS that no conflicts existed, with the exception of her position on the America's Cup Jury, from which she resigned.

(v) Non-executive directors do not deal with specific business or client matters. By letter dated 21 December 2007, Professor Kaufmann-Kohler confirmed that no information involving the parties implicated by the challenge of 29 November 2007 would be distributed to her or discussed in her presence.

60. Professor Kauffman-Kohler also attached a letter of 20 December 2007 from individuals in the UBS legal department providing additional information with respect, *inter alia*, to EDF, Motor Columbus, and AEM. Later in this Challenge Decision we shall make further reference to information contained in the letter.

IV. The Tribunal's Analysis

A. Applicable Standard

61. Professor Kaufmann-Kohler must be disqualified if facts exist to indicate a manifest lack of reliability with respect to the exercise of independent judgment in this case.

62. The starting point for our analysis can be found in the qualities required by Article 14(1) of the ICSID Convention, to which reference has been made in Convention Article 57.

63. No suggestion has been made that Professor Kaufmann-Kohler is deficient in

either of the first two categories required by that in Article 14(1): high moral character or recognized competence in the field of law.¹¹

64. The relevant quality that has been put into question relates to independence. We must consider whether Professor Kaufmann-Kohler “may be relied upon to exercise independent judgment.” If reasonable doubts exist on this matter, she should cease to serve in these proceedings.
65. Pursuant to Convention Article 57, a lack of reliability to exercise independent judgment must be “manifest”. We understand Respondent to propose that a lack of reliability to exercise independent judgment becomes “manifest” when it can be “easily understood or recognized by the mind.” In this connection, Respondent cites Schreuer.¹²
66. We note that Professor Schreuer makes this suggestion in connection with award annulment for *excès de pouvoir* as provided in Convention Article 52(b) (“the Tribunal has manifestly exceeded its power”), rather than a lack of independence by an individual arbitrator.
67. For the purposes of this challenge, however, no reason exists that Respondent’s proposed test should not apply to disqualification. Nothing in Professor Schreuer’s commentary, or any other authority, suggests that the same notions of “manifest” cannot be relevant both to excess of powers and to lack of independence.
68. Professor Schreuer indicates that the proposed test for what is “manifest” relates not to the seriousness of the allegation, but to the ease with which it may be

¹¹ This second category includes competence in the fields of “law, commerce, industry or finance.” The disjunctive “or” indicates that competence in only one of these fields is required.

¹² Schreuer, *supra* note 1, at 932.

perceived. Something is “manifest” if it can be “discerned with little effort and without deeper analysis.”¹³

69. We have taken note of the other sources discussed by the parties, including *inter alia* the relevant portions of the IBA Guidelines on Conflicts, the UNCITRAL Arbitration Rules and the relevant case law. In all instances, these authorities have been given the weight that they deserve.

B. Grounds for Challenge

1. Summary of Considerations

70. As an initial matter, we stress for the sake of good order that the remaining two members of the Tribunal find no improper motive on the part of the Argentine Republic in connection with this challenge. We accept that all allegations have been made in good faith.
71. The facts asserted by Respondent give no reason to suspect that Professor Kaufmann-Kohler would be biased in favor of Claimants. Her position as a non-executive director at UBS gives her no financial interest in any of the Claimant companies. Nor would she benefit in any way from an award in favor of Claimants.
72. We have asked ourselves whether Professor Kaufmann-Kohler might favor Claimants because a victory for their side in this dispute would result in some benefit to UBS, an entity with which Professor Kaufmann-Kohler feels a sense of emotional solidarity and psychological identification by virtue of her position.
73. While the prospect of such subconscious influence can never be completely excluded, the possibility remains remote, tenuous and speculative. The outcome of

¹³ *Id.*, at 933.

this arbitration cannot be expected to have any material impact on the fortunes of UBS. Just as *de minimis* would be the effect on Professor Kaufmann-Kohler's psychological, social or economic well-being.

