

AMICUS CURIAE SUBMISSION

In ICSID case No. ARB/03/19

Between
Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.
And
The Republic of Argentina

Amici

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Asociación Civil por la Igualdad y la Justicia (ACIJ)
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TABLE OF CONTENTS

SUMMARY OF ARGUMENT & ROADMAP

I. FACTUAL BACKGROUND OF THE DISPUTE RAISES HUMAN RIGHTS ISSUES

1. Argentina's Economic Crisis
2. Tariff Stabilization & Access to Water

II. HUMAN RIGHTS LAW IMPLICATED IN THIS DISPUTE

1. The right to water & the right to life
2. The right to water as a component of other human rights
3. Obligations of the Host State under human rights treaties

III. HUMAN RIGHTS LAW IS RELEVANT FOR THE PROPER ADJUDICATION OF THE DISPUTE

1. Human rights law plays a role as applicable law to the dispute
2. Human rights law can aid the interpretation of BIT standards
3. Human rights law can contribute to the proper application of BIT standards
 - A. Fair & Equitable Treatment
 - B. Indirect Expropriation

IV. HUMAN RIGHTS LAW COULD DISPLACE INVESTMENT LAW

1. Conflict of norms
2. Necessity as a Circumstance Precluding Wrongfulness

CONCLUSION

***Amicus Curiae* Brief**

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

SUMMARY OF ARGUMENT & ROADMAP

During 2001 Argentina adopted emergency measures to address the most severe economic and social crisis of its history. *Inter alia*, Argentina devalued its currency and froze the tariff levels of certain essential services, including water and sanitation. *Amici* argue that human rights law provides a rationale for these measures, and that this rationale is relevant to the interpretation and application of Bilateral Investment Treaties (BITs).

More particularly, human rights law recognizes the right to water and its close linkages with several other human rights, including the right to life, health, housing, and an adequate standard of living. Human rights law also requires that Argentina adopt measures to ensure access to water to the population, including physical and economic access. Under this light, the measures adopted by Argentina, and particularly the freezing of the tariff levels amidst an economic crisis, ensured access to water to the population, and thus fully conformed to human rights law.

The *amicus curiae* brief is structured in four parts. *First*, the brief offers a basic account of the key facts of the dispute that implicate human rights issues. *Second*, *amici* analyze the content of the human right to water and its linkages with the enjoyment of other human rights, as well as the corresponding obligations of Argentina. *Third*, *amici* analyze how human rights law is relevant for the proper adjudication of the dispute. This analysis covers issues such as applicable law, interpretation, and the application of BIT standards. Specifically, *amici* argue that the rationale of the measures is relevant to determining whether Argentina's treatment was fair and equitable under the circumstances. Likewise, *amici* argue that the question whether governmental conduct is equivalent to an expropriation, or alternatively the legitimate exercise of regulatory powers, can also benefit from a human rights analysis. *Fourth* and finally, the *amicus curiae* brief suggests ways in which any conflict

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

of norms can be resolved, and explores the linkages between human rights law, essential services, and the state of necessity as a circumstance precluding wrongfulness.

I. FACTUAL BACKGROUND OF THE DISPUTE RAISES HUMAN RIGHTS ISSUES

1. Argentina's Economic Crisis

In 2001, a severe economic and social crisis hit Argentina. The crisis had been looming for several years, as the economy contracted by 25 percent between 1999 and 2002. Economic experts characterized the severity of the crisis as staggering, with social consequences comparable to that experienced by the United States during the Great Depression of the 1930s.¹ The Economist noted that, over the period of the collapse, “income per person in dollar terms . . . shrunk from around \$7000 to just \$3,500” and “[u]nemployment [rose] to more than 25%”².

Before the end of 2001, Argentina was already experiencing massive social upheaval³.

The overall situation at the end of 2001 was described as “potentially explosive,” marked by

¹ See, e.g. Cybils, Weisbrat, and Kar, *Argentina Since Default: the IMF and the Depression*, working paper of the Center for Economic Policy Research (Sep. 3, 2002). See also Anthony Faola, *Despair in Once Proud Argentina*, Deep Poverty Makes Dignity a Casualty, Washington Post Foreign Service, Aug. 6, 2002 (“The economy is projected to shrink by 15 percent this year [2002], putting the decline at 21 percent since 1999. In the Great Depression years of 1930-33, the Argentine economy shrank by 14 percent.”).

² *A decline without parallel – Argentina's collapse – Explaining Argentina's economic collapse*, THE ECONOMIST, Special Report, 2 March 2002 (“income per person in dollar terms . . . shrunk from around \$7000 to just 3,500”).

³ Citizens had begun protesting in the streets in late 2000. On November 23, 2000, “millions of workers stayed off their jobs ... in the largest national strike in years as a union-led protest against government belt-tightening measures [designed to stave off the coming meltdown] paralyzed Argentina.” (Laurence Norman, *Argentina paralyzed by national strike, one striker killed*, THE ASSOCIATED PRESS, (Buenos Aires), Nov. 24, 2000). On May 22, 2001, demonstrators barricaded highways in protests across the country. The protestors set up a wave of roadblocks, and thousands marched on the capital. (Laurence Norman, *Demonstrators Protest in Argentina*, THE ASSOCIATED PRESS, May 22, 2001). On July 20, 2001, protestors blocked roads with flaming tires, and the national airline suspended all flights in “one of the biggest labour protests in years.” (See Foreign Staff, *Strike over cutbacks brings Argentina to a standstill*, THE SCOTSMAN, July 20, 2001). On August 8, 2001, approximately 100,000 people marched through Buenos Aires to protest further government austerity measures (see *Argentines protest against pay cuts*, BBC NEWS, Aug. 8, 2001, available at: <http://news.bbc.co.uk/2/hi/americas/1481313.stm>). In December 2001, one day of riots left more than 20

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

“domestic political weakness and a lack of external support with depression, deflation, hyper-unemployment (20 percent of the active population), extreme poverty (14 million people) [and] high external debt (142,000 million dollars)”⁴.

