

**PETITION FOR TRANSPARENCY AND PARTICIPATION
AS AMICUS CURIAE***

(Unofficial Translation from Spanish Original)

**In case No. ARB/03/19 before the
International Centre for Settlement of Investment Disputes**

Between

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

And

The Republic of Argentina

Applicants

**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
Unión de Usuarios y Consumidores**

* This is an unofficial translation from the Spanish original available at www.cels.org.ar and www.ciel.org

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1. INTRODUCTION

The present case discusses the appropriateness of damages claimed by the company *Aguas Argentinas S.A.* in relation to the alleged harm caused to its business on account of certain general measures adopted by the Argentine Government in response to the 2002 economic crisis¹. Such economic policy measures included the devaluation of the Argentine currency, tariff freeze and a ban on tariff indexation according to the US price index². The company considers that such measures breach the Agreement between the Government of the Republic of Argentina and the Government of the Republic of France for the Mutual Promotion and Protection of Investments dated July 3, 1991³ (hereinafter “Argentina – France BIT”).

The measures questioned by *Aguas Argentinas S.A.* in the present case involve general measures adopted by the Argentine State in the exercise of its regulatory power. These measures have a direct impact on inhabitants’ ability to have access to essential public services like drinking water and sanitation. Thus, the decision adopted by this tribunal will directly affect the protection of fundamental rights of the people living in the service concession area.

Because of the clear public interest involved in this case, the applicants believe that the procedure should be conducted with transparency and the participation of the people interested in its resolution. The transparency of the process translates into free access to the documents produced by the parties and to the hearings. Likewise, civil society participation translates into the possibility of submitting arguments that are substantial to the resolution of the case as *amicus curiae*.

We believe that the Tribunal should, in construing the extent of the rights of the parties to the dispute, take into account principles of international and domestic law relating to public health, essential services, adequate quality of life, housing, and consumers’ defense. The close relation existing between the effective protection and the exercise of such rights, and the provision of drinking water and sanitation under discussion in this case justifies our interest in participating in the case.

¹ The information we have available on the subject matter of the dispute arises from journalistic versions, as the case filed by the company is not public.

² That is, according to the simple average between the Producer Price Index – Industrial Commodities and the Consumer Price Index – Water & Sewage Maintenance as was the case.

³ Accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l’encouragement et la protection réciproques des investissements, signé à Paris le 3 juillet 1991.

2. THE APPLICANTS

The Association for Equality and Justice (ACIJ) is a non-profit organization whose mission is to contribute to the strengthening of democratic institutions in Argentina and to defend the basic rights of disadvantaged groups. In particular, ACIJ has legal authority in Argentina to take legal action in defense of user and consumer rights, in accordance with the provisions of article 42 and 43 of the Argentine Constitution.

The Center for Legal and Social Studies (CELS) is a non-governmental organization that has worked since 1979 for the promotion and protection of human rights in Argentina.

Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria (Cooperative for the provision of community action services) is an organization devoted to the defense and protection of Argentine users and consumers' rights.

The Unión de Usuarios y Consumidores (Users and Consumers' Union) is an organization devoted to the defense and protection of Argentine users and consumers that has been active for ten years and is a member of Consumers International.

The Center for International Environmental Law (CIEL) is a nonprofit organization working to provide legal support to persons and civil society agencies around the world. CIEL's Trade and Sustainable Development Program seeks to reform the global framework of economic law, in order to promote human development and a healthy environment.

3. - BASIS OF THE PETITION FOR TRANSPARENCY AND PARTICIPATION

The grounds that support our petition for transparency and participation are clear and concrete:

First, the controversial subject matter of this arbitration, in which a constitutional and democratic State is a party, involves a clear public content, that will directly affect the fundamental human rights of the entire population. The legitimacy of the decision and the arbitration is affected by the secrecy applied to the proceedings. In that regard, by virtue of fundamental democratic principles that lead to the enjoyment of human rights, the public decisions that affect millions of people cannot be adopted in secrecy nor exclude the opinion of the affected population.

Second, the petitions for transparency and participation are appropriate both under the Argentina - France BIT, the norms of the ICSID Convention, and the

arbitration rules of the international Centre for Settlement of Investment Disputes (ICSID).

Third, the Argentine legislation, including international human rights treaties that have constitutional status, guarantee the participation of civil society organizations in legal and non-legal proceedings that may affect collective incidence rights.

Fourth, the arbitral tribunal has inherent powers that vest it with jurisdiction to recognize the rights to participation and transparency that the applicants request.

Fifth, the close relationship between ICSID and other “World Bank Group” institutions, especially the International Finance Corporation (IFC) and the International Bank for Reconstruction and Development (IBRD), demands that the proceedings be made public.

Sixth, a trend exists in other international tribunals and international organizations to recognize the value of transparency and the participation of users, environmentalists, and other organizations that represent affected people, in cases where disputes concern the public interest; therefore ICSID is in no position to justify the need for secrecy in cases of this sort.

3.1. The Public and Institutional Significance of the Case

This case does not merely discuss private commercial interests, but rather issues of major public importance. The subject matter of the dispute under arbitration concerns the Argentine State’s freedom to regulate the supply of essential public services and, therefore, this arbitration affects the entire population of the country. Likewise, the case directly affects the ability of millions of people living in the Greater Buenos Aires –the claimant’s service concession area– to access water and sanitation services.

The government’s decisions questioned by *Aguas Argentinas S.A.* in the present case involve general economic measures adopted by the Argentine State to face a sizable economic crisis. The scope and application of such measures, albeit involving consequences to the complainant and to all the economic activities conducted in Argentina, also determine the way in which inhabitants have access to, and enjoy an essential public service like drinking water and sanitation.

