

Suez, Sociedad General de Aguas de Barcelona S.A.
and Vivendi Universal S.A.*
v. Argentine Republic
(ICSID Case No. ARB/03/19)

Introductory Note

In January 2005, five non-governmental organizations, based in Buenos Aires and Washington, D.C., filed with ICSID a request for leave to submit *amicus curiae* briefs in a case instituted against Argentina by French and Spanish shareholders in a water and sewer concession in the Province of Buenos Aires. Asserting that the case involved matters of basic public interest and fundamental rights of the people living in the area affected by the underlying dispute, the Petitioners also sought access to the case record and hearings.

Claimants had brought the case to the Centre in 2003, invoking the investor-State dispute settlement provisions in the 1993 Argentina-France and the 1991 Argentina-Spain bilateral investment treaties (BITs). Claimants alleged that the emergency measures adopted by the Argentine authorities in late 2001 and early 2002 constituted a breach of their rights under the above BITs.

The Tribunal, presided by Professor Jeswald W. Salacuse (U.S.), and comprising also Professor Gabrielle Kaufmann-Kohler (Swiss) and Professor Pedro Nikken (Venezuelan), upon receipt of the request, invited the disputing parties to file any observations on the matter. After considering the request and the parties' positions, the Tribunal issued the following Order, finding as follows.

On the Petitioners' request for access to the hearing, the Tribunal focused on ICSID Arbitration Rule 32(2) under which access to hearings is limited to the parties, their witnesses and experts, and the officers of the Tribunal, unless the parties otherwise agree. In the absence of the parties' agreed consent in this case, the Tribunal had no choice but to deny the request.

*This case was originally registered by the Centre as Aguas Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic (ICSID Case No. ARB/03/19). On April 14, 2006, the Arbitral Tribunal issued Procedural Order No.1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A. (available online at <http://www.worldbank.org/icsid/cases/ARB-03-19-PO-NO1.pdf>). The proceedings have since continued with respect to claimants Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. The case has been renamed to reflect this change.

On the Petitioners' request for permission to file an *amicus curiae* brief, the Tribunal relied on its residual power under Article 44 of the ICSID Convention to decide on procedural questions not treated in the Convention or the applicable Arbitration Rules. Following closely the analysis of the 1976 UNCITRAL Arbitration Rules made by a NAFTA arbitral tribunal before, the Tribunal concluded that the admission of *amicus curiae* briefs is a "procedural question" that can be addressed under Article 44.

The Tribunal, having found that it had the power to admit *amicus curiae* briefs, turned to the conditions under which such submissions would be admitted. In this regard, the Tribunal concluded that admission of *amicus curiae* briefs would depend on three basic criteria: (a) the appropriateness of the subject matter of the case; (b) the suitability of a given nonparty to act as *amicus curiae* in that case, and (c) the procedure by which the *amicus* submission is made and considered.

With respect to the first criterion, the Tribunal focused on the fact that the dispute centered around water services provided to millions of people, and thus may raise a variety of complex public and international law questions, including human rights considerations. With this in mind, the Tribunal concluded that *amicus curiae* brief would be suitable in this case, as any decision by the Tribunal would potentially affect the manner in which water concessions operate and thus the vast public they serve. As to the suitability of the Petitioners, the Tribunal identified *expertise*, *experience*, and *independence* as the three factors to be considered. Finally, with respect to the appropriate procedure, the Tribunal declared its goal to enable the *amicus* to present their views, while safeguarding the substantive and procedural rights of the disputing parties.

Having found that in this case the three basic criteria referred above were met, the Tribunal decided to grant an opportunity to the Petitioners to apply for leave to file an *amicus curiae* brief, in compliance with the conditions stated in the Tribunal's Order and deferred its decision on the question of access to the case documentation.

Finally, as to the Petitioners' request for access to the documents of the case, the Tribunal's decision was deferred until such time as the Tribunal grants leave for a non-disputing party to file an *amicus curiae* brief.

This was the first case in which a Tribunal acknowledged its powers under the ICSID Convention to allow submissions from non-disputing parties as "friends of the court." A similar request had been rejected a few years earlier by another ICSID tribunal. This Order reflects a tendency toward greater openness in investment arbitration. Such tendency would be later confirmed in April 2006, when ICSID amended its Arbitration Rules. The new Arbitration Rule 37 echoed the language used by the Tribunal in the attached Order. The

amendments also modified Arbitration Rule 32, on which basis the Tribunal rejected the Petitioners' request for access to the hearings. Under new Rule 32, access to hearings to third non-disputing parties may be granted by an ICSID tribunal, unless there is an express objection from either party.

The English version of the Tribunal's Order in Response to a Petition for Transparency and Participation as *Amicus Curiae* in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* is reproduced below with the parties' consent. The English and Spanish versions of the Order are posted, in PDF format, on ICSID's website at www.worldbank.org/icsid.

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