

**Public Private Partnerships  
and  
Water Multinationals practices**

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## INTRODUCTION

### Scope of the study

The following study focuses on water multinational companies (WMNCs) practices observed worldwide at each step of their contractual relations with States within Public Private Partnerships (PPP).<sup>1</sup>

Only WMNCs companies actual and/or former shareholders in Aguas Argentinas and Aguas Provinciales de Santa fe are concerned, and more specifically:

- AGUAS ARGENTINAS : Suez (ex Lyonnaise des eaux), Veolia (ex Compagnie Générale des Eaux), Aguas de Barcelona, Anglian Water
- AGUAS PROVINCIALES DE SANTA FE : Suez (ex Lyonnaise des eaux), Aguas de Barcelona, Interagua – Servicio Integral de Agua SA

### Aims of the study

This study intends demonstrating, through a legal perspective, how some WMNCs practices might have contributed to their actual retreat of PPP projects located in developing countries<sup>2</sup> and the repeated acknowledgement of failure of private financed projects made by international financial institutions.<sup>3</sup>

It results from this around 60 contracts set of data that many asymmetries arise between public and private partners within an international market of private water services dominated up to 75% by only two companies. In this much concentrated market, situations identified worldwide reveal a position of weakness of the host countries in front of IFI requirements and WMNCs expertise.

This study gathers a large set of facts and figures that show how WMNCs use and may sometimes abuse of this weakness. In doing so, we intend to bring objective and pragmatic explanations on the cause of passed and present conflicting situations opposing public authorities and WMNCs.

Through this study, unilateral terminations of PPP from public authorities might be considered differently than the current international arbitration case law. In major cases, it should be appreciated as the sole alternative opened for the host country to fulfil its public welfare obligations. It results from these findings that the legitimacy of such termination shall be taken into consideration when assessing the WMNCs request for compensation according the terms of Bilateral Investment Treaties (BIT).

## Methodology

All these issues impose to come back to basics and to question the reason why these private participations did not work. Referring to the notion of "fairness" might be helpful. "Fairness" is justly mentioned as a key postulate in the Public Private Infrastructure Advisory Facility (PPIAF) recent presentation of the challenge of getting private participation to work.<sup>4</sup>

To lead to efficient operator and related government legal protection, fairness, legitimacy and good faith should govern relation between parties. If these elements are not gathered, investment cannot reach the point. The following developments describe how WMNCs practices might have impair these fundamental elements in various places worldwide, particularly in developing countries. This echoes the economic theory confirming that competition rules are indispensable for limiting "market failures" that constitute welfare-reducing anti-competitive abuses.<sup>5</sup>

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<sup>1</sup> Notion of Public Private Partnerships (PPP) will be used in this study as referring to any type of private participation, i.e. from mere services agreement up to complete privatization.

<sup>2</sup> On 9 January 2003, Suez announced a five point 'action plan' for 2003-2004, among them "*investment restricted to cash flow - reducing its exposure in developing countries by one third*". This trend is confirmed in the 2005 document of reference, p.28 : "*Prioritise profitable organic growth targeted on developed countries, particularly Europe (...) outside Europe, maintain strict selectivity of opportunities and improvement in the profitability and financial returns of lowest performing assets*".

<sup>3</sup> On 29 May 2006, Paul Wolfowitz (World Bank chairman) declared at the annual conference on development in Tokyo "*Vouloir faire du secteur privé le pilier du développement des infrastructures dans les pays pauvres, une théorie en vogue dans les années 1990, s'est avéré inapplicable dans les faits*" [Le Monde - 30 May 2006].

<sup>4</sup> Public-Private Infrastructure Advisory Facility (PPIAF), IBRD, World Bank, Toolkit "Approach to Private Participation in Water Services" 2006, pp 5-6.

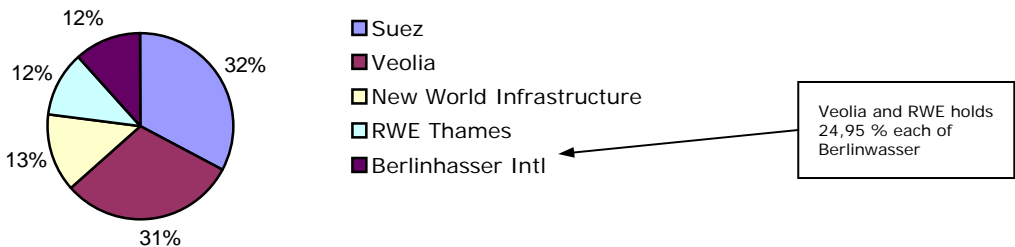
<sup>5</sup> International Law Association, Fifth report of the committee on international trade law, p.8, New Delhi Conference 2002. "Criticism of welfare-reducing anti-competitive abuses is manifestly *not* a new issue either in policy debates or economics, as illustrated by Adam Smith's criticism, e.g. of the monopoly power of the East India Company in his classic *The wealth of Nations* (1776) - <http://www.ila-hq.org/pdf/Sustainable%20Development/Sustainable%20Development%20Final%20Report%202002.pdf>.

### First step - observation of private water management market shares

At an **international scale**, private water services only represent around 5% of the water market, i.e. 290 millions of people<sup>6</sup> (126 million in Europe, 72 million in Asia and Oceania, 48 million in USA, 21 in South America and 22 million for others)<sup>7</sup> and the market is largely dominated by four WMNCs :

Figure 1

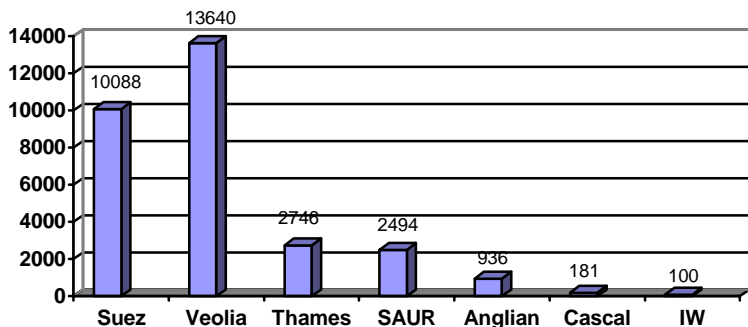
TOP FIVE SPONSORS OF WATER AND SEWERAGE PROJECTS  
WITH PRIVATE PARTICIPAION IN DEVELOPING COUNTRIES 2001-2004



Source : World Bank PPI (*Private Water Projects*, Izaguirre et Hunt, 2005)

Figure 2

WATER SALES, 2001 (euros millions)



Source : David Hall, Public Services International Research Unit (PSIRU)<sup>8</sup>

At a **French scale**, private operators represent 80% of the water services market, i.e. around 48 millions people<sup>9</sup>, the market being shared between the following companies which concentrate 98% of the activity :<sup>10</sup>

Figure 3

MARKET SHARE OF PRIVATE OPERATORS IN FRANCE

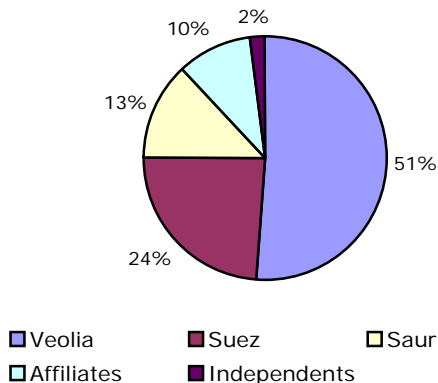
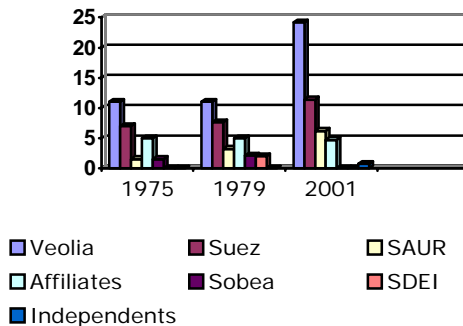


Figure 4

EVOLUTION OF PRIVATE SECTOR  
IN FRENCH WATER MARKET



Source : « Eau : le temps d'un bilan » [La Gazette des communes – des départements – des régions, cahier n°2, p.239 – 30/1752 – 9 août 2004].

<sup>6</sup> Stephenson, *Water Services Management*, Londres, IWA, 2005, p.265.  
<sup>7</sup> Stephenson, D. 2005 « Water Services Management », London, IWA – cited in Meriem Ait Ouyahia, "Le partenariat public-privé pour financer les infrastructures municipals d'eau potable : quels sont les défis" – document de discussion, Government of Canada, May 2006, p.14.  
<sup>8</sup> "The Water Multinationals 2002 – financial and other problems", Public Services International Research Unit (Psiru), August 2002, p.6.  
<sup>9</sup> Rapport d'information de Yves Tavernier *Le financement et la gestion de l'eau* Assemblée Nationale n°3081 du 21 mai 2001.  
<sup>10</sup> Decision n°05-D-58 of the French Competition Council of November 3, 2005 related to practices revealed in the water sector in the sector of Ile-de-France, section 15, p.4.

It is remarkable that current market position of the two main French water companies in their domestic-historical market (75%) and in the international context (75%) is more than significant. At both scales, whatever the source of figures may be, these two companies appear as the first 2 operators detaining around ¾ of the water services market.<sup>11</sup>

This market approach illustrates how much the French model of water management<sup>12</sup> has been successful at international scale, thanks to the natural monopoly characteristic of water market and also to the promotion of private participation made by International Financial Institutions (IFI) in the 90s.

Hence, the historical market of the two main French water companies should be of great relevance as it is the market where they developed expertise and practices which lead to their actual position on the international market.

## Methodology second step - report of WMNCs practices

Considering this recognised dominating position of the two French water multinationals, the second step of the study consists in assessing whether or not they have abuse of this position in their contractual relationships with states. After having addressed and reported practices of French water multinationals on their domestic market (1) which lead to judicial sanctions we will highlight and report of similar practices at international scale (2).

### 1 FRENCH PERSPECTIVE

#### 1.1 French water market

Main French market characteristics (stable due to length of contracts and low risks regarding average users' purchasing power) are of great importance to French water companies to develop their activity in riskier areas, namely in developed countries.<sup>13</sup>

Private participation in French water services has arisen in the end of the 19<sup>th</sup> century and this participation has been intensified along the 20<sup>th</sup> century to reach today around 80% as shows figure 4 above. Stability and enforcement of private participation has been largely encouraged by a weak regulation characterised namely by the lack of any compulsory tender at the entrance or renewal steps.

In front of such economical trend, the frame of French regulation has evolved in order to ensure transparency and competition within this market.<sup>14</sup> Whereas the French Loi Sapin was implemented in 1993 to avoid the former situation of quasi systematic renewal of concessions without tendering, the rate of renewal of incumbent contract has remained around 90%.<sup>15</sup>

It should also be noted that very few users association exist and/or are involved in the process of private participation. In this context, French water companies have had the opportunity to develop a large lobby activity.

#### 1.2 French water companies practices in their domestic market

##### 1.2.1 Competition issues

It has firstly to be noted that water markets in developed countries and particularly in France are characterized by a natural monopoly. Indeed it is economically impossible to duplicate infrastructures to allow entrance of new competitors. Hence, many reports from the French ministry of environment show that in two cases out of three, the number of offers in competitive bidders for delivery and sanitation is limited to one or two.<sup>16</sup>

Very early and still today, excessive length of contracts has also been alleged by the French Cour des Comptes (the Federal Comptroller), namely in 1976 in a report on water and sanitation management. Were also denounced in this report the recurrent mechanism of entrance in the contract with moderate rates, followed by regular increases in application of tariff revision clause and the lack of sufficient financial information at public authority disposal to duly appreciate private operator's performance.<sup>17</sup>

<sup>11</sup> To confirm the concern of competition authorities, in the current project of merger between Suez and Gaz de France, Brussels commission, through its competition department, has opened an inquiry to analyse effect of such merger that would lead to the creation, namely in France and Belgium natural gas markets, of an entity controlling di facto most of natural gas imports in both countries – [Cécile Cornudet, Les Echos, June 20, 2006].

<sup>12</sup> It is generally admitted to speak about " l'école française de l'eau ", see Marc Laimé in "Main basse sur l'eau des villes" [Le Monde Diplomatique, March 2005, pp 16-17].

<sup>13</sup> Eau : le temps d'un bilan, p.250 [La Gazette des communes – des départements – des régions, cahier n°2 – 30/1752 – August 9, 2004].

<sup>14</sup> Loi « Sapin » January 29, 1993 and loi « MURCEF » December 11, 2001.

<sup>15</sup> Eau : le temps d'un bilan, p 240.

<sup>16</sup> Eau : le temps d'un bilan, p 250.

<sup>17</sup> Eau : le temps d'un bilan, p.231 [La Gazette des communes – des départements – des régions, cahier n°2 – 30/1752 – August 9, 2004].

In this context, the French Competition Council has had various occasions for alleging anti-competitive abuses and imposing sanctions.

### JOINTLY SUEZ, VEOLIA, SAUR

N°	DECISION	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
1	Competition Council n°02-D-44	July 11 2002	France	Suez Veolia Saur	Ile-de-France	o Abuse of dominant position

DETAILS

**Abuse of dominant position** : [decision of July 11, 2002] The Competition Council found that the existence of joint ventures between SUEZ, VEOLIA and SAUR constituted a “collective dominant position” and requested the French ministry of economy, Finance and Industry to take all necessary measures to modify, complete or terminate the pooling of means arrangement of these companies through their joint venture.<sup>18</sup>

In this case, the three companies joint ventures had been used to affect the level of competition in more than 40 tenders since 1997 by not entering or tendering as agreed with other competitors.

### SUEZ

N°	DECISION	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
2	Competition Council n°05-D-58	November 3, 2005	France	Suez	Ile-de-France	o Abuse of dominant position

DETAILS

**Abuse of dominant position** : [decision of November 3, 2005] The Competition Council found that Suez abused of its dominant position in the water market in the area of Ile-de-France. The Council imposed a fine of 400,000 euros.<sup>19</sup> This case focuses on practices implemented by Suez at the moment of contract renewals to avoid new competitors entrance (namely lack of communication of financial information in its quality of incumbent to other challenging bidders).

### VEOLIA

N°	DECISION	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
3	Competition Council	March 21 2006	France	SADE	Ile-de-France	o Anti competitive agreements

DETAILS

**Anti competitive agreement** : [decision of March 21, 2006] The Competition Council retained complaints against Sade in respect of 2 markets object of anticompetitive agreements in the Ile-de-France region and imposed a fine of euros 5,4 million relating to this matter. Sade has accrued a reserve in its account to cover this litigation, and is currently examining its options for appealing the Council’s decision.<sup>20</sup>

4	Competition Council	July 5 2005	France	Veolia Transportation	Meuse	o Anti competitive agreements
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DETAILS

**Anti competitive agreement** : [decision of July 5, 2005] The Competition Council issued a decision in which it partially validates the findings of anticompetitive practices in the public transportation market and ordered Veolia Transportation to pay a fine of approximately euros 5 million. Veolia paid this fine and filed an appeal, which the Paris Court of Appeals rejected on February 7, 2006. On March 7, 2006, Veolia Transportation filed an appeal with the Supreme Court (Cour de Cassation).<sup>21</sup>

<sup>18</sup> Decision n°02-D-44 of the French Competition Council of 11 July 2002 related to the situation of competition in water delivery and sanitation market.

<sup>19</sup> Decision n°05-D-58 of the French Competition Council of 3 November 2005 related to practices revealed in the water sector in the sector of Ile-de-France.

<sup>20</sup> Veolia reference document 2005, pp. 268-269 - <http://www.veoliaenvironnement.com/library/ve/file/1/829EdzdiOYwv487qRB9ffR39.pdf>.

<sup>21</sup> Veolia reference document 2005, pp. 270 - <http://www.veoliaenvironnement.com/library/ve/file/1/829EdzdiOYwv487qRB9ffR39.pdf>.

VEOLIA						
N°	DECISION	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM

5	Competition Council	June 9 2005	France	SADE	Meuse	o Anti competitive agreements
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DETAILS

**Anti competitive agreement** : [decision of June 9, 2005] The Competition Council issued a ruling against eleven companies (including Sade) in respect of a complaint alleging anticompetitive behavior relating to public bids for various public works contracts in the Meuse department from 1996 to 1998. Sade was implicated with respect to one such contract, which was awarded to a competitor in 1998. Under this ruling, Sade was fined euros 5 million, which it has already paid. Sade has filed an appeal with the Paris Court of Appeals.<sup>22</sup>

### 1.2.2 Corruption

SUEZ						
N°	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM	

6	1996-1998	France	COGESE	Grenoble	o Corruption for award of contracts o Illegal tariffs - customers overcharged
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DETAILS

**Corruption for award of contract** : Alain Carignon, former mayor of Grenoble was sentenced in 1996 in appeal<sup>23</sup> (five years in prison plus a 70,000 fine) for accepting from COGESE, a SUEZ subsidiary, illegal campaign contributions and around 3 millions euros as counterpart to awarding the town water concession. The court also sentenced water executives Lean-Jacques Prompsy and Marc-Michel Merlin to three and four years in prison.

**Illegal Tariffs – customers overcharged**: the Administrative Court of Grenoble, on May 12, 1999<sup>24</sup> stated that the Suez subsidiary managing the city's water service had for years overcharged customers through various fraudulent accounting procedures. The court stated that *"the [corrupt] behaviour of the defendant is linked to the increase of [water] tariffs"* and cancelled the contract, meanwhile ordering the company to pay back all water charges imposed between 1990 and 1998.

The Conseil d'Etat (Supreme Administrative Council)<sup>25</sup> cancelled the city council of Grenoble decision of October 30, 1989 awarding contract the COGESE as this award was the counterpart of a misuse of company funds.

VEOLIA						
N°	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM	

7	July 8, 1994	France		Angoulême	o Corruption for award of contracts
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DETAILS

**Corruption for award of contract** : The former mayor of Angoulême, Jean-Michel Boucheron was convicted and sentenced to two years in prison for taking bribes from companies bidding for public tenders. This included US\$ 55,000 for a fictitious job by General des Eaux in exchange for giving Vivendi a water distribution contract in Angoulême.<sup>26</sup>

<sup>22</sup> Veolia reference document 2005, pp. 268-269 - <http://www.veoliaenvironnement.com/library/ve/file/1/829EdzdiOYwv487qRB9ffR39.pdf>.