74. A reasonable observer cannot find that Professor Kaufmann-Kohler's independence would, by virtue of her position at UBS, fluctuate in function of her contemplation of a victory for one side or the other. No reasonable observer would find such a scenario credible.

2. Specific Assertions

a) UBS Recommendation

75. The UBS recommendation of EDF as a good investment opportunity cannot establish a manifest lack of reliability with respect to independence on the part of Professor Kaufmann-Kohler.
76. These recommendations were made in the ordinary course of UBS business. While UBS obviously wants its recommendations to prove sound, this fact gave Professor Kaufmann-Kohler no direct incentive to favor Claimants. The connection remains speculative and indirect, and thus not determinative for purposes of this challenge.
77. The Argentine Republic cites a UBS press release in which EDF is mentioned as one of a half dozen companies whose stock might benefit from climate change.¹⁴ Absent something more, such a recommendation gives no reason to suspect that Professor Kaufmann-Kohler cannot be relied upon to exercise independent judgment.
78. Under different circumstances, our conclusion might be different. For example, a

¹⁴ See UBS Media Release of 25 June 2007: UBS launches major climate change research initiative: 'Forget the science concentrate on financial markets', cited as Respondent's Annex XX to its Challenge of 29 November 2007.

different conclusion might be indicated if an arbitrator held a substantial equity stake in a bank which owned and actively promoted a company that was party to the relevant proceedings. Such facts, however, have not been presented to us.

b) Common Interest in AEM

79. The fact that UBS and Transalpina de Energía (controlled by EDF) share a joint shareholding in AEM does not create circumstances in which Professor Kaufmann-Kohler would be deemed to lack independence.
80. UBS holds its interest in AEM in the normal course of its business activity as one of the largest banks and private equity firms in the world. Under the circumstances, no reason exists to believe that such ownership would cause Professor Kaufmann-Kohler to lack independence of judgment.
81. This conclusion imposes itself even more in light of the low level of the UBS stake in AEM, which we understand to fall below 1.5%.¹⁵

c) Ownership of Motor Columbus

82. With respect to the Motor Columbus shares, a line of analysis similar to the one applied to AEM must dictate our conclusion. Nothing in the facts surrounding the Motor Columbus investment give reason to suspect that Professor Kaufmann-Kohler's independence would be thereby impaired.
83. We note in passing that UBS disposed of its shares in Motor Columbus approximately two years ago. See letter of 20 December 2007 from Dr. Karin Eugster and Dr. Bernhard Schmid, respectively Legal Adviser and General Counsel of UBS, attached to Professor Kaufmann-Kohler's letter of 21 December 2007.

¹⁵ See Annex 2 of Professor Kaufmann-Kohler's letter of 21 December 2007.

See section 3 of that letter indicates that on 23 March 2006 UBS sold its 55.6% stake in Motor Columbus.

84. No mechanism or nexus has been suggested to explain why someone in Professor Kaufmann-Kohler's position, as a non-executive director at UBS, would wish Respondent to lose this arbitration because of this one-time share ownership.

d) Share Placement in the French Market

85. Respondent also urges disqualification of Professor Kaufmann-Kohler by reason of the UBS participation in a financial consortium that assisted EDF in placing its shares in the French market.
86. No allegation is made that UBS itself purchased shares in EDF during this placement.
87. Under the circumstances, we are unable to perceive any link between that consortium's activity and the way Professor Kaufmann-Kohler will evaluate the issues of this case.
88. The role of UBS in this financial placement does not give Professor Kaufmann-Kohler any reason to expect a benefit, whether direct or indirect, from an outcome in this arbitration favoring Claimants.

e) UBS Investment Foundation

89. The matter of the "UBS Investment Foundation 2" (the "Foundation") stands on a somewhat different footing from Respondent's other arguments. If EDF loses this arbitration (so it might be argued) the Foundation investments in EDF will be worth less.
90. The argument continues that Professor Kaufmann-Kohler will be inclined to seek the welfare of the Foundation and might be tempted to decide in favor of

Claimants.

