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Human Rights Council

Independent Expert

on the issue of human rights obligations related to
access to safe drinking water and sanitation

Consultation on Private Sector Participation
in the delivery of water and sanitation services
and the Right to Water and Sanitation

**Private Water Operators
Contribute to making the
Right to Water & Sanitation real
AquaFed's submission**

Part 3

**Avoiding misconceptions
on private water operators in relation
to the Right to Water and Sanitation**

26 March 2010

Submission by AquaFed, the International Federation of Private Water Operators, as a contribution to the Consultation on *Human Rights to Water and Sanitation and Private Sector Participation in the provision of water and sanitation services*", organised by Ms. Catarina de Albuquerque, Independent Expert on the issue of human rights obligations related to safe drinking water and sanitation.

http://www2.ohchr.org/english/issues/water/ieexpert/private_sector_participation.htm

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Important note on Private Water Operators:

The private sector is involved in delivering water and sanitation services directly or indirectly through a number of different mechanisms. The appendix describes a variety of different operators, including privately-owned ones. In this document the term "Private Water Operators" means private companies that deliver water supply or sanitation services through contracts or licenses under the direction of public authorities. Other private providers of water / sanitation are named differently.

1. Acronyms

CBO	Community-Based Organisation
CESCR	UN Committee on Economic, Social and Cultural Rights
GC15	General Comment 15 to the International Covenant on Economic, Social and Cultural Rights
HR	Human Rights
HRC	UN Human Rights Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
IERTWS	Independent Expert on the RTWS
MDG	Millennium Development Goal
NGO	Non-Governmental Organisation
OHCHR	Office of the UN High Commissioner on Human Rights
PPP	Public-Private Partnership
PSP	Private Sector Participation to the delivery of water or sanitation services
PWO	Private Water Operator
RTWS	Right to Water, including Right to Safe Water and Right to Sanitation, as in GC15
SPSP	Small-Scale Private Service Provider

2. Executive summary: Key messages about potential misconceptions on private water operators in relation to the Right to Water and Sanitation

Many misconceptions circulate about the work of Private Water Operators. This Part 3 of our submission aims at rectifying those misconceptions that are allegedly related to the Right to Water and Sanitation [RTWS].

- Knowledge of projects including PWOs is far more developed than knowledge of other types of operators. This results inter alia from the existence of contracts, clear targets, and mandatory reporting in all types of PSP. This availability of data facilitates academic work which is more developed on PSP than on other types of operation in comparison with their respective presence in the field.

Knowledge of PSP is influenced by anti-private lobbies, which issue many biased reports on PSP. Some of these draw general conclusions from exceptional or unsubstantiated facts. Academic researchers do not always detect this anti-private bias even when the “facts” reported are systematically unfavourable to the PWOs.

Many opportunities, challenges and problems in the water sector have been made visible thanks to PSP. However this raises the risk of looking at these in a very limited range of cases where they are the most visible or well documented and of missing the majority of cases where the magnitude of these problems might be higher. The most important issues are not necessarily where there is the most light.

- The respective roles of public authorities and Private Water Operators in the delivery of water / sanitation services are often poorly understood outside the water sector. For example, contrary to what many people believe, consumption tariffs and connection charges are set by the authorities and not by the private operators.

In all PPP contracts the private water operator is instructed to supply all existing customers of the water utility plus to develop access progressively to un-served people. Private action is about developing ways to include new areas and un-served people not about excluding any segment of the population as is often insinuated.

Misconceptions of this kind have induced some to imagine that private management of public water services creates specific challenges with respect to the RTWS. This submission discusses these topics and explains that in practice these issues are related to real problems of the water sector but are not specific to private operation alone. Most of these problems cannot be solved by operators, public or private. They can only be solved by public authorities, working in partnership with their operator.

- This Part 3 of AquaFed’s submission discusses many misconceptions and explains why there is no specific challenge with respect to PWOs and the RTWS:
 - a) for important matters with respect to the RTWS such as conflicts with landowners’ rights, geographical priorities, tariff setting, defining connection charges and pro-poor mechanisms, organisation of economic sustainability, etc. the challenges are the same with both public and private operators. Finding solutions falls under the direct responsibility of public authorities;

- b) for the important matter with respect of the RTWS, that of the quality of service, including water quality, setting the targets and the monitoring the compliance of the work of the operator by the public authorities, is a challenge that is the same for all types of operators, public or private;
- c) for several challenges that are linked to PSP but that do not impact the implementation of the RTWS such as investment funding or procurement procedures;
- d) for alleged issues which do not exist in practice such as power differentials in favour of PWOs or impossibility for governments to respect their international obligations and their obligations under the RTWS simultaneously.

Decision-makers that want to develop the RTWS should understand these misconceptions of the role of PWOs and avoid restricting the practical implementation of the RTWS instead of contributing to it.

We know that all Private Water operators have not been able to achieve what was expected from them. We also know that the majority of PWOs contribute to the implementation of the Right to Water.

This submission shows that all the criticisms raised about potential issues with private operation in relation to the Right to Water and Sanitation are unfounded and irrelevant.

Some are not related to the Right to Water and Sanitation at all (see Chapter 7). Others are real Human Rights issues (see Chapters 5 and 6) but, they are faced by all operators, both public and private. In most cases (Chapter 5) the solution of the issues raised lies with the public authorities, not with the operator.

The suggestion that the risk to rights-holders is greater under Private Sector Participation than under public management is not substantiated. This is particularly the case when a publicly managed service is unable to provide access to the whole population.

It is in the interest of rights-owners that all management options are maintained for public authorities to choose and that imposing discriminatory preconditions on one type of operation is avoided. Decision-makers should accept that success in implementing ambitious policies to develop universal access to water / sanitation services lies in a number of factors that are unrelated to the nature of the operators, be they public or private.

There are good and competent managers in both categories. The people who need access to water and sanitation do not mind which hand helps them so long as it provides them the service they need. The role of public authorities is to decide on policies and to create and maintain conditions that enable their chosen operator to perform the public service most effectively.

3. Introducing AquaFed, Private Water Operators and this report

AquaFed, the International Federation of Private Water Operators, represents private companies that deliver water supply or sanitation services under the direction of public authorities.

Members of the Federation are water services providers of all sizes, operating in around 40 countries, as both locally and internationally owned businesses¹. The members of our Federation serve a majority of the people who get water from private companies that are mandated and regulated by governments. Our members' business is to be the operators of public services entrusted to them by governments (central government, local government, water authority) through PPP contracts or licenses to supply drinking water and to provide sanitation services to their populations.

In this way they are used by governments as a tool to implement the Right to Water - that includes the Right to access to Drinking Water and the Right to Sanitation - as described in the General Comment 15 to the International Covenant on Economic, Social and Cultural Rights (GC15). Implementing the Right to Water is an integral part of their core business.

As practitioners of this Right they have contributed to, and are continuing to contribute in many ways, to the works of the Office of the UN High Commissioner on Human Rights [OHCHR] and of the UN Human Rights Council [HRC] on the recognition, the definition and the implementation of this Right.

They appreciate that the UN Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation has been mandated to make a report on their activities with respect to the Human Right to Water and Sanitation.

The necessity for detailed contracts, strict monitoring and detailed regular reporting, means that knowledge of the work of private water operators is far more extensive than knowledge of any other type of water supply in both developing and developed countries. Private Sector Participation in water and sanitation services **highlights the challenges that are faced by all water operators**, public or private. We would be gratified that this experience with the Private Sector helps the United Nations to promote the Human Right to Water in a way which helps all operators to further the development of access to drinking water and sanitation to the billions of people who need these public services.

As the work of the Independent Expert focuses on our industry we believe that it is important to provide information on our activities, our contributions on the Right to Water and on misconceptions about our work. This is why our submission to the Independent Expert is structured in different parts.

This Part 3 of the AquaFed's submission provides information on the many issues that some see in relationship with Private Water Operators and the Right to Water and Sanitation. It explains why these allegations do not fit with the practical reality.

¹ www.aquafed.org

4. The lamp-post syndrome

4.1. A minority case better known than other cases

Because the work of regulated private operators is formalised, knowledge of their action is far more developed in academic or official reports than knowledge of the action of informal operators, NGOs or even public operators.

Private Water Operators are mandated by governments and are only able to operate if a detailed contract or license is finalised. These contracts / licenses provide for strict monitoring, detailed regular reporting, public information and debated political decisions. This is not usually the case for the other types of operators in developing countries. In addition public scrutiny is higher on private than on public operators. Therefore, the level of knowledge of the work of private water operators is far more extensive than knowledge of any other type of water supply in developing countries.

This increased basic knowledge creates a cumulative effect. As more information is available on PPP contracts than other types of operation, academic researchers, who try to draw general conclusions, tend to use more data on PWOs than data on other operators. The result is that the number of research papers on private operators exceeds by a huge factor their proportion in the water/sanitation services sector.

This intrinsic transparency on the actions in the field of Private Water Operators means that while private companies mandated by governments serve less than 4% of the population of developing countries it is where they operate that the problems of the water sector in developing countries are most studied and best known.

Because of this increased transparency, many structural problems facing the whole water sector have been made visible through Public-Private Partnerships. Some of these problems revealed by Private Sector Participation [PSP] are related to the Right to Water and Sanitation [RTWS], but certainly not all of them.

However, the additional transparency provided by contracts with external operators that makes problems of the sector more visible does not mean that these problems result from the presence of private operators themselves. Our work in the field has made many of the hurdles in the water sector visible, has unlocked opportunities and lead to innovative solutions. For example, it has allowed a better understanding of the importance of connection subsidies, the conflict with the rights of land-owners or the necessity for inclusive policies with clear targets. However, private operators are not the cause of any of these problems.

Attention should be shifted to the content of public water policies since governments have the responsibilities to make the main decisions and to make the Right to Water a reality for all.

Figure 1 illustrates the risk of looking at the problems of only the minority of cases where they are the most visible or they are most documented and to miss the majority cases where the magnitude of these problems might be much higher. This is the risk of the “lamp-post syndrome”.

The most important issues are not necessarily where there is the most light.