<sup>23</sup> Court of Appeal of Lyon, July 9, 1996 (<http://eausecours.free.fr/juris/corrupt/ca09071996.html>) - confirmed by Cour de cassation chambre criminelle du 27 octobre 1997, N° 96-83,698 (<http://eausecours.free.fr/juris/corrupt/crim27101997.html>) - and the Court of Appeal of Chambéry on June 10, 1998 (<http://eausecours.free.fr/juris/corrupt/ca10061998.html>).

<sup>24</sup> Arrêt of the Administrative court of Grenoble n°982087 dated May 12, 1999 - <http://eausecours.free.fr/juris/tarifnul/ta12051999.html>.

<sup>25</sup> Arrêt du Conseil d'Etat n°133849 du 10 septembre 1997 - <http://eausecours.free.fr/juris/corrupt/ce01101997.html>.

<sup>26</sup> Veolia Corporate Profile – Polaris Institute, June 2005, p.27 - [http://www.polarisinstitute.org/corp\\_profiles/public\\_service\\_gats\\_pdfs/veoliapdf.pdf](http://www.polarisinstitute.org/corp_profiles/public_service_gats_pdfs/veoliapdf.pdf). See also press article dated June 4, 1997 - <http://www.humanite.presse.fr/journal/1997-06-04/1997-06-04-780517>.

VEOLIA				
N°	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
8	France		Saint-Denis Isle de la Réunion	o Corruption for award of contracts
DETAILS	<p><b>Corruption for award of contract</b> : Two senior Vivendi/generale des Eaux executives were convicted of bribing the mayor of St Denis in order to obtain a water contract<sup>27</sup> after admitting in court in October 1996 that Vivendi had funded elected officials in order to obtain a water concession.<sup>28</sup> In 1996, Jean-Dominique Deschamps was fined US\$27,000 in addition to an 18 months prison sentence after courts found him guilty of bribing officials in 70 cities throughout France. Mr. Deschamps was then Vivendi's deputy director general and sought to secure water contracts for the Vivendi group.<sup>29</sup></p>			

### 1.2.3 Practices observed during contract execution

The following two examples highlight the rather natural and legitimate trend of profit organization to optimize any legal flaw for their own interest. They illustrate how much is delicate to coordinate rights and obligations within a market dealing with essential public services.

#### 1.2.3.1 Account of reserve for renewal – interpretation problems

Whereas terms of the debate in developing countries are more concentrated on immediate need to enhance access to water facilities and its related investment issues, in France the issue is more a matter of renewing an old yet well extended network water system. This implies anticipation of the renewal investments. This is traditionally an operator's obligation but also a regular matter of conflicting interpretation.

Due to unclear contractual dispositions, recent debates have arisen on this issue between French water companies operating and the local and national comptrollers and municipalities. The point is whether this reserve should be qualified as a mere reserve for renewal or as a guarantee of renewal. When the contract did not specify, the water companies generally choose the notion of guarantee as it allows them to keep the related sums at the termination of the contract when the risk does not arise (just like the mechanism of a premium).<sup>30</sup>

**This issue is still in debate in France and subject of a major concern because of the small 1,1% renewal rate of assets<sup>31</sup>, whereas 800.000 km of connections built between 1950 and 1980 should be renewed considering their average lifetime of 85 years.<sup>32</sup>**

<sup>27</sup> "Vivendi's Empire-building", Corporate Watch, May 16, 2003 – <http://corporatewatch.org.uk/news/vivendi.htm>. Cited in Public Citizen Veolia corporate profile, February 2005, p.3.

<sup>28</sup> David Hall "The Public Sector Water Undertaking – a necessary option", Psiru February 2001 - cited in Public Citizen Veolia corporate profile, February 2005, p.3.

<sup>29</sup> Public Citizen Veolia corporate profile, February 2005, p.3.

<sup>30</sup> Report of the national Comptroller on "Management of water public services" December 2003, p 41 and the answer of Veolia CEO, p 166.

<sup>31</sup> Report of the national Comptroller on "Management of water public services" December 2003, p 41 and the answer of Veolia CEO, p 166.

<sup>32</sup> Eau : le temps d'un bilan – p.234, in La Gazette des communes – des départements – des régions, cahier n°2 – 30/1752 – August 9, 2004.



### 1.2.3.2 Excessive prices

VEOLIA						
N°	TYPE	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
9	Concession 32 years	1992	France		Bordeaux	<ul style="list-style-type: none"> <li>o Lack of transparency</li> <li>o Excessive prices</li> </ul>

**Lack of transparency** : It has been reported<sup>33</sup> that the accountancy methods used by Veolia are too much complex and impair any attempt from public authorities namely to assess and measure costs evolution, operators' revenues and account of reserve for renewal. Bordeaux city council ordered an audit with the mandate to prepare the five-year renegotiation of the concession agreement.

DETAILS

**Excessive prices** : In June 2005, city councilors received the audit<sup>34</sup> which denounced irregularities in invoicing, including less than transparent bills with no breakdown of costs for water supply, sanitation and other services, charging for services which in most cases were not provided. Audit also mentioned that very expensive interest rate were used by the operator to assess its financial charges. These latter being, like other overestimated charges, invoiced to the users, auditors concluded that this should be taken into consideration in the renegotiation of the agreement. It has to be noted that earlier in 1997, the price of water per liter had already been reduced of 0,3 euros under the pressure of the users association Transcub.

### 1.2.3.3 Abuse of consumer overpayments

SUEZ						
N°	TYPE	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
10	Concession	1997	France		Nationwide	<ul style="list-style-type: none"> <li>o Use of consumer overpayment</li> </ul>

**Use of consumer overpayment** : French national comptroller accused in 1997 Suez of, among other charges, deficient financial management. Suez was found to be depositing consumer overpayments into interest-generating accounts, keeping the interest as undeclared profit. In 1997, Suez earned about US\$500,000 this way.<sup>35</sup> Jean-Luc Trancard, deputy director general of Suez, told the International Consortium of Investigative Journalists (ICIJ) that they "consider this profit as remuneration for the management of money that doesn't belong to us. It passes through our accounts due to the public (payment) system".<sup>36</sup> He added also that they now declare the interest as profit.

DETAILS

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#### TRANSITION

This short presentation of French water Lycées companies practices observed in their historical market reveals two majors trends :

- dominant position on the market has led to anti-competitive practices ;
- private companies use of any flaw in a legal context to their own advantage, namely due to an asymmetric expertise to their advantage.

This French perspective is relevant in our study as the same companies, shareholders of major water companies in Argentina and in all developing countries have reproduced similar practices worldwide.

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<sup>33</sup> Annual report 2004 on price and quality of water of the county community of Bordeaux, <http://transcub1.free.fr/Rapport%20Cub%20Eau%202004.pdf>.

<sup>34</sup> Audit of Finance Consult, IRH Environnement and SCP Lyon-Caen, Fabiani, Thiriez, dated June 24, 2005 in the perspective of the five-year revision of the concession agreement, <http://transcub.free.fr/audit-finance-consult.pdf>.

<sup>35</sup> Follorou, J., "Un système d'entente mis au jour dans l'affaire des Lycées d'Ile de France » [Le Monde, December 10, 1998] – cited in Polaris Institute Suez Corporate profile, July 2005, p. 25.

<sup>36</sup> Follorou, J., "Un système d'entente mis au jour dans l'affaire des Lycées d'Ile de France » [Le Monde, December 10, 1998] – cited in Polaris Institute Suez Corporate profile, July 2005, p. 25.

## 2 INTERNATIONAL PERSPECTIVE

### 2.1 Main characteristics of the international water market

#### 2.1.1 Ranges of contractual options

TYPE OF PRIVATE PARTICIPATION	MAIN CHARACTERISTICS
Services	<p>Duration 2/3 years</p> <p>Public entity mandates a private operator to increase limited specific performance for a fee. All management duties and liabilities as well as income and charges remain with the public sector.</p>
Management	<p>Duration 5/10 years</p> <p>Public entity delegates the management of certain functions for the payment of a fixed fee plus if necessary bonuses paid upon reaching certain performances targeted.</p>
Lease	<p>Duration 7/15 years</p> <p>Public entity leases the assets to a private operator for a fee. The private operator takes on the operational risk and the public entity retains full control on the investment policy.</p>
Concession	<p>Duration 25/30 years</p> <p>Private entity takes over the management of a state-owned enterprise. A Concession gives a private operator responsibility not only for the operation and maintenance of assets but also for financing and managing investment.</p> <p>Asset ownership typically rests with the government from a legal perspective, however, and rights to all the assets, including those created by the operator, typically revert to the government when the arrangement ends.<sup>37</sup></p>
BOT Build Operate Transfer Greenfield Projects *	<p>A private sponsor builds a new facility at its own risk, owns and operates the facility at its own risk, then transfers ownership of the facility to the government at the end of the concession period. The government usually provides revenue guarantees through long-term take-or-pay contracts for bulk supply facilities or minimum traffic revenue guarantees.</p>
Privatization Divesture *	<p>A private entity buys an equity stake (full or partial) in a state-owned enterprise through an asset sale, public offering, or mass privatization program.</p> <p>A divesture, like a concession, gives the private operator full responsibility for operation, maintenance and investment. But unlike a concession, under a divesture legal ownership of the assets rest with the private operator.<sup>38</sup></p>

\* terms used by World Bank Private Participation Infrastructure Database glossary

#### 2.1.2 Financial and competition issues proper to developing countries

**Problematic of full cost recovery** – Full cost recovery water charges<sup>39</sup> can help to generate the necessary fund for infrastructure development, renewal and maintenance, and provide incentives for efficient water use.<sup>40</sup> This requirement is one major reason for private operators retreat from developing countries as they represent significant exposure of water operators to political and economic risks.<sup>41</sup>

According to a recent study, 55 percent of water concession in Latin America were renegotiated in the 1990s.<sup>42</sup> If renegotiation do not necessarily indicates systematic problems or project failures, namely in such long-term contracts, this phenomena raises questions about the viability of private participation in water, particularly in concessions with significant investment commitments<sup>43</sup> and/or difficulties relating to payments by consumers.

This problematic of **full cost recovery** is central in the perspective of the **Millennium Development Goals** (MDG) – In 2006, over 1 billion people worldwide still lack access to safe water and 2,6 billion people are without access to adequate sanitation services. About 80 % of all disease in developing countries are water-related, leading to an estimated 1.7 million death each year. To tackle these challenges, countries agreed through the Millennium Development Goals (2000) and commitments at the World Summit on Sustainable Development (2002) to halve by 2015 the number of people worldwide without access to safe water and sanitation services.<sup>44</sup>

<sup>37</sup> Public-Private Infrastructure Advisory Facility (PPIAF), IBRD, World Bank, Toolkit "Approach to Private Participation in Water Services" 2006, p 10.

<sup>38</sup> Public-Private Infrastructure Advisory Facility (PPIAF), IBRD, World Bank, Toolkit "Approach to Private Participation in Water Services" 2006, p 10.

<sup>39</sup> Full costs recovery requires tariffs to yield enough revenue to recover all the following costs : Operating and maintenances expenses, Depreciation and Return on capital as mentioned in PPIAF Toolkit 2006, p.78.

<sup>40</sup> OECD Policy brief "Improving water management – recent OECD experience", February 2006, p.3.

<sup>41</sup> OECD Policy brief "Improving water management – recent OECD experience", February 2006, p.6.

<sup>42</sup> J.Luis Guash, Jean-Jacques Laffont and Stephane Straub, "Renegotiation of Concession Contracts in Latin America", World Bank, Washington DC, 2002.

<sup>43</sup> Ada Karina Izaguirre and Catherine Hunt, "Private Water Projects", World Bank, Private Sector Development Vice-Presidency, July 2005, p.2.

<sup>44</sup> OECD Policy brief "Improving water management – recent OECD experience", February 2006, p.1.

Failing to implement financial solutions to reach MDG will not encourage water multinationals focusing on these risky markets, neither stop their retreat. This statement is all the more so obvious that without any implementation of financial incentives, water multinationals will carry on practices described hereafter in section 2.2 that indirectly impair achievement of MDG.

**Remark on competition issue** - regarding competition issue, as mentioned in 2006 PPIAF Toolkit,<sup>45</sup> in order to avoid the consolidation which has taken place in France over the years, reducing the potential for competition as described in section 1.2.1 above, it could be envisage a limit on the number of contracts that an operator can win. In most developing countries, however, general limitations on bidding for several contracts would not be required because the emphasis would be on developing service providers' demand base to allow them to benefit from economies of scale, rather than on limiting their potential market size. **Such context has appeared much favourable for French water companies to reproduce some of their practices developed in France.**

## 2.2 Inventory of practices occurring at each contractual step

For the purpose of inventorying WMNCs practices, we have divided State/operator relation in four steps :

- 2.2.1 Precontractual steps
- 2.2.2 Design of contractual architecture
- 2.2.3 Execution of the contract
- 2.2.4 Termination of the contract

### 2.2.1 Precontractual steps

Process to select and reach agreement with an operator can be divided into three broad types : 1) competitive tendering, 2) competitive negotiation and 3) direct negotiation.<sup>46</sup>

This precontractual step of relationship between States and operators is crucial as there meet the first signs of their power struggle.

Indeed, in practice one can observe that even in process of competitive tendering, where companies should not have any scope of negotiation and accept contractual conditions as set-up by the State, they challenge this limitation. We will address the various means implemented by companies to strengthen their position. Anti competitive behaviours, corruption, unrealistic biddings, unsolicited proposal are among these means addressed and illustrated hereafter.

#### 2.2.1.1 Unsolicited proposals

There are serious dangers in these initiatives, not least of corruption and higher costs from the resulting contracts precisely because they are less rigorously scrutinised and subjected to competition and evaluation of alternatives, as a recent World Bank paper warned, concluding: "The many negative experiences with unsolicited proposals for private infrastructure projects may lead some governments to see blanket refusals as the only way to safeguard against potential problems with corruption and lack of transparency."<sup>47</sup>

#### 2.2.1.2 Bidder appliances

##### 2.2.1.2.1 Anticompetitive behaviour

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
11		Ongoing 2003	Germany	SITA	Nationwide	o Anticompetitive behaviour

DETAILS

**Anti competitive behaviour** : In September 2003, German antitrust authorities raided the offices of dozens of German based waste management companies, including Suez' SITA unit, on suspicion of antitrust and criminal activities in bidding for waste disposal contracts. Authorities suspected that the waste management companies had fixed bids contracts from a German recycling company.<sup>48</sup> As of February 2005 the outcome of this case is still pending.<sup>49</sup>

<sup>45</sup> Public-Private Infrastructure Advisory Facility (PPIAF), IBRD, World Bank, Toolkit "Approach to Private Participation in Water Services" 2006, p 70.

<sup>46</sup> PPIAF Toolkit "Approach to Private Participation in Water Services", 2006, p 20.

<sup>47</sup> Unsolicited proposals : the issues for private infrastructure projects. John Hiodges. Public Policy for the Private Sector. Note no 257. [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/08/19/000160016\\_20030819180828/Rendered/PDF/263990PAPER0VP0no10257.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/08/19/000160016_20030819180828/Rendered/PDF/263990PAPER0VP0no10257.pdf)

<sup>48</sup> Gassman, M., Harnischfeger, U. "Cartel office hits companies in crackdown on waste bids" [The Financial Times, September 12, 2003] - Suez Corporate Profile – Polaris Institute, July 2005, p 18 - [http://www.polarisinstitute.org/corp\\_profiles/public\\_service\\_gats\\_pdfs/updated\\_Suez.pdf](http://www.polarisinstitute.org/corp_profiles/public_service_gats_pdfs/updated_Suez.pdf).

<sup>49</sup> Suez Corporate Profile – Polaris Institute, July 2005, p 18 - [http://www.polarisinstitute.org/corp\\_profiles/public\\_service\\_gats\\_pdfs/updated\\_Suez.pdf](http://www.polarisinstitute.org/corp_profiles/public_service_gats_pdfs/updated_Suez.pdf).

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM

12	Concession 25 years	Ongoing 1997	Indonesia	Palyja	Jakarta	o No competitive tender
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**Remark :** There are 2 concessions. Each cover approximately one half of the city, and are held by subsidiary companies of Thames Water (Thames PAM Jaya - TPJ) and Suez (PAM Lyonnaise Jaya – Palya)

See also Case n°37

DETAILS

**No competitive tender** :<sup>50</sup> Suez and Thames sued for illegal water concessions, saying that the concessions breached Indonesian law because they were awarded without any competitive tender by the regime of the former dictator Suharto. The governor of Jakarta, Mr. Sutiyoso, fired the President of the water authority, blaming him for strike action in Jakarta, saying he encourage unions and criticized Suez.<sup>51</sup>

### 2.2.1.2 Unrealistic biddings

It is acknowledged that old concessions are on average more profitable than young ones. The PPIAF suggests that returns may be depressed in early concession years by inadequate prices or overly aggressive bidding, corrected after the first price control period (...) or through renegotiation.<sup>52</sup>

The high incidence of renegotiation in infrastructure contracts, about 42 percent within three years of the award date,<sup>53</sup> renders support to the hypothesis that operators have tended to submit overly aggressive bids – which are not financially viable – so as to secure the concessions, with the belief of expectation of renegotiating the contract shortly afterward and securing better terms. It has been shown that the outcome of renegotiations tended to benefit the operator with better terms than those contracted or bid at the time of the award.<sup>54</sup>

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM

13	Concession 30 years	Terminated 1993- 2005 <sup>55</sup>	Argentina	Aguas Argentinas	Buenos Aires	o Early high tariff rising
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Termination at the request of the public authorities

See also Case n°40

DETAILS

**Early high tariff rising** : Only 8 months after the award Aguas Argentinas requested an extraordinary review of tariffs, due to 'unexpected' operational losses, which was obtained in June 1994.<sup>56</sup>

### 2.2.1.3 Procedure of allocation and ratification

#### 2.2.1.3.1 Communities involvement

Whereas the postulate of communities involvement is high in theoretical good practices<sup>57</sup> and reflects the need for **transparency**, in practice WMNCs feel more than reluctant to communities involvement in allocation process.