91. As an initial matter, we note the reference in footnote 32 of Respondent's Challenge, directing our attention to page 136 of its Annex XXIV, which provides the Foundation's "*Compositions du portefeuille*" as of 30 September 2006. No indication of EDF securities seems to be present on that page.
92. For the sake of this Challenge Decision we accept that the Foundation's ownership has been recorded in that report. We assume that by inadvertence the proper reference has been misplaced, and should point to another section of the report.
93. Nevertheless, it still remains unclear why the composition of the Foundation's assets would cause Professor Kaufmann-Kohler to deviate from her duty to exercise independent judgment. The Foundation is an institution for the collective investment of assets by Swiss pension funds. Ultimately, the assets of the Foundation will benefit the various Swiss pension funds that have joined in the institutions which participate in the Foundation.
94. We note that the UBS Legal Department contends that the references in Annex XXIV refer to debt (bonds) rather than equity (share). See section 4 of the letter of 20 December 2007 from Dr. Karin Eugster and Dr. Bernhard Schmid, respectively Legal Adviser and General Counsel of UBS, attached to Professor Kaufmann-Kohler's letter of 21 December 2007.
95. That same section of the letter from the UBS Legal Department indicates that the "total of UBS's shareholdings" in EDF falls below 1.5%. From the context, we understand this mention of "UBS's shareholdings" as a reference to the Foundation discussed in the prior paragraph.
96. Even if UBS A.G. (the bank) held EDF bonds, a stake of less than 1.5% would not

be significant enough to have an impact on the independence of Professor Kaufmann-Kohler.

3. Duty of Disclosure and Investigation

97. Respondent argues that Professor Kaufmann-Kohler had a duty to disclose her membership on the UBS Board and to investigate possible conflicts of interest.¹⁶ The rubric for Section II-B of the Respondent's Observations emphasizes the duty to disclose (*deber de informar*) the Board membership. However, the text of that Section also devotes considerable discussion to the duty to investigate (*deber de investigar*) various possible conflicts of interest. We have examined both the duty to disclose (Board membership) and the duty to investigate (possible conflicts of interest).
98. With respect to the alleged failure to disclose, we cannot accept that non-disclosure of the Board membership indicates a manifest lack of reliability in the exercise of independent judgment, the standard to be applied in this challenge. Whatever level of disclosure might be required under the ICSID Convention, a failure to inform the parties about this Board membership does not rise to that plane.
99. Nothing inherently suspect can be found in Professor Kaufmann-Kohler's participation in the board of directors of that particular financial institution, such as to cause her to question the propriety of her service as arbitrator in this case. While some legal systems and arbitral rules might require such disclosure, no such duty indication can be found in the ICSID standards discussed above.
100. Respondent's argument with respect to the duty to investigate is equally misplaced.

¹⁶ See Respondent's Observations of 16 January 2008, Section II-B (paras. 23 through 40).

The provisions of IBA General Standard 7(c) (were they applicable) speak to “reasonable” enquiries of “potential” conflicts and “facts ... that may cause ... independence to be questioned.” No evidence has been presented that Professor Kaufmann-Kohler had reason to suspect any potential conflict or fact that would call into question her independence.

101. This conclusion remains consistent with the line of analysis in the recent decision of the U.S. Federal Court of Appeals in *AIMCOR v. Ovalar*, a dispute between an American and a Turkish company.¹⁷
102. In *AIMCOR*, the challenged arbitrator had already learned about, and disclosed, a potential transaction between his company and the purchaser of the American entity in the arbitration.¹⁸ No challenge was made at that time. Later, however, other facts came to light about dealings between the arbitrator’s company and the American side to the dispute. In light of having been put on notice by that earlier transaction, the arbitrator was expected to follow up with continued vigilance.
103. We take no position on whether such a standard applies under the ICSID Convention, but note simply that no similar fact pattern faced Professor Kaufmann-Kohler. In *AIMCOR v. Ovalar* the challenged arbitrator was not a non-executive director, but was the Chairman, President and CEO of a company that engaged in direct business dealings with one of the parties to the arbitration.
104. We note Rule 6(2) of the new ICSID Arbitration Rules, which require an arbitrator to notify the ICSID Secretary General of any professional or business relationship

¹⁷ *Applied Industrial Materials Corp. v. Ovalar*, 492 F.3d 132 (2nd Cir. 2007).

