

Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi Universal S.A.

(Claimants)

v.

The Argentine Republic

(Respondent)

ICSID Case No. ARB/03/19

**ORDER IN RESPONSE TO A PETITION BY FIVE NON-GOVERNMENTAL
ORGANIZATIONS FOR PERMISSION TO MAKE AN AMICUS CURIAE
SUBMISSION**

Members of the Tribunal

Professor Jeswald W. Salacuse, President

Professor Gabrielle Kaufmann-Kohler

Professor Pedro Nikken

Secretary of the Tribunal

Mr. Gonzalo Flores

DATE: February 12, 2007

I. Introduction

1. On January 28, 2005, five non-governmental organizations, Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria, and Unión de Usuarios y Consumidores [hereinafter Petitioners] filed a “Petition for Transparency and Participation as Amicus Curiae” with ICSID in the above-entitled case. Asserting that the case involved matters of basic public interest and the fundamental rights of people living in the area affected by the dispute in the case, the Petitioners asked the Tribunal to grant three requests:

- a. to allow Petitioners access to the hearings in the case;
- b. to allow Petitioners opportunity to present legal arguments as *amicus curiae*; and
- c. to allow Petitioners timely, sufficient, and unrestricted access to all of the documents in the case.

2. After receiving the observations of the Claimants and the Respondents on this request, the Tribunal issued an Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005 (available at ICSID’s website at www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf) in which it found that under Article 44 of the ICSID Convention the Tribunal had the power to grant suitable parties the opportunity to make submissions as *amicus curiae* in appropriate cases and granted the petitioners an opportunity to apply for leave to make *amicus curiae* submissions in accordance with certain stated conditions. In applying its power to

permit *amicus* submissions, the Tribunal stated that it had to take into account 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 (para. 17).

3. With respect to the first criteria, the Tribunal concluded that this case “involved matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties.”(para. 20). To support its conclusion, the Tribunal stated at paragraph 19 of the Order:

“In examining the issues at stake in the present case, the Tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.”

4. In the same Order, the Tribunal denied Petitioners' request to attend the hearings in this case and deferred a decision on Petitioners' request for access to documents until such time as the Tribunal granted leave to a non-disputing party to file an *amicus curiae* brief (para. 33) . The Tribunal also stated that in view of the fact that the Parties had competently and comprehensively argued all issues regarding jurisdiction, *amicus* submissions on jurisdictional questions would not be appropriate, under the standards set forth previously in paragraph 17 of the Order, as they would not assist the Tribunal in assessing jurisdiction (para 28).

5. On April 14, 2006, the Tribunal, at the request of the Claimant Aguas Argentinas S.A. (AASA) and with the approval of the Respondent, issued Procedural Order no. 1 Concerning the Discontinuance of Proceedings with Respect to Aguas Argentinas S.A. (available at www.worldbank.org/icsid/cases/ARB-03-19-PO-NO1.pdf) directing the discontinuance of the arbitral proceeding with respect to AASA, which the Claimant shareholders were then in the process of selling, while affirming that the case should continue in all other respects.

6. On August 3, 2006, the Tribunal issued a Decision on Jurisdiction (available at worldbank.org/icsid/cases/pdf/ARB0319_DecisiononJurisdiction03-19.pdf) in which it rejected all of the Respondent's objections to jurisdiction and directed that the case proceed on the merits.

7. On December 1, 2006, the Petitioners filed with the Tribunal a *Solicitud de Autorización para Realizar una Presentación en Calidad de Amicus Curiae* (Petition for Permission to Make an Amicus Curiae Submission) [hereinafter the Petition] in which the five non-governmental organizations asked to make a single, joint *amicus*

curiae submission because of the matters of public interest presented by this case. In the Petition, the Petitioners made two specific requests: 1) to be granted an opportunity to present a written *amicus curiae* submission in the form and time that the Tribunal deems appropriate in order to provide arguments and perspectives that may contribute to a better and more comprehensive solution of the case, and 2) to be given timely, sufficient, and unrestricted access to the documents produced during the course of the arbitration in order to focus their *amicus* submission on the questions most pertinent to the case. Alternatively, in the event that the Tribunal would reject such request, the Petitioners asked that they be granted access to the Parties' pleadings.

8. On December 4, 2006, the Secretary of the Tribunal, at the direction of the Tribunal President, sent copies of the Petition to the Claimants and Respondent and requested them to submit their observations.

9. The Tribunal received observations from both parties. In their observations of December 18, 2006, the Claimants asked the Tribunal to reject the Petition for the following reasons: a) any decision in this case no longer has the potential to affect the operation of the water and sewage system of Buenos Aires and the public they serve since AASA is no longer a party to the case; b) the former concessionaire AASA is no longer a party to the case and even if there was any residual public interest after the termination of the concession, the proper forum for the Petitioners are the Argentine domestic courts, where some of them already participate in proceedings; c) the Petitioners offer no new factual elements to the arbitration and will only make inappropriate legal arguments that the Parties are fully competent to make; d) none of

the issues which the Petitioners propose to raise concern the public interest identified by the Tribunal in its earlier Order or fall within the subject matter of the dispute; e) the Petition has been filed too late and its timing is likely to cause disruption of the proceedings; and f) the documents filed in the proceeding are confidential and the Claimants expressly refuse their consent to disclosing them to the Petitioners.