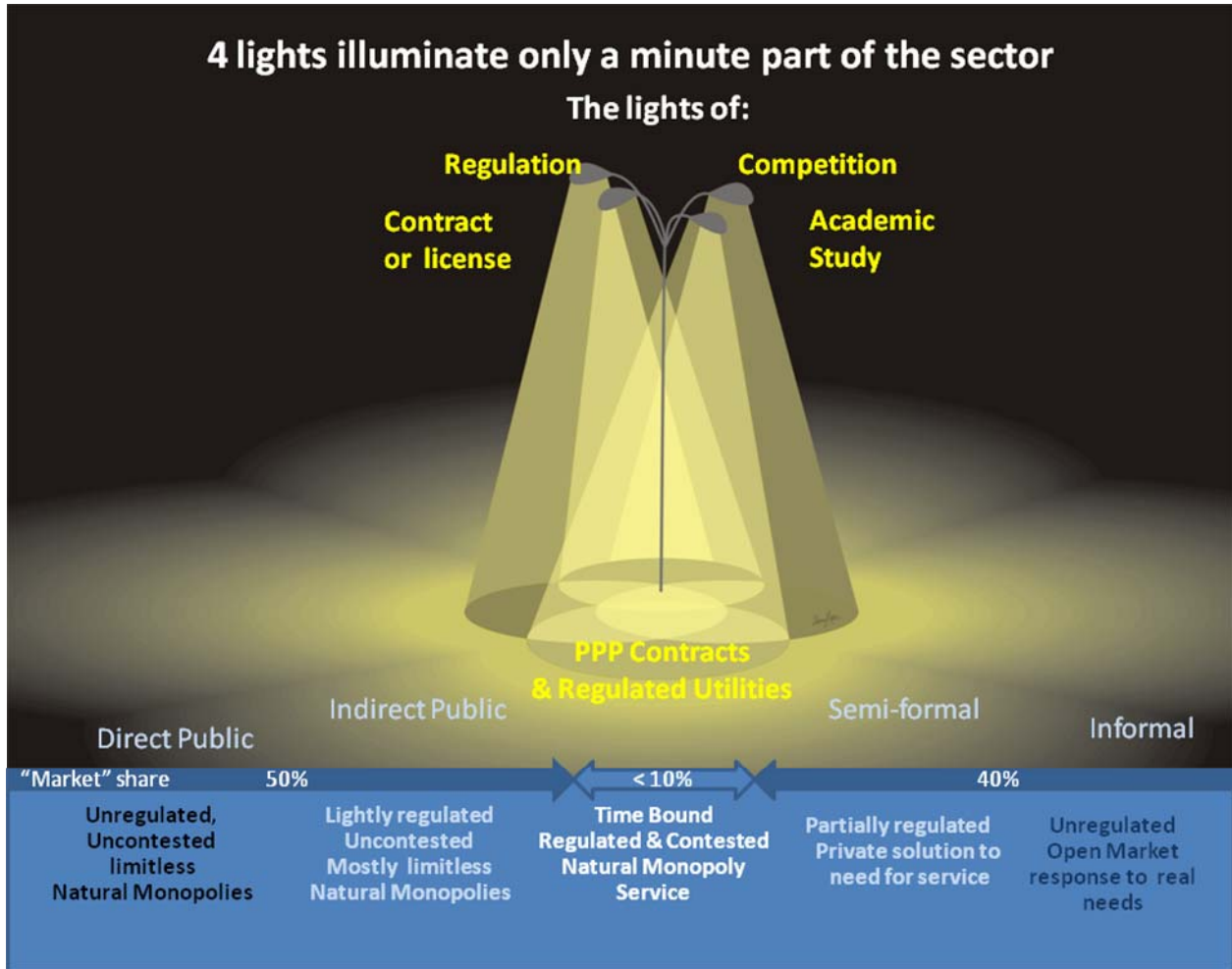


Figure 1. The lamp-post brings additional light on regulated private operators

4.2. A false idea: no clear separation exists between “private operators” and other service providers.

When read in conjunction with Figure 2 of part 2 of our submission, it should be clear there is no real or clear separation between private operators and other service providers. There is a continuum of different structures and operating models. These extend from the public operations that are completely unregulated, uncontested and unconstrained monopolies, through lightly regulated, but otherwise uncontested and unconstrained monopolies, which in some cases combine public and private capital, or, in the form of corporatized public entities, operate exactly as if they were private companies, including declaring profits. In the middle are the operations under clear contracts and licenses, which are mostly contested by bidding processes at regular intervals and are closely regulated. Here again many of these involve a combination of public and private capital. Moving across the diagram one then comes to the “semi-formal” category, which includes services providers such as property developers that operate to regulated standards, but because they operate in the private domain are not

regulated in the same way as public services. This semi-formal category also includes a growing segment of service provision provided by benevolent and CSR activities of companies and charities². Finally there are the completely unregulated service providers that compete freely with one another to provide some form of service that usually is a response to the failure by public authorities to provide structured public services.

In addition to this “horizontal” segmentation of the ways services are provided, there is also a need to recognise that there is a “vertical” segmentation in the value chain. Almost all the materials, equipment and many services for publicly operated services are provided by private companies. In some cases these constitute the majority of the turnover of such operations.

The recognition of this reality exposes the invalidity of focussing on the private sector role in connection with the Right to Water and Sanitation. The Independent Expert will need to examine this issue carefully to avoid reinforcing a false separation between public and private that does not exist and has no practical meaning. This would result in a partial and discriminatory outcome.

4.3. Knowledge biased by anti-private propaganda

The dominant institutional knowledge of PSP versus other types of operation of water services is increased, but also distorted, by the specific attention of anti-private, including academic, lobbies, that regularly issue reports “interpreting” the factual knowledge with their own “slant”. The continuous flow of anti-private documents help them to invade progressively many academic bibliographies where the number of references influenced by them tends to exceed the number of neutral documents.

4.4. Semantic biases

Anti-private lobbies try to create negative perceptions of PSP by using selected words even if they are not appropriate.

One interesting example is the repeated use of the word “privatisation” not only for the sale of public assets to private owners, which is the common meaning of this word, but for all kinds of arrangements between public authorities and private water operators. As the sales of public assets are opposed by some this creates a negative perception of all kinds of PPP contracts. The word “privatisation” is now used even when there is no private operator! In Nairobi many citizens were led to believe that they were supplied by a private company because the political opposition used this word to oppose the government’s will to “corporatize” the public utility while keeping its ownership with the City.

Another example is the repeated use of the word “failure” to qualify water PPPs and their operators, especially in Latin America. Anti-private lobbies have tried for many years to convince the international community that PPPs and private operators “failed”

² See for example the Diageo Corporate Citizenship Report 2009 that describes how their Water of Life & Million Challenge projects have provided water for 1.56 million people in Africa, bringing the total number of beneficiaries from the 1 Million Challenge to date to 3.2 million.
http://annualreview2009.diageoreports.com/library/diageo_cr09.pdf accessed 24/03/2010 In 2008

in Latin America by building on the fact that a few contracts were terminated prematurely. Some have even used this wording of “failures” in recent debates about the Right to Water. The early terminations of these few contracts were indeed unfortunate as they prevented the partnerships between the government and the operator from delivering more achievements. However, millions of right-owners have benefited from these prematurely terminated contracts before they were terminated. For the contracts which were not interrupted in the first year there may have been difficulties after many years between the two partners in the project but this did not prevent these PPP contracts from contributing significantly to the RTWS during their life. In Buenos Aires around 2 million right-owners gained access to safe water thanks to the 1993 PPP contract. In La Paz and El Alto, 400,000 right-owners got access to safe water after 1997 thanks to a private operator. These huge numbers show that a PPP project can be a great success with respect to access to water and contribute significantly to the RTWS although it may face difficulties of another nature.

Business successes or failures must not be confused with successes or failures in implementing the RTWS.

4.5. Non-substantiated biased statements

The most brutal anti-private documents are certainly not the most convincing ones. Their main interest is that they provide information on the seriousness and credibility of the issuer. Many exist and some are pure propaganda without any substantiation.

An interesting example is the brochure widely released by Public Services International on World Women’s Day 2007 (and repeated on WWD 2008). Although this brochure is presented as a pro-gender brochure, 2 out of 8 pages are only presenting anti-PSP propaganda.

In page 4 the most visible statement says (Figure 2 below) that with PSP there are often quality problems, deterioration of services and increased corruption. Although this might have happened in some very exceptional cases, there is evidence that in most PSP cases the opposite is true³. In addition, price hikes result from the decision and the ambition of public water authorities and are not caused by the recourse to the private sector. (see paragraph 5.4 below).

Water privatisation schemes often result in massive price hikes, water quality problems, a deteriorating service, a loss of local control and increased corruption.

Figure 2. Excerpt from 2007 PSI brochure

It is interesting to note that Food & Water Watch (USA) develops similar propaganda⁴.

³ See for example reference E6 in Part 1 of AquaFed’s submission

⁴ See “Dried Up, Sold out” Food and Water Watch, 2009, p6: “However, the Bank has not begun to acknowledge the other aspects of the privatization failure. These include (1) the failure to expand services to the poor, (2) environmental and public health catastrophes, (3) legal quagmires and new debt burdens for governments, and (4) skyrocketing consumer water rates.”

4.6. Non-substantiated insinuations

More subtle are the insinuations by anti-private lobbies about several so-called issues with PSP in order that they are debated in the international community although there are one-sided or more theoretical than real.

For example, some are lobbying for human rights-related preconditions to be made compulsory before a water authority mandates a private operator to deliver water or sanitation services to the population.. However, the arguments provided up to now are more anti-private than pro-right-owners. It has never been documented nor demonstrated that PSP is by nature or in practice a higher risk for right-owners than the status quo ante or another type of operation. What has been documented is the high number of rights-owners who have gained access to water or improved services thanks to PSP worldwide. It has also been shown that in the majority of cases, PSP in developing countries contributes to the development of access to water. It is hard to understand why the millions of right-owners who have gained access to safe water through PSP might have had their rights denied for theoretical preconditions. It is also unclear how additional preconditions could accelerate the rate of progress to give access to water and sanitation to right-owners who remain un-served by water authorities.

4.7. Questionable academic cover that influences surreptitiously many academic researchers with anti-private propaganda

The core funding of the Public Services International Research Unit⁵ [PSIRU] comes from Public Services International. PSIRU is hosted by the University of Greenwich. This provides an academic cover to PSIRU's anti-private activities. This is very useful for them to influence academic researchers. PSIRU regularly issues reports on water PPP contracts and from time to time reports on partnerships between public utilities. Their reports on PPPs deliberately collect and concentrate on problems with private operators. These are reported and often copied from one report to another even if they happened only once. Positive achievements of private operators are very hard to find in PSIRU reports. On the opposite, they never report on problems of public utilities. This bias towards reporting only "facts" which fit the anti-private strategy of their core funder may not be detected by academic researchers, in particular by students, who find information in them that they believe is valuable and that they often reference in their own research documents.