The measures at issue in this arbitration, particularly the tariff freeze and the ban on tariff indexation according to the U.S. price index, relate directly to the fundamental human right of access to essential services. In such sense, it should be mentioned that a recent World Bank report specifically mentions that the practice of indexing public service tariffs according to the U.S. price index,

rendered such services practically inaccessible to many Argentines, a situation that –as stated– could worsen should new tariff increases be approved.⁴

The public interest and institutional dimension of this case are heightened by the close relationship that exists between the discussions generated within its framework and the renegotiation process of the *Aguas Argentinas S.A.* contract, which is a parallel process in course in Argentina. Such connection is evidenced both by the Ministry of Finance’s decision to exclude those companies that file a submission before an arbitral tribunal from the renegotiation process,⁵ and by the recent agreement between *Aguas Argentinas S.A.* and the Argentine Government whereby the proceedings in this case shall be suspended while a temporary agreement concluded during the renegotiation remains in force,⁶ i.e. until December 31, 2004.

An additional factor for concern is the way in which *Aguas Argentinas S.A.* is invoking this case and the provisions of the Argentina-France BIT to pressure the Government, so that it will refrain from taking certain measures of public relevance that might affect the investor’s interests.⁷ The utilization of the ICSID mechanism as a means of pressuring the Government and obtain benefits is promoted by the lawyers that advise foreign investors. In line with this, a major law firm that works in this field representing some of the companies that have sued Argentina before ICSID expressly recognizes that the use of international arbitration under a bilateral investment treaty, or the threat of so

⁴ “Residential services that were quite attainable in 1997 are now very expensive, especially in relation to the income of first quintile homes (due to, among other things, the rates indexed to the US dollar).” The “economic crisis the country is experiencing has significantly worsened the attainability of water and energy services, which currently absorb 22% of the income of first quintile homes, a ratio that could increase if the raise in service rates is approved...” and consequently, it states the need to avoid “that the expenditures on the three most essential services (water, electricity, and natural gas) exceed a threshold of 15% for the poorest sectors of the population.” Vivien Foster, *Hacia una Política Social para los Sectores de Infraestructura en Argentina: Evaluando el Pasado y Explorando el Futuro*. Produced by the World Bank Office for Argentina, Chile, Paraguay and Uruguay in collaboration with the Department of Finance, Private Sector and Infrastructure, Working Document 10/03, December 2003 in http://www.bancomundial.org.ar/archivos/Documento_de_Trabajo10_Hacia_una_Politica_Social.pdf

Regarding water and sanitation services in particular, the current regressive tariff scheme implies remarkable inequality concerning service costs for users living in the Greater Buenos Aires area. Actually, for the 10% higher income population, the resources used to pay such services account for only 1.3% of their income while for the poorest 10% such payment requires 9% of their already deteriorated income. (Cfr. Aspiazu, Daniel and Forcinito, Karina, *Historia de un fracaso: la privatización del sistema de agua y saneamiento en el área Metropolitana de Buenos Aires*).

⁵ Ministry of Finance Resolution, No. 308/02 art 11.

⁶ Until December 31, 2004

⁷ As derived from the whereas clauses of Resolution ETOSS 86/03, the Concessionary company rejected the notification it received to constitute the trust fund agreed on the Five-year Review Minute dated 01/09/01, stating that forcing it to do so would imply “another” serious violation of the Argentine State to the rights protected by the bilateral investment treaty enacted by Law 24100.

doing, constitutes the best option for foreign investors to put pressure on defaulting host states and obtain satisfactory contract renegotiation.⁸

In this manner, the discussions that have taken place under the ICSID framework –from which the public has been excluded–, may be critical in relation to the positions and decisions that, with respect to the future services regime, may be adopted in the concession contract renegotiation process. It is clear that the final decision adopted as a result of such process, as much as the positions adopted by the Argentine Government before this Tribunal, will have an impact beyond the rights and interests of the parties to the dispute. It is also equally clear that this process and the resulting decisions should not be conducted in secrecy, without civil society participation, particularly of those who are directly affected.

The decision adopted by this Arbitral tribunal will have a substantial impact on the ability of the inhabitants of Buenos Aires City and Greater Buenos Aires to access indispensable basic services of water and sanitation. Such services are necessary to exercise the right to an adequate quality of life and other fundamental human rights such as health, food, housing and education, all of which have constitutional rank in Argentina’s institutional system. Such a situation is even more serious in the context of the widespread and unprecedented poverty faced by Argentina.

As has been shown, this arbitration process goes far beyond merely resolving commercial or private conflicts, and, rather, it has a substantial influence on the populations’ ability to enjoy basic human rights. This aspect of the case means that the process should be transparent and permit citizens’ participation and monitoring. Decisions that impact on a State’s public policy-making should not be adopted in settings devoid of the checks and balances that characterize democratic institutions and lend legitimacy to government measures.

In that regard, the arbitral tribunal in the *Methanex* Case –which involved California inhabitants’ access to drinking water– recognized the public interest in such investment dispute, and allowed the participation of the public as *amicus curiae*, because, as stated by tribunal,

“[t]here is undoubtedly a public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties... There is also a broader argument... the Chapter 11 arbitral process could

⁸“The Argentine crisis - foreign investors rights” at <http://www.freshfields.com/places/latinamerica/publications/pdfs/2431.pdf>

benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.”⁹

This presentation and the petitions that we submit to the Tribunal are a necessary and unavoidable consequence of the clear institutional relevance of the case and should not, in good faith, be denied or minimized. On this basis, in our role as Civil Society Organizations, devoted to the defense of fundamental human rights, promoting transparency and participation in accordance with the democratic rule of law, and to contribute to the institutional strengthening of Argentina, we request access to the process and the right to submit arguments.