¹⁸ *AIMCOR* had been acquired by Oxbow Industries, which had potential dealings with a company called Seacor Holdings, of which Mr. Charles Fabrikant (the challenged arbitrator) was Chairman, President and CEO. The first incident (which did not give rise to challenge) involved a contract for the carriage of petroleum coke by the barge operation conducted by his company’s St. Louis office.

that might cause a party to question the arbitrator's reliability for independent judgment. These new rules, which entered into force on 10 April 2006, do not apply to proceedings in this arbitration, which pursuant to ICSID Convention Article 44 were expressly subject to the Rules in force as of January 2003.¹⁹

105. Even if the new Rules applied in this matter, it is doubtful that they would apply to facts which Professor Kaufmann-Kohler neither knew nor had reason to know.
106. Respondent asserts that Claimants themselves had a duty to make a disclosure with respect to Professor Kaufmann-Kohler's Board membership. Without taking a position on whether a jurisprudential basis exists for this asserted standard, we note that no evidence demonstrates that anyone at EDF was aware of either Professor Kaufmann-Kohler's position at UBS or the alleged links between UBS and EDF.

4. Wolfram Report

107. The Report of Professor Wolfram, submitted by Argentina on 29 February 2008, does not change our conclusion. For the sake of good order, we set forth below several of our more salient concerns with respect to the analysis of this report.
108. We note again that the relevant test looks to whether an arbitrator "may be relied upon to exercise independent judgment." In this connection, a related question is whether the individual is likely to be influenced by a particular fact. As discussed below, Professor Wolfram's report does not appear to be focused on this test.
109. Professor Wolfram argues that "long-established custom and practice in arbitral bodies" required Professor Kaufmann-Kohler to "make careful inquiry" of whether UBS had connections to either party. Curiously, the authority cited falls short of

¹⁹ See Minutes of the First Session of the Tribunal of 1 September 2004, Washington, D.C.

supporting the proposition.²⁰

110. Professor Wolfram cites *Commonwealth Coatings*, a case in which a central point (for the opinions of both Justice Black and Justice White) was that the offending engineer/arbitrator had worked directly for one of the parties, and did not need to make any inquiries. A prime contractor was being sued by a subcontract. The Court noted that the prime contractor's patronage (of the disqualified arbitrator) was "repeated and significant ... over a period of four or five years" and added that the relationship even went so far as to include "services on the very projects involved in this lawsuit." Such a fact pattern is far from the one at issue in this present case.
111. The other authority cited by Professor Wolfram was Standard 7(c) of IBA Guidelines on Conflicts of Interests in International Arbitration. Like the *Commonwealth Coatings* case, however, the IBA Guidelines actually support a very different principle.
112. First, Standard 7 speaks of "reasonable" inquiries. The Standard and the accompanying comment also clear that the type of information that must be ascertained and disclosed is information that might affect the arbitrator's impartiality and independence. As discussed below, a *de minimis* interest would not be of such a nature as to call into question that impartiality or independence.
113. The *de minimis* principle can be found in Standard 2 of the IBA Principles, which oblige an arbitrator to resign if he or she knows of facts or circumstances which – "from a *reasonable* third person's point of view" (emphasis added) give rise to

²⁰ See Wolfram, *supra*, at para. 16.