An interesting example of PSIRU's work is the progressive indoctrination in the international community of the idea that private water operators are able to act so badly that in their service areas there might be cholera outbreaks. PSIRU mentions many times in 2001, 2002, 2006 the cholera outbreak that occurred in 2000 in South Africa. Initially, PSIRU presented this outbreak as a consequence of the cost-recovery policy of the South African government: *"In South Africa, the most shocking consequence of this has been shown by the direct link between cholera outbreaks and inability to pay*

⁵ Excerpt from PSIRU website:

"PSIRU was set up in 1998 to carry out empirical research into privatisation, public services, and globalisation. It is based in the Business School, University of Greenwich, UK. PSIRU's research is based on the maintenance of an extensive database of information on the economic, political, financial, social and technical experience with privatisations of public services worldwide. The core work is funded by Public Services International (PSI), the global confederation of public service trade unions."

for water supply". Then in 2006, PSIRU mentions that a private operator had "Disconnections for non-payment continued even during the cholera epidemic of 2000". This may be right but does not mean that this operator has any responsibility in the outbreak. However, it is a way for PSIRU to make an apparent link between this operator and the outbreak. In 2008, without providing any new evidence the message changed and became aggressively anti-private. PSIRU stated: "It is finally worth noting the evidence of case studies especially in Africa, where repeated outbreaks of water-related diseases like cholera and typhoid, in areas run by private water companies, have often been accompanied by reports of extremely ineffective management responses, e.g. in time taken to repair systems." This new statement is totally wrong as no such evidence has been made public. We have never been informed of "repeated outbreaks of water-related diseases like cholera and typhoid, in areas run by private water companies"! Many people around the world are now convinced wrongly and are repeating that poor management by private operators created cholera outbreaks. This is because PSIRU and others named just one case of a private operator operating close to areas struck by cholera outbreaks insinuating responsibility on this operator.

In fact, to our knowledge, water supplied by private operators has never been identified as causing cholera.

4.8. Anti-private Activist Organisations employ similar tactics

There are a number of publicly declared anti-private sector organisations that adopt very similar approaches in the production of their propaganda. An examination of documents such as "Money down the Drain"⁶ or "Reclaiming Public Water,"⁷ use very similar arguments and cross-referencing in a way that suggests a degree of collusion.

These insinuations, misreported facts and propaganda are serious enough in themselves as they create an atmosphere that restrains governments' right to choose and hinders public authorities and private operators alike in extending and improving services to the people that need them.

Furthermore, there is evidence of international activists intervening across national borders to hinder, disrupt or destroy projects and partnerships that involve some degree of private operation. This has occurred in Africa, Latin America and Asia⁸

It is hard to see how these groups can maintain that this kind of action is compatible with the "International obligations" section and particularly clause 33 of General Comment 15,⁹ while at the same time criticising Private Operators who are invited to tender for contracts by Public Authorities.

⁶ "Money down the Drain" Food and Water Watch, February 2009

⁷ "Reclaiming Public Water", Transnational Institute & Corporate Europe Observatory (Amsterdam, 2005)

⁸ See for example "Replacing failed private water contracts", David Hall, Emanuele Lobina, Violeta Corral, PSIRU, 2010

⁹ "Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law." clause 33 of General Comment 15

4.9. Institutional propaganda

Even governments can influence successfully the thinking of the population with respect to PSP.

The impact of the Argentinean government's efforts to influence the thinking of the population negatively with respect of PSP in Buenos Aires have been studied by researchers of the National Bureau of Economic Research¹⁰

This study found that a person's beliefs of the benefits of the water "privatization" (relative to other privatizations) were almost 30% more negative if his/her household did not gain access to water after the "privatization". Similarly, a person's view of the water "privatization" (relative to other privatizations) was 16% more negative if he/she was read a vignette with some of the negative statements about the water "privatization" that Argentina's President expressed during the nationalization process in 2006. Interestingly, the effect of the vignette on households that gained water is insignificant, while it is largest (and significant) amongst households that did not gain water during the "privatization". This suggests that propaganda was persuasive when people had no contact with the private water operator. The study also highlights the asymmetry that is clearly biased against the private sector and in favour of the political powers in this case.

4.10. The necessary caution with respect to individual reports

Not all publicly-available reports, even academic research reports, have the same validity although all reports appear in bibliographies in the same way.

Some reports are very selective: they only mention facts that can present the private operators negatively and omit facts that could go into another direction. This is very common with the PSIRU's and other anti-private lobbies' reports. This also happens with journalists¹¹.

Some research documents lack scientific rigour and quote other authors even if these authors have not been peer-reviewed nor challenged by anybody.

Many documents report on only a single example or a very small sample. This allows the authors to draw attention to potential issues but certainly does not allow them to draw general conclusions. One problem may have appeared once in one location without being a general issue which deserves specific action. Drawing general conclusions from one or two selected examples is not legitimate.

Only a few reports are statistically significant at global level. In this respect the two recent World Bank reports referred to as E5 and E6 in the Part 1 of AquaFed's submission are most valuable since they provide for the first time a statistically meaningful global overview of the impact of water PPPs in developing countries.

A result of the disparity of publicly-available information is that serious researchers and issuers have been contaminated unconsciously by anti-private propaganda. Even

¹⁰ "Reality versus Propaganda in the Formation of Beliefs about Privatization", DiTella-Galiani-Schargrodsky, NBER Working Paper 14483, Nov 2008 <http://www.nber.org/papers/w14483>

¹¹ See for example the South African *National Business Initiative* comments on an article printed in a South African paper on <http://www.nbi.org.za/welcome.php?pg=2&pgm=M&id=10020#58>

some of the staff in some parts of the UN system such as UNRISD¹² or ECLAC¹³ has been misled by these anti-private documents.

In many cases the people working in the field are not aware of a study having been conducted or the conclusions of the researchers who studied them and are therefore are not in a position to rectify errors or inaccuracies.

It is not because an issue exists in the literature that it exists in the real world.

4.11. The light of the lamp-post can hide the causes of problems revealed by PSP

In this context of unbalanced knowledge of private operation versus the other types of operation aggravated by the influence of anti-private lobbies, there is a risk that many forget to look outside the light of the lamp-post and confuse cases that made problems the most visible with cases where the most important issues actually exist.

There is a risk of PWOs being presented once again as convenient scapegoats for the problems of the whole water sector.

In the following chapters of this submission we present a number of problems that some people have tried to attribute to the PWOs with respect to the RTWS. Some of these are not real problems, others are not relevant. As UN officials may have taken them into consideration we explain why some are not the responsibility of PWOs but depend on the water authorities, why some are not specific to PWOs because they are faced by all operators and why many are not related to the Human Right to Water and Sanitation despite the insinuations made by some.

¹² For example, a book entitled “*Social policies and private sector participation in water supply*” edited by Naren Prasad was published under the banner of UNRISD in 2006 (Palgrave Macmillan). In his introduction to the Overview of this book, the first reference made by the author is to mention a publication by D.Hall from PSIRU commissioned by PSI. This is to list the main challenges facing the water sector as if PSIRU was the major reference in the water sector. In page 22, the author alleges that in France private companies are subsidised by the central government and he justifies this erroneous statement by a reference to PSIRU.

¹³ The document entitled “*Revisiting privatisation, foreign investment, international arbitration, and water*” by M. Solanes & A. Jouravlev, United Nations ECLAC, November 2007 brings together without caveat most of the arguments used elsewhere about Bilateral Investment Treaties allegedly curtailing the regulatory powers of governments (see our submission to UN Special Rapporteur on Business & Human Rights, page15, reference 29 in Part 1 of this submission and paragraph 8.1 of this Part 3).

5. Human Rights-related issues that are not specific nor attributable to PSP

Public and private regulated operators face the same types of issues as far as the Right to Water and Sanitation is concerned. Many of these issues can only be solved by decisions of the responsible public authorities. A few others depend on the performance of the operator, but the challenge is the same for both public and private operators.

5.1. Challenges to be handled by Water authorities not by operators, public or private

The key decisions with respect to the RTWS include: tariff structures, pro-poor mechanisms, consumption and connection subsidies, rules for potential disconnections, the geographical priorities, respective proportion of funding sources, etc.

Many of those who do not know the inside of the water sector have thought that private water operators have responsibility for decisions about these key elements. These misconceptions result from the lamp-post syndrome (see paragraph 4.1 above) and from the fact that operators are the contact point of individual users with respect to the organisation of water services

Most issues that relate to the implementation of the Right to Water and Sanitation lie with the public authority responsible for the local delivery of water and sanitation services. Water operators mandated by public authorities, public or private, operate under guidance and instructions of these authorities. They have no legitimacy to decide in lieu of governments. It is in the public policies of which they are the instruments that the main decisions regarding the implementation of the Right to Water must be made.

The following paragraphs 5.2 to 5.6 describes many misconceptions about key challenges such as security of tenure, the geographical priorities, tariff structures, pro-poor mechanisms, connection subsidies, pre-payment meters, rules for potential disconnections, respective proportion of funding sources, etc.

5.2. Security of tenure

One key challenge regarding the RTWS is to develop access to water / sanitation in areas of informal settlements (slums). In these locations, practitioners often face a conflict between the will to provide access to water to rights-owners and the ownership's rights of land owners. Many inhabitants of slums have no legal right to live where they have installed their precarious house. This creates two major difficulties.

If the land is owned by a private owner or a public body that does not want the inhabitants to settle there, in many cases the land-owner opposes to the building of any permanent infrastructure and requests the support of public authorities to have their ownership right respected. This is why in many countries our members have been prevented by public authorities from supplying certain areas with piped networks. In some cases they were able to convince the authorities to change their mind and to let them supply the inhabitants with piped water but not always.

The slum inhabitants often fear eviction from the area. As a result they hesitate before taking the risk of investing in expensive connections or home appliances (faucets, etc)

that are necessary to make use of a public piped network. Experience shows that they tend to take more investment risk if they live on a publicly-owned land than if the land is owned by a private owner.

All kinds of operators that aim at expanding public networks into illegal settlements, public or private, are face this problem of security of tenure. They cannot solve this conflict of rights by themselves. They have no legitimacy to decide what to do. This is the responsibility of public authorities. In the case of the rapidly urbanising urban centres of the developing world, this problem is crucial. Public authorities have the obligation to define the general urbanisation policies, which must address the critical issue of land tenure for any rights-based water policy to be implemented effectively. They must decide if they relocate the inhabitants or if they accept that they stay where they are. They must decide what type of water supply must be created.

