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

In the proceedings between

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

(Claimants)

and

The Argentine Republic

(Respondent)

ICSID Case No. ARB/03/19

ORDER IN RESPONSE TO A PETITION FOR TRANSPARENCY AND PARTICIPATION AS *AMICUS CURIAE*

Members of the Tribunal:
Professor Jeswald W. Salacuse, President
Professor Gabrielle Kaufmann-Kohler, Arbitrator
Professor Pedro Nikken, Arbitrator

Secretary of the Tribunal:
Mr. Gonzalo Flores

Date: May 19, 2005

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" [hereinafter the Petition] in the above-entitled case with ICSID. 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 requested 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. On February 16, 2005, 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 thereon to the Tribunal by March 11, 2005.

3. The Tribunal received observations from both parties. The Claimants asked the Tribunal to reject the Petition in its entirety and to deny each of the requests it contained. The Respondent, on the other hand, approved of the Petition. This order responds to the three requests made by Petitioners.

II. Access to the Arbitral Hearings

4. Petitioners ask the Tribunal "to concede the applicants access to the hearings" and also suggest that hearings in the present case should be opened to the public, citing the NAFTA cases of *Methanex v. United States of America* and *UPS v. Canada*, both of which involved public hearings. By "access to the hearings," Petitioners not only request the right to attend hearings but they also seem to suggest that they be given the opportunity to make oral presentations to the Tribunal, asserting "the right of every person to participate and make their voices heard in cases where decisions may affect their rights…" (Petition Page10).

5. The presence and participation of persons at ICSID hearings is expressly regulated by ICSID Arbitration Rule 32 (2), which states:

> "The tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings." (emphasis supplied).

6. Rule 32 (2) is clear that no other persons, except those specifically named in the Rule, may attend hearings unless both Claimants and Respondent affirmatively agree to the attendance of those persons. In this case, the Claimants, in their observations of 11 March 2005 on the Petition, have expressed their clear refusal to the attendance by Petitioners at the hearings in this case. Although the Tribunal, as the Petition asserts, does have certain inherent powers with respect to arbitral procedure, it has no authority to exercise such power in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the procedure in this case. While the

Methanex and *UPS* cases (both NAFTA cases under UNCITRAL Arbitration Rules) cited by Petitioners did indeed involve public hearings, both claimants and respondents in those cases specifically consented to allowing the public to attend the hearings. The crucial element of consent by both parties to the dispute is absent in this case.

7. For the foregoing reasons, the Tribunal unanimously concludes that it must deny Petitioner's request to have access to and attend the hearings in this case.

III. <u>Submission of *Amicus Curiae* Briefs</u>

8. Petitioners request the Tribunal to "allow the applicants sufficient opportunity to present legal arguments, as *amicus curiae*." Although Petitioners do not define in detail the role and nature of an *amicus curiae* or "friend of the court" in an ICSID arbitration or the precise form that such proposed intervention is to take, the Tribunal assumes that the *amicus curiae* role the Petitioners seek to play in the present case is similar to that of a friend of the court recognized in certain legal systems and more recently in a number of international proceedings. In such cases, a nonparty to the dispute, as "a friend," offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission. Claimants in their observations of 11 March 2005 asked the Tribunal to refuse such a request, while Respondent expressed its approval.

9. Neither the ICSID Convention nor the Arbitration Rules specifically authorize or specifically prohibit the submission by nonparties of *amicus curiae* briefs or other documents. Moreover, to the knowledge of the Tribunal, no previous tribunal functioning under ICSID Rules has granted a nonparty to a dispute the status of *amicus*

curiae and accepted *amicus curiae* submissions. This lack of specificity in the ICSID Convention and Rules requires the Tribunal in this case to address two basic questions: 1) Does the Tribunal have the power to accept and consider *amicus curiae* submissions by nonparties to the case? and 2) If it has that power, what are the conditions under which it should exercise it?

10. The Powers of the Tribunal to Accept *Amicus Submissions*. Article 44 of the ICSID Convention states:

> "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question." (emphasis supplied)

The last sentence of Article 44 is a grant of residual power to the Tribunal to decide procedural questions not treated in the Convention itself or the rules applicable to a given dispute.