This crisis had devastating effects on the population. The poverty rate in Argentina increased by more than 50 percent from 1998 to 2002. Between April 2001 and April 2002 alone, the number of people living below the poverty line in the greater Buenos Aires region increased by 26 percent.⁵ According to the World Bank, “[f]ew countries in the world have seen such a rapid rise in poverty.”⁶

2. Tariff Stabilization & Access to Water

In the context of these poverty figures, a sudden three-fold spike in the price of water to 7.740.000 inhabitants and of sewage services to 5.890.000 inhabitants could have had devastating consequences.⁷ It would have transformed an economic and social crisis into a full-fledged humanitarian disaster by abruptly depriving millions of citizens of their access to life-giving water. Such increase in tariffs would have triggered further social unrest and riots, thereby aggravating the already severe public order crisis.

In 2002 the National Congress initiated a process to renegotiate all the concession contracts with privatized companies in the essential services sectors, including water distribution and sanitation. There was a clear rationale in this decision. Two critical

civilians dead. (see *The events that triggered Argentina's crisis*, BBC NEWS, Dec. 21, 2001, available at: <http://news.bbc.co.uk/1/hi/business/1721103.stm>).

⁴ Deborah L. Norden & Roberto Russell, *The United States And Argentina*, 127 (Routledge 2002).

⁵ World Bank, *Poverty Reduction and Economic Management Unit*, Report No. 26127-AR, *Argentina—Crisis and Poverty 2003: A Poverty Assessment*, July 24, 2003, p. 5, available at: [http://wbln0018.worldbank.org/lac/lacinfoclient.nsf/d29684951174975c85256735007fef12/3d29a0ed02294a8b85256db10058dbdd/\\$FILE/ArgentinaPAMainReport.pdf](http://wbln0018.worldbank.org/lac/lacinfoclient.nsf/d29684951174975c85256735007fef12/3d29a0ed02294a8b85256db10058dbdd/$FILE/ArgentinaPAMainReport.pdf).

⁶ World Bank, Report No. 26127-AR, *supra* note 5, at p. 4.

⁷ See www.etoss.org.ar. (containing the figures cited)

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

dimensions of the contracts had changed: the value of the currency had been completely modified, and fundamental human rights were seriously affected by the crisis.

II. HUMAN RIGHTS LAW IMPLICATED IN THIS DISPUTE

1. The right to water & the right to life

The right to water is essential for sustaining human life and is protected under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸ According to the Committee on Economic, Social and Cultural Rights (ESCR Committee or Committee), the treaty body charged with monitoring State compliance with the ICESCR,⁹ “[t]he right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”¹⁰ In reviewing country compliance with the ICESCR, the Committee has repeatedly expressed concern about States’ failures to provide adequate access to potable water.¹¹

Other international human rights treaties also protect the right to water. Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women (Women’s Convention) requires States to take appropriate measures to ensure women’s right “[t]o enjoy adequate living conditions, particularly in relation to housing,

⁸ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

⁹ See Office of the High Commission for Human Rights, *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, Economic and Social Council Resolution 1985/17 (May 28, 1985).

¹⁰ See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15, The right to water, U.N. Doc. E/C.12/2002/11, ¶ 3, 29th Sess. (Jan. 20, 2003) [hereinafter CESCR General Comment No. 15].

¹¹ See generally CENTRE ON HOUSING RIGHTS AND EVICTIONS, LEGAL RESOURCES FOR THE RIGHT TO WATER: INTERNATIONAL AND NATIONAL STANDARDS 98-108 (2003), [hereinafter LEGAL RESOURCES FOR THE RIGHT TO WATER] (summarizing Concluding Observations by the Committee on Economic, Social and Cultural Rights expressing concern about lack of access to adequate and potable water).

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

sanitation, electricity and water supply.”¹² Article 24 of the Convention on the Rights of the Child (CRC) requires States to protect “the right of the child to the enjoyment of the highest attainable standard of health” through appropriate measures “[t]o combat disease [...] through [...] the provision of adequate nutritious foods and clean drinking water.”¹³

Although the adequacy of water that is necessary to ensure the right to water may be different in different conditions, water must in any event be available, of acceptable quality, and accessible. In defining accessible, the ESCR Committee has explained that water must be accessible without discrimination and both *physically* and *economically* accessible.¹⁴

The prohibition against discrimination requires that “[w]ater and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited

¹² Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR 34th Sess., Supp. No. 46 at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, at art. 14(2)(h). Sanitation and washing facilities are not only critical components of the right to housing, but are closely tied to the right to water. As the U.N. Special Rapporteur on the Right to Water notes, “the right to water and to sanitation are interdependent. The right to water, particularly the aspect of water quality, depends on adequate sanitation for all. Conversely, to ensure hygiene and adequate sanitation, each person should have access to at least a small amount of water on a regular basis.” Final Report of the Special Rapporteur, Mr. El Hadji Guissé, Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, U.N. Doc. E/CN.4/Sub.2/2004/20, 56th Sess., ¶ 50 (July 14, 2004) [hereinafter Report of Special Rapporteur Guissé, 2004].

¹³ Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990, at art. 24(1), (2)(e).

¹⁴ CESCR General Comment No. 15, *supra* note 10, at ¶ 12. In interpreting the right to health, the Committee adopted a similar definition of accessibility, explaining that health determinants, such as potable water, “must be accessible to all, especially the most vulnerable or marginalized sections of the population ... within safe physical reach for all sections of the population ... [and] affordable for all.” Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4, ¶ 43(c), 22nd Sess. (Aug. 11, 2000), [hereinafter CESCR General Comment No. 14, at ¶ 12(b)]; *see also* Interim report of the Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health, Mr. Paul Hunt, U.N. Doc. A/58/427, 58th Sess. (Oct. 10, 2003), at ¶¶ 51, 53(c)-(d), (explaining that “health facilities, goods and services, including the underlying determinants of health, shall be available, accessible, acceptable and of good quality”). [hereinafter Interim Report of Special Rapporteur Hunt, 2003].

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

grounds.”¹⁵ States “have a special obligation [...] to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.”¹⁶

Physical accessibility requires that “water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.”¹⁷

Economic accessibility requires that “[w]ater, and water facilities and services, must be affordable for all.”¹⁸ The ESCR Committee has explained: “[A]ny payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups.”¹⁹ Further, the Committee stated that “[t]he direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights.”²⁰

2. The right to water as a component of other human rights

The right to water is also “a prerequisite for the realization of other human rights”²¹. The Special Rapporteur on the enjoyment of economic, social and cultural rights and the

¹⁵ CESCR General Comment No. 15, *supra* note 10, at ¶ 12(c)(iii). Prohibited grounds include race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status. *Id.* at ¶ 13.