When New Orleans dropped its privatisation plans in 2004, after five years ad US\$5,7 million worth of study. The 20 years - US\$1,5 billion contract would have been the largest ever awarded in the U.S. It fizzled after city residents and the state legislature overwhelming approve or reject any privatisation contract worth more than US\$5 million.

<sup>50</sup> "Pipe dreams, The failure of the private sector to invest in water services in developing countries", World Development movement and Public Services International (Psiru), March 2006, p 33 and Shofiani, N.E. (2003). Reconstruction of Indonesia's Drinking Water Utilities - Assessment and stakeholders' perspective of private sector participation in the capital province of Jakarta. TRITA-LWR Master Thesis LWR-EX-03-30.

<sup>51</sup> Psiru, "Suez-Lyonnaise and Thames Water sued for illegal water concessions in Jakarta", [www.psiru.org/news/317775.htm](http://www.psiru.org/news/317775.htm).

<sup>52</sup> PPIAF "how profitable are infrastructure concessions in Latin America – empirical evidence and regulatory implications", January 2005, pp 42-43.

<sup>53</sup> Guash, J.L. 2004 "Granting and Renegotiating Infrastructure Concessions : Doing it Right", World Bank Institute Development Studies, Washington DC.

<sup>54</sup> Guash, J.L. 2004 "Granting and Renegotiating Infrastructure Concessions : Doing it Right", World Bank Institute Development Studies, Washington DC.

<sup>55</sup> 2005 Suez reference document, p.285.

<sup>56</sup> "Private and public interest in water and energy" by David Hall and Emanuele Lobina in Natural Resources Forum 28 (2004), p.271.

<sup>57</sup> Considering how private participation will affect customers and other stakeholders and involving them in the design of the arrangement in the Chapter 3 of PPIAF Toolkit 2006.

Both Suez and Veolia cited the measures as reasons they withdrew their bids. "If we now have to run an election every time we want to get a job," a Suez executive said, "it makes public-private partnerships cost-prohibitive."<sup>58</sup>

This matter refers also to the **social involvement in the process of execution of the contracts** which is rarely contractually provided *ab initio*. For instance, in the case of Aguas Argentinas, where only in 1999, after a first five years of social tensions, the unit "Community development" has been created offering a methodology of social intervention.<sup>59</sup>

This risk of failure refers to the expertise of the private operator. Indeed, delivery of operator's management skills, on among others operator's contractual counterpart, not only implies to put knowledge at disposal. **It goes further as operator must actively contribute in leading to a sustainable arrangement and to do so implies involving communities.**

### 2.2.1.3.2 Corruption

**Allegations of corruption** have been made in many cases of water privatisation but without criminal convictions, especially in developing countries. This is a strong concern regularly mentioned by International Financial Institutions such as the World Bank, which, through its affiliated Public-private Infrastructure Advisory Facility states : "Like other stakeholders, a private provider will seek to shape policy (the arrangement, in other words) in its favor. For example, a private provider may offer bribes to achieve favourable arrangements, and some politicians and officials may be willing to trade policy for money".<sup>60</sup>

The most relevant cases of corruption have been raised and subject to judicial proceedings only essentially in developed countries. It is worth noting that we cannot conclude from this report that no such practices occur in developing countries. We can only conclude that it might be more difficult in certain developing countries to go through criminal proceedings on such issues.

VEOLIA						
N°	TYPE	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
14	<b>Sewage contracts</b>  Remark : via Veolia subsidiary US Filters	1994-2003	USA	<b>Professional Services Group / US Filters</b>	<b>Bridgeport, Connecticut</b>	o <b>Corruption for award of a contract</b>
DETAILS	Former Bridgeport Mayor Joseph P. Ganim was sentenced to nine years in prison for corruption on several counts, <sup>61</sup> which included a relationship between his office and Professional Services Group (PSG), which was purchased by US Filters. A major part of the testimony heard was regarding two multi-million dollar sewage contracts awarded to PSG – first a five-year contract, then an extended 20 years contract – in return for US\$ 500,000 in kickbacks from the company through consulting fees and benefits. <sup>62</sup>					
15	<b>Sewage contracts</b>  Remark : via Veolia subsidiary Aqua Alliance	Ongoing 1997	USA	<b>Professional Services Group (PSG)</b>	<b>New Orleans</b>	o <b>Corruption for renewal of a contract</b>
DETAILS	On May 30, 2001, the United States filed a one-count information charging Aqua Alliance, Inc., formerly known as Air & Water Technologies, Inc., with bribery concerning a federally funded program. Aqua Alliance signed a plea agreement on June 22, 2001, admitting the charged offense. <sup>63</sup>  In addition, also on May 30, 2001, a federal grand jury returned a ten-count indictment charging former PSG president and Aqua Alliance executive officer Michael M. Stump, former Sewerage and Water Board member Katherine R. Maraldo and other lobbyist Salvador A. Anzelmo, and former PSG vice presidents William K. Gottenstrater and H. Grantand Simmons with conspiracy to violate the Travel Act, to commit mail and wire fraud, and to commit bribery. <sup>64</sup> Aqua Alliance was sentenced on December 14, 2001 to a US\$3 million fine and five year's probation. <sup>65</sup>					

<sup>58</sup> Carr, Martha and Russell, Gordon. "Company bails out of N.O. sewer bid." [New Orleans Times-Picayune, June 27, 2003 – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p.15.

<sup>59</sup> Lise Breuil, Thesis "The renewal of public private partnership for water services in developing countries", p.136, November 22, 2004, Ecole Nationale du Génie Rural, des Eaux et des Forêts.

<sup>60</sup> PPIAF Toolkit "Approach to Private Participation in Water Services" 2006, p 4.

<sup>61</sup> United States Attorney's Office District of Connecticut, press release, March 19, 2003 - <http://www.usdoj.gov/tax/usaopress/2003/txdv0320030319.html>.

<sup>62</sup> Race, T., "Plymouth sewer operator scolded ; Perturbed Selectmen assert displeasure with excuses" [The Patriot Ledger (Worcester, MA), January 22, 2003] – cited in Polaris Institute Veolia Corporate profile, p 26, June 2005.

<sup>63</sup> Report to Congress on the activities and operations of the public integrity section for 2001, United States Department of Justice, Criminal Division, p. 38 - [http://www.usdoj.gov/criminal/pin/Annual\\_Report\\_2001.pdf](http://www.usdoj.gov/criminal/pin/Annual_Report_2001.pdf).

<sup>64</sup> Report to Congress on the activities and operations of the public integrity section for 2001, United States Department of Justice, Criminal Division, pp 38-39 - [http://www.usdoj.gov/criminal/pin/Annual\\_Report\\_2001.pdf](http://www.usdoj.gov/criminal/pin/Annual_Report_2001.pdf).

<sup>65</sup> United States Department of Justice press release, December 14, 2001 - [http://www.usdoj.gov/opa/pr/2001/December/01\\_crm\\_648.htm](http://www.usdoj.gov/opa/pr/2001/December/01_crm_648.htm).

## VEOLIA

N°	TYPE	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
16	Waste-water treatment plant	Ongoing 2001	Italy		Milan	o Corruption for award of a contract

DETAILS

In March 2000, 'La Repubblica' revealed that Alain Maetz, a senior manager in Vivendi's water division planned to bribe local politicians in the majority and opposition parties on Milan city council in order to win the ITE200bn tender for a wastewater treatment plant in the south of Milan. The evidence includes a floppy disk containing a letter by Alain Maetz, dated July 1998 in which Maetz states he had " excellent contacts" with the rightwing majority coalition, and planned to pay total ITE300mn to politicians.<sup>66</sup>

Alain maetz was convicted for bribery and received a prison sentence of one year and ten months with a conditional discharge.<sup>67</sup> Judge said Mr. Maetz had paid bribe to the president of the Milan city council during the bidding procedure for the contract of waste-water treatment plant in the south of Milan.<sup>68</sup> Massimo De Carolis, the then former city council president received an almost three-year sentence or receiving the US\$2 million bribe.

## SUEZ

N°	TYPE	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
17		2002	Lesotho		Lesotho Highlands projects	o Corruption for award of a contracts

DETAILS

In June 2000, many companies were accused of bribing Lesotho officials in order to obtain contracts in the Lesotho Highlands Project, including then Suez subsidiary Dumez (Suez has since sold Dumez to Vinci, but Suez was in control of the company when the alleged bribery took place). The Canadian corporation, Acres International was found guilty of corruption in September 2002 by the Hight Court of Lesotho as the first company to go to trial in the case. In August 2003, the Court of Appeal of Lesotho upheld the Hight Court's decision on one of the two counts of bribery. Since then, Acres was declared ineligible to receive any new Worl Bank financed contracts for a period of three years.<sup>69</sup> The other accused corporations, including the former Suez subsidiary Dumez, are to go to court over the coming months.<sup>70</sup>

## 2.2.2 Design of the contractual architecture

### 2.2.2.1 Negotiation asymmetries

In most bidding procedure, bidders are informed that the terms of the tender and of the future contract are compulsory and should not be subject to any modification, which implies, theoretically, that any reserve made by the bidders will result in rejecting their offer.

However, in practice water multinational companies make reserves and in this strategic stage of designing the agreement they have developed a great expertise. In this context, three major asymmetries between private companies and public authorities have to be highlighted as they show the position of weakness of most public authorities at the entrance of the contract.

<sup>66</sup> "Whistle blowing and corruption : an international Review", Psiru, January 2003, p.9.

<sup>67</sup> Public Citizen Veolia corporate profile, February 2005, p.4.

<sup>68</sup> "Vivendi's Empire-building", Corporate watch, May 16, 2003, <http://corporatereview.org.uk/news/vivendi.htm>.

<sup>69</sup> World Bank sanctions Acres International Limited – press release n°2005/33/S, July 23, 2004 - [http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20229958~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607\\_00.html](http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20229958~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607_00.html)

<sup>70</sup> "Lesotho court fines Germany' s Lahmeyer 1,4 mn dollars for bribery" [Agence France Presse, August 26, 2003] – cited in Polaris Institute "Suez Corporate profile" July 2005, p24.

### 2.2.2.1.1 Economical asymmetry

Some of the multinational companies that government authorities are going in to contract with are supposed to regulate can sometimes have bigger annual turnover than the GDP of the country. For example, in 2002 the water-related revenue of Veolia exceeded the GDP of countries like Ivory Coast and Kenya (Metha and Miroso-Canal, 2004). Such economic asymmetry can have an effect on the negotiation powers of going in to contracts and how contracts are interpreted once they are implemented.<sup>71</sup>

SUEZ						
N°	TYPE	DATE	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
18	Concession 30 years	Terminated 1997-2005  Termination at the request of the public authorities <sup>72</sup>	Bolivia	Aguas del Illimani	La Paz El Alto	o Irregular modification of contractual terms conducting to asymmetrical financial risks  <span style="border: 1px solid black; padding: 2px;">See also Cases n°26 and 44</span>

DETAILS

**Irregular modification of contractual terms** : It arise from an audit of Aguas del Illimani dated April 2000 that between June 26, 1997 and July 24, 1997, modification of final contractual terms have been introduced to the normally inalterable version joined to the operator bidding. The audit also notes that these changed have not been formally regularized.<sup>73</sup>

Among the modification is the article 26.3.3 of the concession agreement which provide to the operator, in any case of termination, a guarantee of minimum purchase price of assets : either amounting to the asset net value at the moment of the adjudication or amounting to 85% of the net asset value at the date of termination.<sup>74</sup>

### 2.2.2.1.2 Legal expertise asymmetry

A state of legal expertise asymmetry between parties is widely acknowledged due to the characteristics of such agreements : "*The bargaining and the negotiation*". As municipalities assume new responsibilities within the framework of programs of decentralization, they meet to negotiate million dollar contracts with private companies, unusual experience for many of them. Often, there is very big one disparities of the power of negotiation, especially when big water multinationals are associated to it."<sup>75</sup>

This is also confirmed by PPIAF stating that "Good lawyers will focus on making the intended risk allocation legally effective and developing an arrangement that minimize future disputes".<sup>76</sup> This latter postulate seems not to be reached in practice, in the view namely of Suez executives stating in the 2005 Reference document that "The main risks are exchange rate risk, and the risk that the contracting authority may not respect the terms of the contract **often due to an inadequate understanding of the applicable legal issues**".<sup>77</sup>

Regarding Veolia "given the complexity of management agreements and their generally longer term, Veolia Environment has developed skills in contract analysis and control. The legal departments of Veolia Environment's division are involved in the preparation of contracts, and controls are imposed on the implementation of Veolia Environment's main contracts".<sup>78</sup>

This is a major issue as it comes back to basic principle of fairness which leads to sustainable private-public participation agreements. Such asymmetry, together with "the political pressures exercised on the governments so that they refloat big projects (which are so important that a failure cannot be envisaged) and suppliers of essential services, could mean that the governments incur more important risks than let it understand the contract".<sup>79</sup>

### 2.2.2.1.3 Informational asymmetry

In the context of **re-tendering**, it is recognised that "the key issue here is the advantage an incumbent might have. The incumbent will have much better information than anyone else about likely future costs, efficiency and revenue potential of the utility. This means that other firms may be reluctant to compete because they feel disadvantages and worry that, if they win, it will be because they underestimated the costs involved."<sup>80</sup>

<sup>71</sup> United Nations Development Programme "World Water development report – Chapter 2: The challenge of water governance", March 2006, p. 71 - [http://www.unesco.org/water/wwap/wwdr2/pdf/wwdr2\\_ch\\_2.pdf](http://www.unesco.org/water/wwap/wwdr2/pdf/wwdr2_ch_2.pdf)

<sup>72</sup> Decreto Supremo n°27973, December 12, 2005, to initiate necessary termination steps.

<sup>73</sup> Audit of Aguas del Illimani contract "Análisis de los contratos de concesion y regimen de bienes, sus antecedentes y consecuencias." April 2000, p.iv.

<sup>74</sup> Audit of Aguas del Illimani contract "Análisis de los contratos de concesion y regimen de bienes, sus antecedentes y consecuencias." April 2000, p.11.

<sup>75</sup> OCDE, 2000 "Global trends in urban water supply and waste water financing and management : changing role of the public and private sectors." Paris, Centre for cooperation with non members environment directorate – cited in Meriem Ait Ouyahia, "Le partenariat public-privé pour financer les infrastructures municipals d'eau potable : quels sont les défis" – document de discussion, Government of Canada, May 2006, pp 34-35.

<sup>76</sup> PPIAF Toolkit "Approach to Private Participation in Water Services" 2006, p 28.

<sup>77</sup> Suez 2005 reference document, p 57 - [http://www.suez.com/documents/french/docderef2005fr/SUEZ\\_docderef2005\\_fr.pdf](http://www.suez.com/documents/french/docderef2005fr/SUEZ_docderef2005_fr.pdf).

<sup>78</sup> Page 96 of the base prospectus issued by Veolia November 8, 2005 for its *Euro 8,000,000,000 euro medium note programme*.

<sup>79</sup> International Monetary Fund "public-private partnerships", public finance department, 2004 - cited in Meriem Ait Ouyahia, "Le partenariat public-privé pour financer les infrastructures municipals d'eau potable : quels sont les défis" – document de discussion, Government of Canada, May 2006, p. 35.

<sup>80</sup> PPIAF Toolkit "Approach to Private Participation in Water Services" 2006, p 197.



## 2.2.2.2 Main obligations of the parties and related allocation of risks and responsibilities

### 2.2.2.2.1 Generally observed practices

At this stage, we need to present the different scheme depending on the type of arrangement formalising the private participation. It is generally acknowledged that allocation of risks and responsibilities differs between private operator and public authorities as it follows :

TYPE OF PRIVATE PARTICIPATION	ALLOCATION OF RESPONSABILITIES & RISKS		
	RESPONSABILITIES & RISKS	OPERATOR	STATE
Services	Staff management	X	X
	Operation and maintenance of facilities	X	X
	Financing of operating costs		X
	Financing of renewal of existing assets		X
	Financing of new assets		X
	Ownership of new assets		X
	Operation and maintenance related risks		X
	Commercial related risks		X
	Investment related risks		X
Management	Staff management	X	
	Operation and maintenance of facilities	X	
	Financing of operating costs	X	
	Financing of renewal of existing assets		X
	Financing of new assets		X
	Ownership of new assets		X
	Operation and maintenance related risks		X
	Commercial related risks		X
	Investment related risks		X
Lease	Staff management	X	
	Operation and maintenance of facilities	X	
	Financing of operating costs	X	
	Financing of renewal of existing assets	X	X
	Financing of new assets		X
	Ownership of new assets		X
	Operation and maintenance related risks	X	
	Commercial related risks	X	X
	Investment related risks		X
Concession	Staff management	X	
	Operation and maintenance of facilities	X	
	Financing of operating costs	X	
	Financing of renewal of existing assets	X	
	Financing of new assets	X	
	Ownership of new assets		X
	Operation and maintenance related risks	X	
	Commercial related risks	X	
	Investment related risks	X	
BOT Build Operate Transfer Greenfield Projects	Staff management	X	
	Operation and maintenance of facilities	X	
	Financing of operating costs	X	
	Financing of renewal of existing assets	X	
	Financing of new assets	X	
	Ownership of new assets	X	X *
	Operation and maintenance related risks	X	
	Commercial related risks	X **	
	Investment related risks	X	

\* Transfer to the public entity at the end of contract

\*\* unless paid by public entity



TYPE OF PRIVATE PARTICIPATION	ALLOCATION OF RESPONSABILITIES & RISKS		
	RESPONSABILITIES & RISKS	OPERATOR	STATE
Privatization Divesture	Staff management	X	
	Operation and maintenance of facilities	X	
	Financing of operating costs	X	
	Financing of renewal of existing assets	X	
	Financing of new assets	X	
	Ownership of new assets	X	
	Operation and maintenance related risks	X	
	Commercial related risks	X	
	Investment related risks	X	

### 2.2.2.2.2 Examples of asymmetrical risks and responsibilities allocations

The following examples describe how asymmetries may arise in risks and responsibilities allocation. They illustrate how such asymmetries can generate difficulties and sometimes lead to failure of private partnerships. They also demonstrate how much **financial issues** are crucial in developing countries as large infrastructures investments are needed to reach a minimum quality service. The role of international financial institutions is very important and clearly mentioned as crucial by WMNCs.<sup>81</sup>

One more time, this risk of failure refers to the expertise of the private operator. Indeed, delivery of operator's management skills, on among others operator's contractual counterpart, not only implies to put knowledge at disposal. **It goes further as operator must actively contribute in leading to a sustainable arrangement and to do so implies avoiding such asymmetries and/or anticipating their negative effect.**

It has also to be noted that the following set of data reflects **asymmetrical final obligations** leading to identification of a position of weakness of States in their relation with multinational private operators. These issues will be addressed section 2.3.