3.2. The Petition for Transparency and Participation is Appropriate under the Argentina - France BIT, the ICSID Convention, and the ICSID Arbitration Rules.

The properness of this request for transparency and participation finds normative support both in the international and domestic law that this tribunal should apply, and in the rules that control the resolution of disputes under ICSID.

First, it should be pointed out that by virtue of Article 8.4 of the Argentina - France BIT, this dispute should be decided by resorting to, *inter alia*, Argentine law rules, and that such rules require the transparency of the arbitration and the participation of all persons interested in the resolution of the case. Indeed, fundamental rules of the Republic of Argentina –examined in the next section– including its Political Constitution and its international human rights obligations recognize citizens’ participation and access to information as basic principles of the State’s institutional legal order.

Second, with respect to procedural issues, Article 44 of the ICSID Convention should be observed, which requires the application of the Argentine regulations. Article 44 establishes that “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”. Given that the ICSID Convention and the arbitration rules are silent on the question of transparency and participation, the Tribunal should resort to Argentine law as the rules agreed by the parties, and eventually resolve possible legal lacunae in favor of the principles of transparency and participation that inspire the democratic order of the Argentine State.

Likewise, the ICSID Convention contains no clause calling for the confidentiality of the proceedings. The only provision that has given rise to

⁹ *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions for Intervention and Participation as “Amici Curiae”, paragraph. 49, (January 15, 2001). (unofficial translation).

certain doubts is Article 48(5) of the ICSID Convention, which states, “the Center shall not publish the award without the consent of the parties.” In practice, however, most of the decisions are published, if not by the Center, by third parties. In fact, as has been recently pointed out by the ICSID Secretariat, “The notion that [Article 48(5)] connotes wider confidentiality or privacy obligations, beyond those of ICSID itself, is not supported by current arbitral practice.”¹⁰

Further, an analysis of the ICSID Arbitration Rules confirms the absence of legal obstacles to the transparency of the proceedings and the participation of the public. As for transparency, nothing in the arbitration rules indicates that the documents produced in the arbitration process should be kept secret. With regard to *amicus curiae* presentations, the Tribunal is not prevented from accepting information from third parties. Rather, the contrary applies: Article 34 of the Arbitration Rules establishes that “the Tribunal may, if it deems it necessary at any stage of the proceeding: (b) visit any place connected with the dispute or conduct inquiries there.”

As noted, Article 34 of the ICSID Arbitration Rules expressly allows the Tribunal to receive information from persons and groups other than the parties to the dispute. As explained below, a similar provision in the World Trade Organization’s *Dispute Settlement Understanding* has been construed by said institution’s Appellate Body as allowing dispute resolution panels to accept *amicus curiae* briefs.

Also, with respect to open hearings, Article 32 of the Arbitration Rules, that regulates who can attend oral hearings, far from establishing a prohibition to the participation of non-disputing parties, allows such possibility by expressly regulating the procedure that the Tribunal should follow.

Already two investment arbitrations administered by ICSID, *Methanex* and *UPS*, hearings have been open to the public. ICSID has not had logistical problems in managing the opening of hearings to the public. Moreover, some of the new generation investment treaties –analyzed below- explicitly recognize the public’s right to attend the hearings.

Thus, no contradiction exists between the fundamental principles of transparency and participation considered in the Argentine norms and the procedural standards applicable to the resolution of this dispute.

In conclusion, the Argentina – France BIT, and applicable norms provide that the Tribunal should handle this arbitration with transparency and with the participation of the applicants. Moreover, nothing in the ICSID convention or

¹⁰ ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, 22 October 2004, Paragraph 14, available at <http://www.worldbank.org/icsid/improve-arb.pdf> (unofficial translation).

the ICSID Arbitration Rules prevents transparency or participation. De rigeur, the ICSID Convention allows the Tribunal to decide on procedural matters that are not expressly regulated. And the Arbitration Rules empower the Tribunal to carry out enquiries in the place related to the dispute –i.e. where the applicants are located- and receive information from non-disputing third parties. Therefore, according to the juridical instruments that control this arbitration, the Tribunal is fully empowered to conduct the arbitration in the open light, before the public.

Finally, it should be pointed out that opening the proceedings to the public shall by no means affect the orderly conduct of this arbitration or jeopardize due process, but on the contrary it would contribute to attach further legitimacy to the decision adopted.

3.4 The Argentine Laws that the Tribunal Should Apply

As mentioned in the preceding Section, under both article 8.4 of the Argentina – France BIT, and article 44 of the ICSID Convention, this Tribunal must resolve issues of form and substance applying, *inter alia*, the rules of Argentine law.

The Argentine legislation, in particular the National Constitution in articles 42¹¹ and 43¹², Consumer Defense Law 24.24,0¹³, and the regulation that provides for public participation in administrative instances, recognize that the applicants have the right to participate whenever decisions that will affect the supply of public services are discussed, and also to have access to information relevant thereto.

¹¹ Art. 42 of the Argentine National Constitution establishes that “(1) As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment. The authorities shall provide for the protection of said rights...” It also provides that “Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities. Such legislation shall take into account the necessary participation of consumer and user associations and of the interested provinces in the control entities...”

