

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

Compañía de Aguas del Aconquija S.A. & Vivendi Universal

v.

Argentine Republic (ICSID Case No. ARB/97/3)

DECISION ON THE CHALLENGE TO THE PRESIDENT
OF THE COMMITTEE

Introduction

1. On 21 November 2000, an ICSID Tribunal consisting of Judge Francisco Rezek, President, Judge Thomas Buergenthal and Mr. Peter Trooboff unanimously dismissed a claim brought by Compañía de Aguas del Aconquija S.A. and its parent company, now Vivendi Universal (“the Claimants”) against the Argentine Republic. On 20 March 2001, the Claimants requested annulment of the award pursuant to Article 52 of the ICSID Convention. Under Article 52 (3), the Chairman of the Administrative Council appointed three members of the Panel of Arbitrators, the undersigned and Mr. Yves Fortier, C.C., Q.C., as an *ad hoc* Committee to consider the request. The three members agreed that Mr. Fortier would be the President of the Committee.¹ At its first session in Washington on 21 June 2001, all members made declarations in terms of Rule 6 of the Arbitration Rules. Mr. Fortier qualified his declaration in one respect, and the Respondent reserved the right to challenge him. Subsequently it did so.

¹ On the election of the President by members of an *ad hoc* Committee see C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) pp. 1013–1014 (§345).

Chapter V of the Convention is entitled “Replacement and Disqualification of Conciliators and Arbitrators”. Article 56 provides that once a Commission or Tribunal has been constituted and has begun its proceedings, its composition shall remain unchanged, subject to contingencies such as the death, incapacitation or resignation of a member. Articles 57 and 58 of the Convention deal with the procedure to be followed in case of a proposal to disqualify any member of a Commission or Tribunal. In particular Article 58 states that a proposal to disqualify a conciliator or arbitrator is to be decided “by the other members of the Commission or Tribunal . . . provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision”. Arbitration Rule 9 deals with issues of disqualification of arbitrators in further detail.

3. Chapter V does not refer to disqualification of the members of *ad hoc* Committees. Nor does Article 52. Article 52 (4) stipulates that:

“The provisions of Articles 41–45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.”

Chapter V is not mentioned, although it deals with questions that could well arise with respect to the membership of Committees. However Rule 53, which is entitled “Rules of Procedure”, states:

“The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.”

The effect is to apply the procedure referred to in Arbitration Rule 9 to proposals to disqualify any member of a Committee. Pursuant to Rules 9 and 53, the undersigned were called on promptly to decide on the Respondent’s proposal.

4. Before doing so Mr. Fortier made an explanation of his position in terms of Rule 9 (3). This was circulated to the Parties, who were given a brief period to comment on it. The Claimants made no observations. By

letter of 12 September 2001 the Respondent confirmed its earlier challenge and made certain additional observations, which are discussed below.

Competence of Members of the Committee to Decide on a Disqualification Proposal

5. An initial question concerns our competence to decide on the proposal. Although neither Party raised the issue, it might be argued that the failure of Article 53 (4) of the Convention to refer to Chapter V or to apply it to the disqualification of members of *ad hoc* Committees was deliberate. If so, the Administrative Council was arguably incompetent to achieve by a Rule what the Convention itself specifically did not achieve and thus by implication precluded. It is necessary to consider this question before turning to the circumstances of the present case.

6. The rule-making powers of the Administrative Council are set out in Article 6 of the Convention. This provides, *inter alia*, that:

“(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:

...

“(c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);

...

“The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

“(2) The Administrative Council may appoint such committees as it considers necessary.

“(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.”

The Council consists of one representative of each Contracting State (Article 4).