¹⁶ *Id.* at ¶ 15.

¹⁷ *Id.* at ¶ 12(c)(i).

¹⁸ *Id.* at ¶ 12(c)(ii).

¹⁹ *Id.* at ¶ 27.

²⁰ *Id.* at ¶ 12(c)(ii).

²¹ CESCR General Comment No. 15, *supra* note 10, at ¶¶ 1, 3; *see also* Report of Special Rapporteur Guissé, 2004, *supra* note 12, at ¶ 23 (“The right to drinking water and sanitation is a part of internationally recognized human rights and may be considered as a basic requirement for the implementation of several other human

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

promotion of the right to drinking water supply and sanitation (Special Rapporteur on Water)²² has emphasized that the right to drinking water is “an essential component of the right to life” and that “the lack of access to drinking water and sanitation jeopardizes the lives of millions of individuals.”²³

The International Covenant on Civil and Political Rights (ICCPR)²⁴ and the American Convention on Human Rights (American HRs Convention)²⁵ also protect the right to water in order to ensure the right to life. The ICCPR provides that every individual has an inherent right to life and explicitly prohibits the deprivation of means of subsistence.²⁶ Article 4 of the American HRs Convention also provides that “[e]very person has the right to have his life respected” and that “[n]o one shall be arbitrarily deprived of his life.”²⁷ The Inter-American Court of Human Rights has interpreted the right to life as including the right

rights.”); *see generally* Joint Statement by the Special Rapporteur on adequate housing, Special Rapporteur on the right to food and Special Rapporteur on the right to the highest attainable standard of physical and mental health at the Third World Water Forum, ¶¶ 6-9 (Mar. 17, 2003) [hereinafter Joint Statement by the Special Rapporteurs], [available at: http://www.unhchr.ch/huricane/hurricane.nsf/\(Symbol\)/HR.03.22.En?OpenDocument](http://www.unhchr.ch/huricane/hurricane.nsf/(Symbol)/HR.03.22.En?OpenDocument) (discussing the importance of water for the rights to housing, food and health and calling “for a clear recognition of water as a human right in the Ministerial Declaration and other outcomes of the World Water Forum, in accordance with international human rights instruments including General Comments”).

²² In 2001, the U.N. Commission on Human Rights approved a decision of the Sub-Commission on the Promotion and Protection of Human Rights (Resolution 2001/2, U.N. Doc. E/CN.4/Sub.2/2001/40, ¶¶ 3-4 (Aug. 10, 2001)) to appoint Mr. El Hadji Guissé as Special Rapporteur. In approving the Sub-Commission’s resolution, the Commission instructed the Special Rapporteur “to conduct a detailed study on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, at the national and international levels, taking also into account questions related to the realization of the right to development, in order to determine the most effective means of reinforcing activities in this field and defining as accurately and fully as possible the content of the right to drinking water in relation to other human rights.” Report of the Sub-Commission on the Promotion and Protection of Human Rights on its 53rd Session, U.N. Doc. E/CN.4/2002/2, at 9 (Nov. 22, 2001).

²³ Final Report of the Special Rapporteur, Mr. El Hadji Guissé 2004, ¶ 29, *supra* note 12. *See also* Preliminary report submitted by Mr. El Hadji Guissé, Relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation, U.N. Doc. E/CN.4/Sub.2/2002/10, 54th Sess., ¶ 42 (June 25, 2002) [hereinafter Preliminary Report of Special Rapporteur Guissé, 2002].

²⁴ International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

²⁵ American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

²⁶ ICCPR, *supra* note 24, at arts. 1(2), 6(1).

²⁷ ACHR, *supra* note 25, at art. 4(1).

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

to access to conditions that guarantee a dignified life.²⁸ The right to water stands out as enabling life itself, as well as the conditions for a dignified life.

In interpreting the right to housing²⁹ enshrined in the ICESCR, the ESCR Committee has emphasized that “[a]ll beneficiaries of the right to adequate housing should have sustainable access to ... safe drinking water.”³⁰ The UN Special Rapporteur on the right to adequate housing has stated that “[A]ccess to safe and sufficient water – including drinking water – is an essential element of adequate housing. . . . Water is not only an essential human need, but its place in human rights lies at the confluence of human rights and housing, health and food.”³¹

The right to water is also a component of the right to the highest attainable standard of health. Article 12(1) of the ICESCR provides: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³² Article 10(1) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) provides: “Everyone shall have the right to health, understood to

²⁸ Corte Interamericana de Derechos Humanos, *Caso Villagrán Morales y Otros (Caso de los “Niños de la Calle”)*, Sentencia del 19 de noviembre de 1999 (Ser. C) No. 63, párr. 144.

²⁹ ICESCR, *supra* note 8, at art. 11(1), (guaranteeing “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”); CRC, *supra* note 13, at art. 27(3) (“States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”).

³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 4, The right to adequate housing under Art. 11(1) of the Covenant, U.N. Doc. E/1992/23, annex III at 114 (1991), ¶ 8(b) 6th Sess. (Dec. 13, 1991) [hereinafter CESCR General Comment No. 4]. *See also* Working paper of the Special Rapporteur, Mr. El Hadji Guissé, The right of access of everyone to drinking water supply and sanitation services, U.N. Doc. E/CN.4/Sub.2/1998/7, 50th Sess., ¶ 22 (June 10, 1998) [hereinafter Working Paper of Special Rapporteur Guissé, 1998] (discussing the link between water and the right to housing).

³¹ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari, Addendum: Visit to the occupied Palestinian territories, U.N. Doc. E/CN.4/2003/5/Add.1, 59th Sess., ¶ 65 (June 12, 2002) [hereinafter Report of Special Rapporteur Kothari, Palestine Addendum, 2002].

³² ICESCR, *supra* note 8, at art. 12(1).