¹² In its second paragraph this article provides that summary proceedings may be filed “against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends ...”.

¹³Particularly articles 52, 55 and 56. Article 52 establishes that “the consumer and user may bring judicial actions when their interests are affected or threatened”. “The action shall be brought by the consumer or user, consumer associations constituted as corporate persons, the national or local application authority and the public prosecutor’s office”. Article 55 provides that “consumer associations constituted as corporate persons are entitled to act when consumers’ interests are objectively affected or threatened” and Article 56 provides, among the purposes of such associations, *inter alia*: i) Defend and represent the interests of the consumers, before the justice system, application authority and/or other official or private agencies; ii) Advise consumers on goods consumption and/or use of services, prices, purchase conditions, quality and other matters of interest; and iii) Organize, perform and disseminate surveys on markets, quality control, price statistics and provide all information of interest to consumers.

According to the above, both in the administrative jurisdiction, through their participation in public hearings, or in the judicial jurisdiction, through their standing both to bring legal actions and to participate as interested parties in cases brought by other social actors, the associations that defend users' and consumers' rights (representing Argentine users and consumers) under Argentina's domestic law are empowered to participate in proceedings that may affect the rights they represent.

Additionally, such norms have crystallized, through numerous judicial decisions, the recognition of standing for users' and consumers' associations in judicial proceedings where aspects related to the supply of public services are at stake.¹⁴ Therefore, the standing of consumers defense associations to sue in the defense of users' interests and rights is not only clearly established in the National Constitution and in National Law No. 24240, but furthermore is non-controversial in local jurisprudence.

Given that at issue in this case are measures that directly affect the interest of current and future public service users, and that the State's regulatory power is at stake, if the applicants were not allowed to participate in this proceeding, an undue restriction to their rights would be imposed as well as an unjustified breach of the applicable law.

Besides the previously mentioned rule that specifically applies to issues relating to access to public services, our petition is also supported by other articles of the National Constitution and international human rights treaties, which in Argentina are granted constitutional rank.¹⁵ Among them are the International Covenant on Civil and Political Rights and the American Convention on Human Rights (ACHR) that especially guarantee the right of access to information, to an effective recourse, and to due legal process.

¹⁴ Conf. "Youssefian, Martin v/ National State - Communications Secretariat w/o protection Law 16.986", National Trial Court of Administrative Affairs n° 9 and which resolution constitutes a condition prior to the operability of decree 264/98, with resolution of the court, Room IV, 06/23/98, "Consumidores Libres Cooperativa Limitada de Provision de Servicios de Accion Comunitaria v/ Telefonica de Argentina S.A., Telecom Argentina S.A., Stet-France Telecom and Telintar S.A.. w/o court record", National Trial Court of Administrative Affairs N° 7, Secretariat N° 13 - Room IV; "Consumidores Libres Cooperativa Limitada de Provision de Servicios de Accion Comunitaria w/o protection", National Trial Court of Administrative Affairs N° 9, Secretariat N° 17 - Room V; "Consumidores Libres Cooperativa Limitada de Provision de Servicios de Accion Comunitaria v/ E.N.- Presidency of the Nation - Communications Secretariat and others w/o protection, Expeditious Proceeding", National Trial Court of Administrative Affairs N° 10, Secretariat N° 19 - Room V, Case 9/99 "ADECUA v/PEN (Tax Law) DTO. 1517/98", among others.

¹⁵ Article 75, paragraph 22 of the National Constitution grants constitutional status to a long list of international treaties on human rights.

The right of access to information is provided for in Article 14 of the National Constitution,¹⁶ which in harmony with Article 1 of the same legal text¹⁷, establish the principle of publicity of governmental acts. This right is also approached in Article 13 of the American Convention on Human Rights¹⁸ and Article 19 of the International Covenant on Civil and Political Rights.¹⁹ Finally, this right has been broadly defined and regulated through the National Executive Power decree N° 1172/2003 of Access to Public Information.²⁰

The right of every person to participate and make their voice heard in cases where the decisions may affect their rights and interests is an integral part of the principles that secure the right to an effective recourse and the guarantee to due legal process. Such guarantees are expressed both in article 18 of the National Constitution²¹ and in the most important international law human rights instruments, as the International Covenant on Civil and Political Rights (Art. 14 and 25)²² and the American Convention on Human Rights (Art. 8 and 25).

¹⁶ Article 14 provides that " All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: ...to petition the authorities; ... to publish their ideas through the press without previous censorship...".

¹⁷ Article 1 provides: "The Argentine Nation adopts the federal republican representative form of government, as this Constitution establishes". This article, while establishing a republican and democratic form of government, places on citizens a central role in the management of public issues. Citizens elect the government and rule through their representatives, but they also permanently collaborate, participate and oversee the public issues.

¹⁸ Article 13.1 establishes: "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice". The Inter American Court of Human Rights in construing the scope of such right has adopted a broad notion of freedom of expression which involves not only everyone's right to try to communicate to others his/her points of view but also everyone's right to receive opinions and news. The Court has held that "For the citizen in the street becoming aware of others' opinions or the information available to others is as important as the right to disseminate their own" (Inter American Court of Human Rights, Consultative Opinion =C-5/85 of 13/11/1985).

¹⁹ Article 19.2 provides "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

²⁰ Enacted on December 4, 2003. The text of the decree recognizes that "public information constitutes a citizens' participation act whereby everyone exercises their right to seek, consult and receive information..." and that "the purpose of access to public information is to allow and promote effective citizens' participation, through a complete, appropriate, timely and truthful supply of information". Annex VII, articles 3 and 4.