11. In applying this provision to the present case, the Tribunal faces an initial question as to whether permitting an *amicus curiae* submission by a non disputing party is a "procedural question." At a basic level of interpretation, a procedural question is one which relates to the manner of proceeding or which deals with the way to accomplish a stated end. The admission of an *amicus curiae* submission would fall within this definition of procedural question since it can be viewed as a step in assisting the Tribunal to achieve its fundamental task of arriving at a correct decision in this case.

12. Claimants argue in their Observations that such a procedural measure would have substantive consequences, since "the practical effect would be that Claimants would end up litigating with entities which are not party to the arbitration agreement" (para. 23). They also contend that the Tribunal should interpret the ICSID Convention and Rules as prohibiting the submission of an *amicus curiae* brief since the Convention and Rules provide only for litigation between investors and host states, a factor that implicitly excludes other persons as litigants and parties in an ICSID arbitration.

13. The Tribunal does not accept Claimants' interpretation of the ICSID Convention and Rules on this point. An *amicus curiae* is, as the Latin words indicate, a "friend of the court," and is not a party to the proceeding. Its role in other forums and systems has traditionally been that of a nonparty, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. The traditional role of an *amicus curiae* in an adversary proceeding 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. In short, a request to act as *amicus curiae* is an offer of assistance – an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.

14. In *Methanex v. United States of America*, a NAFTA case under the 1976 UNCITRAL Rules, the Decision of the Tribunal on Petitions From Third Parties to Intervene as Amici Curiae of January 15, 2001 (see www.naftalaw.org) supports the conclusion of the present Tribunal with respect to its power to admit *amicus* submissions in this case. The *Methanex* tribunal, interpreting article 15(1) of the UNCITRAL Rules, which is substantially similar to Article 44 of the ICSID Convention, concluded that the

UNCITRAL Rules gave it the power to accept *amicus* briefs. It specifically concluded, as does this Tribunal, that "the receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration." (para.30). Moreover, like the *Methanex* tribunal, the Tribunal in the present case finds that acceptance of *amicus* submissions is a procedural question that does not affect a disputing party's substantive rights since the parties' rights remain the same both before and after the submission.

15. Like the claimants in *Methanex,* Claimants in the present case argue that *amicus* submissions would place an increased burden on the parties and the Tribunal. While that result is theoretically possible, it is not inevitable. The Tribunal believes that it can exercise its powers under Article 44 in such a way as to minimize the additional burden on both the parties and the Tribunal, while giving the Tribunal the benefit of the views of suitable *amici curiae* in appropriate circumstances. The Tribunal in the present case finds further support for the admission of *amicus* submissions in international arbitral proceedings in the practices of NAFTA, the Iran-United States Claims Tribunal, and the World Trade Organization.

16. The Tribunal unanimously concludes that Article 44 of the ICSID Convention grants it the power to admit *amicus curiae* submissions from suitable nonparties in appropriate cases. We turn now to consider the conditions under which the Tribunal may exercise that power.

17. <u>The Conditions for the Admission of *Amicus Curiae* Briefs</u>. Based on a review of *amicus* practices in other jurisdictions and fora, the Tribunal has concluded that the exercise of the power conferred on the Tribunal by Article 44 to accept *amicus*

submissions should 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. The Tribunal believes that the judicious application of these criteria will enable it to balance the interests of concerned nondisputant parties to be heard and at the same time protect the substantive and procedural rights of the disputants to a fair, orderly, and expeditious arbitral process.

18. The appropriateness of the subject matter of the case for amicus curiae submissions. Petitioners base their request to act as *amicus* on the ground that this case involves matters of significant public interest since the underlying dispute relates to water and sewage systems serving millions of people. Claimants, on the other hand, contest that characterization, asserting that such " ´public and institutional significance' of the case does not exist" (para. 40) and that the case is simply about Claimants' alleged right to compensation for claimed violations of their rights by Respondent.

19. Courts have traditionally accepted the intervention of *amicus curiae* in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case. 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.

20. These factors lead the Tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties. This case is not simply a contract dispute between private parties where nonparties attempting to intervene as friends of the court might be seen as officious intermeddlers.

21. Given the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision. Rather than to reject offers of such assistance peremptorily, the Tribunal, while taking care to preserve the procedural and substantive rights of the disputing parties and the orderly and efficient conduct of the arbitration, believes it is appropriate to consider carefully whether to accept or reject such offers.

