

Foreign Investment in the Water  
Sector: The example of  
*Biwater versus Tanzania*

Nathalie Bernasconi-Osterwalder

Center for International  
Environmental Law (CIEL)

# Structure of discussion

1. Background to private participation in Dar es Salaam water delivery system

2. Three topical issues:

- Relationship of water sector to human rights law
- Investor protection under international investment treaties (IIAs)
- Prevalence of renegotiation of contracts

# Water Service in Dar es Salaam: Background

- **Until 1991:** Water is a free service in Dar es Salaam.
- **1991:** Subsidies removal in the water sector and move towards self-financing.
- **1997:** Creation of the Dar es Salaam Water and Sewerage Authority (DAWASA) as a quasi-commercial parastatal agency / Search for private operator begins.
- **1999:** Adoption of Water Law allowing for the privatization of DAWASA's operational activities.
- **2000:** WB/IMF Conditionalities.

# Bidding process and lease contract

- **2002:** A British-German-Tanzanian consortium (CWS) wins the tender for a project to manage and operate the water and sewerage system in Dar es Salaam.
- **2003:** The consortium, incorporated as a Tanzanian company, enters into a lease contract for the implementation of the Dar es Salaam Water Supply and Sanitation Project with DAWASA.
- Under the Lease Contract, the operator agrees to provide water and sewerage services on behalf of DAWASA for a period of ten years.
- **2003:** World Bank and other donors award funding in the amount of US\$ 140,000,000 for repairs, upgrades, and expansion of the Dar es Salaam water and sewerage infrastructure.

# Lack of improvement despite privatization

***“The primary assumption on the part of almost all involved, certainly from the donor side, was that it would be very hard if not impossible for the private operator to perform worse than DAWASA. But that is what happened.”***

*(United Republic of Tanzania: Privatization Impact Assessment – Infrastructure, PPIAF Report, 21 July 2005)*

# Desire of operator to renegotiate lease contract

December 2004 / January 2005: CWS proposes a revision of the lease terms:

- reduction in the amount of equity required from the investors
- increase of tariffs
- reduction of lease and other fees
- write off of existing obligations to DAWASA
- free hand in reduction of staff
- extension of lease contract

# Investor guarantees in IIAs

## The UK-Tanzania BIT

- Non-discrimination principles (most-favored nation treatment/national treatment)
- Fair and equitable treatment
- Compensation in case of expropriation
- Investor-state arbitration: right to sue host state under international arbitration

# Issues to consider in investment arbitration relating to water

## 1. Investor conduct:

- Duty of due diligence
- Duty of good faith

## 2. Human rights obligations of host government

## 3. Role of private operator to contribute to MDG/targets

# Private participation in the water sector (Latin America)

- Almost 75% of contracts were renegotiated:
  - Initiated by government: 24%
  - Initiated by operator: 66%
  - Initiated by both of them: 10%
- On average 1.6 years after the award of the contract.

Guasch, *Doing it Right*, World Bank Institute

# Outcome of renegotiations

Renegotiations typically favoured the operator:

- Reduction of investment obligations
- Delays in investment obligations targets
- Water tariff increases

# Types of renegotiations by operators

Two types of renegotiations initiated by operators:

- Shock related: when a devaluation or a recession make the operation of a given concession unsustainable.
- Opportunistic: when a firm uses its bargaining power in bilateral negotiation with the government or the regulatory agency to strike a better deal than the initially agreed one.

Jose Luis Guasch and Stéphane Straub, 2006

# How should governments deal with requests for re-negotiations

*“The appropriate behavior for government is to uphold the sanctity of the bid and not concede to opportunistic requests for renegotiation. Doing so may lead to the abandonment of a concession, but that is a price worth paying and, in fact, can help government establish a reputation of not being easy in terms of renegotiation demands and, in doing so, would discourage future aggressive bids.”*

Guasch, *Doing it Right*, World bank Institute