²¹ Article 18 provides among other guarantees that " The defense by trial of persons and rights may not be violated".

²² Article 14 provides that "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". "The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a

Finally, it should be mentioned that the Supreme Court of Justice of Argentina has recently regulated the “Friend-of-the-Court” (*amicus curiae*) instrument as one meant to, among other purposes, allow citizens’ participation in the administration of justice in cases involving institutionally relevant issues, or that concern the public interest.²³ Indeed, as the Supreme Court has stated,

“Physical or corporate persons that are not parties to the dispute may appear before the Supreme Court of Justice of the Nation as Friend-of-the-Court in all judicial proceedings corresponding to original or appeals jurisdiction where collective or general interest issues are debated.”

3.4 The Inherent Powers of an Arbitral Tribunal Empower it to Recognize Collective Participation and Transparency Rights.

The inherent powers of this Arbitral Tribunal empower it to recognize the participation and access to information rights that inhabitants enjoy on issues concerning essential public services. By virtue of its inherent jurisdiction, the tribunal is empowered to allow for the transparency of its procedures on account of the public interest involved in this arbitration.

The inherent power doctrine has been articulated by several international tribunals in the specific context of judicial dispute resolution mechanisms, including the International Court of Justice (ICJ), International Criminal Tribunal for the Former Yugoslavia (ICTY), and several arbitral tribunals, including the one constituted for the *Rainbow Warrior*²⁴ arbitration between France and New Zealand, and recently the tribunal that, under the framework of ICSID, dealt with the *Enron v. the Republic of Argentina*²⁵ case.

The inherent powers doctrine has been applied in several issues that are central to the exercise of jurisdiction, for instance, the tribunal’s decision about its own

criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children”. Article 25 provides: “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country”.

²³ Ruling by the Supreme Court of the Nation N° 28/2004, (Regulations, Art. 1). It is also provided that “The *amicus curiae* shall be a physical or corporate person knowledgeable in the issue under discussion.”

²⁴ *Rainbow Warrior*, R.I.A.A., Vol. XX, 1990, p. 217, at 270.

²⁵ *Enron and Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (January 14, 2004).

jurisdiction (Kompetenz-Kompetenz),²⁶ as well as the characterization of the nature of the dispute.²⁷ *A fortiori*, this Tribunal is fully empowered, by virtue of its inherent jurisdiction, to order the transparency of the proceeding in matters relating to the public interest.

The ICJ, in the *Nuclear Tests case*, pointed out that the court possesses an inherent jurisdiction, derived from its existence as a judicial organ, to make whatever findings necessary to provide for the orderly settlement of all matters in dispute.²⁸ The ICTY Court of Appeals, in the 1995 *Tadic case*, has also recognized that the inherent power doctrine is a necessary component in the exercise of the judicial function, and need not be expressly provided for in the constitutive documents of the tribunals.²⁹ In applying these principles, transparency and participation need not be expressly mentioned, and may be recognized by the Tribunal under its inherent jurisdiction.

In the *Rainbow Warrior case*, the tribunal considered that its inherent powers empowered it to order the cessation of a continuing illegal act.³⁰ Such decision influenced the *Enron v. Argentina case*, where the arbitral tribunal considered that its inherent powers authorized it not only to exercise declaratory powers, but also to order measures involving performance of certain acts.³¹ As readily seen, these matters go well beyond mere procedural issues, and find their place at the limits of the tribunal's jurisdiction. Therefore, a procedural question, inspired on principles of justice and equality and geared to guarantee the transparency of the arbitration when the public interest is at stake, cannot but remain covered by an international tribunal's inherent powers.

3.5 The Close Relationship between the Institutions of the World Bank Group Demands Transparency and Participation

In the current arbitration, there is close relationship between ICSID and other institutions that are part of the World Bank Group³² which have a specific interest in the resolution of the dispute, particularly the International Bank for Reconstruction and Development (IBRD) and the International Finance

²⁶ CIJ, *Nottebohm Case*, (preliminary objections), [1953] ICJ Reports 111,119.

²⁷ CIJ, *Fisheries Jurisdiction Case 1998* (Spain v. Canada), Jurisdiction, General List No. 96, paras. 30-31 (Dec. 4, 1998), available at <http://www.icj-cij.org>; *Atún Aleta Azul Case* (Australia & N.Z. v. Japan), Award on Jurisdiction and Admissibility, para. 48 (Aug. 4, 2000), available at <http://www.worldbank.org/icsid>.

²⁸ CIJ, *Nuclear Tests Case*, ICJ Reports 1974, pp. 259-260, para. 23, quote CIJ, *Northern Camerouns case*, ICJ Reports 1963, p.29.

²⁹ ICTY Appeals Chamber, *Tadic (Jurisdiction) -- Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case IT-94-1, 2 October 1995.

³⁰ Case *Rainbow Warrior*, cit., paragraph 114.

³¹ Case *Enron*, cit., paragraphs. 75-81.

³² The World Bank website states that the World Bank Group includes five closely linked institutions: the International Bank for Reconstruction and Development ("IBRD"); the International Development Association ("IDA"); the International Finance Corporation ("IFC"); the Multilateral Investment Guarantee Agency ("MIGA") and the ICSID.

Corporation (IFC). The IBRD has played a key role in the design of the regulatory framework for public services under concession and in the privatization process, and the IFC holds a percentage of *Aguas Argentinas S.A* equity shares.