This major issue is mentioned because some have suggested that Private Water Operators are reluctant to serve areas with non-tenured residents and decide by themselves not to serve illegal settlements.

This is totally wrong and has never been documented seriously. Private operators experience is completely different. In the case of illegal settlements:

- In many cases both public and private operators have been prevented from supplying illegal settlements by public authorities. Often they were told that it would be illegal for them to supply illegal settlers.
- In some cases they were able to convince the authorities to change their minds.

In many cases illegal settlers are good payers and represent a lower economic risk than many wealthy customers. There are at least two reasons for that: a) safe water is essential for life and in urban areas getting water from public networks is cheaper than alternative water sources; b) becoming customers of the water supplier means that they receive individual bills that are the first social recognition of their existence in the area.

We are not aware of any PWO having argued that inhabitants are illegal settlers for refusing to supply them with water. On the contrary, they have often helped the public authorities by finding ways of supplying water to illegal occupants of public or private land.

An example is in the city of Manaus (Brazil), where newcomers illegally house themselves in peripheral rural areas, generally close to districts that are already occupied so that they can connect illegally to the water and sanitation networks. These underprivileged districts represented 60% of the population of Manaus and are therefore a serious challenge for the public authority and the private operator alike. The operator successfully developed a number of community pilot projects to develop ways to overcome this problem.¹⁴

Another example is in Jakarta (Indonesia). It is important to understand the meaning of lacking property rights in Indonesia. Two main cases are found in the Jakarta concession area:

- Homeowners who do not pay property taxes.
- Homeowners without valid property papers.

¹⁴ "Global skills for the Environment Community Participation in developing countries"
http://www.suez-environnement.com/gse/eau_pour_tous/en/pdf/pays_emergents.pdf

In both cases, the operator is not entitled to provide a service to these populations. Illegal residents have been threatened by the public administration with eviction for the past 30 years and yet no water service is available for these people. It is therefore important to mention the effort made by the private operator PALYJA to overcome this situation. During the design of the GPOBA program, PALYJA managed to obtain from the Vice-Governor of DKI Jakarta (The City Government), exceptional approval to connect a part of the illegal settlements in Muara Baru (northern Jakarta). So far 414 house connections have been successfully installed in this informal settlement.

There are many examples of PWOs having supplied illegal settlers¹⁵. In practice this means that they supplied slums that the previous public utility had not supplied.

Therefore, if this conflict of rights is a major obstacle to the implementation of the RTWS, it has no specific link with Private Water Operators. Its solution lies with public authorities.

5.3. Geographical priorities / cherry-picking / progressive implementation

Some have criticized the private sector for allegedly “cherry-picking”, i.e. selectively serving attractive areas where a higher rate of return can be expected and ignoring the poorest areas¹⁶. Some have also said that the least profitable areas of a municipality are “often” “excluded” from the PPP contract insinuating that operators were the decision-makers in that matter¹⁷. This is a completely wrong view which has been fuelled by anti-private intents.

The main reasons for which this perception is wrong are:

- Action of the private operators in cities in developing countries is not about “exclusion”, it aims at the “inclusion” of areas which were not previously served by the public utility. In all PPP contracts the private water operator is instructed to supply all existing customers of the water utility plus to develop access progressively to un-served people.
- Areas to be served with water / sanitation services are not decided by private water operators. They are decided by the public authorities and instructed to the different operators. Most PPP contracts are awarded through competitive procedures. The targets to be achieved are unilaterally fixed by the public authority in the tender documents and in practice cannot be negotiated to exclude certain areas.

¹⁵ Another example: under request of the Mayor of the city, Aguas de Limeira (Brazil) supplied areas illegally occupied by landless settlers (“Sem Terra”).

¹⁶ Lobina and Hall, PSIRU, even invented the concept of “ring-fencing profitable customers” in 2003: “*Problems with private water concessions: a review of experience*”, PSIRU, 2003, says p31: “*In February 2001, a presentation by two Vivendi Water executives at a conference on the reform of the water sector in Africa emphasised the ring-fencing of profitable customers...*”

¹⁷ For example in “*Privatization and the provision of urban water and sanitation in Africa, Asia and Latin America*”, Jessica Budds/Gordon McGranahan, Human settlements discussion paper series, IIED, 2003, page 32 you can read: “*Evidence suggests that private operators often take active measures to avoid taking on the responsibility for extending services to low-income settlements. Often, the least profitable areas are excluded from the service area in the contract. In both Cartagena and La Paz, low-income settlements on the city periphery were excluded, as they were considered to be outside the cities’ limits.” Similarly, when the Côte d’Ivoire contract was renegotiated, more sparsely populated rural areas were excluded.”*

- The practical development of access can only be progressive. The General Comment 15 recognises that governments cannot supply all the un-served people in one day. This is why public authorities that want to develop access progressively to un-served people have to decide the areas to be served in priority and instruct their operators accordingly.

Strangely we have never been informed of the use of the word “cherry-picking” for public utilities despite the high number of deprived areas that have not been served on the same basis as richer areas for many decades in many cities.

Geographical (and expansion area) priorities are set by responsible authorities, who are the co-contracting parties with the private sector – these priorities should be designed to comply with the objectives of progressive implementation (in accordance with RTWS prescriptions). They should also take into account technical planning and operational constraints.

Authorities are the only decision-makers on which areas get priority over others (this is also sometimes a concern for political interference), and this is true independently of the nature of the service providers.

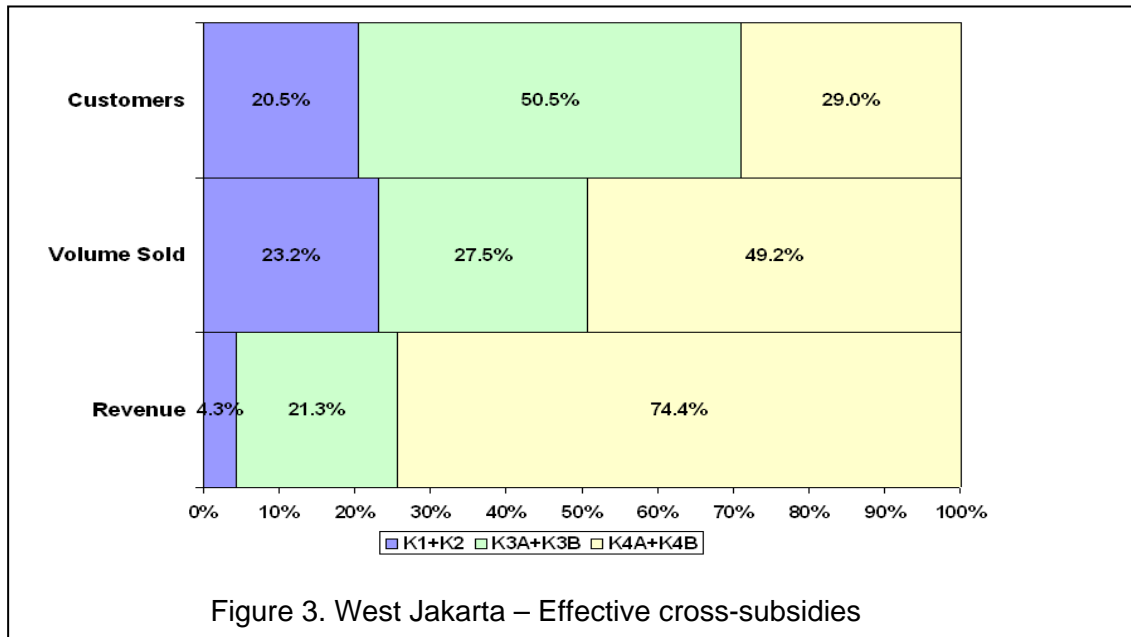
Contracts can be more or less explicit in this matter. Governments can set different contractual targets (four service levels) for various areas (ranging from full-networked services to standpipes depending on the levels of investment, complexities etc...)

Contrary to this flawed idea of “cherry-picking”, some private operators have actually tried to go by themselves beyond the initial area serviced by the predecessor public operator or beyond the contractual area.

For example, in the El Alto area (Bolivia) Aguas del Illimani worked with the Swiss Cooperation to serve part of the demand of people not included in the contract area.

Another example that goes against this idea of “cherry-picking” is the development of access to water in Jakarta (Indonesia). There, water tariffs have been fixed by the authorities according to the wealth of households, with categories K1 & K2 being the poorest ones. The operators in Jakarta are paid by the authority on the basis of a contractual “water charge” which decouples the operators remuneration from the block tariffs levied to water users. PALYJA’s revenue is based on the water charge which is independent from the tariff. This means that the operator has no built-in discrimination in his tariff system against the users who are on the lowest tariff rates. PALYJA has consistently followed a policy of trying to connect all users irrespective of category. In practice this has meant that they have connected about eight times more people in the lowest tariff band than in the higher ones as shown in Box 1.

Figure 3 below shows that the poorest 20% of the population consumes more water per person than the other segments of the population and contributes to only 4.3% of the bills collected by the operator on behalf of its public client, Pam Jaya.



5.4. User tariffs / pro-poor subsidies

Common allegations against the private sector include increases in tariffs that are allegedly the result of entering in new PPP contracts.

Tariff setting

Contrary to what many people believe in all forms of contract and licenses, the tariff policy and details of tariffs themselves are determined by the public authority. The same is true for publicly operated systems. In this respect there is no difference between public and private operation.

Price increases

Some people allege repeatedly that PPP contracts result in massive price hikes¹⁸. This is a misconception of the work of private water operators. Tariff hikes are wrongly attributed to PPPs.

There are several reasons why tariffs applied by authorities that hire a private sector operator might appear in that case to be higher than those under direct public operation:

- The private sector has been engaged to take in a more comprehensive scope of work than that being carried out by the preceding public service. This may be because it has been asked to implement a specific programme of investment, rehabilitation and restoration of a failing system or a significant upgrade of system performance.
- It is also common that when a private sector operator is brought into an existing system the proportion of revenues to be recovered through tariffs as opposed to taxes is increased to improve the cost transparency of providing the service.
- The public sector operator has been operating at a significant loss as a result of being required to apply tariffs that are too low and inadequate to sustain the service economically.