(WS/BOT = bulk water supply, build-operate-transfer contract; WWT/BOT = wastewater treatment, build-operate-transfer contract)

VEOLIA						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
19	Lease	Ended 1989-2000  No renewal at the request of the public authorities	Guinea	SEEG	Conakry	<ul style="list-style-type: none"> <li>o Operator not fully subject to commercial risks</li> <li>o Interpretation problems</li> </ul>

See also Case n°31

DETAILS

**Operator not fully subject to commercial risks** : Guinea's experience illustrates the challenges of creating performance incentives for private operators when regulations and monitoring are weak and the operator is not fully subject to commercial risks.<sup>82</sup>

**Interpretation problems** : there were disputes between the state company which owned the system, and the private operator, over definitions of water losses and hence responsibility for actions and investment to reduce them.<sup>83</sup>

<sup>81</sup> The importance of IFI intervention and precisely the World Bank should be consider in the light of a recent report made by the World Bank Operations Assesment Department in 2006. Chief of the departement, Mr. Vinod Thomas states that "We have been too much optimistic and results have not been as good as expected" – [Le Monde, April 11, 2006].

<sup>82</sup> OECD Task Force on Financing Water for All, Report 1, p.52 - March, 2006.

<sup>83</sup> OECD Task Force on Financing Water for All, Report 1, p.52 - March, 2006 and K. Bayliss. Water privatisation in Africa: lessons from three case studies. May 2001. PSIRU. <http://www.psir.org/reports/2001-05-W-Africases.doc>

VEOLIA						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
20	WS/BOT	Ongoing 2002	China	CGE- Marubeni	Changdu	o Asymmetric financial risks
DETAILS	<p><b>Asymmetric financial risks</b> :<sup>84</sup> The contract requires the municipal water operator, which already has supplies of 900,000m<sup>3</sup> per day, to buy 400,000m<sup>3</sup> per day on a take-or-pay basis. However, the present daily requirement of Chengdu is only about 1 million m<sup>3</sup> per day, so the city is left to purchase an unrequired 300,000m<sup>3</sup>. An Asian Development Bank survey comments that the contract is causing concern: "Demand has been overestimated. This clearly shows that governments take a risk with take or pay BOTs." <sup>85</sup></p>					

(WS/BOT = bulk water supply, build-operate-transfer contract; WWT/BOT = wastewater treatment, build-operate-transfer contract)

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
21	Concession	Terminated 1997- 2006 <sup>86</sup>	Argentina	Aguas Provinciales de Santa Fe APSF	Rosario	o Potable water quality control  o Lack of emergency response system
DETAILS	<p><b>Potable water quality control</b> :<sup>87</sup> in its Environmental Review Summary of the project (n°9815), the International Finance Corporation (IFC) stated that although APSF's performance with meeting potable water quality standards is good, they need to address the appropriate levels of treatment for certain substances, namely chloroform, arsenic, and nitrate in some of the systems.</p> <p><b>Lack of emergency response system</b> : In addition, according to the IFC, APSF should develop, install, and operate their own emergency response system to protect the Rosario raw water intake from accidental up-stream chemical release.<sup>88</sup></p>					
22	WS/BOT	Ongoing	Malaysia	Jetama Sdn/Bhd	Kota Kinabula	o Asymmetric financial risks
DETAILS	<p><b>Asymmetric financial risks</b> :<sup>89</sup> Suez states that its Malaysian subsidiary has water distribution agreements with three states, covering 1.8 million consumers; however it treats the Malaysian companies as equity investments in its annual accounts, which implies that Suez does not have control of the operations.</p> <p>One operation is a bulk water supply BOT in Kota Kinabula, Sabah state, which started in 1993 through the subsidiary Jetama Sdn. Bhd (Ondeo Services), one of three such BOTs set up by the Sabah state government. According to the ADB review, the contract is a success<sup>90</sup>; however, the state has found it impossible to pay the price set by the agreements, as the total revenue collected from water users (Ringgit 60-65m) is far less than the amounts it has to pay to the contract companies (Ringgit 165m.).<sup>91</sup> As a result the state is seeking to privatise the entire water distribution system, to a Malaysian company, Ranhill Utilities: the state chief minister said the contract was being scrutinised "to ensure that the clauses were not lop-sided, (...) the weaknesses of previous water privatisation deals should not be repeated." <sup>92</sup></p>					

23	WS/BOT	Ongoing 1993	India	Sonia Vihar	Sonia Vihar	o Asymmetrical financial risks
DETAILS	<p><b>Asymmetrical financial risks</b> :<sup>93</sup> In Sonia Vihar, near Delhi, Suez is operating a BOT water treatment project . The Times of India reports that, "the amount [Suez] will get as fee for treating the water will be much in excess of what the DJB [Delhi Jal Board] will charge the consumers", indicating that the public sector will have to pick up the difference.<sup>94</sup></p>					

<sup>84</sup> « Pipe dreams », p44.

<sup>85</sup> A. C. McIntosh And C.E. Yniguez, "Privatization Of Water Supplies In Ten Asian Cities A Study", For The Asian Development Bank, January, 2000 p.3.

<sup>86</sup> On January 13, 2006, an administrative decree was issued by the authorities terminating the agreement – Suez 2005 reference document; p285.

<sup>87</sup> IFC Environmental Review Summary – project n°9815.

<sup>88</sup> IFC Environmental Review Summary – project n°9815.

<sup>89</sup> PSIRU study - Water privatisation and restructuring in Asia-Pacific by David Hall, Violeta Corral, Emanuele Lobina, and Robin de la Motte, January 2005, p.5.

<sup>90</sup> Malaysia: Kota Kinabalu: Water Concession [http://beyondboundaries.adb.org/ch6/malaysia\\_snapshot.htm](http://beyondboundaries.adb.org/ch6/malaysia_snapshot.htm).

<sup>91</sup> Bernama The Malaysian National News Agency. October 23, 2001, Proposed Review Of Pacts Will Go Beyond Water Supply Concessions – source Psiru.

<sup>92</sup> "Sabah Water Privatisation Project To Be Finalised This Month" [Malaysia General News, January 11, 2004] – source Psiru.

<sup>93</sup> « Pipe dreams », p44.

<sup>94</sup> Sonia Vihar "plant a tough jinx to crack" [Times of India News Network, Friday, June 17, 2005] – source Psiru.

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
24	WWT/BOT	Terminated 1999-2002  <a href="#">Termination at the request of the operator</a>	Vietnam	Suez Pilecon	Thu Duc	<ul style="list-style-type: none"> <li>o Asymmetrical financial risks</li> <li>o Interpretation problems</li> </ul>
DETAILS	<p><b>Asymmetrical financial risks - Interpretation problems :</b> Under the contract, it sold water to the city water utility at 20 cents per cubic metre, although the price charged by the utility to consumers was only 11 cents. The balance had to be subsidised by the city council. In February 2003 Suez abandoned the contract, reportedly because of disputes over its interpretation.<sup>95</sup></p>					
25	Concession	Ongoing 1995  Remark : Suez via Aguas de Barcelona	Colombia	Aguacar	Cartagena	<ul style="list-style-type: none"> <li>o Asymmetrical financial risks</li> <li>o World Bank pressure</li> </ul>
DETAILS	<p><b>Asymmetrical financial risks :</b><sup>96</sup> Acucar had a responsibility for operating water supply and sanitation, but limited responsibility for financing investments. Immediately after being awarded the 26-year affermage-style contract, ACUACAR signed a fee-based management with Aguas de Barcelona. So that Aguas de Barcelona was remunerated through the dividends paid to shareholders and the management fees, calculated as a percentage of Acucar's gross income.</p> <p>Another striking feature of the Cartagena PPP was that the alleviation of the financial burden carried by the municipal water operations. "When the water supply was privatised, the municipality retained responsibility for payment of pensions to the staff of the former municipal-owned water company. This heavy financial obligation, currently 16,000m pesos per year (\$8m), reduces the funds available for social investment in health and education. This factor should be taken into account when evaluating the overall impact of PSP on the urban poor".</p> <p><b>World Bank Pressure :</b><sup>97</sup> In 1995 the newly elected mayor of Cartagena was fiercely opposed to the way the water PPP had been set up leading to the award of the contract to Aguas de Barcelona in December 1994. This was due to lack of transparency and accountability and potential inducements to corruption. The mayor wanted to annul the contract and remunicipalise the water services but changed his mind when the World Bank made clear that it would made funding conditional to privatisation. As a result, the mayor did not terminate the contract and simply renegotiated the terms of the arrangements with Aguas de Barcelona.<sup>98</sup></p>					
26	Concession 30 years	Terminated 1997-2005  <a href="#">Termination at the request of the public authorities</a> <sup>99</sup>	Bolivia	Aguas del Illimani	La Paz El Alto	<ul style="list-style-type: none"> <li>o No sewage obligations</li> <li>o Interpretation problems</li> </ul> <p style="text-align: right; border: 1px solid black; padding: 2px;">See also Cases n°18 and 44</p>
DETAILS	<p><b>No sewage obligations – interpretation problems :</b> the contract only request from the operator to ensure water distribution. No correlative sewage service has to be provided. This situation is questionable regarding efficiency issues, but it also creates uncertainty and interpretations problem on the scope of parties respective investment obligations.<sup>100</sup></p>					

<sup>95</sup> "Infrastructure: Malaysian Firm Interested In Hcm City's Half-Completed Water Project" Global News Wire - Asia Africa Intelligence Wire [Vietnam News Briefs, 11 July 2003] – source Psiru.

<sup>96</sup> Psiru – *Water privatisation in Latin America* July 2002, pp 19-20.

<sup>97</sup> Psiru – *Water privatisation in Latin America* July 2002, pp 19-20.

<sup>98</sup> Andrew Nickson: "Establishing and Implementing a Joint Venture - Water and Sanitation Services in Cartagena, Colombia" GHK International January 2001 – source Psiru.

<sup>99</sup> Decreto Supremo n°27973, December 12, 2005, to initiate necessary termination steps.

<sup>100</sup> Audit of Aguas del Illimani contract "Análisis de los contratos de concesion y regimen de bienes, sus antecedentes y consecuencias." April 2000, p.v

## 2.2.3 Execution of the contract

The following development will present details on the execution of contracts that encountered problems. Presentation is made by territories :

- 2.2.3.1 Sub-Sahara Africa
- 2.2.3.2 East Asia – South Asia
- 2.2.3.3 Latin America
- 2.2.3.4 USA
- 2.2.3.5 Europe

### 2.2.3.1 Sub-Sahara Africa

VEOLIA						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
27	Concession	Distressed <sup>101</sup> 1997	Gabon	SEEG	Five towns including Libreville	<ul style="list-style-type: none"> <li>o Underinvestment</li> <li>o Breakdowns of water supply</li> <li>o Public health problems</li> </ul>
<p><b>Underinvestment</b> : In Gabon, Veolia purchased 51 of the State water and electricity company (SEEG) in 1997, in a privatisation designed by the World Bank's private sector division, the International Finance Corporation (IFC). Veolia paid FCFA7.6 billion (US\$13.7 million), and the company's initial investments were assisted by funds from Agence France de Developpement.<sup>102</sup> Between 1997 and 2001, the privatised SEEG's investment in water amounted to about FCFA16 billion (equivalent to US\$22 million)<sup>103</sup>, and the numbers connected to water rose from 57,000 to 90,000, out of an urban population of 788,000.<sup>104</sup> According to the IFC, "From the time of its privatization until present [2005] SEEG financed all of its investments with equity and cash flow from operations only." According to PPIAF, Among the main business responsibilities of the operator were investment. "Although not required by the contract to invest, the government continues to finance major investments in the water network in the capital city (due to the amount of investment needed) (...)."<sup>105</sup></p> <p><b>Breakdowns of water supply</b> : in 2004, long interruptions in supply and poor water quality.<sup>106</sup></p> <p><b>Public health problems</b> : In December 2004 Gabon suffered its first ever outbreak of typhoid, with 50 cases in Oyem, a town of 35,000 people, following repeated breakdowns of the local water supply system. Julien Meye, a doctor at the endemic diseases service in Libreville, stated that, "This is the first typhoid fever alert in the region and in Gabon."<sup>107</sup></p>						
DETAILS						
28	Lease	Terminated 1993-1995  Termination at the request of the public authorities	Gambia	SOGEA	Nationwide	<ul style="list-style-type: none"> <li>o Account and financial reporting failures</li> <li>o Interpretation problems</li> </ul>
<p><b>Account and financial reporting failures</b> : : The Gambia awarded a 10-year lease contract to a Veolia subsidiary in 1993, but terminated it in 1995, alleging poor performance and contractual omissions including failure to produce accounts and financial reports.<sup>108</sup></p> <p><b>Interpretation problems</b> A report for the World Bank says there was "a high degree of uncertainty regarding the precise scope of maintenance and investment responsibilities".<sup>109</sup> The World Bank report further states that the contract was "generally considered a failure".<sup>110</sup> The increases in connections and reductions in unaccounted-for-water were due not to the lease contract but to the implementation of a donor funded project by the public authorities.<sup>111</sup></p>						
DETAILS						

<sup>101</sup> A project is said "distressed" according to the World Bank Private Participation in Infrastructure Projects database, where the government or the operator has either requested contract termination or are in international arbitration [[http://www.ppi.worldbank.org/resources/ppi\\_glossary](http://www.ppi.worldbank.org/resources/ppi_glossary)].

<sup>102</sup> "New Water Owner Will Be French" [Africa Economic Digest Reuter Textline, 24 Mars 97] – source Psiru.

<sup>103</sup> Emerging Lessons in Private Provision of Infrastructure Services in Rural Areas: *Water and Electricity Services in Gabon* Sophie Tremolet and Joanna Neale. September 2002. World Bank/ PPIAF Reference 8524 <http://rru.worldbank.org/Documents/PapersLinks/1506.pdf> - source Psiru.

<sup>104</sup> "Gabon: une enquête pour évaluer l'accès des populations à l'eau potable et à l'électricité" [Xinhua News Agency, 15 juillet 2004] – source Psiru.

<sup>105</sup> PPIAF Toolkit 2006, p 221.

<sup>106</sup> "Privatised Water Company Runs Into Supply Problems" [Africa News January 24, 2005] – source Psiru.

<sup>107</sup> "Gabon : One Dead in Typhoid Fever Epidemic" [Africa News January 7, 2005] – source Psiru.

<sup>108</sup> "Pipe dreams", p 26.

<sup>109</sup> Michel Kerf "Do State Holding Companies Facilitate Private Participation in the Water Sector? Evidence from Cote d'Ivoire, The Gambia, Guinea and Senegal" [World Bank, February 2001] – source Psiru.

<sup>110</sup> Michel Kerf "Do State Holding Companies Facilitate Private Participation in the Water Sector? Evidence from Cote d'Ivoire, The Gambia, Guinea and Senegal" [World Bank, February 2001] – source Psiru.

<sup>111</sup> "Generale faces courts at home and unhappy clients abroad" [FT Energy Newsletters - Water Briefing March 22, 1995] – source Psiru.

**VEOLIA**

N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
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29	Management	Ongoing 2001	Burkina Faso		Ougadougou	o Pressure of donors to go in private participation
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DETAILS

**Pressure of donors to go in private participation** : Donors nevertheless forced Burkina Faso to accept a management contract with French utility Veolia, as a condition of funding for a new reservoir.<sup>112</sup>

30	Management	Terminated 2000-2005  Mutual agreement	Chad	STEE	Nationwide	o Breakdowns of water supply o Quality and related public health problems
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DETAILS

**Breakdowns of water supply** : in 2004, According to the Panafrican News Agency: "the disease broke out after the city experienced water problems for several days. Inhabitants, who could not find clean drinking water, consumed polluted water from the Logone River, which carries industrial effluents. According to officials of the Chadian Water and Electricity Company (STEE), residents may have to wait for weeks before they can get clean drinking water again. 'The water pump has broken down. We urge residents to avoid drinking water from the river and wells,' an STEE official said."<sup>113</sup>

**Quality and related public health problems** : A cholera epidemic broke out in Moundou, the Chadian business capital, as a result of which at least nine people died.

31	Lease	Ended 1989-2000  No renewal at the request of the public authorities	Guinea	SEEG	Conakry	o number of connection not reached linked with high tariff costs o Interpretation problems o Claim from Veolia for compensation and settlement
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See also Case n°19

DETAILS

**Number of connection not reached linked with high tariff costs** : The high tariff costs were driven in part by low labour productivity, a large continuing presence of expatriate staff, high debt servicing costs, and considerable bad debt. Although the contract led to many service improvements, it did a poor job of reducing physical and commercial losses and in achieving big improvement in access. These failures probably also contributed to the high tariffs, because production inefficiencies could be passed through to the tariff, and slow progress on connections meant that capital costs were covered by a small customer base.<sup>114</sup>

**Interpretation problems** : there were disputes between the state company which owned the system, and the private operator, over definitions of water losses and hence responsibility for actions and investment to reduce them.<sup>115</sup>

**Claim and settlement** : The water and electricity multinationals claimed compensation and a settlement was eventually reached in 2005.<sup>116</sup>

<sup>112</sup> "Private Sector Participation In Urban Water Supply In Sub-Sahara Africa." Dr. Tony Ballance (TRC Global Management Solutions). Ms. Sophie Trémolet (Trémolet Consulting). November 2005. German Development Cooperation – cited in "Pipe Dreams", p.28.