7. It is not entirely clear from the Convention whether annulment requests and proceedings pursuant to such requests under Article 52 come within the term “arbitration proceedings” in Article 6 (1) (c), or whether they are to be considered as distinct. There are indications both ways. On the one hand annulment proceedings occur before a separate *ad hoc* Committee, separately constituted; on the other hand, the role of the Committee is narrowly defined and could be seen as ancillary to the arbitration function of ICSID as a whole. Nothing turns on this, however, since in any event the Council has power under Article 6 to regulate the procedures to be applied on a request for annulment, procedures which are only skeletally set out in Article 52. In particular it would have such power under Article 6 (3), on the basis that to establish orderly procedures for dealing with annulment requests can plainly be regarded as “necessary for the implementation of the provisions of this Convention”. No doubt any such Rules must be consistent with the terms of the Convention and with its object and purpose. But subject to this, the judgement whether they are necessary is a matter for the Council.

8. Article 52 (3) provides that no member of an *ad hoc* Committee can have been a member of the Tribunal which rendered the award. In addition no member may have the same nationality as any of the members of the Tribunal or of either Party or have been nominated to the Panel of Arbitrators by either of the States concerned. This covers some issues relating to the independence of members of *ad hoc* Committees but it does not do so exhaustively. Although such members must be Panel members (and may therefore be presumed to have the general qualities required), they may still have or have had particular links with the parties to an annulment proceeding which would disqualify them from sitting. Yet it is not clear that the Chairman of the Administrative Council would have inherent power to decide such issues in the absence of any article or rule to that effect. It would clearly be appropriate for the Administrative Council under Article 6 (3) to provide a procedure for challenging the appointment of an *ad hoc* Committee member. It seems equally clear that the Council has actually done so. Although Arbitration Rule 9 itself refers to Article 57 of the Convention (which does not apply to disqualification of Committee members), Rule 9 is sufficiently self-contained and can be given effect without relying on powers expressly conferred by the Convention itself on

other bodies. There can be no doubt as to the competence of the Administrative Council to apply the Arbitration Rules *mutatis mutandis* to proceedings relating to the interpretation, revision or annulment of an award, since this can clearly be seen as “necessary for the implementation of the provisions of this Convention”. Nor—if such a characterisation is relevant—is there any difficulty in describing proceedings on a request for disqualification, including the identification of those who will make the decision, as procedural questions for the purposes of Rule 53.

9. The intention of the Administrative Council to apply Arbitration Rule 9 to the membership of *ad hoc* Committees can be inferred from the history of the Rules. Rule 53 of the initial Arbitration Rules of 1968 provided that:

“Chapter II to V (excepting rules 39 and 40) of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision and annulment of an award, and Chapter VI shall similarly apply to the decision by the Tribunal or Committee.”²

Rule 39 concerned provisional measures; Rule 40, ancillary claims. These corresponded to Articles 46 and 47 of the Convention, which likewise were not applied by Article 52 (4) to annulment proceedings. Apart from these two Rules, the only significant exclusion from former Arbitration Rule 53 was Chapter I, which dealt with the establishment of the Tribunal, and which included the procedures for dealing with challenges. In 1984, the Administrative Council adopted a new set of Arbitration Rules, including Rule 53 in the terms set out above. The substantial effect of new Arbitration Rule 53 as compared with its predecessor was to apply *mutatis mutandis* the provisions of Chapter I and of Rules 39 and 40 to annulment procedures. We are informed that Parties to the Convention, who were given the opportunity to comment on the new Rules, made no comments on Rule 53. The new Rules were adopted without debate or dissent.³

10. Thus it can be inferred that the intention of the Council in 1984 was to apply all the Arbitration Rules, so far as possible, to annulment

² For the text of the 1968 Arbitration Rules see 1 *ICSID Reports* p. 63.

³ See *ICSID Annual Report 1985*, p. 18.

proceedings, including Rule 9. In our view the only reason why the procedure laid down in Arbitration Rule 9 could not be applied to members of *ad hoc* Committees *mutatis mutandis* would be if to apply such a procedure was inconsistent with the Convention, having regard to its object and purpose. We see no reason to regard it as such.