This relationship clearly creates a source of potential conflict of interests. Such a clear institutional relationship demands that the ICSID arbitral tribunals provide for full transparency in cases where other World Bank Group members are involved, as is the case in this arbitration.

To illustrate the close institutional relationship between ICSID and other World Bank Group agencies, we should first mention that ICSID offices are located in the IBRD headquarters in Washington, DC³³ (Art. 2 of the ICSID Convention), and that the members of the ICSID –Administrative Council and Secretariat (Art. 3 of the Convention)- are related to the World Bank.

Furthermore, the President of the World Bank is *ex officio* Chairman of the ICSID Administrative Council (Art. 5 of the Convention).³⁴ This fact is relevant if one considers that the Chairman of the Administrative Council could play a decisive role in the outcome of arbitrations and conciliations.³⁵ And even though this Tribunal has been constituted by agreement of the parties, nothing can ensure that a future vacancy may need to be filled and that the parties do not reach agreement.

The IBRD and IFC interest in solving the case is undeniable. The IBRD has exerted enormous influence in the characteristics adopted by the privatization process of drinking water and sanitation services in Argentina. In particular, the IBRD has influenced the regulatory framework of the claimant's concession contract, whose interpretation and scope are essential to the resolution of the instant dispute.

It should also be mentioned, first, that after the mission that visited the country between November 1991 and October 1992, the Bank recommended, in order "to render more attractive the sale of public companies", the adoption of an official program that included the following, *inter alia*: that privatized services' prices and tariffs be established following international prices, and that

³³ International Centre for Settlement of Investment Disputes (ICSID) 1818 H Street, N.W. Washington, D.C. 20433.

³⁴ The Chairman shall serve without remuneration from the Centre (art. 8 of the Convention), as his position in the Centre is *ex officio* and the remuneration for his "*ex officio*" work is covered by the World Bank.

³⁵ In fact, the Chairman of the ICSID Administrative Council shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed; If a conciliator or arbitrator appointed by a party resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy; shall fill the vacancy at the request of either party, should the vacancy not have been filled after 45 days. Cfr. arts. 30, 38, 56, and 58 of the ICSID Convention.

indexation be adjusted according to the U.S. price index.³⁶ It becomes entirely clear that both the impact on access to essential services of this recommendation, as well as the measures adopted by the Government to guarantee the population's supply of water and sanitation, are in question in this arbitration.

Another report elaborated by the IBRD Operation Evaluation Department, analyzing the assistance to Argentina in a loan for water and sanitation services, shows that external consultants hired through the World Bank were responsible for drafting the regulatory framework and preparing the privatization documents, and that said consultants then held major positions in the privatized corporate service providers.³⁷

Also, several reports of the Bank demonstrate the participation of its institutions in the Argentine privatization process. A report elaborated in July 2000 by the Bank's Operation Evaluation Department with respect to the assistance to Argentina, expressly states the role of the IFC in promoting privatizations in Argentina, particularly in sectors such as water, sanitation and health.³⁸ Additionally, a memorandum elaborated in 2001 by the IBRD and the IFC for the Bank Executive Directors, concerning the progress of the *Country Assistance Strategy* (Report 22049-AR), clearly indicates that the Bank supported the water privatization process.

Besides the role played by the IBRD in the factual setting of the arbitration, several of the claims brought against Argentina before the ICSID were brought by private multinational companies that received funding from the IFC.³⁹ *Aguas Argentinas S.A.* is one of them. As of December 2001, the IFC was the

³⁶ Argentina: From Insolvency to Growth (World Bank Country Study).

³⁷ World Bank Operations Evaluation Department, Implementation Completion Report Number 18014, dated June 16, 1998.

³⁸ Report of the Independent Evaluation Department to the World Bank Board and President evaluating the assistance to Argentina. OED, Country Assistance Evaluation, Report No. 20719.

³⁹ Some of the examples we could mention in this respect are: ENRON (projects funded by the IFC in Dominican Republic and Colombia); CMS GAS (projects funded by the IFC in Chile, Mongolia and Ghana); SIEMENS (multiple projects funded by the IFC throughout the world); AES (projects funded by the IFC in Cameroon, Uganda, Salvador, Georgia, Mexico and Pakistan); CAMUZZI (participates in the water concessions privatizations in Argentina. The IFC funds projects of other Camuzzi shareholding companies); PAN AMERICAN ENERGY (projects funded by IFC in Turkey, Madagascar, Algeria, Baku, Mali, Romania, Mauritania, Kenya, South Africa and others); EL PASO ENERGY (projects funded by IFC in Mexico); AGUAS PROVINCIALES DE SANTA FE (projects funded by IFC in Argentina); TELEFONICA (projects funded by IFC in Venezuela, Bolivia and Morocco); ENERSIS (projects funded by IFC in Brazil); SUEZ -majority shareholder of Aguas Argentinas- (projects funded by IFC in Egypt, Bolivia, Cambodia, Chile, Zambia, Argentina and Bolivia); EDF (projects funded by IFC in Mexico and Egypt); UNISYS CORP. (projects funded by IFC in Philippines). For more details see: <http://ifcln001.worldbank.org/>.

creditor to 20% of the company's international debt⁴⁰, and the holder of 5% of its equity shares⁴¹.

Finally, it should be highlighted that the World Bank, as sponsor of the establishment of ICSID through a decision of its Executive Directors, has facilitated funds for the Centre to finance its expenses.⁴² ICSID's economic dependency on the World Bank Group also implicates potential problems, thus highlighting the relevance of transparency.

