

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

In the proceedings between

Aguas Provinciales de Santa Fe S.A., Suez, Sociedad General de Aguas de Barcelona
S.A. and InterAguas Servicios Integrales del Agua S.A. (Claimants)

and

The Argentine Republic
(Respondent)

ICSID Case No. ARB/03/17

**ORDER IN RESPONSE TO A PETITION FOR
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: March 17, 2006

I. Introduction

1. On June 21, 2005, the *Fundación para el Desarrollo Sustentable*, Professor Ricardo Ignacio Beltramino, Dr. Ana María Herren, and Dr. Omar Darío Heffes [hereinafter Petitioners], filed a *Petición de Participación como Amicus Curiae* (Petition for Participation as Amicus Curiae) [hereinafter the Petition] in the above-entitled case with ICSID. According to the Petition, the *Fundación para el Desarrollo Sustentable* is a nongovernmental organization founded in 1996 with its headquarters in Rosario in the Province of Santa Fe, Argentina. The three named individual petitioners are identified as persons with expertise in law, human rights, and development. Section 2 of the Petition states:

“We request that this participation as amicus curiae can have access to the information in the trial and participate in future actions of the trial in order to state, through written (amicus curiae brief) and oral presentations in the hearings our points of view which will contribute to the trial openness, and at the same time, give the court an enriching perspective different from the parties one.”

The Tribunal interprets this statement as embodying three distinct requests:

- a. to allow Petitioners access to and the presentation of oral arguments at the hearings in the case;
 - b. to allow Petitioners opportunity to make submissions in the form of *amicus curiae* briefs; and
 - c. to allow Petitioners access to documents and other information in the case.
2. On July 13, 2005, the Secretary of the Tribunal, following directions of the President of the Tribunal, sent copies of the Petition to the Claimants and Respondent and requested them to submit their observations thereon to the Tribunal by July 20, 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, referring to the response it had previously filed in response to the *amicus curiae* petition in ICSID Case No. ARB/03/19, approved of the Petition. This order responds to the three requests made by Petitioners.

4. At the outset, it must be noted that this Tribunal has received and decided upon on a similar “Petition for Transparency and Participation as Amicus Curiae” submitted by five Argentine nongovernmental organizations in the case of *Agua Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* (ICSID Case no. ARB/03/19). In its *Order in Response to a Petition for Transparency and Participation as Amicus Curiae* of May 19, 2005 (available online at <http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf>), the Tribunal denied the petitioners access to the hearings but established a process by which appropriate third parties might apply for and be granted leave to make amicus submissions to the Tribunal in that case. The Tribunal deferred a decision on access to documents in the case until such time as an appropriate third party had been granted leave to make an amicus submission. While its order of May 19, 2005 dealt only with ICSID Case No. ARB/03/19 and did not apply to the present case, the Tribunal believes that the issues raised by the present Petition in this case are virtually identical to those raised in the petition filed by the five nongovernmental organizations and decided in the Tribunal’s order of May 19, 2005. The Tribunal has therefore decided to apply the principles of that decision to the present petition. In addition, it will also seek to determine whether the Petitioners, under the information provided in their Petition, qualify as appropriate *amici curiae* in accordance with the rules set down by the Tribunal.

II. Access to the Arbitral Hearings

5. Petitioners ask to participate in the hearings so that they may present oral arguments and also seem to suggest that hearings in the present case should be opened to

the public, citing the NAFTA case of *Methanex v. United States of America*, which involved public hearings.

6. 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 added).

7. 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 July 20, 2005 on the Petition, have expressed their clear refusal to the attendance by Petitioners at the hearings. 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* cases (a NAFTA cases under UNCITRAL Arbitration Rules) cited by Petitioners did indeed involve public hearings, both claimants and respondents in that case 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.

8. For the foregoing reasons, the Tribunal concludes that it must deny Petitioners’ request to have access to and attend the hearings in this case and to make oral presentations.

III. Submission of *Amicus Curiae* Briefs

9. Petitioners request permission to participate in this case through the presentation of *amicus curiae* briefs. 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 July 20, 2005 asked the Tribunal to refuse such a request, while Respondent expressed its approval.

10. 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, prior to its Order of May 19, 2005, no previous tribunal functioning under ICSID Rules had 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, as it did in ICSID Case ARB/03/19, 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?

11. 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 added).

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 in the rules applicable to a given dispute.

12. 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.

13. 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 fora 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 (available at <http://www.state.gov/documents/organization/6039.pdf>) 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 “[its] 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. Although it could be argued that *amicus* submissions would place an increased burden on the parties and the Tribunal, that result 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 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. The Conditions for the Admission of *Amicus Curiae* Briefs. 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 non disputant 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. 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 urban areas in the province of Santa Fe. Those systems provide basic public services to hundreds of thousands 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.

19. 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.

20. 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.

21. 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.

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

23. 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.

24. 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.

25. 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 Respondent and ask for their views.

26. 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.

27. 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 above, as they would not assist the Tribunal in its task of assessing jurisdiction.

28. Procedure for *Amicus* Briefs. If the Tribunal decides to grant leave to a particular non-disputing 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.