11. As to the object and purpose of the Convention, there is no difficulty. *Ad hoc* Committees have an important function to perform in relation to awards (in substitution for proceedings in national courts), and their members must be, and appear to be, independent and impartial. No other procedure exists under the Convention, expressly or impliedly, for deciding on proposals for disqualification. The only question then is whether it is literally inconsistent with the terms of the Convention, given that Chapter V is not applied by Article 52 to annulment, for the Rules to step in and make equivalent provision. Admittedly, the catalogue of provisions incorporated by reference in Article 52 (4) appears a considered one. The provisions incorporated are not only concerned with the powers of Committees. They apply to a range of questions, including the status of decisions made. On the other hand the matter of disqualification might simply have been overlooked, and other aspects of Chapter V are clearly apt to be applied to *ad hoc* Committees.

12. The point is noted as follows by Schreuer's *Commentary*:

“the application of Arbitration Rules 8–12 to annulment proceedings is only possible on the assumption that the omission of the Convention's Chapter V from the list of provisions in Art. 52(4) was unintentional. If the omission of Arts. 56–58 from Art. 52(4) is interpreted as a deliberate exclusion, it is not permissible to reintroduce these Articles under the guise of the corresponding Arbitration Rules... If this were otherwise, one could introduce the procedures for interpretation, revision and annulment in respect of decisions on annulment by way of applying the pertinent Arbitration Rules, a result that is clearly not intended by the Convention.”⁴

⁴ C.H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) p. 1042 (§422).

But as Schreuer also notes,⁵ the *travaux préparatoires* of the Convention do not suggest that there was any particular reason for excluding the application of Chapter V. It appears that no State party at the time of the adoption of Arbitration Rule 53 suggested any such reason. That Rule was adopted unanimously and was treated by the Members of the Administrative Council as uncontroversial. In the circumstances, the unanimous adoption of Arbitration Rule 53 can be seen, if not as an actual agreement by the States parties to the Convention as to its interpretation, at least as amounting to subsequent practice relevant to its interpretation.⁶

13. For all these reasons, we accept that Arbitration Rule 53 was within the competence of the Administrative Council under Article 6 (3) of the Convention, to the extent that it applies Chapter V *mutatis mutandis* to proposals to disqualify any member of an *ad hoc* Committee.

The Question of Disqualification

14. We turn then to the particular question raised by the challenge to Mr. Fortier. The governing standard here is not in doubt. It is set forth in Article 14 of the Convention, which is applied to members of annulment Committees by Article 57 of the ICSID Convention. Article 14 provides as follows:

“(1) 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. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”

Neither Mr. Fortier’s moral character nor his competence in the field of law have been questioned by the Respondent. The issue centres only on the question of his independence and impartiality with respect to the parties to the dispute, specifically the Claimants, i.e. on whether he “may be relied upon to exercise independent judgment”.

⁵ *Ibid.*, p. 1039 (§412).

⁶ Cf. Vienna Convention on the Law of Treaties, 1969, Art. 31 (3).

15. Arbitration Rule 6, as applied to *ad hoc* Committees by Arbitration Rule 53, requires from each of the members a declaration that there is to the best of their knowledge no reason why they should not serve, and a “statement of . . . past and present professional, business and other relationships (if any) with the parties”. In his statement of 18 June 2001, Mr. Fortier advised that one of the partners in his law firm Ogilvy Renault had been engaged by Vivendi’s predecessor, Compagnie Générale des Eaux, to advise on certain matters relating to taxation under Quebec law. Mr. Fortier had had no personal involvement in the work, which was wholly unrelated to the present case.

16. In response to certain questions put by the Respondent at the first session, Mr. Fortier affirmed that the remuneration involved was *de minimis*. He subsequently provided a memorandum from his firm stating that the work done for Vivendi S.A. had “always been very limited and, in relative terms, is inconsequential to our firm’s total billing”. The responsible tax partner of the firm provided a further memorandum outlining in general terms the nature of the work done and specifying the fees charged. According to this statement, fees of approximately \$216,000 had been billed, of which the great majority (approximately \$204,000) concerned work done in the period 1995–1999. The work was done for Vivendi S.A. but on instructions from a United States law firm which was acting generally in the matter. The work remaining to be done by Ogilvy Renault in respect of the matter was trivial; it concerned only the winding up of the arrangements in question and would involve fees of not more than \$2000. The partner undertook that he would not accept any further instructions from Vivendi S.A. until after the completion of this Committee’s mandate.