In conclusion, the close relationship between the five World Bank Group institutions covers with a cloak of doubts the impartiality and independence of the mechanisms used to resolve disputes that particularly derive from the Bank's operations. This dark cloak also affects the perception of this arbitration's legitimacy by Argentine citizens' and the global public opinion. The transparency of this arbitration, that is, access to information and public participation, would clear many doubts and contribute to clarify the linkages between the different World Bank Group institutions.

3.6 The Trend Towards Openness of other Tribunals and International Organizations Demonstrates the Value of Transparency and Participation in the Progressive Development of International Law

Over the last few decades, the democratic principles that support our petition for transparency and participation have found a space in the progressive development of international law. Such development towards an international democratic order where fundamental human rights may be realized becomes apparent both in the operation of dispute resolution mechanisms and in the practices of international agencies, as in new conventional instruments. In effect, various international tribunals and agencies have taken notice of the public component involved in certain commercial disputes, and have allowed and facilitated the participation of third parties.

First, we should refer to ICSID, whose Secretariat has elaborated a document to improve arbitrations through transparency and participation. The document elaborated by the ICSID Secretariat points out that it would be useful to make clear that the tribunals have the authority to accept and consider submissions by the public.⁴³ The ICSID Secretariat (rightly) speaks about "clarifying" the arbitration rules, because, as shown above, no ICSID provision precludes transparency or participation.

⁴⁰ As at December 2001 Aguas Argentinas SA owed the IFC US\$ 50.092 (current debt) and US\$ 74.517 (non current debt).

⁴¹ Aguas Argentinas S.A. website, <available at <http://www.aguasargentinas.com.ar>> Also, according to the information furnished by the *Consejo Federal de Entidades de Servicios Sanitarios* (COFES), in <http://www.cofes.org.ar/infosector/gestionservicios.htm>

⁴² General Provisión No. 17 of the Executive Directors' Report about the Convention.

⁴³ ICSID Secretariat, Possible Improvements of the Framework for ICSID Arbitration, 22 October 2004, Paragraph. 13, available at <<http://www.worldbank.org/icsid/improve-arb.pdf>>

In the context of international investment law, it is timely to mention the development towards transparency and participation in the North American Free Trade Agreement (NAFTA). Firstly, two arbitral tribunals have already admitted written presentations by civil society organizations as *amicus curiae*. Secondly, the NAFTA “Free Trade Commission”, whose role is to supervise the implementation of NAFTA and issue binding interpretations on investment disciplines,⁴⁴ has prepared “interpretation notes” and “declarations” that recognize the importance of transparency and participation. This development is further analyzed below.

Both in the *Methanex Corporation vs. United States of America*, and the *United Parcel Service of America Inc. vs. Government of Canada (UPS)* cases, the arbitral tribunals recognized their power to allow for transparency and the participation of civil society organizations.⁴⁵ Among the factors that these investment arbitral tribunals considered important in evaluating whether to accept the presentations made by civil society organizations, the following were included:

- a) the potential of the respective presentations in assisting the Tribunal decide the dispute,
- b) the public significance of the matter under discussion, and the eventual impact of the decision beyond the specific facts of the case and the parties to the process; in other words, the public interest involved in the cases under analysis, and
- c) the possible contribution that such transparency and participation could provide to enhance the legitimacy of NAFTA Chapter 11, which has been openly criticized because of its secrecy; and conversely, the harm that rejecting such presentations could cause.

Besides the decisions adopted in the *Methanex* and *UPS* cases, the public relevance of many of the investment disputes brought under the NAFTA, as well as the consequent need to generate a broader opening of the procedure, had also been recognized at institutional level by the NAFTA Free Trade Commission.⁴⁶ In July 2001, the Commission issued an interpretation note to NAFTA Chapter 11, binding on NAFTA arbitral tribunals, that provides,

“Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4) [regarding the publication of awards], nothing in the NAFTA precludes the

⁴⁴ NAFTA, Articles 2001 and 1131.

⁴⁵ In both cases the Tribunals held that their ability to accept the *amici curiae* presentation was by virtue of the powers vested upon arbitrators in paragraph 1, article 15 of the *Arbitration Rules of the United Nations Commission on International Trade Law* to conduct the arbitration in such manner as they consider appropriate

⁴⁶ [from now on, the Commission]

Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.”⁴⁷.

Such an important step in favor of opening the procedure was complemented by the Commission in its 10th Meeting, held on October 7, 2003, where it issued a Declaration on the Participation of Non-disputing Parties. Such Declaration states that, “No provision of the North American Free Trade Agreement (“NAFTA”) limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party (a “non-disputing party”).”⁴⁸

In the light of such developments, a new generation of bilateral investment agreements expressly incorporates transparency and regulates the participation of non-disputing parties. For instance, the Chile - United States BIT, the Singapore - United States BIT, and the Central America Free Trade Agreement, provide that the proceedings shall be open to the public.⁴⁹ In particular, such agreements establish the publicity of the hearings, the written submissions of each party, the written versions of their oral depositions, and the written responses to a request or questions of an arbitral tribunal. Likewise, such agreements provide that the arbitral tribunal shall consider the requests to contribute written opinions related to the dispute from non-governmental entities.

Besides the experiences in the sphere of international investment law, precedents showing participation also exist in other dispute resolution mechanisms where commercial issues involve the public interest. Such is the case of the World Trade Organization (WTO), for instance, where, as a result of repeated attempts by civil society, the Appellate Body admitted the participation of non-disputing parties in proceedings.