***Amicus Curiae* Brief**

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

mean the enjoyment of the highest level of physical, mental and social well-being.”³³ Article 24 of the CRC requires States to protect “the right of the child to the enjoyment of the highest attainable standard of health.”³⁴

In interpreting the right to health in the ICESCR, the ESCR Committee explained that it extends “also to the underlying determinants of health, such as access to safe and potable water.”³⁵ The Committee on the Rights of the Child, the treaty body charged with monitoring State compliance with the CRC, has stated that the obligation in Article 24 of the CRC to ensure that children have access to the highest attainable standard of health means that States “have a responsibility to ensure access to clean drinking water” and that such access is “essential for young children’s health.”³⁶

Finally, Article 26 of the American Convention provides that States “undertake to adopt measures . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires”.³⁷

³³ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, O.A.S.T.S. No. 69 (1988), *entered into force* Nov. 16, 1999, at art. 10(1).

³⁴ CRC, *supra* note 13, at arts. 24(1), (2)(e).

³⁵ CESCR General Comment No. 14, *supra* note 14; *see also* Working Paper of Special Rapporteur Guissé, 1998, *supra* note 30, at ¶ 21 (discussing the link between water and the right to health).

³⁶ Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood, U.N. Doc. CRC/C/GC/7, ¶ 27(a), 41st Sess. (Nov. 1, 2005).

³⁷ American Convention, *supra* note 25, at art. 26.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

3. Obligations of the Host State under human rights treaties

Among other treaties, Argentina is a party to the International Covenant on Economic, Social and Cultural Rights³⁸, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights,³⁹ the Convention on the Rights of the Child,⁴⁰ the International Convention on the Elimination of All Forms of Discrimination against Women,⁴¹ the International Covenant on Civil and Political Rights,⁴² and the American Convention on Human Rights.⁴³ All these treaties are fully incorporated in Argentine law and require Argentina to protect the right to water.

Further, the Argentine Constitution lists and gives full constitutional status to the major international and regional human rights instruments: the American Declaration on the Rights and Duties of Man, the Universal Declaration of Human Rights, the American Convention on Human Rights, the ICESCR, the ICCPR, the CRC, the Women's Convention, and several others.⁴⁴ Section 75(22) of the Constitution confers upon these human rights conventions "constitutional hierarchy" and provides that they "are to be understood as complementing the rights and guarantees recognized herein."

Under the ICESCR Argentina is obligated to ensure a minimum essential level of the right to water which includes:

- (a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

³⁸ ICESCR, *supra* note 8, (ratified by Argentina on August 8, 1986).

³⁹ Protocol of San Salvador, *supra* note 33, (ratified by Argentina on October 23, 2003).

⁴⁰ CRC, *supra* note 13, (ratified by Argentina on December 4, 1990).

⁴¹ Women's Convention, *supra* note 12, (ratified by Argentina on July 15, 1985).

⁴² ICCPR, *supra* note 24, (ratified by Argentina on August 8, 1986).

⁴³ American Convention on Human Rights, *supra* note 25, (ratified by Argentina September 5, 1984).

⁴⁴ CONST. ARG. (Constitution of the Argentine Nation, adopted 1852, as amended 22 Aug 1994), at § 75(22).

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

- (b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups; . . . [and]
- (c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water.⁴⁵

As the ESCR Committee has explained, each State party to the ICESCR, notwithstanding its level of economic development, has an obligation to ensure a minimum essential level of each of the rights in the ICESCR, including the right to water.⁴⁶ Although Argentina is obligated to take affirmative measures to progressively realize the right to water, it also has obligations that “are of immediate effect”,⁴⁷ including to ensure that the right to water can be exercised without discrimination⁴⁸ and to refrain from taking any retrogressive measures.⁴⁹

The ESCR Committee explained that affirmative measures may include “appropriate pricing policies such as free or low-cost water” to ensure that water is affordable.⁵⁰ The U.N. Special Rapporteur on the Right to Water also explained that States must ensure that prices for water are reasonable and should “play an active role in designing and regulating pricing structures in order to ensure access to affordable water and sanitation, based on the principle of non-discrimination.”⁵¹

⁴⁵ CESCR General Comment No. 15, *supra* note 10, at ¶ 37. The ESCR Committee has explained that “access to . . . an adequate supply of safe and potable water” is also a core obligation of the right to health. CESCR General Comment No. 14, *supra* note 14, at ¶ 43(c).

⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties obligations under art. 2, para. 1 of the ICESCR, U.N. Doc. E/1991/23, annex III at 86 (1991), ¶ 10, 5th Sess. (Dec. 14, 1990) (emphasis in original).

⁴⁷ CESCR General Comment No. 15, *supra* note 10, at ¶ 17.

⁴⁸ *Id.* at ¶ 17.

⁴⁹ *Id.* at ¶ 19.

⁵⁰ *Id.* at ¶ 27(b).

⁵¹ Report of Special Rapporteur Guissé, 2004, *supra* note 12, at ¶¶ 51-52; *see also* Commission on Sustainable Development, Annex: Major groups’ Priorities for Action in water, sanitation and human settlements, U.N.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

Argentina's treaty obligations include not only the duty to respect the right to water, e.g., to refrain from measures that violate this right, but also the duty to protect the right to water, e.g., "to prevent third parties from interfering in any way with the enjoyment of the right to water."⁵² The responsibility to protect entails the obligation to adopt "the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water."⁵³

According to the ESCR Committee, when water services "are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water."⁵⁴

The U.N. Special Rapporteur on Housing stated: "While human rights law does not prevent the provision of services – including water, education, electricity and sanitation – through private companies, States have the responsibility to ensure that such privatization does not infringe on the human rights of the population."⁵⁵ Also the Special Rapporteur on Water has identified as "[a] particular concern . . . the phenomenon of companies' raising prices when the local currency is devalued. Any concession contracts should specify that the risk of devaluation shall not be borne by the poorest consumers."⁵⁶

Doc. E/CN.17/2005/5, 13th Sess., ¶ 8 (Dec. 15, 2004) (calling on governments to "ensure safe, accessible and affordable drinking water supply (inter alia, through price regulation)").

⁵² CESCR General Comment No. 15, *supra* note 10, at ¶ 23.

⁵³ *Id.* at ¶ 23; *see also* CESCR General Comment No. 14, *supra* note 14, at ¶ 51 ("Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties.").

⁵⁴ CESCR General Comment No. 15, *supra* note 10, at ¶ 24.

⁵⁵ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Addendum: Mission to Brazil, U.N. Doc. E/CN.4/2005/48/Add.3, 61st Sess., ¶ 32 (Feb. 18, 2004); *see also* Adequate housing as a component of the right to an adequate standard of living, Report by the Special Rapporteur, Miloon Kothari, Addendum: Mission to Kenya, U.N. Doc. E/CN.4/2005/48/Add.2, 61st Sess., ¶ 19 (Dec. 17, 2004) (making same point with respect to Kenyan privatization program).