In all these cases tariff increases are not caused by the PPP or the PWO but result from decisions of the authorities.

Furthermore, often the PWO is hired to provide the additional efficiency that will allow the necessary price rises to be limited, i.e. lower than they would have been with the previous operator in the same conditions. While it is necessary to draw general conclusions, apparent differences in tariffs are often due to the failure to compare like with like. This problem also occurs frequently when comparing a number of public and private services within a given country.

The World Bank report referenced as E5 in part1 of AquaFed's submission did not find evidence of price rises that are higher for private management than for public management under equivalent conditions.

Therefore, there is no reason to blame PSP for inducing price hikes that would be different from the case of public operation. Price hikes result from the decisions and ambitions of the water policy and targets that are decided by the public authorities.

¹⁸ For example PSI that wrote "Water privatisation schemes often result in massive price hikes, ..." as reported in para 4.4 above.

Affordability challenges

In the context of tariffs for water and sanitation services it is important to distinguish between "capacity" to pay and "ability" to pay. In many cases, the poorest segments of the population are also the best payers. This is because they are aware how much more they have to pay to procure services from alternative sources and of the coping costs involved as a result of unsatisfactory services. In contrast the well-off have little difficulty in securing water and sanitation services even where the formal provision fails completely. This category of user is often much less inclined to pay. For this reason affordability policies need to be able to distinguish between those categories of customer who "would pay if they could pay" and those who "can pay, but won't pay". For the former it is clear that affirmative action policies to help them enjoy the Right to Water and Sanitation are necessary. In the latter case sanctions are required against those who are blatantly abusing an essential public service to the detriment of other users.

A further complication is an inherent conflict at the level of the political decision maker. Many politicians fear unpopularity as a result of setting adequate water tariffs. Often they are also unwilling to allocate sufficient revenues from taxation to cover the costs of water and sanitation service provision. This occurs even where they understand that the long-term implications of failing to ensure adequate financial resources for a water service are unsustainable and leads to failing systems. This is often referred to as the "unwillingness to charge" syndrome.

Pro-poor mechanisms

The "affirmative action" doctrine necessitates careful understanding of the above-mentioned issues at the political level and good and impartial execution of pro-poor policies at the operational level. A wide range of pro-poor mechanisms is available to the political decision-makers although they are not all equally effective. Choosing the most appropriate in a specific situation requires considerable care and deep understanding. Their execution also often requires specific information about the socio-economic status of households.

It is generally argued that these kinds of judgements and decisions are inappropriate for a service operator irrespective of whether that operator is public or private. Many pro-poor mechanisms are even outside the scope of the operator. For example in Chile an efficient mechanism exists and is handled by the national and local governments that target the poorest people without any impact on operation.

Nevertheless once these decisions have been made by the responsible authorities, operators of all kinds can execute them with equal satisfaction.

5.5. Connection charges

Some have argued that in the case of a PPP contract connection charges may be unaffordable to poor users because of the need for the operator to recoup its investment¹⁹. This does not fit with the way operation is organised. Connection

¹⁹ For example, in "Privatization Revisited: Lessons from Private Sector Participation in Water Supply and Sanitation in Developing Countries", ERD Working Paper No. 15, Asian Development Bank, 2008, Herath Gunatilake and Mary Jane F. Carangal-San Jose say in page 14: "large costs in water supply force private operators to recoup their investment by charging high connection costs, which the poor cannot afford (Svedoff and Spiller 1999). For instance in Buenos Aires, customers in the poorest

charges, like tariffs are set by political decision-makers, not operators. Connection charges are common in services operated by the public sector as well as those operated by private operators.

Our members share the experience that unlike tariffs, connection charges can represent a significant one-off charge for water users. Charges of this kind can present a significant difficulty for low income households that are often characterised by having no capacity to save and low and precarious incomes. On the other hand, being connected to water and sanitation services has very beneficial impacts on property values and security of tenure even for very low income households. For this reason setting an appropriate level of connection charge can be a sensitive issue for governments.

Private operators are well aware of these challenges²⁰ and in many cases propose a wide range of procedures to assist customers to connect to the network. These include proposing to public authorities to change the levels set for the service charge (e.g. Buenos Aires), involving users in making their own connections through the provision of their own labour (e.g. Buenos Aires, La Paz El Alto, Manaus, Manila), a variety of financing facilities (e.g. La Paz El Alto) and the co-development of systems such as output-based aid with international financial institutions (e.g. Casablanca, Tangiers, Jakarta, Uganda).

AquaFed advocated several times for connection charges to be studied more seriously in project preparation. In our 2007 submission to OHCHR we stated:

“Current professional wisdom suggests that the most effective forms of subsidy are those that support connections rather than those that cover consumption charges. It is important to ensure that the subsidies really do flow into additional connections and are not diverted to reduce the financial deficit of the local water utility. If this happens the people who benefit are those who are already connected and not the un-served.”

The case of Buenos-Aires deserves a special mention since initially the connection charges decided by the public authorities were too high. Many people did not connect themselves to the new water networks. This is why the private operator suggested to the authorities that they reduce the connection charge. They did it by organising a cross-subsidisation from all water users to new connections. This was first challenged by the local “ombudsman” and the water-users that already benefited from the public service. When eventually this cross-subsidy was implemented the result was impressive. Within about a decade 2 million people were able to gain access to water networks.

Even if operators, public or private, can and do provide advice to the political decision-makers, it is only the public authorities that can make the appropriate decisions regarding the price to be charged for new connections and the source of related subsidies.

All these examples demonstrate that far from neglecting the poorer segments of communities, private operators actually make considerable efforts to ensure that coverage is extended to these people.

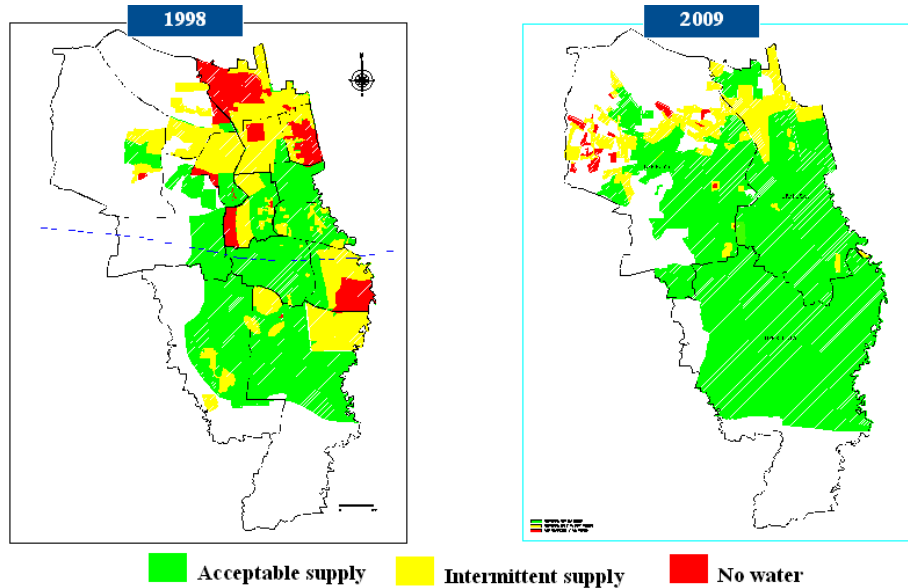
The example of West Jakarta where new connections are made with a priority given to the poorest parts of the population is described in Box 1.

regions were asked to contribute almost 20% of their income to get water connections (Estache et al. 2000)”

²⁰ See paragraph 6.2.5 page 26 of AquaFed’s submission to OHCHR in 2007

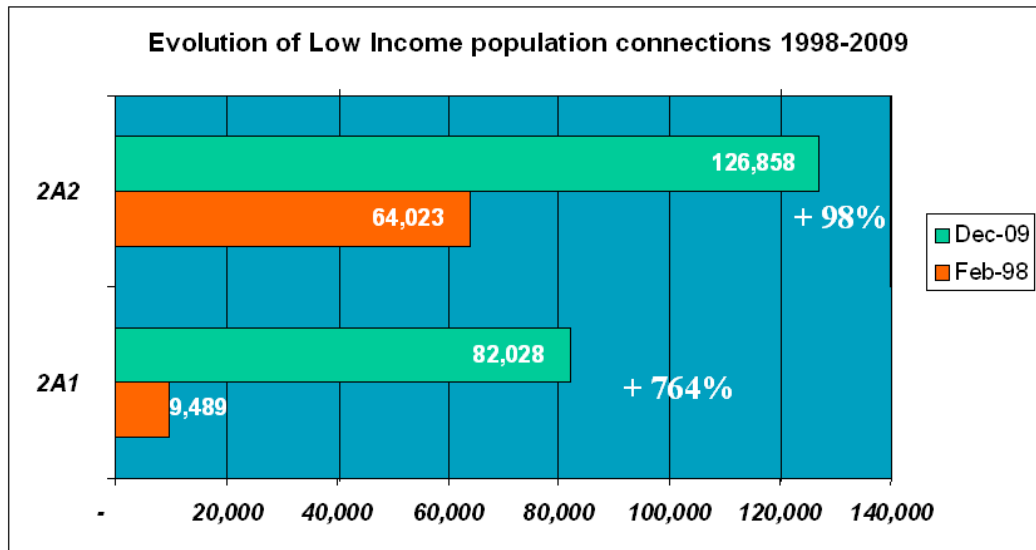
Box 1. West Jakarta. Many new connections benefit poor people

Since 1998, the year of the start of the contract, PALYJA's water service coverage has almost doubled, mainly in the western and northern parts of Jakarta, where the historically deprived areas are located:

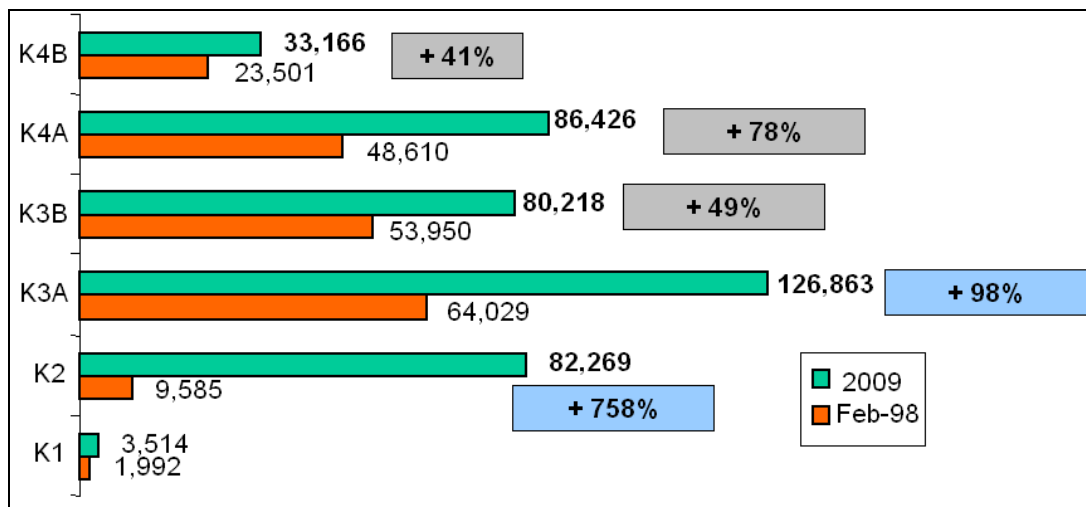


In 1998, 34% of population had access to piped water whereas more than 64% have access to piped water now (2009).