<sup>113</sup> "Cholera epidemic breaks out in southern Chad" [Panafrican News Agency (PANA) Daily Newswire January 10, 2004] – cited in "Pipe dreams", p.28.

<sup>114</sup> OECD Task Force on Financing Water for All, Report 1, p.52 - March, 2006.

<sup>115</sup> OECD Task Force on Financing Water for All, Report 1, p. 52 - March, 2006 and K. Bayliss. Water privatisation in Africa: lessons from three case studies, May 2001, PSIRU. <http://www.psiru.org/reports/2001-05-W-Africases.doc>

<sup>116</sup> "Guinea; Water, Water Everywhere But Not a Drop to Drink" [Africa News October 13, 2005 Thursday].

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
32	Lease	Distressed 1993	South Africa	WSSA	Sutterheim	o Interpretation problems
DETAILS	<p><b>Interpretation problems</b> : led to disputes between the municipality and the company over who was responsible for repairs to a major water main damaged by floods in 2000. The dispute arose because the company claimed the repairs were new capital investment, and so outside their remit under the lease contract, whereas the municipality claimed the repairs were part of the companies responsibility for operations and maintenance.<sup>117</sup></p>					
33	Lease	Terminated 1992-2001  Termination at the request of the public authorities	South Africa	WSSA	Nkonkobe	o Contract nullified by high court
DETAILS	<p><b>Nullified by Court</b> : the contract was terminated by a court ruling in 2001 stating that the contract was invalid. The lawyer for Nkonkobe council, Dumisani Tabata, said the court found the contract was invalid, as it had not been published first, for comment by members of the public. Secondly, approval from the local government MEC was never obtained.<sup>118</sup></p>					
34	Management	Distressed 2001	South Africa	Johannesburg Water	Johannesburg	o Automatic cut off
DETAILS	<p><b>Automatic cut off</b> : Suez installed pre-paid water meter in Orangefarm, one of the poorest townships. Consumers were required to pay up-front for their water, and if users failed to pay the water would be automatically cut off. People without access to clean water in these areas resorted to collecting water from unsafe sources.<sup>119</sup></p>					

### 2.2.3.2 East Asia – South Asia

VEOLIA						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
35	Concession	Ongoing	China	Water Group	Shenzhen	o Corruption
DETAILS	<p><b>Corruption</b> :<sup>120</sup> The Shenzhen contract was part of a sale by the city of its utilities, by open tender. The then chairwoman of Shenzhen Energy was tried in September 2003 for bribery and embezzlement.<sup>121</sup></p>					
36	WWT/BOT  Remark : joint venture with Thames Water	Ongoing	Australia	United Water	Sydney	o Irregular bidding process o Operational failures o Lack of transparency
DETAILS	<p><b>Irregular bidding process</b> :<sup>122</sup> The bidding process involved irregularities that led to two government investigations and an inquiry by a parliamentary committee: United Water had submitted its bid documents more than four hours after the deadline and after the other bids were opened and distributed.<sup>123</sup></p> <p><b>Operational failures</b> : Fifteen months later Adelaide suffered a “big pong” over a three-month period in 1997, due to a failure to monitor one of the sewerage treatment plants.<sup>124</sup></p> <p><b>Lack of transparency</b> : United Water’s contract is secret.</p>					

<sup>117</sup> “Pipe dreams”, p 26.

<sup>118</sup> Sources: Business Day 18/12/2001 ‘South Africa: Nkonkobe Council Wins Case Against Company’; Dispatch online 15/12/2001 ‘Nkonkobe water contract nullified by high court’ Mthobeli Mxotwa <http://www.dispatch.co.za/2001/12/15/easterncape/CNULL.HTM>.

<sup>119</sup> Polaris Institute Suez Corporate Profile July 2005, pp 29-30.

<sup>120</sup> Psiru – Water privatisation and restructuring in Asia Pacific, p.7.

<sup>121</sup> “Veolia takes charge at Shenzhen Water” [South China Morning Post, December 23, 2003] – cited in Psiru “Water privatization and restructuring in Asia Pacific”, 2005 – see also Honk Kong Trade development Council ,news dated March 23, 2006 on briberies in China <http://my.tdctrade.com/airnewse/index.asp?id=17044>.

<sup>122</sup> Psiru – Water privatisation and restructuring in Asia Pacific, p7.

<sup>123</sup> William Birnbauer, *The Age (Melbourne)*, 7 May 2003, “Tapping Australia’s Water” (PSIRU Source ID: 7910).

<sup>124</sup> William Birnbauer, *The Age (Melbourne)*, 7 May 2003, “Tapping Australia’s Water” (PSIRU Source ID: 7910).

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
37	Concession 25 years	Ongoing 1997	Indonesia	Palyja	Jakarta	<ul style="list-style-type: none"> <li>o failure to achieve targets on connections</li> <li>o 2001 renegotiation : decrease of targets</li> <li>o since 2004 systematic increase of tariffs every 6 months</li> <li>o no financial risk : not even financial penalty for non-achievement of the targets<sup>125</sup></li> </ul>
<p><b>Remark :</b> There are two concessions. Each cover approximately one half of the city, and are held by subsidiary companies of Thames Water (Thames PAM Jaya - TPJ) and Suez (PAM Lyonnaise Jaya – Palya)</p> <p style="text-align: center;"><u>See also Case n°12</u></p> <p><b>Failure to achieve targets on connections :</b><sup>126</sup> By 2001, the operators had increased the total number of connections from 429,000 to 620,000, instead of the originally projected figure of 711,000 – thus failing to meet the target by about one-third.<sup>127</sup> The operators were failing on other targets as well.<sup>128</sup> Thames and Suez explain their failure to achieve targets on connections by pointing to the higher costs resulting from currency devaluation, but a city auditor pointed to excessively high operating costs, including unnecessary rent expenses and high expatriate salaries.<sup>129</sup></p> <p><b>2001 renegotiation - decrease of targets :</b> The new targets were set to reflect actual performance – and the companies have since managed to keep pace with these new lower connection targets. According to the companies and the regulator, the number of connections increased to 709,000 at the end of 2005 – a total increase of 280,000 connections.<sup>130</sup> After 8 years, this figure is still slightly below the original target for 2001 – it has in effect taken the companies twice as long to reach this level as originally forecast. The companies continue to have problems achieving the revised targets: unaccounted for water, the indicator used for leakage, has even risen again in both concessions to over 50%, some of the worst figures in Asia.<sup>131</sup></p> <p><b>Since 2004 systematic increase of tariffs every 6 months :</b> Since 2004, tariffs have been increased automatically every six months, which ensures that Pam Jaya can finance their payment of the guaranteed charges to the companies.<sup>132</sup></p> <p><b>No financial risk :</b> Under the renegotiated agreement, the private water companies are paid a ‘water charge’ by the water authority, Pam Jaya. in accordance with a formula which covers all the companies’ costs, including investment, and guarantees a 22% rate of return on capital.<sup>133</sup> There is no financial penalty for non-achievement of the targets (except billing).<sup>134</sup> Thus the company itself carries no risk (except of non-payment by Pam Jaya), and their returns are effectively guaranteed by the government.<sup>135</sup></p>						
38	Concession	Ongoing 1997	Philippines	Maynilad Water	Manila	o financial problems leading to stop paying concession fees
<p><b>Financial problems :</b> The concession (in joint venture with the Philippine company Benpres) has encountered major financial and performance problems, and there has been a tense judicial standoff between Maynilad, and the state authority the Metropolitan Waterworks and Sewerage System (MWSS). This has included threats of unilateral termination of the agreement from both sides, suspension of payment of concession fees by Maynilad due to MWSS, re-consideration of rehabilitation plans, debt-equity swaps, and other forms of restructuring. In April 2005, a debt and capital restructuring agreement was concluded with MWSS, the shareholders and the lending institutions to ensure the long-term viability of the company, and reduce Suez Group’s exposure.<sup>136</sup> By January 2006, Benpres and Suez had sold 84 per cent of Maynilad to the Philippine government.<sup>137</sup></p>						

<sup>125</sup> “Pipe dreams”, p 33 and Shofiani, N.E. (2003). Reconstruction of Indonesia’s Drinking Water Utilities - Assessment and stakeholders’ perspective of private sector participation in the capital province of Jakarta. TRITA-LWR Master Thesis LWR-EX-03-30 – source Psiru.

<sup>126</sup> “Pipe dreams”, pp 31-33

<sup>127</sup> Harsono, A. (2003). *Water and politics in the fall of Suharto*. International Consortium of Investigative Journalists – source Psiru.

<sup>128</sup> Shofiani, N.E. (2003). *Reconstruction of Indonesia’s Drinking Water Utilities - Assessment and stakeholders’ perspective of private sector participation in the capital province of Jakarta*. TRITA-LWR Master Thesis LWR-EX-03-30 – source Psiru.

<sup>129</sup> Harsono, A. (2003). *Water and politics in the fall of Suharto*. International Consortium of Investigative Journalists – source Psiru.

<sup>130</sup> Operator Performance December 2005 . *Jakarta Water Supply Regulatory Body (JWSRB)* <http://www.jakartawater.org/eng/index.php> – source Psiru.

<sup>131</sup> Ardhanie, N. Water privatisation in Indonesia. In Balanya, B., Brennan, B., Hoedeman, O., Kishimoto, S. and Terhorst, P. (2005). *Reclaiming public water: Achievements, struggles and visions from around the world*. Transnational Institute and Corporate Europe Observatory. January 2005.; and Operator Performance December 2005 . *Jakarta Water Supply Regulatory Body (JWSRB)* <http://www.jakartawater.org/eng/index.php> – source Psiru.

<sup>132</sup> Pipe dreams”, pp 33-34 – Current Status Restated Cooperation Agreement (RCA) “Water Service Provision in the DKI Jakarta” between PAM JAYA and PT. PALYJA & PT. TPJ By: Jakarta Water Supply Regulatory Body October 2005 [http://jakartawater.org/eng/?page\\_id=85](http://jakartawater.org/eng/?page_id=85) – source Psiru.

<sup>133</sup> Current Status Restated Cooperation Agreement (RCA) “Water Service Provision in the DKI Jakarta” between PAM JAYA and PT. PALYJA & PT. TPJ By: Jakarta Water Supply Regulatory Body October 2005 [http://jakartawater.org/eng/?page\\_id=85](http://jakartawater.org/eng/?page_id=85) – source Psiru.

<sup>134</sup> Shofiani, N.E. (2003). *Reconstruction of Indonesia’s Drinking Water Utilities - Assessment and stakeholders’ perspective of private sector participation in the capital province of Jakarta*. TRITA-LWR Master Thesis LWR-EX-03-30 – source Psiru.

<sup>135</sup> “Pipe dreams”, p 33. Shofiani, N.E. (2003). Reconstruction of Indonesia’s Drinking Water Utilities - Assessment and stakeholders’ perspective of private sector participation in the capital province of Jakarta. TRITA-LWR Master Thesis LWR-EX-03-30 – source Psiru.

<sup>136</sup> 2005 Suez reference document, p.284.

<sup>137</sup> “Pipe dreams”, p 31.



SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM

39	WWT/BOT	Terminated 1999-2002  <a href="#">Termination at the request of the operator</a>	Vietnam	Suez Pilecon	Thu Duc	o Interpretation problems
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DETAILS

**Interpretation problems** : Under the contract, it sold water to the city water utility at 20 cents per cubic metre, although the price charged by the utility to consumers was only 11 cents. The balance had to be subsidised by the city council. In February 2003 Suez abandoned the contract, reportedly because of disputes over its interpretation.<sup>138</sup>

### 2.2.3.3 Latin America

(Types: WD/C – water distribution, concession contract; WS/BOT = bulk water supply, build-operate-transfer contract; WWT/BOT = wastewater treatment, build-operate-transfer contract)

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM

40	Concession 30 years	Terminated 1993- 2005 <sup>139</sup>  <a href="#">Termination at the request of the public authorities</a>	Argentina	Aguas Argentinas	Buenos Aires	o Early high tariff rising o Underinvestments o Water breakdowns  <a href="#">See also Case n°13</a>
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DETAILS

**Early high tariff rising** : Only 8 months after the award Aguas Argentinas requested an extraordinary review of tariffs, due to 'unexpected' operational losses which was obtained in June 1994.<sup>140</sup>

**Underinvestments** : AA was not fulfilling its contractual obligation to expand its services and investments. In the first three years of the concession investments only amounted to 45% of the total required by the contract.<sup>141</sup>

**Water breakdowns** : Aguas Argentinas was fined US\$666,000 for interruptions to water supply in early January 2005 that affected thousands of residents around Buenos Aires. Aguas Argentinas has owes 20 million US\$ in accumulated fines.<sup>142</sup>

41	Concession 30 years	Ongoing 1997	Argentina	Aguas Cordobesas	Cordoba	o interpretation problems o Not extended
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DETAILS

**Interpretation problems** :<sup>143</sup> The unclear distinction of responsibilities between the provincial government, which owned the infrastructure, and the municipality weakened "the overall regulatory role of the public sector, at the same time enhancing the bargaining strength of the private concessionaire".

It remained unclear whether the projected 97% coverage ratio included low-income areas, for which the operator seemed to have no legal requirement to connect residents to the network. Also, the 1997 contract only provided for the operator's responsibility to build and extend the primary network and not residential connections, which remained the responsibility of the municipality or individual households.

**Not extended** :<sup>144</sup> The concession agreement required Aguas Cordobesas to extend water supply coverage from 83% to 97% over the 30-year duration of the concession. "By mid-2000 service coverage for water had reached 87%, compared with only 40% for sewerage".

<sup>138</sup> "Infrastructure: Malaysian Firm Interested In Hcm City's Half-Completed Water Project" [Global News Wire - Asia Africa Intelligence Wire - Vietnam News Briefs, 11 July 2003] – source Psiru.

<sup>139</sup> 2005 Suez reference document, p.285.

<sup>140</sup> "Private and public interest in water and energy" by David Hall and Emanuele Lobina in Natural Resources Forum 28 (2004), p.271.

<sup>141</sup> Vilas, C., "Water privatisation in Buenos Aires", NACLA Report on the Americas, Vol. 38, N°1, July/August 2004, p. 36 – in Polaris Institute Suez Corporate profile, July 2005, p.28.

<sup>142</sup> "Argentina fines foreign-owned water, energy providers", [Agence France Presse, January 12, 2005] - in Polaris Institute Suez Corporate profile, July 2005, p.17.

<sup>143</sup> Psiru – *Water privatisation in Latin America* July 2002, p 14.

<sup>144</sup> Psiru – *Water privatisation in Latin America* July 2002, p 14.



## SUEZ

N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
42	Concession 30 years	Ongoing 2000	Brazil	Manaus Saneamento Aguas do Amazonas	Manaus	<ul style="list-style-type: none"> <li>o underinvestments</li> <li>o environmental problems</li> </ul>

DETAILS

**Underinvestments** :<sup>145</sup> Total investment over the life of the concession was estimated at US\$ 280m or Euro 300m, 40% of which in the first five years. Suez initially pledged that in five years it would extend water supply to 95% of the population and sanitation to at least 30% of the population (from 10% actually receiving sanitation services). However, after the concession award Suez stated that sanitation was in "dreadful" conditions and that changes could not be introduced overnight.<sup>146</sup> Financial support would be provided by the state owned development bank BNDES (Banco Nacional de Desenvolvimento). BNDES agreed to issue a R\$ 72mn loan to help Lyonnaise pay the R\$ 193m price. BNDES would also support the company's investment programme.<sup>147</sup>

**Environmental problems** : several legal disputes, including those relating to the discharge of untreated waste water and **the invoicing process** are in progress. Suez has accrued provisions.<sup>148</sup>

43	Concession 26 years	Ongoing 1995	Colombia	Aguacar	Cartagena	o Not extended
<p><b>Remark</b> : Suez via Aguas de Barcelona</p>						

DETAILS

**Not extended** :<sup>149</sup> The result is that many of the poor are 'invisible' to the contractor: the company claimed that over 90 per cent of the population were connected by 1999, whereas a World Bank report the same year stated that "Nearly one-third of the population, mostly in poor neighbourhoods, is without running water and basic sanitation services". The company's estimates are based on a gross underestimation of the target population because they ignore those citizens who reside outside the legally defined "urbanised" area of the municipality.

44	Concession 30 years	Terminated 1997-2005	Bolivia	Aguas del Illimani	La Paz El Alto	<ul style="list-style-type: none"> <li>o Not extended</li> <li>o Lack of transparency</li> <li>o Water quality problems</li> <li>o Water pressure problems</li> <li>o No respect of insurance policy's obligation</li> </ul>
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Termination at  
the request of  
the public  
authorities <sup>150</sup>

See also Cases n°18 and 26

**Not extended** : A recent audit requested by the regulatory authority in the current process of Suez departure from the country (May 26, 2006)<sup>151</sup> has concluded that the operator had missed between 15% and 25% of its obligation of extension of connections.

**Lack of transparency** : The same audit also refers to a lack of transparency (due namely to wrong accountancy options) that does not provide sufficient evidences and accurate data to authorities, preventing any reliable assessment of operator's effective investments.<sup>152</sup>

DETAILS

The audit also reveals a violation of the national legal disposition on environment and namely regarding the obligation to provide an accurate environmental impact report.<sup>153</sup>

**Water quality problems** : The audit has identified various water quality problems, namely in water plants located in Achachicala and Puchuckollo.<sup>154</sup>

**Water pressure problems** : The audit refers to water pressure under the contractual requirements during years 1999, 2000, 2002 and 2003.<sup>155</sup>

**No respect of insurance policy's obligation** : Another audit dated April 2000 had also reported that the operator had neglected its obligation of insurance during from 1997 to 1999.<sup>156</sup>

<sup>145</sup> Psiru – *Water privatisation in Latin America* July 2002, p 18.