At least, three cases demonstrate the WTO’s acceptance of transparency and participation. In the *Shrimp/Turtle* case,⁵⁰ the Appellate Body interpreted the provisions of the *Dispute Settlement Understanding (Understanding)* so as to allow dispute settlement panels to accept and consider *amicus curiae*. The Appellate Body extended such interpretation of the *Understanding* to its *Working Procedures for Appellate Review* in the *Bismuth Carbon Steel* case, even where such

⁴⁷ Interpretation note of the NAFTA Free Trade Commission (July 31, 2001), available at the Mexican government website, http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/nota_interpretativa/interpretacion_clc_espanol.pdf

⁴⁸ Statement by the Free Trade Commission on the Participation of non-disputing parties, October 7, 2003, available at the Mexican government website, http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/nuevos/participacion.pdf

⁴⁹ See for all, Article 22.10 of the Chile-US Free Trade Agreement, available at http://www.aduana.cl/p4_principal/antialone.html?page=http://www.aduana.cl/p4_principal/site/artic/20040108/pags/20040108121000.html

⁵⁰ United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, Report of the Appellate Body, October 12, 1998. WT/DS58/AB/R..

procedural rules do not explicitly authorize it to consider information that is not supplied by the parties to the proceedings.⁵¹ Finally, in the *Asbestos* case, the Appellate Body, “in the interest of equity and order of the proceedings”, adopted an additional process, applicable only to that case, whereby it would, “accept written communications received by the Appellate Body from persons other than the parties or third parties to the present dispute”.⁵²

Other fields of international law have been more open to recognize rights to information and participation. The International Court of Justice, for instance, even though explicitly limited in its acceptance of information in contentious proceedings, it has considered, when the special circumstances of the case have so justified, that it is empowered to take into account and use information obtained from informal sources and through methods not regulated by the Courts’ procedural rules.⁵³

It should also be mentioned that the European Court of Justice has accepted *amici curiae* presentations when the result of the case could affect the legal or economic position of individuals or associations representing collective interests. For instance, the European Court of Justice has recognized the interest and right of the Italian Consumers’ Union to intervene in competition cases, because of the effect that free competition has on consumers.⁵⁴ Likewise, the said Court admitted that the Consultative Committee of the European Association of Lawyers participate in a private case where the issue was the mandatory publicity of certain documents, upon consideration that its decision could affect the rules governing the legal profession in the Community, and thus have a general impact on all lawyers.⁵⁵

Finally, regional human-rights protection mechanisms both in Europe and the Americas presently accept the direct participation of human rights victims in the international proceedings, as well as that of *amicus curiae*. The Inter American Court of Human Rights, for instance, has admitted *amicus curiae*

⁵¹ United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, Report of the Appellate Body, May 1, 2000. WT/DS138/8.

⁵² European Communities - Measures Affecting Asbestos and Asbestos-Containing Products - Communication from the Appellate Body, November 8, 2000. WT/DS135/9.

⁵³ It did so in the case *Nicaragua vs. United States*, Merits 1986, Rep. 14, par. 31, in which facing the denial of the United States to participate in the process bringing the petitions and evidence in the way stipulated by the rules of proceeding, the Court considered it was entitled to make use of other kind of material and documentation that had been obtained through informal means. (In this respect, see Dinah Shelton, “The Participation of Non-governmental Organizations in International Judicial Proceedings”, *The American Journal of International Law*, Vol. 88:611, p. 628).

⁵⁴ See Dinah Shelton, “The Participation of Nongovernmental Organizations in International Judicial Proceedings”, *The American Journal of International Law*, Vol. 88:611, p. 630.

⁵⁵ *Ibid.*

briefs in numerous cases, for instance the *Awás Tingni (Mayagna Sumo)* case on indigenous communities' property rights over their lands.⁵⁶

The trend towards openness, transparency, and public participation in international disputes on investment, trade, environment, or human rights, reflects the democratic values of an international order where fundamental human rights may be exercised, as established in the United Nations Universal Declaration of Human Rights. The background examined above illustrates the global trend towards accepting the participation of third parties interested in the result of the proceedings, especially when issues of public significance are at stake. Also, in this particular case, no legal obstacles exist to transparency and participation. Furthermore, as previously discussed, the domestic legislation of the Republic of Argentina, including human rights treaties, recognizes the applicants' rights to participate and to have access to the information produced in this arbitration.

⁵⁶ Case *Awás Tingni Mayagna (Sumo) Indigenous Community vs The Republic of Nicaragua*, Inter. American Court of Human Rights Decision on August 31, 2001. Several organizations and private individuals submitted *amicus curiae* in this case, among them the International Human Rights Law Group (IHR LG) together with Center for International Environmental Law (CIEL).

5.- PETITION

As a result of all the above, we request this Tribunal the following:

a.- to concede the applicants 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 document produced in this arbitration.

b.- to concede the applicants access to the hearings.

c.- to allow the applicants sufficient opportunity to present legal arguments, as *amicus curiae*.

Yours Sincerely,

For ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA (ACIJ),

Gustavo Maurino, Lawyer

For CENTRO DE ESTUDIOS LEGALES Y SOCIALES (CELS),

Victor Abramovich, Carolina Fairstein, Jimena Garrote, Lawyers

For CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL),

**Marcos A. Orellana
Lawyer**

**For CONSUMIDORES LIBRES COOPERATIVA LTDA. DE PROVISIÓN DE
SERVICIOS DE ACCIÓN COMUNITARIA,**

Ariel Caplan, Lawyer

For UNIÓN DE USUARIOS Y CONSUMIDORES,

Horacio Bersten, Lawyer

Buenos Aires, January 27, 2005