Jakarta's water tariff, proposed by the Regulatory Body and decided by the Governor, is based on a cross-subsidy principle: lower tariffs for low-income households do not cover the water cost but are compensated by the margin made on higher tariff classes (multiple of 12 between the lower and higher tariffs). The tariff grid is composed of 7 categories, from K1 for the lowest tariff up to K5 for the highest tariff. Tariffs 2A1 and 2A2 are respectively part of K2 and K3A tariff categories and represent very-low income households and low-income households. As shown on the following graph, the number of these customers has significantly increased since the takeover:



Compared to higher tariff categories, the major evolution of the number of connections is certainly for low and very-low income households:



Furthermore, to continue supporting such increase for low-income consumers, a dedicated project, the GPOBA, tends to improve the access to piped water in deprived areas of Jakarta (1st Phase 5,048 connections, 2nd Phase 1,700 connections).

5.6. Pre-payment meters – a public policy tool that delivers results, independently from the type of operator

Frequently, prepayment water meter schemes are falsely and willingly associated with private sector participation and are characterized as failing to achieve RTWS objectives. This is untrue for a number of reasons.

Prepayment meters are a public policy tool. In the controversial case of Johannesburg, South Africa, the municipality requested the operator Johannesburg Water (publicly owned and supported by a private company) to install pre-payment meters as part of the whole water resources conservation scheme.

Politicians in various countries have recognized this. Prepayment meters are actually helping governments to implement their policies, irrespective of who is the operator, and they are helpful in leading efforts for mobilising people to conserve water, while helping them to understand that water should be neither wasted nor free. Recent research indicates that these schemes are really useful²¹.

Furthermore, in October 2009, they were recognised to be “lawful, procedurally fair, and not unfairly discriminatory” by the South African Constitutional Court²², which settled a heated debate in this country. This landmark ruling was so important that the Court itself published a media advisory²³ which mentions the RTWS explicitly, including the principle of progressive implementation.

5.7. Rules for potential disconnections

Bad payers are a very serious problem for all responsible authorities and their operators. They disrupt the economic sustainability of the whole water utility and therefore put the quality of water services at risk. In addition they increase the cost to those who do pay for the service, which are often the poorest users.

On another hand, very poor people may have utmost difficulties to pay their water bills. This is why pro-poor solidarity mechanisms exist in many countries.

In all countries it is very delicate to differentiate between those who are unable to pay and those who avoid paying although they are able to do so. Those in the first category have reasons to be helped. Those in the second have no justification for creating a burden on other users, potentially poorer than they are, and there is thus a good reason for them to be disconnected from the service delivery.

Private Water Operators are often blamed for disconnecting bad payers which is unfair since they do not do it for pleasure but because it is part of their mandate and responsibility formulated by the public authority. Furthermore, disconnecting bad

²¹ “Pro-Poor Water Service Strategies in Developing Countries: Promoting Justice in Uganda's Urban Project”, Sanford W. Berg and Silver Mugisha, 2009, p5: “Sophisticated models may not ‘convince’ a human rights activist that some pre-paid meters can be pro-poor, but the use of such techniques represents an improvement over political rhetoric that does not deliver water.”
www.iwaponline.com/wp/up/pdf/wp2010120.pdf

²² Lindiwe Mazibuko and Others v City of Johannesburg and Others (2009)

payers is not something that is only practiced by PWOs, public utilities do the same. In many countries water utilities number the connections they serve in two categories: active ones and inactive ones. An inactive connection is a physical connection that is temporarily disconnected either because there is no inhabitant at the tap anymore or because the supply has been interrupted. Many public utilities have significant numbers of inactive connections²⁴..

Operators apply the rules for disconnections carefully. These rules are fixed by the legislator and by the local authority. In the case of private operation these rules are often annexed to the PPP contract along with the other regulations for interacting with water-users.

As far as the RTWS is concerned, the focus of the discussion should be on these rules for disconnection and the way they are applied in practice by the operator, public or private; the ownership of the operator does not make any difference.

5.8. Economic sustainability

Some have debated the ability for private operators to bring all the funding needed for infrastructure investments in developing countries as if it was something that could depend only on the will of private operators. This is a strange view for many reasons:

- Private operators should not be confused with private banks although they are all parts of the private sector
- Private operators can only invest in PSP models where they are requested to do so by public authorities
- Private operators can only bring external funding if the economic sustainability of the water services is ensured by the public authorities (see below)
- Regulated Private operators only supply less than 4% of the population of developing countries today.

Economic sustainability of the water service in an area is a prerequisite for this service to be delivered with good quality over the long time to all users. There are many misconceptions about the economics and the funding sources of the water sector. The OECD clarified the situation in 2009²⁵ by distinguishing between

- The ultimate funding sources that they termed the 3Ts, which stands for Tariffs, Taxes and Transfers (from outside the area).
- The temporary sources of cash such as borrowings from public and private banks or private investments.

The second category needs repayments after some time. The first category is the one that ensures the economic sustainability of the water services. An appropriate funding by the 3Ts is a prerequisite to attract temporary sources of cash. The latter are very

²⁴ For example the National Water and Sewerage Company of Uganda has 13% inactive accounts.. Source: "Making public enterprises work, from despair to promise: a turnaround account", William Muhairwee, Fountain publishers, 2009., Table 9.2 page 196

²⁵ Managing Water for All – an OECD Perspective on Pricing and Financing - OECD 2009

useful to fund the creation of a new infrastructure which will only be paid by the users and taxpayers after many years.

Organising the 3Ts, i.e. tariffs, budget subsidies and ODA grants is the responsibility of public authorities. Operators, public or private have no legitimacy to make this kind of decisions. Therefore, the responsibility of the economic sustainability lies with the authorities.

The operator, public or private, may organise temporary funding with external cash. However, this only comes if the 3Ts are organised appropriately. This temporary funding is a complement to revenues from users and budget subsidies. It is not the other way round.

The transparency, good governance and sound operating performance that is induced by setting up a PPP has been shown to be beneficial to the economic sustainability of water projects in several ways. These include the ability to improve the underlying economics and cash flow and the improved financial ratings that enhance borrowing capacity as evidenced by successful financing of many projects.

6. Operational challenges for all operators, public or private

Operators, public and private, have many operational challenges to face. Some of them are related to the implementation of the RTWS and must be achieved continuously. In general these challenges are overcome at least as well by private operators as by public ones. Furthermore, as for the issues mentioned in chapter 5 above, they depend heavily on the instructions given by the public authority to its operator.

In this chapter we discuss the challenges of providing good quality water and respecting adequate transparency and accountability.

6.1. Water quality

Some have argued that common problems encountered when involving the private sector include provision of services of a lower quality standard, including water quality issues²⁶. This interpretation is misleading and even totally wrong. PWOs monitor water quality carefully and cannot afford to supply services of a lower quality than the previous operator.

Our experience is that in average PWOs supply water of an equal or better quality than the previous operator or than the current neighbouring public utilities.

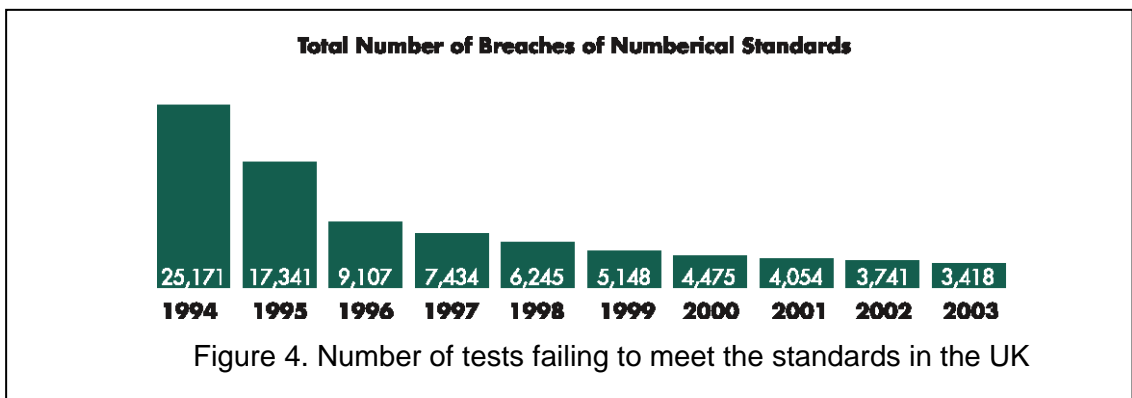
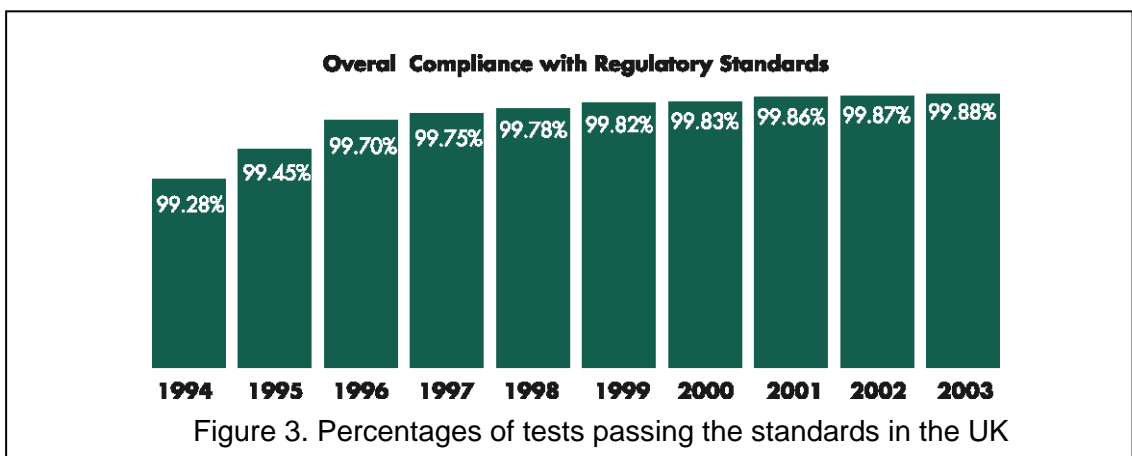
In this respect it is useful to mention some of the returns of experience at the scale of countries or regions.