10. In its observations of December 18, 2006, the Respondent stated that it had no objection to the Petition.

11. This order rules on the Petition.

II. Suitability of the Petitioners to Make Amicus Submissions

12. In its Order of May 19, 2005, the Tribunal stated that the exercise of its power under Article 44 of the ICSID Convention to accept *amicus* submissions should depend on three criteria: 1) 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 to be made and considered.

13. With respect to judging the suitability of the Petitioners, the Tribunal in its Order of May 19, 2005, indicated three factors of importance: expertise, experience, and independence. To be in a position to assess these factors, the Tribunal required that the petition for leave to submit an *amicus curiae* brief include information on the petitioner itself, its interest in the case, any support received from the Parties or other persons associated with the case, and the reasons why the Tribunal should accept the petition.

14. After the Tribunal's Order of May 19, 2005, ICSID revised its Arbitration Rules and adopted a new Rule 37 (2) which became effective on April 10, 2006 and reads as follows:

“(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

15. While this new Rule does not apply to this case and while its formulation may be partly different from the wording used in the Tribunal's decision of May 19, 2005, this amendment of the ICSID Arbitration Rules is in accord with the three criteria

previously identified by the Tribunal as well as with the three factors which the Tribunal decided to use to rule on the suitability of the Petitioners.

16. In this context, the Petition meets the requirements for information set out in the Order of May 19, 2005 and referred to above. Indeed, it provides sufficient information to show that the five Petitioners are respected nongovernmental organizations and that they have as a group developed an expertise in and are experienced with matters of human rights, the environment, and the provision of public services. Moreover, the Petition alleges that they are independent of either Party in this arbitration. The Claimants do not challenge any of the Petitioners' assertions in this regard nor do they challenge in any way the Petitioners suitability to serve as *amici* with respect to their expertise, experience or independence. The Tribunal concludes that the Petitioners have demonstrated their suitability to make *amicus* submissions in this case.

III. The Appropriateness of the Subject Matter of the Case

17. Effect of the Withdrawal of AASA. In paragraph 19 of its Order of May 19, 2005, which is quoted above, the Tribunal determined that this case presented an appropriate subject matter for an *amicus* submission because it involved matters of public interest, namely the international legal responsibility of the Argentine state, and more particularly the water and sewage system affecting millions of people, possibly raising complex issues in international law, including human rights considerations. The Claimants now argue that the termination of AASA's concession and the discontinuance of the proceedings with respect to AASA, the former operator of that water and sewage system, changes the nature of this case since any decision in

this arbitration can no longer have an impact on the operations of AASA or the water and sewage system it formerly operated. The Claimants contend that the only effect of any decision in this case is to determine the monetary liability, if any, in respect of alleged treaty breaches.

18. The Tribunal does not believe that the withdrawal of AASA and the end of the concession changes the nature of the subject matter of this case. Nor do they render such subject matter inappropriate for an *amicus* submission. Even if its decision is limited to ruling on a monetary claim, to make such a ruling the Tribunal will have to assess the international responsibility of Argentina. In this respect, it will have to consider matters involving the provision of “basic public services to millions of people”. To do so, it may have to resolve “complex public and international law questions, including human rights considerations” (Order of May 19, 2005, para. 19). It is true that the forthcoming decision will not be binding on the current operator of the water and sewage system of Buenos Aires. It may nonetheless have an impact on how that system should and will be operated. More generally, because of the high stakes in this arbitration and the wide publicity of ICSID awards, one cannot rule out that the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties. As a result, the Tribunal concludes that this case continues to present sufficient aspects of public interest to justify an *amicus* submission even after the discontinuance of the proceeding with respect to AASA.

19. The Proper Forum for the Petitioners. The Claimants argue that the proper forum for the Petitioners to raise their concerns is the domestic courts of Argentina and that

in fact some of the Petitioners are engaged in such domestic litigation. The Tribunal does not believe that the availability of another forum is relevant to the question of whether the Petitioners may act as *amicus curiae* in the present arbitration. The present ICSID case and the litigation in the domestic courts of Argentina are distinctly different matters involving the application of distinctly different legal frameworks. Furthermore, the role of the Petitioners in this arbitration is not to serve as a litigant, as would be the case in a domestic case, but to assist the Tribunal, the traditional role of an *amicus curiae*.

20. New Factual Elements and Legal Arguments. The Claimants further argue that the Tribunal should reject the Petition because the Petitioners do not seek to offer any new factual elements but rather to make legal arguments inappropriate for a non-party. In its Order of May 19, 2005, the Tribunal did not limit the contribution of an *amicus curiae* to “new factual elements.” Rather, the Tribunal stated in paragraph 13 that the traditional role of an *amicus curiae* is “...to help the decision maker arrive at its decision by providing the decision maker with *arguments, perspectives, and expertise* that the litigating parties may not provide” (emphasis added). Such “arguments, perspectives and expertise” may relate to law, facts, or the application of law to the facts. This conclusion is further supported by the language of the new Rule 37(2) of the ICSID Arbitration Rules which refers to the *amicus* assisting the Tribunal “in the determination of a factual or legal issue”. Consequently, the Tribunal does not accept the Claimants’ argument on this point.