<sup>146</sup> Source: PSIRU Database; "Suez gets water concession in Manaus, Brazil", News Item 4390. Sources: No.4734:- SLE press release 30/06/00 'Lyonnaise des Eaux Awarded the Water Management Contract in Manaus, Brazil'.

<sup>147</sup> Source: PSIRU Database.

<sup>148</sup> 2005 Suez reference document, p.285.

<sup>149</sup> Psiru – *Water privatisation in Latin America* July 2002, pp 19-20.

<sup>150</sup> Decreto Supremo n°27973, December 12, 2005, to initiate necessary termination steps.

<sup>151</sup> Pozo & Asociados CPA SRL, Resume ejecutivo a la Auditoria Regulatoria a la empresa Aguas del Illimani, May 26, 2006, pp 4-8. Audit requested by the regulatory authority "Superintendencia de Aguas de Saneamiento Basico" (SISAB).

<sup>152</sup> Pozo & Asociados CPA SRL, Resume ejecutivo a la Auditoria Regulatoria a la empresa Aguas del Illimani, May 26, 2006, pp 11-14.

<sup>153</sup> Pozo & Asociados CPA SRL, Resume ejecutivo a la Auditoria Regulatoria a la empresa Aguas del Illimani, May 26, 2006, pp 17-21.

<sup>154</sup> Pozo & Asociados CPA SRL, Resume ejecutivo a la Auditoria Regulatoria a la empresa Aguas del Illimani, May 26, 2006, pp 21-23.

<sup>155</sup> Pozo & Asociados CPA SRL, Resume ejecutivo a la Auditoria Regulatoria a la empresa Aguas del Illimani, May 26, 2006, p. 23.

<sup>156</sup> Audit of Aguas del Illimani contract "Análisis de los contratos de concesion y regimen de bienes, sus antecedentes y consecuencias." April 2000, p.vi.

VEOLIA						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
45	Concession	Terminated 1995-1998  <a href="#">Termination at the request of the public authorities</a>	Argentina	Agua del Aconquija	Tucuman	<ul style="list-style-type: none"> <li>o Underinvestment</li> </ul>
46	Concession	Ongoing 1998	Brazil	Sanepar	Maringá Paranavaí Foz do Iguaçu	<ul style="list-style-type: none"> <li>o Quality problems</li> <li>o Environmental problems</li> <li>o Excessive prices</li> </ul>
						<p><b>Quality problems</b> :<sup>159</sup> Following a marked increase in the number of people suffering from renal problems and diarrhoea, analysis carried out by Parana state laboratory in August 2001 found that water supplied by Sanepar in Itaperuçu was contaminated by faecal colibacteria. The samples analysed contained no chlorine at all and the concentration of faecal coliform bacteria was capable of causing disease.<sup>160</sup> Also, Sanepar supplied water of quality below legal requirements in the metropolitan region of Curitiba, with bad smell and taste due to algae contamination.<sup>161</sup></p> <p><b>Environmental problems</b> :<sup>162</sup> In August 2001, Brazilian environmental agency Ibama (Instituto Brasileiro do Meio Ambiente) fined Sanepar R\$ 1m for exploiting groundwater sources without the required licence. The licence could only be obtained after submission of an environmental impact assessment of the implications of groundwater abstraction. Land slippage causing damage to properties in the Curitiba region had been attributed to groundwater abstraction.<sup>163</sup> Also, in August 2001 local councillors and environmentalists denounced Sanepar for discharging raw wastewater into the river Vermelho.<sup>164</sup></p> <p><b>Excessive prices</b> :<sup>165</sup> According to local press reports, in April 2002 the municipality of Maringá was to take legal action against the tariffs increases imposed by Sanepar. Tariff increases in Maringá would be higher than anywhere else in the state of Paraná, with the exception of the capital Curitiba. In May 2002, a court ruling suspended the validity of the 18.6% tariff increase imposed by Sanepar. Neighbouring municipalities seemed to be following the example of Maringá: Paranavaí city council obtained a court ruling which ordered the restitution to consumers of the amounts charged as a result of the increases. Astorga city council decided that wastewater charges would be reduced from 80% to 30% of water supply charges, arguing that the prevailing ratio was "abusive". Finally, Maringá city council established a commission with the mandate to investigate Sanepar's behaviour in the municipality as regards accounting and financial matters. In June 2002, city councilors in Foz do Iguaçu denounced irregularities in invoicing, including less than transparent bills with no breakdown of costs for water supply, sanitation and other services, charging for services which in most cases were not provided, and charging for minimum consumption. The city councilors proposed that wastewater charges be reduced from 80% to 30% of water supply charges, that a water regulator for the municipality of Foz do Iguaçu be set up, that minimum consumption be fixed in relation to the costs incurred by individual consumers, and that Sanepar issue transparent bills to each consumer.</p>

<sup>157</sup> Psiru – *Water privatisation in Latin America* July 2002, p 14.

<sup>158</sup> Source: PSIRU database; Hudson, P. "Muddy waters – Overview of troubles with Argentina's water infrastructure", *Latin Trade Business & Industry*: 5 Mar 1999. Following the refusal of the large majority of customers to pay water bills, the company rescinded the contract and the operations were retained under public control. Vivendi subsequently filed a \$100 m suit against the government and an ICSID (International Centre for the Settlement of Investment Disputes) arbitration panel is currently examining the case.

<sup>159</sup> Psiru – *Water privatisation in Latin America* July 2002, pp 16-17.

<sup>160</sup> Observatorio Social ([www.observatoriosocial.org.br](http://www.observatoriosocial.org.br)); Folha do Paraná, 19/08/2001 – source Psiru.

<sup>161</sup> Observatorio Social ([www.observatoriosocial.org.br](http://www.observatoriosocial.org.br)); Gazeta do Paraná, 7/08/2001. Gazeta do Povo (PR), 9/08/2001. Gazeta do Paraná, 13/08/2001 – source Psiru.

<sup>162</sup> Psiru – *Water privatisation in Latin America* July 2002, pp 16-17.

<sup>163</sup> Observatorio Social ([www.observatoriosocial.org.br](http://www.observatoriosocial.org.br)); Gazeta do Povo (PR), 28/08/2001 – source Psiru.

<sup>164</sup> Observatorio Social ([www.observatoriosocial.org.br](http://www.observatoriosocial.org.br)); Gazeta do Povo (PR), 28/08/2001– source Psiru.

<sup>165</sup> Psiru – *Water privatisation in Latin America* July 2002, p.17.

## 2.2.3.4 USA

VEOLIA						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
47			USA	Water Applications & Systems Corporation  Aqua Alliance Intl		<ul style="list-style-type: none"> <li>o Various lawsuits mentioned in the Base Prospectus issued by Veolia Environment on June 6, 2006</li> <li>o Quality problems</li> <li>o Public health problems</li> <li>o Transactional payments</li> </ul>
<p><b>Lawsuits regarding public health :</b> Several present and former indirect subsidiaries of Veolia Water in the United States<sup>166</sup> are defendant in lawsuits in the United States in which the plaintiffs seek to recover for personal injury and other damages for alleged exposure to asbestos, silica and other potentially harmful substances (...) Reserves have been accrued by Veolia Water's present subsidiaries for their estimated liability in these cases based on, among other things, the nexus between the claimed injuries and the products manufactured or sold by Veolia Water's subsidiaries (...) To dated, none of these claims has been tried to a verdict.<sup>167</sup></p> <p><b>Modification of presentation of the cost of these claims :</b></p> <p>Version dated November 8, 2005 of the Base prospectus Veolia states that "A number of such claims have been resolved to date through settlement or dismissal. To date, none of these claims has been tried to a verdict. Veolia does not expect these claims to have material adverse effect on its business, financial condition or results of operation. <b>It is not possible, however, to predict the extent to which additional claims of this type may be filed in the future against Veolia Water's present or former subsidiaries or the amounts for which Veolia Water's present or former subsidiaries ultimately may be liable as a result of such claims.</b>"<sup>168</sup></p> <p>Version dated June 8, 2006 that supersedes the previous one Veolia states differently the same issue "A number of such claims have been resolved to date through settlement or dismissal. To date, none of these claims has been tried to a verdict. <b>During the 5-year period ended December 31, 2005, the company's average annual costs relating to these claims, including amounts paid to plaintiffs and legal fees, have been approximately US\$3 million net of reimbursements by insurance companies. Although it is possible that future costs might increase, the Company currently has no reason to believe that any material increase is likely to occur, nor does it expect these claims to have material adverse effect on its business, financial condition or results of operation.</b>"</p>						
48	Concession 20 years	Ongoing since 2002	USA	Veolia Water Indianapolis  Remark : both ISO 9001 and ISO 14100 certification awarded <sup>169</sup>	Indianapolis	o Lack of transparency
<p><b>Lack of transparency :</b><sup>170</sup></p> <p>In summer 2005, Council member Jim Bradford last summer called for a performance audit of the company.</p> <p>In October 2005, four Veolia employees were subpoenaed by a federal grand jury as part of an investigation into allegations that water-quality reports were falsified.</p>						

<sup>166</sup> These include subsidiaries of Aqua Alliance and subsidiaries of Water Applications & Systems Corporation (formerly known as United States Filter Corporation), the holding company of the former USFilter group the majority of the activities of which were sold to different purchasers in 2003 and 2004 [p.269 of the Base Prospectus issued by Veolia Environment on June 6, 2006 regarding its Euro medium term note programme Euro 12,000,000,000].

<sup>167</sup> Base Prospectus issued by Veolia Environment on June 6, 2006 regarding its Euro medium term note programme Euro 12,000,000,000, pp 269-270 - <http://www.veolia-finance.com/media/pdf/file0070.pdf>.

<sup>168</sup> Base Prospectus issued by Veolia Environment on November 6, 2005 regarding its Euro medium term note programme Euro 8,000,000,000, p. 107.

<sup>169</sup> Mentioned in Veolia water booklet "Veolia Environment – Partner to Cities" distributed June 20, 2006 during a European Policy Summit co-organised in Brussels by *Friends of Europe* and the European Water Partnership, with the support of Veolia Environnement and the Water Supply and Sanitation Technology Platform.

<sup>170</sup> O'Shaughnessy, Brendan. "Water company awash in controversy." [Indianapolis Star, October 7, 2005] – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 17.

**VEOLIA**

N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
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49	<b>Waste water treatment facility</b>	<b>Terminated in 2002</b>	<b>USA Puerto Rico</b>	<b>Companas de Aguas de Puerto Rico (CAPR)</b>	<b>Barceloneta</b>	<ul style="list-style-type: none"> <li>o <b>Environmental and public health related problems</b></li> <li>o <b>Current litigation</b></li> </ul>
	Remark : Veolia through Aqua Alliance					

**Environmental and related public health problems :<sup>171</sup>**

On September 22, 1999 and February 10, 2000, several law suits were filed in the Commonwealth Court in Arecibo, Puerto Rico (transferred to San Juan, following the decision of the Supreme Court of Puerto Rico) against, among others, CAPR. CAPR was a subsidiary of Aqua Alliance until 2000, when it was transferred to Proactiva, Veolia Environment's joint venture with FCC.

DETAILS

The complaints allege that CAPR operated (until June 2002) a wastewater treatment facility in Barceloneta, that emitted offensive odors and hazardous substances into the environment, which damaged the health of plaintiffs, a group of local residents.

The lawsuit is currently in the preliminary stage of determining damages and responsibility. Concurrently, a mediation proceeding commenced on May 28, 2003, at the request of the court and all parties, in order to find a complete solution to this litigation. This mediation has not yet resulted in a specific proposal. Total damages sought against all defendants currently amount to approximately US\$300 million. In light of the state of advancement of these two proceedings, Veolia Environment has not accrued a reserve for the potential outcome of this litigation.

50	<b>Management</b>	<b>Terminated 1995-2002</b>	<b>USA Puerto Rico</b>	<b>PRASA</b>	<b>Puerto Rico</b>	<ul style="list-style-type: none"> <li>o <b>Major performance problems : management, quality, efficiency, transparency</b></li> <li>o <b>Fines</b></li> </ul>
	Remark : Veolia through Aqua Alliance	Termination at the request of the public authorities				

**Major performance problems :<sup>172</sup>** The Puerto Rico Office of the Comptroller issued two critical reports in August 1999 and May 2001. There have been major problems with performance, including deficiencies in management, operation and maintenance of aqueducts and sewers, quality, efficiency and required financial reports that were either late or not submitted at all. Comptroller Manuel Díaz-Saldaña declared that water privatization "has been a bad business deal for the people of Puerto Rico".<sup>173</sup>

DETAILS

**Fines :** When Veolia was forced to leave after paying \$6,2 million in fines imposed by the Environmental Protection Agency, 3,181 deficiencies in the administration, operation and maintenance of the water infrastructure had been identified. Among them, the May 2001 Comptroller reports that operating losses had increased from US \$241 million to US \$695 million in May 2001.<sup>174</sup>

51	<b>Management 10 years</b>	<b>Terminated 1998-2004</b>	<b>USA</b>		<b>Rockland MA</b>	<ul style="list-style-type: none"> <li>o <b>Illegal award</b></li> <li>o <b>Post termination legal process</b></li> </ul>
	Remark : Veolia through its USA subsidiary US Filters	Termination at the request of the public authorities				

**Illegal award :** After six years, the city cancelled the contract after the State of the Inspector General found the agreement may have been illegal because it was specifically tailored to Veolia and excluded other bidders.<sup>175</sup>

DETAILS

**Post termination legal process :** the city and Veolia wound up suing each other in federal court – the city claiming Veolia owes it \$1,6 million, and the corporation alleging the contract was improperly cancelled. The case has yet to go to trial.<sup>176</sup>

<sup>171</sup> Veolia Reference document 2005, p.271.

<sup>172</sup> Psiru – *Water privatisation in Latin America* July 2002, p 24.

<sup>173</sup> Carmelo Ruiz-Marrero, "Water company near collapse", May 26, 2001, San Juan, Puerto Rico – source Psiru.

<sup>174</sup> Ruyz-Marrero, Carmelo. "Water company near collapse." [Rio Vivos, May 26, 2001] – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 19 – And Polaris Institute Veolia Corporate profile, June 2005, p.24.

<sup>175</sup> 2003 Annual Report. Office of the Inspector General, Commonwealth of Massachusetts, June 2004 – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 20 and Polaris Institute Veolia corporate profile, June 2005, p.23.

<sup>176</sup> Hollands, Courtney. "Town countersues fired sewer plant operator." [Quincy Patriot Ledger, July 23, 2004] – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 20.

## VEOLIA

N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
52	Management	Terminated 1996-2004	USA		Angleton Texas	<ul style="list-style-type: none"> <li>o Weak level of service</li> <li>o Post termination legal process</li> </ul>

DETAILS

- o **Weak level of service** : The city of Angleton terminated its contract with Veolia Water North America, saying that the company did not provide the promised level of service. The company had been running the city's wastewater treatment plant and maintaining the city's streets since 1996.<sup>177</sup>
- o **Post termination legal process** : Since the contract was terminated, the city and Veolia Water North America have been embroiled in a number of lawsuits.<sup>178</sup>

## SUEZ

N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
53	Concession	Terminated 2002-2005	USA	United Water	Laredo Texas	<ul style="list-style-type: none"> <li>o No such savings as promised</li> <li>o Termination agreement</li> </ul>

DETAILS

**No such savings as promised** : Facing failure to reach its promised savings, and blaming its underachievement on the city's aging infrastructure, Suez asked the city for \$5 million for unexpected expenses plus an additional \$3 million per year. City officials refused, saying the company knew what it was getting itself into and calling the corporation's claims "bogus".<sup>179</sup>

**Termination agreement** : The city rejected Suez's offer of \$500,000 to sever the contract. The sides finally reached an agreement in March 2005, with Suez paying the city \$3 million and turning over some of its equipment.<sup>180</sup>

54	Operation Management 10 years <sup>181</sup>	Terminated 2002-2004	USA	PRASA	Puerto Rico	<ul style="list-style-type: none"> <li>o Poor performance</li> <li>o Consequences of termination (service, financial, quality)</li> </ul>
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DETAILS

**Poor Performance** : After 18 month on the job, Suez demanded an extra \$93 million from the government, alleging it was given false information about the water system. Local official disagreed and accused the corporation of poor performance. "Basic services such as providing drinking water, better sewers and better infrastructure have not improved," Puerto Rico's ombudsman said.<sup>182</sup> PRASA balked at paying the \$93 million, cancelled the contract and regained full control of the system in June 2004.

**Consequences of termination** : Service interruptions, poor water quality and other problems went largely unsolved, and PRASA now faces an operational deficit of \$1,2 billion, much of which could be passed on to citizens.<sup>183</sup>

<sup>177</sup> Polaris Institute Veolia Corporate profile, June 2005, p.22.

<sup>178</sup> Zen Zheng, C. "City appeals judge's ruling" [The Houston Chronicle, June 24, 2004] cited in Polaris Institute Veolia Corporate profile, June 2005, p.22.

<sup>179</sup> Cordova, Erica. "City takes back water duty." [Laredo Morning Times, March 19, 2005] – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 19.

<sup>180</sup> Cordova, Erica. "City takes back water duty." [Laredo Morning Times, March 19, 2005] – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 19.

<sup>181</sup> Psiru – *Water privatisation in Latin America* July 2002, p 24.

<sup>182</sup> James, Canute. "Talks over Puerto Rico Water deal." [Financial Times, December 5, 2003] cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 19.

<sup>183</sup> Blasor, Lorraine. "Government to retake money-losing Prasa on April 1." [Caribbean Business, January, 2004] – cited in "Faulty pipes" by Foodandwaterwatch, 2006, p. 19.