22. The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public

acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. It is this imperative that has led to increased transparency in the arbitral processes of the World Trade Organization and the North American Free Trade Agreement. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.

23. For the foregoing reasons, the Tribunal unanimously concludes that the present case is an appropriate one in which suitable nonparties may usefully make *amicus curiae* submissions.

24. The Suitability of Specific Nonparties to Act as Amici Curiae. The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case. In order for the Tribunal to make that determination, each nonparty wishing to submit an *amicus curiae* brief must first apply to the Tribunal for leave to make an *amicus* submission.

25. Drawing on the experience of relevant NAFTA cases administered by ICSID, as well on the Statement of the North American Free Trade Commission on Non-Disputing Party Participation of October 7, 2003 (available in English at www.ustr.gov and in Spanish at www.economia-snci.gob.mx/sic_php/ls23al.php?s=18&p=1&l=1) the Tribunal has determined that nonparties seeking to make an *amicus* submission in the

present case should file a petition with the Tribunal for leave to submit an *amicus curiae* brief and that such petition should include the following information:

a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute.

b. The nature of the petitioner's interest in the case.

c. Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.

d. The reasons why the Tribunal should accept petitioner's *amicus curiae* brief.

26. Upon receipt of a petition for leave to make an *amicus curiae* submission, the Tribunal will provide copies of the petition to both Claimants and Respondents and ask for their views.

27. In deciding whether to grant a nonparty leave to submit an *amicus curiae* brief, the Tribunal will consider all information contained in the petition; the views of Claimants and Respondent; the extra burden which the acceptance of *amicus curiae* briefs may place on the parties, the Tribunal, and the proceedings; and the degree to which the proposed *amicus curiae* brief is likely to assist the Tribunal in arriving at its decision.

28. In view of the fact that the parties have competently and comprehensively argued all issues regarding jurisdiction, the Tribunal has concluded that it is fully informed on these issues and that *amicus curiae* submissions on jurisdictional questions would not be appropriate, under the standards set forth in paragraph 17 above, as they would not assist the Tribunal in its task of assessing jurisdiction.

29. Procedure for *Amicus* Briefs. If the Tribunal decides to grant leave to a particular nondisputing party to submit an *amicus curiae* brief, the Tribunal at that time will determine the appropriate procedure governing the brief's submission. The goal of such procedure will be 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. In this latter context, the Tribunal will endeavor to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings. In the absence of an approved *amicus curiae*, the Tribunal does not believe it necessary or appropriate to formulate such a procedure at present.

III. Access to Documentation in the Case

30. Petitioners request the Tribunal "…to concede … timely, sufficient, and unrestricted access to the documents of the arbitration, namely the parties' submissions, transcripts of the hearings, statements of witnesses and experts, and any other documents produced in this arbitration"(page 20). This broad request for all documentation in the case raises difficult and delicate questions because of certain constraints in the ICSID Convention and Rules and in the practice of the Centre.

31. At this stage in the present case, the Tribunal does not believe it is necessary to make a ruling on the Petitioners' ability to have access to documents in this case. The purpose in seeking access to the record is to enable a nonparty to act as *amicus curiae* in a meaningful way. Having decided that nonparties must first file an application to make *amicus* submissions before the Tribunal may authorize them to act as *amici curiae*, the

Tribunal has decided to defer a decision on the issue of documentary access until such time as it may grant leave to a particular nondisputing party to file an *amicus curiae* brief.

32. This order is rendered at this stage of the arbitration because the Petition was made at this stage and the Tribunal considers it good practice not to leave such petitions unanswered, even though the Petition proved not to be relevant to the jurisdictional phase. Nothing in this order, however, should be read as implying any determination on jurisdiction.

IV. Conclusion

33. Having reviewed the Petition and the observations thereon of Claimants and Respondent, the Tribunal has unanimously decided to:

a. deny Petitioners' request to attend the hearings of this case;

b. grant an opportunity to Petitioners to apply for leave to make *amicus curiae* submissions in accordance with the conditions stated above; and

c. defer a decision on Petitioners' request for access to documents until such time as a the Tribunal grants leave to a nondisputing party to file an *amicus curiae* brief.

Prof. Jeswald W. Salacuse
President of the Tribunal

Prof. Pedro Nikken
Arbitrator

Prof. Gabrielle Kaufmann-Kohler
Arbitrator