²⁶ for example PSI stated: “Water privatisation schemes often result in massive price hikes, water quality problems, a deteriorating service, a loss of local control and increased corruption”. see paragraph 4.4 above;

Improving water quality in the United Kingdom

Looking at the UK were water and sewerage services in England & Wales (Scotland and Northern Ireland were excluded) were “privatised” under a full divestiture model in the late 1980s, the Water quality statistics demonstrate that drinking water quality has now reached a very high level of compliance almost impossible to beat²⁷ :

In 2003 the water companies in England and Wales carried out approximately 2.9 million tests on drinking water samples of which 99.88% were compliant with the standards. This is better than in 2002 and continues the trend of continuous year on year improvement. The charts below show the percentages of tests, which passed the standards and also the number of tests which failed to meet the standards.



These figures clearly illustrate the dramatic improvement in water quality since the early years after the change of regime of the water industry in England and Wales.

According to the latest annual reporting²⁸ water quality in the UK has even improved further: “Compliance with drinking water standards. The overall results of drinking water quality testing in 2008 show that the water industry in England and Wales achieved 99.96% compliance with the European Drinking Water Directive. The figure for England was also 99.96% and the figure for Wales was 99.95%, an improvement on 2007.”

²⁷ see information from the Water Quality regulator DWI – Drinking Water Inspectorate – at <http://www.dwi.gov.uk/pubs/annrep03/howgood2003/howgood2003.htm>

²⁸ see letter from water quality regulator (DWI) to its Minister dated June 2009 and reporting on the year 2008 <http://www.dwi.gov.uk/pubs/annrep08/CIR08letterEngland.pdf>

PSP improving water quality in developing countries

The only systematic research at global level was made by the World Bank and reported by Ph. Marin in 2009²⁹. This report states that unfortunately the lack of data makes difficult to draw general conclusions that would be valid worldwide:

“Reliable baseline data are typically not available, because many of the utilities transferred to private operators had not been previously conducting proper sampling and analysis. Meaningful project-specific data on the evolution of water potability in PPP projects are, therefore, hard to come by.” (Ref 17, page 73)

However, this report was able to document many examples of significant improvements in water quality standards after PSP arrangements have been introduced:

Excerpt from page 74: “The few econometric studies that have looked at the impact of PPP projects on the quality of water delivered to customers all point to a clear positive impact. Andrés, Guasch, and others (2008) found that water potability in Latin America improved significantly with the introduction of a private operator, in both the transition and the post-transition periods.

In Colombia, using household and public health surveys, both Barrera and Olivera (2007) and Gomez-Lobo and Melendez (2007) found that PPP projects tended to achieve better potability figures than did public water utilities.

In Argentina, Galiani, Gertler, and Schargrodsy (2005) found that the child mortality rate fell in areas served by private operators”.

The few data available in Latin America come from Argentina. Buenos Aires is one of the rare PPP projects for which reliable data are available on the yearly evolution of water potability for three key potability parameters (turbidity, chlorine, and bacteriology). As for access and service continuity, the concessionaire performed well in early years. Before the concession began operating, only half of the water samples in Buenos Aires complied with turbidity standards, one-third had insufficient chlorine, and almost 10 percent tested positive for fecal contamination. An overall compliance rate of more than 99 percent was achieved by the fourth year of private operation.”

“In Manila (the Philippines), significant improvements were achieved by both concessionaires after they took over from public management. In four years (1996–2000), the level of potability compliance went up from about 96 percent to almost 100 percent, after a more stringent system of water quality monitoring was put in place under the control of the regulator. These improvements were sustained in later years, even in the Western zone, despite the concession going gradually into bankruptcy. Potability compliance in both concessions has averaged about 99 percent for the past seven years.”

²⁹ ‘Public-Private Partnerships for Urban Water Utilities, A Review of Experiences in Developing Countries’, Philippe Marin, The World Bank – PPIAF, Trends and policy options 8, 2009. Reference E6 in Part1 of AquaFed’s submission to IERTWS.

6.2. Transparency, accountability

The issues of “Transparency & accountability” are important to water-users and for the adequate implementation of the RTWS. They are certainly not specific to private operators; these fundamental questions are actually essential in the delivery of the RTWS (as per GC15) by all kinds of operators.

Here again, PSP is a laboratory for good practices. Private Sector Participation goes hand in hand with a contract or a license that, by construction, ensures key requirements related to transparency and accountability. This contract/license defines:

- the respective roles of the public authority and the operator;
- a framework for the whole water delivery that has been set up by the authority to make it sustainable;
- a set of objectives and related milestones;
- The content of a regular detailed reporting, at least annual, on achievements and performance.

The private operator is permanently regulated by an authority, which checks its compliance with the contract / licence.

Furthermore, PPP Contracts are reversible in the case of non-compliance and finally, companies have a vested interest in keeping the relationships and the contracts going and thus have the natural efficiency-drive, especially also in the case of transparency and accountability.

This combination of contract and regulation ensures a great transparency for the authority and makes information-sharing with users possible.

It is up to the water authority to decide what it wants to share with the population.

Some public operators are linked to their public authority by performance contracts that are very similar. However, this is not systematic and many water-users do not know what targets are assigned to the public utility that is responsible for water / sanitation delivery in their area.

This why transparency and accountability issues are not specific to PWOs. They have to be faced in a similar way by all types of operators in the framework decided by the responsible public authorities.

7. Non Human Right-related misconceptions on PSP

7.1. History

A common myth is that private water companies and private operation are very recent developments and that these kinds of company have only entered the sector once infrastructure has been established. This is a long way from the truth.

In the 1980s, there was a new start in the developing countries although there had been PPP contracts in some countries many decades before (e.g. Turkey, Senegal, Morocco, etc). In developed countries PSP appeared in the XIXth century and developed continuously from this time. France, Spain and USA have had PSP for more than one and a half centuries

In the UK PSP is even more ancient. There were private operators in the XVIIth century. The New River Company, the first organized water supply to parts of London with fresh drinking water taken from the River Lee and from Amwell Springs and conveyed through a 20 mile long purpose built canal. An entrepreneur, Edmund Colthurst first proposed the idea in 1602, obtaining a charter from King James I in 1604 to carry it out. After surveying the route and digging the first two-mile long stretch, Colthurst encountered financial difficulties and he joined with Sir Hugh Myddelton, to complete the work between 1609 and its official opening on 29 September 1613. The northern part of the New River is still an important link in the supply of water to London and is managed by a private company.

Another example is the numerous small private water companies, established by entrepreneurs, industrialists, property developers and insurance companies in the North East of England. These include; William Yarnold's Waterworks for Newcastle and Gateshead (1697), Ralph Lodge's Waterworks (1769), New subscription Water Company (1834), and Whittle Dean Water Company (1845)³⁰

France has a long history of private water utilities. In 1782 a private company was given a franchise to distribute water to Paris. From the early 1850's, other cities (Cannes, Le Havre, Calais) were giving their water franchises to private firms³¹ an essential part of the responsibilities of these companies was to construct water works and distribution networks. Later in the evolution also charged with constructing sewer systems and wastewater treatment works.

In the United States private water companies also trace their history back to the beginning of the nation. American Water was founded in 1886. The company's origins were in the creation of the local water utilities of the post-civil war era. A small group of entrepreneurs and innovators spurred the nation's industrial development by bringing water to towns and cities across the land. Coming from a similar background, the Hackensack Water Company was founded in 1869 and listed on the stock exchange in 1889. For the most part, these companies are the investors in, and owners of, water treatment and distribution systems. They also carry out water and wastewater contract operations for public authorities. They frequently created and subsequently extended the infrastructure that they operate. As stated by the US Water Science and Technology Board in 2002³²: "*Historically, water services were initially delivered by private providers in many cities in the United States, such as Boston, New York, and Philadelphia.*"

A similar evolution can be found in the history of many countries. The trend continues today with private companies setting up new water systems for towns, industrial parks and housing schemes through various models of private ownership or contracts. Examples can be found in countries as far apart as Brazil, China, Indonesia, the Philippines, and Thailand.

This clearly shows the extent of the myth, and demonstrates that private operators have been developing and extending public water and sanitation systems to customers all over the world for centuries. Whilst this is useful information, it has no relevance to the current enquiry on the role of the private sector in relation to the Right to Water and Sanitation.

³⁰ Anon, Undated, "*Water Reflections*" Grant Editions, Cambridge

³¹ Edwin S. Rubenstein October 2000, "*The Untapped Potential of Water Privatization*"

³² "*Privatization of Water Services in the United States, An Assessment of Issues and Experience,*" Water Science and Technology Board (WSTB), National Research Council, 2002, p2.

7.2. Power differentials

Some argue that PWOs have more experience than governments in negotiating contracts and that this creates an imbalance³³ that puts the fairness of PPP contracts at risk. This seems more theoretical than real since contracts are only signed between willing parties and governments that need additional capacity usually hire experienced, often international, consultants who are specialists in PPP contracts.

Both parties to a PPP contract bring different capacities to the partnership. There are numerous asymmetries that effect one party or the other differently. Private bidders often suffer from asymmetry of information or from asymmetry of power³⁴.

In any case, there are always asymmetries in any relation. By their nature, contracts between agreeing parties are designed to level the playing field as much as possible and it is in all parties' interest to have the best contractual relation possible: this is confirmed by experience as the overwhelming majority of PPP contracts actually delivers, within the foreseen timeframe

Presenting governments as weak and unable to negotiate a contract satisfactorily is a distortion of the reality. Furthermore, experience shows that it is easier for a government to terminate a contract prematurely than it is for a private partner.