17. In its statement of 12 September 2001 the Respondent noted that the retainer from Compagnie Générale des Eaux was a continuing one and stated that the amounts charged on that retainer since 1995 “cannot be considered by the Republic of Argentina as *de minimis*”. It also stressed the importance of the present proceedings. In these circumstances it affirmed its challenge under Article 14 of the Convention. It had originally relied, *inter alia*, on the following provisions of the Code of Ethics for International Arbitrators (International Bar Association, 1987):

Rule 3.1: The criteria for assessing questions relating to bias are impartiality and independence. Partiality arises where an

arbitrator favours one of the parties, or where he is prejudiced in relation to the subject-matter of the dispute. Dependence arises from relationships between an arbitrator and one of the parties, or with someone closely connected with one of the parties.

Rule 3.2: Facts which might lead a reasonable person, not knowing the arbitrator's true state of mind, to consider that he is dependent on a party create an appearance of bias. The same is true if an arbitrator has a material interest in the outcome of the dispute, or if he has already taken a position in relation to it. The appearance of bias is best overcome by full disclosure as described in Article 4 below.

Rule 4 establishes, in effect, the obligation of arbitrators to declare all facts or circumstances that may give rise to justifiable doubts.

18. Consistently with this Code of Ethics, Arbitration Rule 6 of the ICSID Arbitration Rules, which is directly applicable here, imposes the obligation to declare "past and present professional, business and other relationships (if any) with the parties". The fundamental principle is that arbitrators shall be and remain independent and impartial; in terms of Article 14 (1) of the Convention, they must be able to be "relied on to exercise independent judgment". Exactly the same principle applies to the members of *ad hoc* Committees. The role of the other members of this Committee is to determine whether there is "a manifest lack of the qualities required by paragraph (1) of Article 14".

19. Certain initial points should be made. First, although various legal entities within the Vivendi group have been mentioned (Compagnie Générale des Eaux, Vivendi S.A., Vivendi Universal), it does not appear that there is any relevant distinction between them for present purposes. Accordingly we approach the question on the basis that one of the claimant companies, or at any rate a company within the Vivendi group, is a client of Mr. Fortier's law firm in an as yet uncompleted matter. The great bulk of the work was done before the present proceedings were commenced and only a minor amount of work remains to be done. Mr. Fortier at no stage has had any personal involvement with the work or with the Claimant companies in relation thereto, and the work done bears no relationship to the present dispute.

20. Secondly, a question arises with respect to the term “manifest lack of the qualities required” in Article 57 of the Convention. This might be thought to set a lower standard for disqualification than the standard laid down, for example, in Rule 3.2 of the IBA Code of Ethics, which refers to an “appearance of bias”. The term “manifest” might imply that there could be circumstances which, though they might appear to a reasonable observer to create an appearance of lack of independence or bias, do not do so manifestly. In such a case, the arbitrator might be heard to say that, while he might be biased, he was not *manifestly* biased and that he would therefore continue to sit. As will appear, in light of the object and purpose of Article 57 we do not think this would be a correct interpretation.

21. Decisions on a proposal to disqualify an arbitrator under Article 57 have been made in two previous cases. In the *Amco Asia* case, the Respondent challenged the Claimant’s party-appointed arbitrator, Mr. Rubin, on a number of grounds. Prior to his appointment as arbitrator (but after the commencement of the arbitration) Mr. Rubin had personally given a limited amount of tax advice to the principal shareholder in the Claimant company. His law firm had also, prior to the commencement of the arbitration, had a profit sharing arrangement with the lawyers acting for the Claimants. During the period of that arrangement neither the shareholder nor the Claimant had been clients of either law firm. In their unpublished decision of 14 June 1982,⁷ the other two arbitrators (Professors Goldman and Foighel) first affirmed by reference to the object and purpose of the Convention, that . . .