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
55	Concession Remark : Suez through its USA subsidiary United Water	Terminated 1999-2003 <a href="#">Termination at the request of the public authorities</a>	USA	United Water	Atlanta Georgia	<ul style="list-style-type: none"> <li>o Poor performance :               <ul style="list-style-type: none"> <li>o unacceptable maintenance backlogs</li> <li>o repairs delayed</li> <li>o inadequate responses to emergency</li> </ul> </li> <li>o No costs savings as promised</li> </ul>
<p><b>Poor performance</b> : Due in part to staff cuts, maintenance backlogs were “unacceptable”, repairs were delayed, and responses to emergencies were “consistently and habitually inadequate and potentially hazardous”.<sup>184</sup></p> <p><b>No costs savings as promised</b> : Only half of the expected savings were realized.<sup>185</sup></p>						
56	Operation Management Remark : Suez through its USA subsidiary United Water	Ongoing 1996	USA	United Water Services	Houston Texas	<ul style="list-style-type: none"> <li>o Conflicting relations between parties</li> </ul>
<p><b>Conflicting relations between parties</b> : In 1996, United Water was hired by the city of Houston to privatize a municipal water purification plant. In November 2001, United filed a lawsuit seeking US\$900,000 because, according to United Water, the city failed to pay them for services rendered. The city of Houston filed a \$2 million countersuit in federal court claiming that United did not live up to its original agreement in its maintenance of the plant and that \$2 million in repairs need to be made.<sup>186</sup> The city then filed a plea to the jurisdiction on the United Water’s suit. The trial court granted the city’s plea and dismissed the case.<sup>187</sup></p>						

### 2.2.3.5 Europe

Cf also cases above mentioned (n°1 to 10 in France, n°11 in Germany and n°17 in Italy).

VEOLIA						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
57	Concession 25 years <sup>188</sup>	Ongoing 2001	Romania	Apa Nova	Bucharest	<ul style="list-style-type: none"> <li>o Wrong accountancy options</li> </ul>
<p><b>Wrong accountancy options</b> : In February 2003 it was reported that three experts have been asked to help resolve a dispute between Apa Nova and the city of Bucharest. The dispute arises from claims made by an inspection team from the Romanian prime minister’s office. The team identified irregularities in the execution of the lease contract which transferred management of certain assets to Apa Nova, with assets transferred which had not been on the list approved by the city council, and which did not relate to water and sewage services. The team also said that assets which had been provided in 2000 by the city of Bucharest towards its share of the new company had not been properly accounted for.<sup>189</sup></p>						

<sup>184</sup> Suggs, Ernie. “Council agrees to end water deal rejects gag rule” [Atlanta Journal-Constitution, March 4, 2003] – cited in “Faulty pipes” by Foodandwaterwatch, 2006, p. 14.

<sup>185</sup> Roberts, Kristin. « US water privatization effort trips in Atlanta. » [Reuters, January 29, 2003] – cited in “Faulty pipes” by Foodandwaterwatch, 2006, p. 13.

<sup>186</sup> Colley, J., “Legal deluge inundates first city water plant privatisation effort” [Houston Business Journal, August 16, 2002] – cited in Polaris Institute Suez Corporate profile, July 2005, p. 30.

<sup>187</sup> “United Water Services Inc. v City of Houston” [Texas Lawyer, May 14, 2004] – cited in Polaris Institute Suez Corporate profile, July 2005, p. 30.

<sup>188</sup> Public Citizen Veolia Environment corporate profile, February 2005, p.16.

<sup>189</sup> Serban Georgescu, 27 February 2003, “Bucharest looses about 50% of its drinking water”, Nine O’Clock website ([www.nineoclock.ro](http://www.nineoclock.ro) - accessed 27/02/2003), <http://www.nineoclock.ro/index.php?issue=2714&show=business> (PSIRU Source ID: 7711) – source psiru David Hall, Emmanuelle Lobina and Robin de la Motte in “Water privatisation and restructuring in Central and Eastern Europe and NIS countries”, 2002, p.13.

**SUEZ**

N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
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58	Concession	Terminated 1998  Termination at the request of the public authorities	Germany	Euowasser	Potsdam	o Asymmetrical commercial risks
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DETAILS

**Asymmetrical commercial risks** : In 1998, the municipality of Potsdam terminate the water concession given to Suez's German subsidiary, Euowasser. Water consumption was lower than assumed in the tender, so the company called for a massive price increases which the city would not accept.<sup>190</sup>

59	Concession	Ongoing	UK	Northumbrian Water		o Water quality problems o High price increases
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DETAILS

**Water quality problems** :The UK's Environmental Agency found Suez's subsidiary to be the second worst company based on operational performance. The water contained high levels of iron and manganese.<sup>191</sup>

On Tuesday 13 December, Northumbrian Water Ltd, fined £2,500 at Gateshead Magistrates Court for causing sewage to pollute a stream at Heworth, Gateshead. The company pleaded guilty and was ordered to pay full costs of £1,216.53 to the Environment Agency, which brought the case. The Court heard that Environment Agency officers visited Heworth Burn on April 14 2005 and found strong evidence of sewage, that is, toilet paper, sanitary products, a smell of sewage, and fungus, extending for the length of the stream.<sup>192</sup>

**High price increases** : There had been a 110% increase in the price of water between 1989 and 1996. Suez was told to cut their prices by 25% after which Suez said it will hurt its environmental investment programs and they will be unable to meet EU environmental standards in the time allotted.

It has to be noted that since May 2003, Suez has sold 75% of its full share of Northumbrian Water to a group of 20 institutional investors in a sale value at EUR 2.2 billion. Suez remains the largest stakeholder with a 25% share, thus maintaining its investment potential in the UK water market. According to their press release, the decision was based on improving cash flows and improving an average rate of return on capital employed in their European operations, with a net debt reduction of EUR 3.1 billion. Suez CEO, Gérard Mestrallet, at the annual shareholder's meeting in April, had stated that the UK-regulated water market limits profitability as it requires water companies to be owners as well as operators, with an associated commitment to continue investment.<sup>193</sup>

<sup>190</sup> Public Service International Research Unit News, 1998 – cited in Polaris Institute Suez Corporate profile, July 2005, p.31.

<sup>191</sup> "UK Environmental Agency "names and shames" worst corporate polluters", June 1999, <http://www.ukenvironment.com/corporaterespons.html#corporate%20polluters>. – cited in Polaris Institute Suez Corporate profile, July 2005, p.32.

<sup>192</sup> <http://www.environment-agency.gov.uk/news/1241935>.

<sup>193</sup> "Suez sells 75% of Northumbrian Group and achieves a new milestone in implementation of the Action Plan 2003-2004", Suez Press release, May 17, 2003 - <http://www.suez.com/finance/english/actualites/detail.php?id=1028&pg=year&anneeteq=2003>.



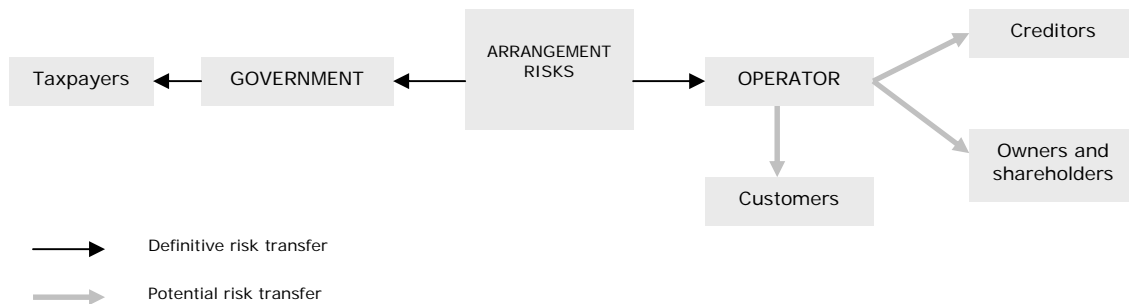
## 2.2.4 Termination of the contract

### 2.2.4.1 Final allocation of risks and responsibilities

As already mentioned, “the political pressures exercised on the governments so that they refloat big projects and suppliers of essential services, could mean that the governments incur more important risks than let it understand the contract”.<sup>194</sup> It has also been recognized that “in many infrastructure privatisations, governments have assumed risks that investors should bear, both because the investors have been understandably wary of taking on the considerable risks involved and because governments have been able to offer guarantees without incurring any immediate cash costs”.<sup>195</sup>

Public-Private Infrastructure Advisory Facility (IBRD - World Bank) confirms this trend when it compares government and operator’s options of risk transfer in a concession.

**Initial and final risk allocation for a concession :**<sup>196</sup>



It can be deduced from this figure that operator has wider risk transfer options at its disposal than the government.

This figure illustrates another major asymmetry :

- when the operator can namely 1) accrue a reserve, 2) inform its financial partner of market risks,<sup>197</sup> 3) initiate international arbitration or 4) risk insurance claim for compensation<sup>198</sup> and 5) decide to redirect its activity in other geographical areas ;
- the public authorities still have to deliver public services and must assume leaving operator’s obligations to do so. No matter how and why the service delegated to a private operator has been terminated, customers will be able to express their dissatisfaction through public disorder and/or elections.

<sup>194</sup> International Monetary Fund “public-private partnerships”, public finance department, 2004 - cited in Meriem Ait Ouyahia, “Le partenariat public-privé pour financer les infrastructures municipales d’eau potable : quels sont les défis” – document de discussion, Government of Canada, May 2006, p. 35.

<sup>195</sup> Timothy Irwin, Michael Klein, Guillermo E. Perry, Mateen Thobani “Managing Government Exposure to Private Infrastructure Risks”, The World Bank Research Observer, vol.14, n°2, August 1999, p.243.

<sup>196</sup> Public-Private Infrastructure Advisory Facility (World Bank) Toolkit “Approach to Private Participation in Water Services” 2006, p 104, Figure 6.5

<sup>197</sup> Cf risk factors mentioned p 13 s. in the base prospectus issued by Veolia November 8, 2005 for its Euro 8,000,000,000 euro medium note programme.

<sup>198</sup> Damon Vis-Dunbar and Luke Eric Peterson, in Investment Treaty News (ITN) newsletter dated July 4, 2006 quote Christopher Cardena (Partner with the law firm of Chadbourne and Parke LLP) “In fact, it may be more advantageous for the foreign investor to pursue a claim under the Political Risk insurance policy and allow the insurers to recover subsequently under any applicable investment treaty by way of subrogation”.



## 2.2.4.2 Disputes – Arbitration

When disputes arise within investor/state relation, reference to arbitration is never far as this is the most used mode of dispute settlement.<sup>199</sup>

Resulting from the proliferation of international investment treaties, international arbitration addresses important issues regarding the balance of strength between states and investors. The 2003 World Investment Report argues that *a new approach is urgently required* so that benefits from entering into international investment agreements and the *need to secure sufficient policy space* are properly balanced.<sup>200</sup> More recently Mary C. Hallward-Driemeier specified that when requesting a better investment climate for everyone, “the goal is to improve outcomes for society as a whole, not just for firms”.<sup>201</sup>

In the following paragraph we will illustrate how the arbitration step in States/Investor relationship may operate as a factor of asymmetry on various matters :

- asymmetrical access to arbitration
- asymmetrical transparency
- asymmetrical jurisdictional competency
- asymmetrical hierarchy of norms

### 2.2.4.2.1 Asymmetrical access to arbitration

While both contracting parties have equal access to State-to-State dispute settlement, in the case of investor-State procedures, there are ad hoc and institutional processes, access to which may be left to the preference of the investor. The only limitation in some cases is that once the investor submits a dispute to an investor-State procedure, this choice can prevent recourse to other procedures (“fork in the road clause”).<sup>202</sup>

For instance, the Agreement between the Government of the Argentine Republic and the Government of the Republic of France for Reciprocal Protection and Promotion of Investments, states in its article 8-2 :<sup>203</sup>

“If any dispute cannot be so settled within six months of the time when a claim is made by one of the parties to the dispute, the dispute shall, **at the request of the investor**, be submitted :

- either to the domestic courts of the contracting party involved in the dispute ;
- or to international arbitration under the conditions described in paragraph 3 below

**Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of this procedure is final”.**

Investment agreements thus give ascendancy to the investor, who is the principal beneficiary of rights contained in agreements entered into between States.<sup>204</sup> Not surprisingly, the principal disputes relating to investment agreements have arisen between the investor and the host State, not inter-States.<sup>205</sup>

Moreover, in investor-State proceedings, the nature of the dispute resolution procedures can provide a great deal of leeway in how cases will be decided...[T]hey could encourage investors to pursue their case even if the merits are not all that strong.<sup>206</sup>

Moreover, the notion of “fork in the road” that should guarantee that choice of procedure (either in front of national jurisdiction or arbitration court) by the investor be final, seems not being as efficient as the States may consider initially.

<sup>199</sup> Evidence points to a significant increase in the use of investor-State dispute settlement procedures under investment agreements since 1997. See Cosbey, Mann, Peterson and von Moltke, “investment and sustainable development”, 2004, pp 15-16.

<sup>200</sup> “Foreign Direct Investment Innovative sources of Development Finance and Domestic Resource Mobilization”, Tony Addison and Georges Mavrotas, August 10, 2004, p. 10.

<sup>201</sup> Mary C. Hallward-Driemeier is Senior Economist and Investment Climate Coordinator with Development Research Group, The World Bank, and Deputy Director of the World Development Report 2005 - source : <http://www1.worldbank.org/devoutreach/mar05/article.asp?id=279>.

<sup>202</sup> Carlos M: Correa “Bilateral investment agreements: Agents of new global standards for the protection of intellectual property rights?”, August 2004, p.26 - [http://grain.org/briefings/?id=186#\\_ftn86](http://grain.org/briefings/?id=186#_ftn86).

<sup>203</sup> French Decree n°93-834 dated May 28, 1993.

<sup>204</sup> “Foreign Direct Investment Innovative sources of Development Finance and Domestic Resource Mobilization”, Tony Addison and Georges Mavrotas, August 10, 2004.

<sup>205</sup> Carlos M: Correa “Bilateral investment agreements: Agents of new global standards for the protection of intellectual property rights?”, August 2004, p.27.

<sup>206</sup> Mary C. Hallward-Driemeier, “Do bilateral Investment Treaties attract FDI ? Only a bit...and they could bite”, Policy Research Working Paper n°3121, p.6, August 2003 - [www.econ.worldbank.org/files/29143\\_wps3121.pdf](http://www.econ.worldbank.org/files/29143_wps3121.pdf).

## FORK IN THE ROAD CLAUSE

N°	CASE N°	DECISION	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
60	ARB/01/12 Argentina v. Azurix	Dec. 8, 2003 <sup>207</sup>	Argentina	Azurix		o strict interpretation of "fork in the road" clause

DETAILS

**Strict interpretation of "fork in the road clause"** : No effect of the clause if the investor claimed in front of national jurisdictions on the basis of the contract, via its local subsidiary. The fork in the road effect is limited to claims based on the applicable bilateral investment treaty and confronting the same parties (State and foreign investor).<sup>208</sup>

## 2.2.4.2.2 Asymmetrical transparency

It can also be noted that promoting arbitration mode of dispute resolution creates an asymmetry towards transparency requirements. Indeed, when transparency is mentioned as a basic postulate in the process of entering in private participation projects,<sup>209</sup> at the final arbitration step, transparency does not appear any more as a crucial issue (regarding namely the acceptance of the award by the citizens). Lack of public debate and unsystematic publication of the awards (generally subject to both parties consent) do not reach the transparency requirement.

This is all the more so remarkable that current responses to petitions for participation as *amicus curiae* confirms this trend:<sup>210</sup>

## ICSID AMICUS CURIAE CLAIMS

N°	CASE N°	DECISION	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
61	ARB/03/17 Argentina v. Aguas Provinciales de Santa Fe, Suez, SG AGBA, Interaguas	Order in response dated March 17, 2006 <sup>211</sup>	Argentina	Aguas Provinciales de Santa Fe	Santa Fe	o no access to hearings o qualification of petitioners as <i>amicus curiae</i>

DETAILS

**No access to hearings** : the Tribunal has decided to deny petitioner's request to attend the hearings of this case,<sup>212</sup> referring to ICSID arbitration rule 32(2), which states : "The tribunal shall decide, **with the consent of the parties**, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings". Tribunal states that "the crucial element of consent by both parties to the dispute is absent in this case".<sup>213</sup>

**Qualification of petitioners as *amicus curiae*** : In its conclusion, the Tribunal grants in b) "an opportunity to Petitioners to apply for leave to make *amicus curiae* submission if and when the Petitioners provide the Tribunal with convincing information and reasons that they qualify as *amicus curiae*" while denying in c) Petitioners' request for access documents.

It can be questioned how petitioners could be able to provide the tribunal with convincing information and reasons that they qualify as *amicus curiae* without having access to documents.<sup>214</sup>

62	ARB/03/19 Argentina v. Aguas Argentinas, Suez, SG AGBA, Vivendi Universal	Order in response dated May 19, 2005 <sup>215</sup>	Argentina	Aguas Argentinas	Buenos Aires	o no access to hearings o qualification of petitioners as <i>amicus curiae</i>
Same comments as the case ARB/03/17 above						

<sup>207</sup> Decision on jurisdiction dated December 8, 2003 - <http://www.worldbank.org/icsid/cases/azurix-decision-en.pdf> and also see award dated July 14, 2006 - <http://ita.law.uvic.ca/documents/AzurixAwardJuly2006.pdf>.

<sup>208</sup> JDI, 1, 2004, p.286.

<sup>209</sup> "Designing arrangements that combine legal protection with legitimacy requires thinking about many things discussed in the toolkit, including : Considering how private participation will affect customers and other stakeholders and involving them in the design of the arrangement". PPIAF Toolkit "Approach to Private Participation in Water Services" 2006, p.6.

<sup>210</sup> To avoid such inertia, International Institute for Sustainable Development (IISD) Negotiator's Handbook [April 2006, p.29] suggests namely in its article 18 that when any breach of investors post-establishment obligations (art.14) and corporate governance (art.15) is raised by an intervener (among them an *amicus curiae* contribution), "the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages award in the event of such award".

<sup>211</sup> Order in response to petition for participation as *amicus curiae* dated March 17, 2006 - <http://www.worldbank.org/icsid/cases/ARB0317-AC-en.pdf>.

<sup>212</sup> International Centre for Settlement of Investment Disputes (ICSID) – order in response to a petition for participation as *amicus curiae* dated March 17, 2006 in Case n°ARB/03/17, section 38, p.14.