⁵⁶ Report of Special Rapporteur Guissé, 2004, *supra* note 12, at ¶ 60.

***Amicus Curiae* Brief**

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

In this sense, if Argentina had not frozen the tariffs, water would have become unaffordable for millions of people in the province of Buenos Aires. In light of the human rights treaties in force in Argentina, this three-fold increase in the price of water would have constituted a breach of Argentina's international human rights obligations.

III. HUMAN RIGHTS LAW IS RELEVANT FOR THE ADJUDICATION OF THE DISPUTE

1. Human rights law plays a role as applicable law to the dispute

The applicable law to the dispute is defined both in the ICSID Convention and the relevant BITs. The ICSID Convention provides in its Article 42(1) that, “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed upon by the parties.” It also states that “[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws), and such rules of international law as may be applicable”.⁵⁷

The present dispute arises under three separate bilateral investment treaties (BITs): the U.K.-Argentina BIT,⁵⁸ the Spain-Argentina BIT,⁵⁹ and the France-Argentina BIT.⁶⁰ Each of these BITs embodies the agreement of the parties, and in the context of the instant dispute makes clear that the Tribunal should consider at least three sources of law in its deliberations, namely: 1) the BITs themselves, 2) the laws of Argentina (as the Contracting

⁵⁷ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ICSID (W. Bank), opened for signature Mar. 18, 1965, 575 U.N.T.S. 159, art. 42(1) [hereinafter ICSID Convention].

⁵⁸ Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Dec. 11, 1990, U.K.-Arg., 1765 U.N.T.S. 33, art. 8(4) [hereinafter U.K.-Argentina BIT].

⁵⁹ Acuerdo para la Promoción y la Protección Recíproca de Inversiones entre El Reino de España y la Republica Argentina, Oct. 3, 1991, Sp-Arg., 1699 U.N.T.S. 202, art. X.5 [hereinafter Spain-Argentina BIT].

⁶⁰ Treaty Concerning the Treatment and Protection of Investments, 3 July 1991, FR.-AR., 1728 U.N.T.S. 298, art. 8(4) [hereinafter France-Argentina BIT], *as translated in* FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 716 (R. Doak Bishop, James Crawford, and W. Michael Reisman eds., 2005) [hereinafter Bishop, Crawford & Reisman].

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

Party in this dispute), and 3) the rules of international law that are applicable to this dispute. Consequently, and given that the factual circumstances underlying this dispute implicate Argentina's human rights obligations, the Tribunal should apply both international and domestic Argentine human rights law to the dispute at hand.

This dispute involves measures taken by the government of Argentina, during a period of severe economic and social crisis, to protect human rights. *Inter alia*, Argentina's measures have been adopted in furtherance of its obligation to progressively realize its citizens' right to water, as well as to protect and promote its citizens' right to health. Those rights are protected by several human rights treaties that were in force in Argentina before the investment was established.⁶¹

These human rights treaties, examined earlier, make clear that Argentina had a positive duty to act to prevent the disruption of water services to its citizens during and after the economic crisis of 2001.⁶² As long as the lingering effects of the crisis compromise Argentine consumers' ability to pay for water at the rates demanded by the Claimants, Argentina's human rights obligations remain relevant to the dispute. In particular, Argentina's measures in this case must be seen in light of its positive duty to ensure access to safe drinking water.

⁶¹ Argentina is a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador or San Salvador Protocol), the Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention), the Convention on the Rights of the Child (CRC), the International Covenant on Civil and Political Rights (ICCPR), and the American Convention on Human Rights (American Convention). These treaties require Argentina to protect the right to water.

⁶² ESCR General Comment No. 15, *supra* note 10, ("The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water.") (emphasis in original). *See also id.* at ¶ 24 ("Where water services . . . are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water.").

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

2. Human rights law can aid the interpretation of BIT standards

Article 31.3.c of the Vienna Convention on the Law of Treaties⁶³ (VCLT) expresses the principle of systemic integration of the international legal system.⁶⁴ The International Court of Justice in the *Case Concerning Oil Platforms* confirmed the relevance of this principle of interpretation, as the Court utilized the rules of international law on the use of force in its interpretation of the bilateral Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran.⁶⁵ In application of this principle of systemic interpretation, human rights law can add color and texture to the standards of treatment included in a BIT. In addition, systemic interpretation is particularly apt when the terms of a treaty are by their nature open-textured,⁶⁶ such as the fair and equitable treatment standard.

A contextual interpretation of language in a BIT is also necessary because investment and human rights law seem to encounter frictions at the level of regimes, particularly in regards to quantitative policy space available for social development. Indeed, the “regulatory chill” that may result from certain interpretations of investment disciplines could reduce the capabilities of States to fulfill their human rights obligations, including their duty to regulate.⁶⁷ In that sense, a contextual interpretation leads to normative dialogue, accommodation, and mutual supportiveness among human rights and investment law.

⁶³ Vienna Convention on the Law of Treaties, art. 31.3.c, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), available at <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Aug. 11, 2005).

⁶⁴ Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 280 (2005).

⁶⁵ *Case Concerning Oil Platforms*, (Iran v. U.S.), Judgment ¶ 41, I.C.J. 2003.

⁶⁶ McLachlan, *supra* note 64 at 312.

⁶⁷ UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, pgs. 43 & 48 (2005).

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

3. Human rights law can contribute to the application of BIT standards

The Tribunal's Decision on Jurisdiction notes that Claimants allege "that, by failing to make tariff adjustments and to respect the equilibrium principle", the Respondent has breached its duties with respect to the expropriation and fair and equitable treatment standards.⁶⁸ In that regard, the question whether an investor has been treated fairly and equitably can be illuminated by reference to the conduct owed by the State to the general population under human rights law. Likewise, the question whether governmental conduct is expropriatory, or otherwise the legitimate exercise of regulatory powers, can also benefit from a human rights analysis. This section addresses these issues.