“an absolute impartiality . . . of all the members of an arbitral tribunal, is required, and it is right to say that no distinction can and should be made, as to the standard of impartiality, between the members of an arbitral tribunal, whatever the method of their appointment.”⁸

But they went on to say that this requirement did not preclude the appointment as an arbitrator of a person who has had, before his appointment, some relationship with a party, unless this appeared to create a risk of inability to

⁷ ICSID Case ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, Decision on the proposal to disqualify an arbitrator, of 24 June 1982, unpublished.

⁸ As cited by M. Tupman, “Challenge and Disqualification of Arbitrators in International Commercial Arbitration”, *ICLQ*, v. 38, 1989, p.26 at p. 45.

exercise independent judgment. In this context, in their view, the existence of some prior professional relationship in and of itself did not create such a risk “whatever the character—even professional—or the extent of said relations.”⁹ As to Article 57, they laid stress on the term “manifest”, which in their view required “not a possible lack of the quality, but . . . a highly probable one.”¹⁰ On this basis they rejected the challenge. In their view, legal advice (with a fee, in 1982, of Can\$450) given by someone who had never been “regular counsel of the appointing party” was minor and had no bearing on the reliability of the arbitrator; nor could the links between the two law firms “create any psychological risk of partiality”.¹¹ Thus Mr. Rubin’s lack of reliability was not manifest; indeed, in their view, it was not even reasonably apprehended.

22. The decision has been strongly criticized.¹² To the extent that it concerned a personal relationship of legal advice given by the arbitrator to a party or to a related person after the dispute in question had arisen, it can in our view only be justified under the *de minimis* exception. That the advice was given on an unrelated matter, though a relevant factor, can hardly be sufficient. The fact remains that a lawyer-client relationship existed between the claimant and the arbitrator personally during the pendency of the arbitration; this must surely be a sufficient basis for a reasonable concern as to independence, unless the extent and content of the advice can really be regarded as minor and wholly discrete.

23. The second decision under Article 57 was given on 19 January 2001 in the *Zhinvali* case, which is still pending. There the challenge was based on the existence of occasional, purely social, contacts between the arbitrator in question and an executive instrumental in the claimant’s investment. The other two arbitrators stressed the absence of any professional or business relationship between the arbitrator and the person concerned, and concluded that to suggest that a merely occasional personal contact could manifestly affect the judgment of an arbitrator, in the

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid., p. 51.

absence of any further facts, was purely speculative.¹³ They accordingly dismissed the challenge.

24. On the crucial question of the threshold test, the *travaux préparatoires* of Article 57 give little guidance. Schreuer says only that the requirement that the lack of impartiality must be manifest “imposes a relatively heavy burden of proof on the party making the proposal”.¹⁴ Some guidance is however to be obtained from general authorities in the field of international arbitration. According to Fouchard, Gaillard & Goldman, the existence of business relations between an arbitrator and one of the parties does not necessarily lead to the existence of a relationship of dependency that would justify a challenge.¹⁵ They note, realistically, the large number of possibilities that exist for arbitrators to have or have had some “professional contact” with the parties. In this respect, an illustrative case is that of *Philipp Brothers*,¹⁶ where it was stressed that a professional party could not be allowed to challenge *en bloc* all other professionals within his or her milieu. The authors also refer to an ICC arbitration where counsel acting for one of the parties belonged to the same firm as the president of the arbitral tribunal. The Paris *Cour d’appel* held that belonging to such an “association of interests” as a large law firm with multiple divisions and specializations does not imply economic dependency sufficient to justify disqualification.¹⁷

25. It is not necessary to consider the implications of the term “manifest” in Article 57 for cases in which there is any dispute over the facts, since there is none in the present case. On the one hand it is clear that that term cannot preclude consideration of facts previously undisclosed or unknown, provided that these are duly established at the time the decision is made. On the other hand, the term must exclude reliance on speculative

¹³ ICSID Case ARB/00/1, *Zhinvali Development Ltd. v. Republic of Georgia*, Decision on Respondent’s Proposal to Disqualify Arbitrator, 19 January 2001 (Davis Robinson, Seymour J. Rubin), unpublished.