Anyway, it is hard to find any link between this alleged issue and the RTWS.

Examples of experienced consultants used by governments to prepare PPP contracts

In Jakarta, the public utility hired several consultants, including Mott Mc Donald, to negotiate the two existing concession contracts.

³³ Jessica Budds/Gordon McGranahan, *Are the debates on water privatization missing the point? Experiences from Africa, Asia and Latin America, Environment and urbanization* (2003), 87–114, p113: “Moreover, there is a serious imbalance of power when indebted governments are negotiating with international financial institutions and multinational water companies. This imbalance not only makes it difficult for the local government to negotiate a “fair deal”, but effectively overrides local political processes. ... In any case, given the limited scale and the elusive benefits to lower-income groups, there is no justification for the continued promotion of private sector participation as a means of achieving the international water and sanitation targets.”

³⁴ See for example OECD Expert Meeting Report on International Investor Participation in Infrastructure, Summary by the Secretariat (2006), page 6: “A major problem for water operators is the asymmetry of information, with the public partner being more well-informed at the outset. They cannot verify the quality of the underground network and they are usually required to offer universal services within urban areas over whose future development they have no influence. Under the circumstances – that is, accepting that pieces of crucial information will become available only later – a strategy of underbidding may be understandable. In a competitive bidding process some of the caveats can be overcome, but a process of competitive bidding is often not feasible in smaller municipalities. This has in the past created problems with a perceived lack of legitimacy of process and outcomes. Secondly, an “asymmetry of power” creates regulatory and contractual risk. As soon as the initial investment is completed, power shifts to the local authorities. Delays in regulatory approvals and denial of previously agreed tariff increases become commonplace.” <http://www.oecd.org/dataoecd/51/47/37474980.pdf>

In Manila, the public authority hired the advisory services of the International Finance Corporation as lead adviser and also consultants from Halcrow, one of them having been involved previously in the contract of Buenos Aires.

In France, local governments use one of the several available consultants like Service Public 2000, Calia Conseil, Jean-Raphael Bert Consultants, etc.

In India, the Municipal Corporation of Greater Mumbai hired Castalia to design a PPP pilot scheme in a part of the city of Mumbai.

7.3. Contribution to financial investment

Some argue that the levels of investment of the private sector in the water sector in the developing countries have been inferior to the expectations of the international community and induce that the private sector does not contribute significantly to the development of water services in these countries.

Such statements underestimate the amounts of finance mobilised by or thanks to the private sector. Of course, hopes were high given the huge backlog of decades of underinvestment by public authorities: All in all, the private sector has contributed greatly, including in the mobilisation of capital. In many cases observers omit:

- the funds provided by private banks to public authorities,
- the important funds mobilised by private individuals to cope with the absence of public services
- the catalytic effect of PWOs who help to mobilise funds in areas where they operate even if these funds do not transit through their own accounts. The presence of professional private operators has contributed greatly to the bankability and credibility of various projects. It has allowed investment by public authorities alongside the management and operation by a private company.
- the multiplier effect due to the efficiencies of the private sector allowing self financing by water utilities.

They even disregard the magnitude of investment made under the direction of PWOs over the last 20 years, which has been a very significant in proportion to the less than 4% population they serve.

In any case, private water operators are only able to provide investments in areas where they are requested by public authorities to do so and where the institutional and business environment is appropriate.

7.4. Invalid arguments about “Profit”

A common objection to private sector involvement in water services operation is that private companies should make a profit and that this is claimed to be against the principles of Human Rights. This premise is false in itself, but also ignores the fact that many publicly-controlled water operations are required by their owners (municipalities or states) to make a profit, and are proud to do so. There is a strong correlation between the public services that are well known for good performance and those that consistently declare profits. All sustainable enterprises need to make a profit (sometimes called something else such as “surplus”). In both the private and public

sectors a substantial proportion of this is reinvested in the activity or sector, but it is also true that revenues from publicly operated water services are often used to finance activities far removed from this. The profit motive can therefore not be used to separate public from private, nor can it be said to be contrary to the ethics of providing essential services such as water.

7.5. Procurement procedures / tendering and competition for PPP contracts

For large, high-value, long-term PSP contracts, the procurement process needs to be well adapted to the specific conditions of the locality, project and parties involved. All parties, including the client, the various bidders, as well as their respective advisers and the ultimate service users have a strong interest in these systems being as effective and efficient as possible. There is a considerable body of literature and practical experience on how to conduct procurement processes successfully^{35,36}.

The transparency of the process; the various different steps from expression of interest, through prequalification, bidding right up to contract finalisation; the number, size and competence of bidders; all need careful consideration. For example it makes no sense to engage in the expense of involving an unnecessarily large number of incompetent bidders for a large and complex project. It is therefore incumbent on the public authorities to ensure through a due process that an appropriate number of potential contractors with the right skills and resources is retained for the final stages of the bidding process. Without this they will incur unnecessary expense and delay with no guarantee of obtaining an appropriate outcome.

The efficiency, transparency and integrity of any major procurement process are of course of great concern to all parties. The number of bidders is not a satisfactory criterion. Evidence shows that a competitive tendering process may be fiercely competitive even with only two bidders.

Simplistic allegations about lack of competition, potential corruption or collusion are both unfounded and unrelated to the issues of the Right to Water.

7.6. Confidentiality

Most public authorities require and encourage the procurement of long-term PSP contracts using competitive tendering procedures. It is misguided to think that complex long-term partnership contracts can be finalised satisfactory without a phase of negotiation.

It is equally important to encourage the bidding parties to be as constructive and innovative in the solutions they include in their bids as possible. Bidders will not do this if they feel that their competitive advantage is being shared with their competitors. This means that it is unavoidable than during the bidding and negotiation processes the substance of the tender and matters under negotiation are kept secret and restricted to

³⁵ , “Approaches to private participation in water services: a toolkit”, Public-Private Infrastructure Advisory Facility & the World Bank, 2006.

³⁶ “Private Sector Participation in Water Infrastructure - Checklist for Public Action” - OECD 2009

the two parties involved. In cases where this is not done, unfair behaviour by either the client or one or more of the tenders completely invalidates due and fair process and a satisfactory outcome. It is in nobody's interest for this to happen.

The academic references suggest that large parts of the contracts should be publicly disclosed, except for commercially sensitive issues, but the onus to prove that these issues are commercially sensitive is heavy, and expected to be borne by the private party^{37, 38}.

Once contracts had been finalised, it is usually accepted that the majority of the contract details are made public. In these cases certain information that may be commercially sensitive for sound reasons may continue to be kept secret.

Some public authorities require that contracts of this kind are kept secret. The reasons for this are not always clear. However one of them is that they wish to avoid malicious interference from opposition political parties or from other interests who might for one reason or another be opposed to the arrangement. It is certainly not unknown for third parties to try to use aspects of the contracts in ways that are disruptive to the successful conduct of the service delivery. The risks of this occurring may be higher in countries where governance systems are weak.

For the most part, private operators do not object to public disclosure of the contract once it has been completed. They understand and subscribe to the needs for transparency. As explained in paragraph 6.2, they support the idea that water users should be informed about the objectives of the public authority and the performance of the operator, public or private. The users' entitlement to such information is compatible with the levels of confidentiality needed by governments to ensure the mobilisation of professional operators and thereby comply with the RTWS.

8. Human Right-related misconceptions on PSP

8.1. Potential conflict with international obligations of governments

Some reports have tried to establish that governments have difficulties in combining their obligations with respect to the Right to Water and Sanitation and their international obligations that result from the treaties they sign with foreign governments to protect foreign investment (Bilateral International Treaties or BITs).

None of these reports are convincing. The report issued on that topic under the umbrella of UN-ECLAC deserves some comment. It states that governments may be unable to comply simultaneously with their RTWS obligations and their international obligations. Based on that statement, it concludes that BITs should be subordinated to the internal obligations of the government with respect to the RTWS. However, in the

³⁷ "Best Practices on Contract Design in PPPs" p62. Iossa, Spagnola and Vellez, World Bank, 2007
<http://www.gianca.org/PapersHomepage/Best%20Practices%20on%20Contract%20Design.pdf>

³⁸ "Public-Private Partnership (PPP) Handbook" - section 7, ADB, 2008
<http://www.adb.org/Documents/Handbooks/Public-Private-Partnership/Chapter7.pdf> "confidentiality during a bid process is also needed so as not to compromise the legitimate commercial interests of the parties."

report there is no substantiation of the rationale that led the authors to make such affirmation of impossibility for governments to respect all their obligations simultaneously.

AquaFed has worked on this issue of compatibility of the various obligations of a State. This resulted in a submission to the UN Special Representative of the UN Secretary-General on Business and Human Rights in 2009³⁹. In this submission we demonstrated that in practice governments have ways to respect their obligations with respect to the RTWS and their obligations with respect to BITs simultaneously.

9. Conclusion

This submission shows that all the criticisms raised about potential issues with private operation in relation to the Right to Water and Sanitation are unfounded and irrelevant.

Some are not related to the Right to Water and Sanitation at all (see Chapter 7). Others are real Human Rights issues (see Chapters 5 and 6) but they are faced by all operators, both public and private. In most cases (Chapter 5) the solution of the issues raised lies with the public authorities, not with the operator.

AquaFed demonstrated in a 2009 submission to the UN that in practice governments have ways to respect simultaneously their obligations with respect to the RTWS and their international obligations that result from the treaties they sign with foreign governments to protect foreign investment (Bilateral International Treaties or BITs).

The suggestion that the risk to rights-holders is greater under Private Sector Participation than under public management is not substantiated. This is particularly the case when a publicly managed service is unable to provide access to the whole population.

It is in the interest of rights-owners that all management options are maintained for public authorities to choose and that imposing discriminatory preconditions on one type of operation is avoided. Decision-makers should accept that success in implementing ambitious policies to develop universal access to water / sanitation services lies in a number of factors that are unrelated to the nature of the operators, be they public or private.

There are good and competent managers in both categories. The people who need access to water and sanitation do not mind which hand helps them so long as it provides them the service they need. The role of public authorities is to decide on policies and to create and maintain conditions that enable their chosen operator to perform the public service most effectively.

³⁹ *'Bilateral Investment Treaties and the Right to Water. The case of the provision of public water supply and sanitation services'*, 16-page submission by AquaFed to the OHCHR consultation on Business and Human Rights, October 1, 2009. Available on <http://www2.ohchr.org/english/issues/globalization/business/docs/AquaFed.pdf>