A) Fair & Equitable Treatment Amidst a Severe Economic and Social Crisis

Despite the vagueness of the terms "fair and equitable" (F&ET) in the definition of the standard of treatment under BITs, and despite the varying formulations of the F&ET standard in BITs, international investment case law suggests several discrete components of this standard. Three emerging components are particularly relevant to this dispute, namely:

- (1) whether the government's regulatory processes were administered in a diligent and transparent fashion;⁶⁹
- (2) whether the government's conduct frustrated the legitimate basic expectations of foreign investors in making their investment;⁷⁰
- (3) whether any changes introduced to the regulatory framework after the investment's establishment were arbitrary or discriminatory.⁷¹

⁶⁸ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A., v. The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction (August 3, 2006), at ¶ 34. See also ¶ 1 and ¶ 28.

⁶⁹ *PSEG Global Inc. v. Republic of Turkey*, Award, ICSID Case No. ARB/02/5, (January 17, 2007).

⁷⁰ *Técnicas Medicamentoales TECMED S.A v. the United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) [hereinafter *TecMed*], ¶ 154. *Eureko B.V. v. Republic of Poland*, Partial Award (Aug. 19, 2005), at ¶ 232.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

In addition, all these components involve the fundamental premise that governments are under the obligation to act in good faith toward foreign investors

None of the components of the F&ET standard would appear *a priori* to conflict with a host State's duty to protect its citizens' human rights. In this sense, human rights law and investment law would not be in conflict, but rather capable of concurrent application. This is all the more relevant in this case because Argentina's motivation for the privatization of the public water utilities was to upgrade service, expand investment, and increase access to water and sanitation services to promote the health of Argentine citizens. Still, a question that arises under the particular factual circumstances of the case is whether strict compliance with every term of the concession contract was at all compatible with the human rights obligations of the State. This question may involve a conflict of norms situation, addressed further below.

This conflict of norms issue need not arise, however, if the F&ET standard is interpreted under a human rights lens. In this regard, as the tribunal in *Waste Management II* concluded with reference to the FE&T, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."⁷² In that vein, it is wholly appropriate for the Tribunal to consider the human rights purposes and impacts of Argentina's measures in this case. On the one hand, the Tribunal would benefit from taking into consideration the purpose of the privatization program: to improve Argentine citizens' access to water and sanitation services, thereby furthering their basic economic and social rights. And at the same time, the Tribunal would also benefit from considering that the tariff levels were frozen by the government to protect the most vulnerable sectors of its population, who

⁷¹ CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/08, (May 12, 2005).

⁷² *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/03 (NAFTA), Award (Apr. 30, 2004) [hereinafter *Waste Management II*], ¶ 99.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

wouldn't be able to afford a sudden three-fold increase in water and sanitation tariffs amidst a deep economic and social crisis.

In this line of analysis, and for reasons of space, *amici* wish to examine only: (1) the frustration of legitimate expectations and (2) arbitrary changes to the legal framework, as components of the F&ET.

Firstly, in regards to legitimate expectations, the investor's expectations cannot be frustrated if the existing legal framework is put into operation. This principle applies equally to a State's pre-existing domestic laws and its pre-existing international treaty obligations.

In the case of *Maffezini v. Spain*,⁷³ for example, an ICSID tribunal constituted under the Spain-Argentina BIT reasoned that it could not hold the government of Spain responsible for Maffezini's unrealized profit expectations on account of the government's application of its environmental law. That is, notwithstanding the existence of the BIT, the fact that legal requirements concerning an environmental impact assessment were established in European Union law and Spanish law prior to Maffezini's investment meant that the investor could not legitimately expect to be compensated for any costs associated with compliance with the legal framework.

In the instant case, by analogy, Argentina's treaty-based human rights commitments pre-date its BITs. As in *Maffezini*, any investor was required to take into account and comply with the pre-existing legal framework in Argentina, which includes human rights norms. Since Argentina's human rights treaties govern its obligations with respect to water, public health, and other critical areas of public policy, an investor entering these sectors cannot legitimately expect the host State to disregard its human rights obligations. More

⁷³ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 (Nov. 13, 2000) [hereinafter *Maffezini*].

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

particularly, an investor in a water concession must be aware that the government is under a duty to ensure access to water to the population, and that this duty does not disappear during an economic and social crisis. Consequently, an investor cannot legitimately expect tariffs to increase in such a way as to become an insurmountable obstacle to effective access to water and sanitation to millions of people.

Secondly, in regards to arbitrary changes to the legal framework, the question highlights the tensions between stability and regulatory change in society. On the one hand, BITs aim at establishing a secure and stable legal framework conducive to economic activity, which in turn may enable the efficient allocation of economic resources --a key element in the ability of governments to progressively realize economic, social, and cultural rights. On the other hand, human rights law and international environmental law establish positive duties upon States to regulate to prevent deleterious consequences to, *inter alia*, human health and the environment. These fields are by nature dynamic; they evolve as science identifies links between substances/activities and risks, and as circumstances require State intervention to secure access to essential services, for example. Under this light, the notion that an investor can expect the legal framework to remain frozen in time is by nature incompatible with the foreseeable and foreseen reality of expected regulatory change, especially in the public health and environmental context.

The tension described above has been addressed by the *Saluka* Tribunal, which noted that, “No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged.”⁷⁴ This conclusion would appear to dispose the question.

⁷⁴ *Saluka Investments BV v. The Czech Republic, Arbitration under the UNCITRAL Rules, Partial Award*, March 17, 2006, ¶ 305.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

Still, the related issue of reliance on specific commitments is also relevant in the operation of the F&ET standard in this case, in relation to any legitimate expectations. As the *CMS Gas* Tribunal reasoned, “It is not a question whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.”⁷⁵ Similarly, the *Methanex* Tribunal also reasoned that specific commitments given to an investor would be relevant in the determination of an expropriation.⁷⁶

The question of the investor’s reliance on specific commitments entered into by the government, as a dimension of the F&ET standard, also can be addressed from a human rights perspective. In so doing, the Tribunal needs to evaluate whether the government of Argentina made any specific commitments guaranteeing that it would refrain from taking certain human rights-protecting measures in the event of an economic crisis.

In this regard, the Tribunal should take into account that no government may validly contract away its treaty-based obligations, including its human rights obligations. For example, any commitment that purported to freeze regulation on health, safety, and environmental matters may be incompatible with the government’s positive duty to provide protection to the population, including from interference by third-parties. Thus, any BIT interpretation turning Argentina’s specific commitments under the concession contract into a commitment to violate its human rights obligations would be contrary to the public order of the State. Consequently, the Tribunal may want to avoid any interpretation of the

⁷⁵ *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/08, ¶ 277 (May 12, 2005).