<sup>213</sup> ICSID – order in response to a petition for participation as *amicus curiae* dated March 17, 2006 in Case n°ARB/03/17, section 7, p.4.

<sup>214</sup> Eric, Teynier, "L'*amicus curiae* dans l'arbitrage CIRDI", in Gazette du Palais, recueil novembre-décembre 2005, p. 3981.

<sup>215</sup> Order in response to petition for participation as *amicus curiae* dated May 19, 2005 - <http://www.worldbank.org/icsid/cases/ARB0319-AC-en.pdf>.

## NAFTA AMICUS CURIAE CLAIMS

N°	CASE N°	DECISION	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
63	NAFTA	Final award dated August 3, 2005	USA	Methanex	USA California	o no consideration of any of <i>amicus curiae</i> issues

DETAILS

**No consideration of any of *amicus curiae* issues in the final award** : i.e. that while welcoming *amicus curiae* contribution, arbitrators are not obliged to address any of the elements provided by *amicus curiae*. In this case they referred only once to *amicus curiae* contribution in a final award of more than 300 pages, and just to state that one of them disagreed on one investor's argument.

It is worth noting that the various *amicus curiae* raised in their contribution rather important notion that arbitrators have not considered at all, namely the impact of referendum process, the principle of precaution in environment matters, the notion of right of water.<sup>216</sup>

## 2.2.4.2.3 Asymmetrical jurisdictional competency

Whatever the arrangement may provide in its dispute settlement clauses (and namely the competence of national jurisdictions), recent significant decisions show that they have to accommodate with BIT arbitration clauses and related ICSID, ICC or UNICTRAL arbitration institutions.

Articulation of these two sources of dispute resolution (the Arrangement between parties on one side and the Treaty between states on the other) leads to an asymmetrical jurisdictional competence : When the investor is able to file a claim either in front of national jurisdictions or in front of an arbitration body, the States will be confronted to a less effective alternative : either national courts (which will not impair investor to claim damages in parallel in front of an arbitration institution) or an arbitration institution but in this latter case, the defendant will not be the investor but its home State, hence turning the arbitration in a more diplomatic process. The host state is deprived of any balanced right to initiate counterclaim.<sup>217</sup>

## ARTICULATION OF ARRANGEMENT AND BIT DISPUTE SETTLEMENT CLAUSES

N°	CASE N°	DECISION	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
64	ARB/01/12 Argentina v. Azurix	Dec. 8, 2003	Argentina	Azurix Buenos Aires SA (ABA)		o Inefficiency of renunciation clause

DETAILS

**Inefficiency of renunciation clause** : No matter if Argentineans authorities had taken precautions to ensure national jurisdictions in case of dispute<sup>218</sup> (namely to avoid precedent cases like Argentina v. Lanco were ICSID jurisdiction had been confirmed despite a renunciation to any other competence fork in the road clause in the agreement<sup>219</sup> , i.e. firstly, mentioning in the concession agreement of the La Plata national court jurisdiction in case of dispute and secondly, renunciation clause by which the operator renounces claiming in front of any other jurisdiction.

Indeed, despite these contractual disposition on jurisdiction, The ICSID arbitration tribunal receiving Azurix Corp complaint has recognized its jurisdiction, stating that the renunciation was strictly limited to disputes based on the contract and did not bind the investor to claim based on the Bilateral Investment Treaty.

## 2.2.4.2.4 Asymmetrical hierarchy of norms

It should here be emphasised that the case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation. Such superiority of international law against national and even constitutional dispositions shall also be taken into consideration in the assessment of parties' respective tools to defend their interest.<sup>220</sup>

<sup>216</sup> Eric, Teynier, "l'*amicus curiae* dans l'arbitrage CIRDI", in Gazette du Palais, recueil novembre-décembre 2005, p. 3981.

<sup>217</sup> International Institute for Sustainable Development (IISD) Negotiator's Handbook [April 2006, p.29] suggests in its article 18 to expressly acknowledge the right to initiate counterclaim for the hosts state.

<sup>218</sup> Namely to avoid precedent cases like Lanco v. Argentina and Vivendi I v. Argentina, were ICSID jurisdiction had been confirmed despite a renunciation to any other competence fork in the road clause in the agreement [JDI, 1, 2004, § 78].

<sup>219</sup> JDI, 1, 2004, p.276.

<sup>220</sup> See Case "Montijo" in 1875 were request for application of its national constitution was denied to Colombia as and excuse for not applying a treaty with USA - Cf. arbitral award of July 26. VII. 1875 in the Montijo case, La Pradelle Politis, *Recueil des arbitrages internationaux*, Paris, 1954, t. III, p. 675.

Hallward-Driemeier cautions that investor-state arbitrations under the treaties could “expose policy makers to potentially large scale liabilities and curtail the feasibility of different reform options.”<sup>221</sup>

Interpretation of notions such as “investment”, “property right” and related “expropriation” arising from BIT have been interpreted in such a way by arbitration tribunals that any regulatory measure that might have adverse effect on investor profitability should qualify as a violation of investor’s property right and lead to damages compensating an expropriation.

The asymmetry is all the more so observable that, to avoid qualification of expropriation, the State bears the burden of proof that any regulatory measure it has taken does not violate investor’s property right.<sup>222</sup>

#### 2.2.4.2.5 Arbitration used as a tool of pressure by investors

It should be repeated that fairness is a universally accepted postulate of international trade relationships.<sup>223</sup> Hence, considering the above-mentioned asymmetries, using of arbitration claim as a tool of pressure when investor-states relation becomes critical may not conform to fairness requirement.

SUEZ						
N°	TYPE	STATUS	COUNTRY	COMPANY	LOCATION	TYPE OF PROBLEM
65	Concession	Terminated 1997-2005  Termination at the request of the city <sup>224</sup>	Bolivia	Aguas del Illimani	La Paz El Alto	o Use of ICSID claim as mean of pressure during the negotiation process

**Use of ICSID claim as mean of pressure during the negotiation process** : by letter date June 13, 2005, sent to the Water Ministry, Suez mentioned its intention to claim for compensation in front of ICSID if no solution has been found within six month.

This situation put the Bolivian state in a dilemma :

DETAILS

**Either it negotiates a mutual agreement with Suez – advantages** : No negative effect on Bolivian image towards investment community / withdraws risk of arbitration claim / maintains international financial institutions support - **disadvantages** : long process of assets assessment to determinate shares’ purchase price in opposition with citizens willing operator leaving / purchase agreement subject to citizen’s concern/implies losing any right to raise contractual breaches / implies large impunity of operators executives.

**Or, it terminates the relation unilaterally – advantages** : immediate effect / maintains its right to sue the operator for breaches of contractual obligations – **disadvantages** : Bolivian administration needs to ensure immediately a transitional water management / operator may activate immediately a claim in front of ICSID or other arbitration body to obtain compensation / difficulties to maintain international financial institutions support / correlative major investments needed/negative image of Bolivian towards investment community.

#### 2.2.4.3 Dispute - Settlement agreement

A settlement agreement might be reach between the State and the operator in order to put an end to their relationship and their disputes. At this stage also, one can observe in action the legal expertise asymmetry, as legal documentation will focus less on financial conditions of the agreement than on the clause of guarantee, responsibility and confidentiality. Operator’s legal advisers pay a great attention to

- 1) strictly limit the period and scope of seller’s (operator) guarantee,
- 2) strictly limit the period and scope of former executives when such right to sue their responsibility is not simply abandoned by the State,
- 3) and no less strictly limit the freedom of expression regarding the agreement in order to avoid any adverse effect on the company image.

<sup>221</sup> Mary C. Hallward-Driemeier (Senior Economist and Investment Climate Coordinator with Development Research Group, The World Bank, and Deputy Director of the World Development Report 2005) in “Do bilateral Investment Treaties attract FDI ? Only a bit...and they could bite”, Policy Research Working Paper n° 3121, August 2003, abstract - [www.econ.worldbank.org/files/29143\\_wps3121.pdf](http://www.econ.worldbank.org/files/29143_wps3121.pdf).

<sup>222</sup> This issue has been raised in the second edition of the International Institute for Sustainable Development (iisd) Model International Agreement on Investment for Sustainable Development - Negotiator’s Handbook [April 2006]. Article 8 consecrated to “expropriation” states that an investor would have to show that the measure is not *bona fide*, for example that it has a disguised purpose - Model International Agreement on Investment for Sustainable Development, commentary on article 8, p.18.

<sup>223</sup> A French award 5030 dated 1992 states “Belonging to the common collection of the national laws, the obligation to behave fairly in the contractual relations, establishes naturally a principle of the international economic relations”, in JDI 1993, p.1004, obs. Y. Derains – cited in JDI 4 2004, p.1293.

<sup>224</sup> Decreto Supremo n° 27973, December 12, 2005, to initiate necessary termination steps.

### 2.3 Synthesis of parties respective tools to defend their interest

It arises from the previous developments that **asymmetrical balance of tools** to defend their respective interest characterizes State/investors relation. This context combined with more than debatable WMNCs practices addressed in this study, not only might legitimate early PPP termination at the request of States but also highlight a general situation of weakness of these latter towards foreign investors.

The following synthesis (Figure 5) intends to sum up and highlight the various asymmetries arising at each contractual steps of States-investors relation that should be considered by arbitrators in their analysis :

Figure 5

		CHRONOLOGICAL CONTRACTUAL STEPS			
		PRECONTRACTUAL STEPS	EXECUTION	DISPUTE TERMINATION	POST TERMINATION
TOOLS AT PARTIES' DISPOSAL TO DEFEND THEIR INTEREST	<b>WMNC</b>	BIT dispositions IFI conditionnalities Unrealistic biddings Few competitors Legal expertise	Renegotiation of financial/performance conditions Guarantee of costs recovery Right of property Currency devaluation protection	Claim in front of arbitration institution (effectively used or used as a mean of pressure) Wide interpretation of the notions of investment and expropriation <sup>225</sup> Few competitors	Possibility for WMNCs to redirect its activity Purchase and settlement agreement avoiding any personal liability and operator's guaranty Legal expertise
	<b>Fundamental Obligations</b>	<b>International scale</b> : no one regarding fundamental human rights or environmental issues, except guidelines like "OECD Guidelines for Multinational Enterprises" <sup>226</sup> or internal charters with no constraining effect <b>Domestic scale</b> : Host country national laws as existing at the entrance of the contract			
	<b>STATE</b>	Regulatory bidding procedure Choice of private partnership modalities	Regulatory authority Periodic contract revision	Claim in front of national jurisdictions State to State arbitration Fines Early termination	Ownership of facilities Choice of water management modalities
	<b>Fundamental Obligations</b>	<b>International scale</b> : <ul style="list-style-type: none"> <li>▪ International regulations even if not constraining (namely in the scope of water, states have to respect General Comment n°15 of the Committee on Economic, Social and Cultural Rights of the Commission on Human Rights dated November 2002)</li> <li>▪ Bilateral Investment Treaties</li> </ul> <b>Domestic scale</b> : Constitutional rights and obligations (namely obligation of service continuity)			

This rather heterogeneous set of **tools** is nevertheless relevant as it shows the wide range of options at operator's disposal, compared with State contractual and public policy options.

The difference of perspectives and related **fundamental obligations** is also relevant as it might not only explain weakness of States in a process of negotiation (either at the entrance, the renegotiation or the dispute settlement steps) but also should legitimate, bona fide regulatory measures currently qualifying as expropriation in arbitration courts.

In this trend, the second edition of the IISD Model of International Agreement on Investment and Sustainable Development (April 2006) states in its article 25 (D) : "*Bona fide*, non-discriminatory measures taken by a Party to comply with its international obligations under other treaties shall not constitute a breach of this agreement."<sup>227</sup>

<sup>225</sup> See study of the International Institute for Sustainable Development "Private Rights, Public Problems – A guide to NAFTA's controversial chapter on investor rights", 2001, pp 30-33 - [http://www.iisd.org/pdf/trade\\_citizensguide.pdf](http://www.iisd.org/pdf/trade_citizensguide.pdf).

<sup>226</sup> <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

<sup>227</sup> IISD Model International Agreement on Investment for Sustainable Development, article 25 (D), p.38.

## CONCLUSION

More than the breaches of contractual or legal obligations during execution of contracts, what should be considered is the behaviour of WMNCs in the key steps of their contractual relationship with authorities : the negotiation before award, the renegotiation of tariffs and the management of conflict with authorities. At each of these stages, WMNCs use their rights and the particular context of developing countries (dependence from international financial institutions) put them in a very strong position.

The point is that at each of these stage, public authorities face an asymmetric balance in matter of expertise, public order obligations and jurisdictional recourse. It is quite remarkable that whereas contractual breaches are revealed and sometimes even acknowledged by WMNCs, their responsibility is almost neutralised by the possibility they have to ask for compensation and damages in front of arbitration courts on the ground of Bilateral Investment Treaties breaches.

As a consequence, such context should be considered very carefully by arbitrators when assessing the legitimacy and the amount of damages requested by water multinational companies. Notion of *good faith* dully recognised in international law should, in current legal context, be included in the scope of arbitrators' analysis.

To finish, we come back to bases. In order to meet Millennium Development Goals, public authorities and operators, whether public or private operators, need sustainable arrangements. As PPIAF Toolkit 2006 states :<sup>228</sup>

*"But for the arrangement to work well, the government must create an arrangement that most people perceive as fair. Otherwise, customers and voters may pressure the government to override the contractual protection to the point that operator's property rights are revealed as less secure than they seemed on paper."*

We have seen along the study how asymmetrical may be the relation between State and operators. **From the first pre-contractual step to the ultimate dispute resolution process, we have gathered elements demonstrating how Veolia and Suez have used and abused of any flaw in a legal context to its own advantage. It should be relevant to notice this general asymmetry as it is often the source of arrangement perceived by people as unfair.**

Such unfairness shall lead to acts that currently qualify as an expropriation for arbitration purpose, i.e. either to social disorder involving expropriation from the State for public order reasons, or to early termination from the State to prevent such social disorders. In both cases such State decisions should often qualify as legitimate public welfare measures and impact assessment of private operator fair compensation.<sup>229</sup>

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<sup>228</sup> Public-Private Infrastructure Advisory Facility (PPIAF), IBRD, World Bank, Toolkit "Approach to Private Participation in Water Services" 2006 – p 5.

<sup>229</sup> See Homayoon Arfazadeh « Ordre public et arbitrage international à l'épreuve de la mondialisation » [LGDJ, 2005].





### APPENDIX 1 – TABLE OF SYNTHESIS

N°	Location	Operator	Status	Pre-competitive bidding	Unethical bidding	Irregular bidding process	Anti-competitive process	Corruption	IPF presence	Design of the agreement	Asymmetrical op and maint responsibility	Asymmetrical op and maint risks	Asymmetrical commercial risks	Execution	Interpretation problem	Lack of transparency	Undertive contract	No cost savings	Poor maintenance	Underconnected	Breakdown of water supply	Water quality problems	Insurance problems	Environmental problems	Public health problems	Maintenance problems	Decrease of operator problems	Excessive prices increase	Fines	Termination	Initiative of termination	Annulment of the agreement	Dispute settlement agreement	National jurisdiction claim	Arbitration claim		
1	France	Suez – Veolia	Non ap																																		
2	France	Suez	Non ap																																		
3	France	Veolia	Non ap																																		
4	France	Veolia	Non ap																																		
5	France	Veolia	Non ap																																		
6	France	Suez	Non ap																																		
7	France	Veolia	Non ap																																		
8	France	Veolia	Non ap																																		
9	France	Veolia	Non ap																																		
10	France	Suez	Non ap																																		
11	Germany	Suez	0																																		
12	Indonesia	Suez	0																																		
13	Argentina	Suez	T																																		
14	USA	Veolia	Non ap																																		
15	USA	Veolia	0																																		
16	Italy	Veolia	0																																		
17	Lesotho	Suez	Non ap																																		
18	Bolivia	Suez	T																																		
19	Guinea	Veolia	E																																		
20	China	Veolia	0																																		
21	Argentina	Suez	0																																		
22	Malaysia	Suez	0																																		
23	India	Suez	0																																		
24	Vietnam	Suez	T																																		
25	Colombia	Suez	0																																		
26	Bolivia	Suez	Cf n°18																																		
27	Gabon	Veolia	D																																		
28	Gambia	Veolia	T																																		
29	Burkina Faso	Veolia	0																																		
30	Chad	Veolia	T																																		
31	Guinea	Veolia	Cf n°19																																		
32	South Africa	Suez	0																																		
33	South Africa	Suez	T																																		
34	South Africa	Suez	0																																		
35	China	Veolia	0																																		
36	Australia	Veolia	0																																		
37	Indonesia	Suez	Cf n°12																																		
38	Philippines	Suez	0																																		
39	Vietnam	Suez	T																																		
40	Argentina	Suez	Cf n°13																																		
41	Argentina	Suez	T																																		
42	Brazil	Suez	0																																		
43	Colombia	Suez	Cf n°26																																		
44	Bolivia	Suez	Cf n°19																																		
45	Argentina	Veolia	T																																		
46	Brazil	Veolia	0																																		
47	USA	Veolia	Non ap																																		
48	USA	Veolia	0																																		
49	USA	Veolia	T																																		
50	USA	Veolia	T																																		
51	USA	Veolia	T																																		
52	USA	Veolia	T																																		
53	USA	Suez	T																																		
54	USA	Suez	T																																		
55	USA	Suez	T																																		
56	USA	Suez	0																																		
57	Romania	Veolia	0																																		
58	Germany	Suez	T																																		
59	UK	Suez	0																																		

Non ap : non applicable  
Non av : non available

T : terminated  
O : Ongoing  
D : Distressed  
E : Ended

S : State  
O : Operator  
M : Mutual

Statistics  
Out of 54 contracts  
Veolia 27 Suez 27

1) Terminated  
30%  
Suez : 59%  
Veolia : 41%

2) Termination  
Initiative  
State : 82%  
Operator : 12%  
Mutual : 6%

3) Asymmetrical  
Financial risks  
16,00%  
Suez : 89%  
Veolia : 11%

4) Interpretation  
Problems  
18%  
Suez : 60%  
Veolia : 40%

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