IV. Whether Petitioners Qualify as Appropriate *Amici Curiae* in This Case

29. Having defined a process for *amicus curiae* submissions and the standards to be applied in determining whether a particular person may act as an *amicus curiae*, the Tribunal next considers whether any or all of the four Petitioners in this case meet those standards and therefore qualify as *amici curiae*. As indicated above, the Tribunal considers that a nonparty must demonstrate three important attributes to qualify as an *amicus curiae*: relevant expertise, experience, and independence. To enable the Tribunal to judge whether a nonparty possesses these three vital attributes, the Tribunal asks that it be provided with information on 4 issues: (i) the identity and background of the petitioner; (ii) the interests of the petitioner in the case; (iii) the petitioners' financial or other relationships with the parties; and (iv) the reasons why the Tribunal should accept the petitioners' *amicus curiae* brief. On the basis of the information contained in the Petition, the Tribunal will examine each of these four factors in turn.

30. The Identity and Background of the Petitioners. The Petition provides minimal information on the identity and background of the Petitioners. It states that the *Fundación para el Desarrollo Sustentable* is a nongovernmental organization founded in

1996 with headquarters in Rosario, Province of Santa Fe, and that its objectives are to promote activities with respect to sustainable development, the preservation of natural resources, and civic commitment. However the Petition provides no information on the nature and size of its membership, the qualifications of its leadership, the expertise of its staff, and the activities in which it has engaged. In short, it fails to provide the Tribunal with specific information to judge whether the *Fundación para el Desarrollo Sustentable* possesses the expertise and experience to qualify as an appropriate *amicus curiae* in this case. Similarly, the Petition only briefly and summarily identifies and gives the background of the three individual petitioners. Without detailed *curricula vitae* on the three named individuals, the Tribunal is unable to judge whether they possess the expertise and experience to serve as *amici curiae* in the present case.

31. The Interests of the Petitioners in this Case. The Petitioners state their interest in this case in the most general of terms. According to the Petition, they are a civic organization concerned with the management of sustainable development and with policies affecting environmental and human needs. They do not state their specific interests in the particular case before the Tribunal. Moreover, because the Petitioners have failed to provide the Tribunal with comprehensive information on their background, experience and expertise, it is impossible for the Tribunal to infer such interest with any degree of specificity from the Petition as a whole.

32. The Independence of the Petitioners. The Petitioners state that the *Fundación para el Desarrollo Sustentable* does not receive support from either the Claimants or the Respondent in this case and that “its financial support from members’ contributions and from people interested in their aims,” (section 1(ii)). The individual petitioners, it is stated, support themselves from the exercise of their professions. These facts are important in determining their independence, but they are not sufficient. In order for the Tribunal to evaluate the independence of the *Fundacion*, it would be necessary to have additional information on its membership. To judge the independence of the three individual petitioners it would be necessary to know the nature, if any, of their professional and financial relationships, with the Claimants or the Respondent. The

Tribunal finds that it has insufficient information to judge whether the Petitioners are truly independent of the parties in this case.

33. Reasons for Accepting Amicus Submissions From the Petitioners. For the Tribunal to accept *amicus* submissions from nonparties, it must be convinced that it has sound reasons for doing so. It is up to the Petitioners to provide such reasons to the Tribunal. As a general matter, a nonparty petitioning to make a submission to the Tribunal must show that its experience, expertise, and perspectives will assist the Tribunal in arriving at its decision. The Petitioners have failed to provide such reasons in this case. It is not enough for a nongovernmental organization to justify an *amicus* submission on general grounds that it represents civil society or that it is devoted to humanitarian concerns. It must show the Tribunal in specific terms how its background, experience, expertise, or special perspectives will assist the Tribunal in the particular case that it is called upon to decide.

34. Conclusion. The Tribunal has decided that the four Petitioners have not provided it with sufficient specific information and reasons to conclude that they qualify as *amici curiae* in this case. Consequently, the Tribunal declines to grant them permission to make *amicus* submissions at this time. In the event that the Petitioners were to present a new application for leave to submit *amicus curiae* submissions, with appropriate and sufficient information and reasons as specified above, the Tribunal would be prepared to consider whether Petitioners qualify as *amici curiae* and to grant them leave to make *amicus* submissions in accordance with the conditions stated above.

V. Access to Documentation in the Case

35. Petitioners request to “...have access to information in the trial...”, would seem to be seeking access to arbitration documents, namely the parties’ memorials, submissions, transcripts of the hearings, statements of witnesses and experts, and any other documents produced in this arbitration. This broad request for all documentation in the case raises

difficult and delicate questions because of certain constraints in the ICSID Convention and Rules.

36. Because of the conclusions reached in Chapter IV above, the Tribunal does not believe it is necessary to make a ruling on a non-party's ability to have access to documents in an ICSID arbitration. Indeed, as the Petitioners have not provided information sharing their qualifications to act in this case, their request must in any event be dismissed, it being again specified that the Tribunal would reconsider the issue upon presentation of the relevant information.

37. 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 is not to be relevant to the jurisdictional phase. Nothing in this order, however, should be read as implying any determination on jurisdiction.

VI. Conclusion

38. Having reviewed the Petition and the observations thereon of the Claimants and Respondent, the Tribunal has 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* submission if and when the Petitioners provide the Tribunal with convincing information and reasons that they qualify as *amicus curiae*;
- c. deny the Petitioners' request for access documents, being specified that it would consider whether access to documents can be granted as a matter of principle and

reconsider the Petitioners' qualification if and when the Petitioners provide the Tribunal with convincing information and reasons that they qualify as *amicus curiae*.

[Signature]
Prof. Jeswald W. Salacuse
President of the Tribunal

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Prof. Pedro Nikken
Arbitrator

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Prof. Gabrielle Kaufmann-Kohler
Arbitrator