⁷⁶ *Methanex Corporation v. United States of America*, Final Award, Part IV, Chapter D, ¶ 7, (August 3, 2005).

***Amicus Curiae* Brief**

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

concession agreement that would lead to a direct conflict between Argentina's human rights obligations and its specific commitments to the claimants.

In light of the tensions addressed above, the better approach to the F&ET standard is its construct as a guarantee against *arbitrary* changes. In that vein, an emphasis on the rationale of the measure, as well as weight on procedural due process and available opportunities for judicial review, would enable BITs to avoid becoming obstacles to the realization of human rights. In the application of such construct, any *capricious* measure devoid of rationale would breach the F&ET standard. That does not seem to be the case here, given the government's need to ensure access to water to the population amidst a severe economic and social crisis.

B) Indirect Expropriation

The question whether governmental conduct is equivalent to an expropriation, or alternatively the legitimate exercise of regulatory powers can also benefit from a human rights analysis. Several issues fall in this basket, and due to space limitations *amici* offer analysis only on the following:

1. whether the measure is covered by the police powers of the State;
2. in the alternative, whether the measure is proportional to its objective, in light of the circumstances.

Firstly, regarding the police powers, the interpretation of the law on expropriation with human rights law could aid the Tribunal in the adjudication of the dispute. The application of the police powers doctrine to include important public health regulations could, in this vein, secure the policy space necessary for States to discharge their human rights obligations.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

In that context, several arbitral decisions confirm the relevance of the police powers. The *Feldman* award, for example, recognized a line separating a valid regulation from a compensable taking.⁷⁷ The *Feldman* Tribunal also observed that, “Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue.”⁷⁸ and concluded the following:

The Tribunal notes that the ways in which governmental authorities may force a company out of business, or significantly reduce the economic benefits of its business, are many. In the past, confiscatory taxation, denial of access to infrastructure or necessary raw materials, imposition of unreasonable regulatory regimes, among others, have been considered to be expropriatory actions. At the same time, governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this [...].⁷⁹

Other investment tribunals have echoed these considerations. The *Methanex* Award concluded that, “as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable [...]”⁸⁰ In this same direction, the *Saluka* Tribunal interpreted the BIT taking into account relevant rules of general customary law,⁸¹ and under its light concluded:

In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are “commonly accepted as within the police power of States” forms part of customary international law today.⁸²

⁷⁷ Marvin Feldman v. Mexico, CASE No. ARB(AF)/99/1, Award ¶ 100 (Dec. 16, 2002).

⁷⁸ *Id.* at ¶ 112.

⁷⁹ *Id.* at ¶ 103.

⁸⁰ Methanex Corporation v. United States of America, Final Award, Part IV, Chapter D, ¶ 7, (August 3, 2005).

⁸¹ Saluka Investments BV v. The Czech Republic, Partial Award, ¶ 254 (Mar. 17, 2006).

⁸² *Id.* at ¶ 262.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

The recent arbitral decisions cited above demonstrate that, as a matter of customary law, measures covered by the police powers do not require compensation. In this regard, it is generally accepted that measures adopted for public health reasons fall within the police powers doctrine.⁸³ In the instant case, the measures adopted by Argentina sought to, *inter alia*, ensure access to water and sanitation to the population amidst a severe economic and social crisis. This measure thus averted the public health emergency that would have resulted from the lack of access to clean water and sanitation to millions of people in Buenos Aires. Under the light of human rights law, the police power doctrine operates to distinguish these measures from an otherwise compensable expropriation.

Secondly, in the alternative, and in case the Tribunal finds that the legitimate exercise of the police powers is subject to a proportionality test, the Tribunal would also benefit from applying human rights law methodologies.

This line of reasoning has been applied by the *Tecmed* Tribunal, which followed a two-pronged approach. The *Tecmed* Tribunal first determined the *effects* of the measure, and second it evaluated whether such impact was *proportional* to the public interest protected by the government's regulatory measures and police powers. The *Tecmed* Tribunal, following precedents from the European Court of Human Rights, queried whether Mexico's "measures [were] reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation."⁸⁴

⁸³ See e.g., G.C. Christie, *What Constitutes a Taking of Property Under International Law?*, 38 Brit. Y.B. Int'l L. 307, 331 (1962), *reprinted in* Bishop, Crawford & Reisman, pg. 888. ("The conclusion that a particular interference is an expropriation might also be avoided if the State whose actions are the subject of complaint had a purpose in mind which is recognized in international law as justifying even severe, although by no means complete, restrictions on the use of property. Thus, the operation of a State's tax laws, changes in the value of a State's currency, actions in the interest of the public health and morality, will all serve to justify actions which because of their severity would not otherwise be justifiable...").

⁸⁴ *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2. (Spain/Mexico BIT), Award, 29 May 2003, at ¶ 122.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

With respect to the effects of the measure, it may suffice to observe that while the investor received less income than it expected from water tariffs, it remained in control over the investment, managing the day-to-day operations of the company. That is, in contrast to the *Tecmed* case, where the investment was destroyed, in the instant case the investor still received income from the concession.

Further, with respect to the public interest protected by the government's measure, it appears that addressing a national emergency and preventing a public health crisis stand in the tallest order. More particularly, the measures of general application adopted by Argentina to address the economic crisis that limited tariff adjustments were adopted with a view to fulfilling a clear public purpose, namely the safeguard of the population's basic rights to water and sanitation.

In *Tecmed*, the tribunal found that Mexico's measures could not be justified under the police powers because the socio-political difficulties associated to the location and operation of the hazardous waste confinement did "not give rise [...] to a serious urgent situation, crisis, need or social emergency",⁸⁵ or have "serious emergency or public hardship connotations, or wide-ranging and serious consequences".⁸⁶ By stark contrast, the instant case implicates an urgent financial and social crisis involving the potential breakdown of essential services and a resulting public health emergency.

Still, while the public interest involved in a social crisis or public health emergency is self-evident, this should not lead to confine the proportionality of State action under the police powers to such grave and exceptional situations. Because human rights law requires that governments take action to prevent infringements on rights, whether during a national

⁸⁵ *Id.* at ¶ 139.