¹⁴ Schreuer, *Commentary*, p. 1200, §16, and see *ibid.*, p. 1199, §14 for a review of the *travaux*. On the meaning of the term “manifestly” in Arts. 36 (3) and 52 of the Convention see *ibid.*, pp. 458–460, §§45–47, pp. 932–936, §§137–146, respectively. It is implicit in what we have said that the term may have a different meaning in these different contexts.

¹⁵ *Traité d’arbitrage commercial international*, Paris, Litec, 1999, pp. 584.

¹⁶ TGI Paris, 28 October 1988 and 29 June 1989, *Rev. arb.* 1990, p. 497.

¹⁷ Judgment of 28 June 1991, *Rev. arb.* 1992, p. 568, reported by P. Bellet; cited by Fouchard, Gaillard & Goldman, pp.584–585.

assumptions or arguments—for example, assumptions based on prior and in themselves innocuous social contacts between the challenged arbitrator and a party. But in cases where (as here) the facts are established and no further inference of impropriety is sought to be derived from them, the question seems to us to be whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party. If (and only if) the answer is yes can it be said that the arbitrator may not be relied on to exercise independent judgment.¹⁸ That is to say, the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality. If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member, the appearance of security for the parties would disappear and a challenge by either party would have to be upheld. Once the other arbitrators or Committee members had become convinced of this conclusion, there would no longer be room for the view that the deficiency was not “manifest”.

26. Turning to the facts of the present case, it is true that a partner of Mr. Fortier’s had (and still has) the Claimants or one of their affiliates as a client. But we do not think that this, in and of itself, is enough to justify disqualification in the circumstances of this case. Relevant on the other hand are the following facts: (a) that the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency;¹⁹ (b) that Mr. Fortier personally has and has had no lawyer-client relationship with the Claimants or its affiliates; (c) that the work done by his colleague has nothing to do with the present case; (d) that the work concerned does not consist in giving general legal or strategic advice to the Claimants but concerns a specific transaction, in which Ogilvy Renault are not the lead firm; (e) that the legal relationship will soon come to an end with the closure of the transaction concerned.

¹⁸ For examples of the application of a test of this kind to diverse facts see e.g. *AT & T Corporation v. Saudi Cable Co.* [2000] 2 Lloyd’s Rep. 127; *In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700.

¹⁹ Mr. Fortier declined, in our view reasonably, to provide details of his overall remuneration with Ogilvy Renault. Disclosure of that information, confidential to him and his partners, was not necessary in order to decide on the proposal for disqualification.

27. In these specific circumstances we see no reason to regard Mr. Fortier's independence as in any way impaired by the facts disclosed. We therefore do not need to rely on any *de minimis* rule as a basis for our conclusion. We note that the Respondent does accept in principle the existence of such a rule.²⁰ While we agree with the Respondent that the amount of fees earned in the transaction since its inception is not *de minimis*, it is the case that only a small amount will have been charged for the last stages of the work, in the period 2000–2002. This is the relevant period for the purposes of the present annulment request. If necessary, the *de minimis* rule would have provided a further basis for rejecting the proposal for disqualification.

Conclusions

28. To summarise, we agree with earlier panels which have had to interpret and apply Article 57 that the mere existence of some professional relationship with a party is not an automatic basis for disqualification of an arbitrator or Committee member. All the circumstances need to be considered in order to determine whether the relationship is significant enough to justify entertaining reasonable doubts as to the capacity of the arbitrator or member to render a decision freely and independently. In the present case, for the reasons given above, the continuing relationship between another partner of Ogilvy Renault and Vivendi is not significant enough for this purpose. Accordingly the proposal for disqualification submitted by the Respondent must be dismissed.

Professor James Crawford SC

Professor José Carlos Fernández Rozas

3 October 2001

²⁰ See above, paragraph 17.