“justifiable doubts” about his or her impartiality or independence.²¹

114. In defining justifiable doubts, Standard 2(d) of the IBA Principles speaks of a “*significant*” interest – *not* “any” economic or personal interest.
115. A comment to General Standard 6 (discussing problematic relationships) throws further light on Professor Kaufmann-Kohler’s situation. The Explanation 6(a) addresses the overlap of the arbitrator’s interests with those of his or her law firm. In this context the explanation states that “the activities of the arbitrator’s firm should not automatically constitute a conflict of interest.” Rather, each firm activity must be considered in the individual case. If the IBA Principles reject an absolutist rule with respect to a law firm, *a fortiori* approach does not commend itself with respect to a bank the size of UBS.
116. The relevant principles in Professor Wolfram’s own jurisdiction (the United States) clearly apply a “*de minimis*” standard. Canon 2 of the American Bar Association (ABA) 2007 Model Code of Judicial Conduct states, “A judge shall perform the duties of judicial office impartially, competently and diligently.”
117. The specific rules following this general Canon provide *inter alia*, in Rule 2.11, as follows:
- A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances: ***
- (2) The judge knows that the judge ***has more than a *de minimis* interest that could be substantially affected by the proceeding.

²¹ Standard 2(a) speaks of subjective “doubts” by the arbitrator, while standard 2(b) makes reference to an objective standard based on a “reasonable third person’s point of view”.

118. The ABA Rules define “de minimis,” to mean “an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.” They also define “economic interest” to mean ownership “of more than a de minimis legal or equitable interest.” Finally, the Rules state that an economic interest does not include an interest in “a mutual or common investment fund,” which seems to be the case for UBS Foundation.
119. Other jurisdictions with developed arbitration laws take a similar perspective. In *ATT v. Saudi Cable Co.*, the English Court of Appeal had to consider the effect of an arbitrator’s ownership of shares of a telecommunications company that might arguably have influenced his views. A *de minimis* approach was taken by the court which stated:
- Any benefit which could indirectly accrue to Nortel [the company whose shares were owned by the arbitrator] as a result of the outcome of the arbitration would be of such minimal benefit to [the arbitrator] that it would be unreasonable to conclude that it would influence him.²²
120. While the facts of that case are different from those of the present arbitration, the principle established is that of proportionality, whereby an insignificant interest will not be cause for disqualification.
121. Were the ethical standards otherwise for international arbitration, it would be unduly easy for a party wishing to derail an arbitration to do so by asserting some tenuous connection between the arbitrator and a fact that might arguably have an impact. In an increasingly interdependent and complex world, it will not be difficult to construct some theory for most scenarios that suggests influence might

²² *ATT v. Saudi Cable Co.*, 200 WL 571190 (2000) (English Court of Appeal). Opinion paragraph 43 (c).

be possible. If Professor Wolfram's "no-link-too-small" theory were correct, EDF might conceivably challenge an arbitrator simply because he or she has good Argentine friends. To permit removal of arbitrators on such grounds would damage the stability and efficiency of the arbitral process. The costs of such an absolutist perspective clearly outweigh the advantages.

122. In summary, if the interest of UBS are *de minimis* in any dealing with EDF then *a fortiori* one must conclude that the possibility of influence upon Professor Kaufmann-Kohler remains equally minimal.
123. Consequently, speculative or tenuous interests do not normally come into consideration. Non-disclosure in itself cannot be a ground for disqualification, but must relate to facts that would be material to a reasonable likelihood of impartiality or lack of independence, which is not the case here. Without some link of materiality, an arbitrator would be called upon to reveal all (or almost all) elements of his or her life, a situation that would paralyze any arbitral process.
124. Having considered seriously on the Wolfram Report, we conclude that its arguments do not give any reason to conclude that Professor Kaufmann-Kohler would be influenced in this case by her position at UBS. No indication has been given that she cannot be relied upon to exercise independent judgment and the challenge must fail.

5. The New Regency Case

125. In its forwarding letter of 25 April 2008, submitting the U.S. Court of Appeals decision in *New Regency Productions Ind., v. Nippon Herald Films, Inc.*, 501 F. 3d 111 (9th Cir. 2007), Argentina drew the Tribunal's attention to what it considered to be "the startling similarity" (*la enorme similitud*) between the facts of that case and those

which engendered this present request for disqualification of Professor Kaufmann-Kohler. For reasons discussed below, we consider the two sets of facts to be clearly distinguishable in their relevant aspects.