21. Timeliness of Petition. Noting that the Tribunal's Order allowing leave to file a Petition as *amicus curiae* was issued on May 19, 2005 and that the Petitioners did not submit their Petition until December 1, 2006, the Claimants argue that the Petition arrived too late in the proceeding to be considered. Since the Tribunal's Order of May 19, 2005 expressly stated that an *amicus curiae* submission would not be considered during the jurisdictional phase of this case, the time when the Petitioners might first have filed their petition was shortly after August 3, 2006, the date of the Tribunal's decision on jurisdiction in this case. While a delay of four months from that date in filing the Petition is somewhat long, the Tribunal does not believe that considering the Petition at this point will impede the progress of the case, particularly in light of the fact that the submission of memorials by the Parties will end on August 9, 2007 and that hearings are not scheduled to begin until October 29, 2007. The Tribunal believes that there is sufficient time to allow an *amicus* submission by the Petitioners and receive the Parties' observations thereon well before the beginning of the hearings, thus integrating the *amicus* process into the general course of the arbitration. In setting the relevant time limits, the Tribunal will obviously avoid conflicts with other deadlines in order not to unduly burden the parties. For the same purpose, it will limit the *amicus* submission to a reasonable length, allowing the *amicus* to provide substantive input without burdening the file with yet another substantial brief. Similarly, it will direct that the submission be filed without annexes, being understood that it will itself ask the *amicus* for any documents possibly referenced by the latter which it may wish to review.

22. Finding that the reasons advanced by the Claimants do not support the rejection of the Petition, the Tribunal concludes that the Petitioners are suitable nonparties to make an *amicus curiae* submission and that this case is an appropriate one to receive such an *amicus* submission in accordance with the limits and conditions stated hereinafter.

IV. Access to Arbitration Documents

23. The Petitioners have also requested “timely, sufficient, and unrestricted access to all the documents produced in the arbitration”. On the basis of extensive and detailed arguments, the Claimants object that the documents filed in this case are confidential and state that they do not consent to their disclosure to the Petitioners.

24. The revision of the ICSID Arbitration Rules which introduced Rule 37(2) did not deal with the *amicus curiae*'s access to the record and thus provides no guidance. As a general proposition, an *amicus curiae* must have sufficient information on the subject matter of the dispute to provide “perspectives, expertise and arguments” which are pertinent and thus likely to be of assistance to the Tribunal. Otherwise the entire exercise serves no purpose. In the present case, the Petitioners have sufficient information even without being granted access to the arbitration record. Hence, because of the specifics of these proceedings, the Tribunal can dispense with resolving the general question of a non-party's access to the record.

25. As is apparent from their Petition, the Petitioners have already gained much information from other sources about this case. Moreover, the Tribunal's Decision on Jurisdiction of August 3, 2006, publicly available on the ICSID website, contains information about the nature of the claims being advanced by the Claimants. In

addition, the Petitioners propose to offer their views to the Tribunal on general issues which per se do not require comprehensive information of the factual basis of this case. Furthermore, it must be emphasized that the role of an *amicus curiae* is not to challenge arguments or evidence put forward by the Parties. This is the Parties' role. The role of the Petitioners in their capacity as *amicus curiae* is to provide their perspective, expertise, and arguments to help the court. The Tribunal believes that, under the circumstances of the present case, the Petitioners can fully carry out that function without access to the record.

V. Procedure for Submitting and Considering Amicus Curiae Submissions

26. To determine the appropriate procedure, the Tribunal bears in mind the goal stated in its Order of May 19, 2005: which is to “enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties”. It is also mindful of the statement made in the same Order pursuant to which it would “endeavor to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings.” It further notes that the new Rule 37(2) of the ICSID Arbitration Rules requires tribunals to “ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission”.

27. On such basis and having considered the Petition and the Parties' observations, the Tribunal has determined that the Petitioners may file an *amicus curiae* submission in accordance with the following procedure:

- a. The Petitioners may file electronically a single joint *amicus curiae* submission with the Secretary of the Tribunal no later than April 4, 2007;
- b. Such submission shall be no longer than 30 double-spaced pages in 12 point font and shall be in both the English and Spanish languages;
- c. If the Tribunal wishes to consult any document which may be referred to in the submission, it will request a copy from the Petitioners who shall then provide it to the Secretary of the Tribunal;
- d. Upon receipt of the *amicus curiae* submission, the Secretary of the Tribunal shall forward the submission (in English and Spanish versions) to the Parties;
- e. The Parties may file observations on the submission no later than June 4, 2007.

[signature]

Professor Jeswald W. Salacuse
President of the Tribunal

[signature]
Professor Gabrielle Kaufmann-Kohler
Arbitrator

[signature]
Professor Pedro Nikken
Arbitrator