⁸⁶ *Id.* at ¶ 147.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

emergency or during normal times, any threshold determination of proportionality that hinges on a finding of an emergency situation would be incompatible with human rights law.

While resort to proportionality as a means of controlling the exercise of the police powers appears to introduce a bridge between investment law and human rights law, this avenue is not devoid of conceptual difficulties. The use of a proportionality test in investment disputes is problematic because it invites tribunals to evaluate the legitimacy of the public interest involved and to balance it against investor's rights. Such scrutiny and balancing role requires that competing rights be in the same axiological plane. In this regard, the UN High Commissioner for Human Rights has underscored the legal distinction between human rights and investor's rights, which is thus of consequence to any evaluation of proportionality.⁸⁷ This distinction rests on the fact that investor's rights are economic policy tools, and human rights reflect the recognition of the inalienable, inherent dignity of the human person. In addition, the Inter-American Commission on Human Rights has followed the UN Human Rights Committee approach in holding that corporations lack *locus standi*.⁸⁸ Thus, the difference in juridical nature between human rights and investor/investment protections means that they operate on different planes and are thus not amenable to balancing.

In light of this analysis, the better approach is to recognize and apply the police powers doctrine as a means of safeguarding the necessary policy space for the State to discharge its human rights obligations. Considerations of proportionality are unnecessary when the application of the police powers is limited to genuine situations involving the

⁸⁷ *Human Rights, Trade, and Investment, Report of the High Commissioner for Human Rights*, ¶ 24, U.N. Doc. E/CN.4/Sub.2/2003/9 (2003).

⁸⁸ *Bernard Merens and Family v. Argentina*, Inter-Am. Comm'n on Hum. Rts., Report No. 103/99, ¶ 16 (September 27, 1999) (*citing* *A Newspaper Publishing Co. v. Trinidad & Tobago*, Communication No. 360/1989, Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, Annex XIL, at 307, U.N. Doc. A/44/40 (1989)).

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

public interest, such as public health regulations. In this regard, the inescapable linkages between public health and access to water and sanitation in the instant case would lead to conclude that Argentina's measures are justified on the basis of the police powers doctrine.

IV. HUMAN RIGHTS LAW COULD DISPLACE INVESTMENT LAW

Human rights law could displace investment law in two situations examined in this section, namely a situation of conflict of norms and a situation of necessity.

1. Conflict of norms

Human rights law could displace investment law in a conflict of norms situation, *i.e.*, where the host State is unable to comply simultaneously with its obligations under human rights law and investment law. A conflict of norms situation could arise if the Tribunal were to find, for example, that against the backdrop of a severe economic crisis, the guarantees offered to foreign investors with respect to the concession's economic equilibrium were incompatible with the government's duty to ensure access to water to the population. This finding is not necessary for the adjudication of the case, however, as the contextual interpretation of investment law provides avenues for accommodation and normative dialogue. Still, in such situation of normative conflict, the primacy of human rights may need to be recognized and given effect.⁸⁹

The primacy of human rights law has been recognized by the international community in the Vienna Conference on Human Rights, which concluded that "Human

⁸⁹ Certain techniques for resolving conflict of norms are also relevant to this analysis, but for lack of space we cannot elaborate them.

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of government.”⁹⁰ The primacy of human rights law also flows from the imperative character (*Ius Cogens*) of certain rights recognized in human rights law, including the right to life, equality and non-discrimination. Further, the primacy of human rights law can also be established on the basis of the jurisprudence of the Inter-American Human Rights Court, which held in the *Case of Velásquez-Rodríguez vs. Honduras* that States are under a duty “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”⁹¹ In light of the primacy of human rights law, a conflict of norms would be resolved in this case by justifying the treatment given to the water concessionaire on the basis of the human rights obligations of the host State.

2. Necessity as a Circumstance Precluding Wrongfulness

A second situation where investment law could be displaced concerns necessity as a circumstance precluding wrongfulness. In this context, human rights considerations involved in the risk of collapse of essential services, particularly amidst a severe economic crisis, are relevant in any analysis of necessity as a circumstance precluding wrongfulness. In this vein, the *LG&E* Tribunal recognized that “a state of necessity is identified by those conditions in which a State is threatened by a serious danger [...] to the possibility of

⁹⁰ World Conference on Human Rights, Vienna Declaration and Programme of Action, Article 1, A/CONF.157/23, (12 July 1993).

⁹¹ Case of Velásquez-Rodríguez v. Honduras, Inter-Am. C.H.R. 35, OAS/Ser. L/V/III. 19, doc. 13, app. VI, ¶ 166 (1988).

***Amicus Curiae* Brief**

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

maintaining its essential services in operation”, and cited Roberto Ago and Julio Barboza as authorities for its reasoning.⁹²

In this regard, *amici* want to stress that the state of necessity does not apply to human rights treaties that provide guarantees to human rights in times of national emergency. As the UN International Law Commission clarifies in its commentary to the Articles on Responsibility of States for Internationally Wrongful Acts, the state of necessity is excluded as a circumstance precluding wrongfulness in situations where the primary norm excludes such possibility, either explicitly or implicitly.⁹³ This is indeed the situation with respect to the American Convention on Human Rights, for example, which specifically incorporates human rights guarantees during times of national emergency.⁹⁴

CONCLUSION

It is the sincere expectation of *amici* that this brief will contribute to the Tribunal’s task of adjudicating this controversy. As the Tribunal itself noted, this decision will carry profound implications for the progressive development of international law and for the effective realization of the right to water.

⁹² LG&E Energy Corp v. Argentine Republic, ICSID Case N° ARB/02/1, Decision on Liability, October 3, 2006, ¶¶ 246, 251 & 257.

⁹³ UN International Law Commission, Commentary on Article 25 (2) ¶ 19; Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001.

⁹⁴ See e.g., Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, October 6, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 9 (1987).

Amicus Curiae Brief

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

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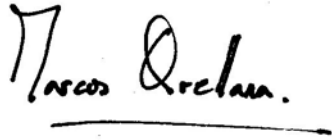
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***Amicus Curiae* Brief**

Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Republic of Argentina

FOR CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)

A handwritten signature in black ink that reads "Marcos Orellana." The signature is written in a cursive style and is underlined with a single horizontal line.

Marcos Orellana, Lawyer

Date: April 4, 2007