126. *New Regency v. Nippon Herald* arose from a dispute over film production in Japan. Nippon Herald had agreed to distribute in Japan five films produced by New Regency. It was undisputed that New Regency delivered only four of these films.
127. The sole arbitrator heard the case during 2004, issuing several orders during the latter half of that year. He found in favor of Nippon Herald for an undisputed amount of US\$440 thousand, representing return of its fee for the film that had never been delivered. In addition, the arbitrator found for New Regency on a claim of more than five times that much (US\$2.3 million) allegedly owed to Nippon Herald under a cross-collateralization provision.
128. Also in 2004, the sole arbitrator was employed by another film company (“Yari Group”) as Senior Executive Vice President and Chief Administrative Officer. In that capacity he had oversight of the company’s business and legal affairs, as well as its general administration.
129. At that time in 2004, the company of which the arbitrator was Senior Executive Vice President was actively negotiating for the right to finance a film developed by New Regency and produced by the daughter of its principal owner. Thus during the course of the arbitration, the arbitrator was also overseeing a substantial business deal whereby his company sought rights from one side to the dispute he was hearing.
130. The court in *New Regency v. Nippon Herald* had no difficulty in finding a conflict of interest. The arbitrator was simultaneously sitting in judgment over the New

Regency dispute and serving as chief administrative officer for a company negotiating a substantial contract with New Regency.

131. Nothing like the scenario in *New Regency v. Nippon Herald* has been alleged in the facts that give rise to the challenge of Professor Kaufmann-Kohler. No allegation has been made of a substantial business deal being negotiated between UBS and EDF, let alone a transaction being supervised by Professor Kaufmann-Kohler.
132. The Court in *New Regency v. Nippon Herald* emphasized repeatedly that conflicts of interest must be “non-trivial” in order to give rise to challenge. For example, see page 1107 (“more than trivial business”), page 1108 (“where an arbitrator has reason to believe that a nontrivial conflict of interest might exist”) and page 1110 (“conflict alleged by Nippon Herald is ... nontrivial”). This language in *New Regency v. Nippon Herald* reinforces our finding that a challenge, in order to succeed, must rest on a relationship that is other than *de minimis*. See our analysis of the Wolfram report, *supra*.
133. In consequence, since any link between UBS and EDF was trivial and *de minimis*, nothing in the *New Regency case* suggests that there should be justifiable doubts about Professor Kaufmann-Kohler’s reliability to exercise independent judgment.

6. Letter of 14 May 2008 (“Decisive Influence” on Board)

134. We have considered Argentina’s letter of 14 May 2008, suggesting that Professor Kaufmann-Kohler should be disqualified because she exercises a decisive influence (“una influencia aún más decisiva”) on the UBS Board of Directors. Respondent points to an article titled “Une Genevoise commence à faire le ménage à la tête d’UBS” (*24 Heures*, 9 May 2008), which sets forth the work done by Professor

Kaufmann-Kohler in eliminating Board members at UBS following certain well-publicized problems at that bank. In itself, such a role does not change the result in this Challenge. There is no implication that Professor Kaufmann-Kohler assumes responsibility over UBS's investments or profit and loss account. Rather, her responsibilities are limited to promoting good corporate governance. Whatever interaction might possibly exist between UBS and EDF remains trivial. No connection has been alleged between the UBS difficulties and the present arbitration. Consequently, it follows the services performed by Professor Kaufmann-Kohler at UBS (Chair of the Nominating Committee) create no risk that she will be unreliable to exercise independent judgment in this case.

V. Decision

135. For the reasons set forth above, the remaining members of the Tribunal reject the challenge to Professor Kaufmann-Kohler.

_____ [signed] _____

Professor William W. Park
President of the Tribunal

_____ [signed] _____

Professor Jesús Remón
Arbitrator