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THE WORLD BANK'S INFLUENCE ON WATER PRIVATISATION IN ARGENTINA

THE EXPERIENCE OF THE CITY OF BUENOS AIRES

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TABLE OF CONTENTS

INTRODUCTION	1
I. THE WORLD BANK AND THE PRIVATISATION OF WATER SERVICES	1
A) Privatisation as a Condition of Access to World Bank Lending	1
B) World Bank Policies on Water	3
II. THE PRIVATISATION OF WATER SERVICES IN BUENOS AIRES	6
A) The Concession Contract and Early Problems	6
B) The 1997 Renegotiation of the Contract	9
C) The Service after the 2001 Economic Collapse	10
III. LESSONS TO LEARN FROM THE PRIVATISATION OF WATER SERVICES IN BUENOS AIRES	13
A) The Importance of a Sound Legal and Regulatory Framework	13
B) Increasing the Accountability of the International Institutions Involved	14
IV. CONCLUDING REMARKS	15

INTRODUCTION

The work of the International Financial Institutions (IFIs) in developing countries has been subject to intense criticism in recent years. Detractors of the International Monetary Fund (IMF) and the development agencies forming the World Bank (WB) Group do not only deplore the contents of the measures supported by IFIs, deeming that they are inappropriate to address the individual situation of different countries, but also criticise the way in which these policies are presented to indebted member states, which has been perceived as short of an imposition.

In a context of loss of prestige, the role of the IMF and WB Group has attracted particular attention in the contemporary wave of privatisation of public services.¹ Indeed, privatisation of said areas has been one of the central reforms sponsored by IFIs for reducing state deficit and stimulating economic growth in developing countries. Among the public services that have been transferred to private operators in recent decades, the case of water and sanitation in urban areas has merited special study. Given the importance of such services for the well-being of the population, and the magnitude of the business that they represent, the success or failure of privatisation processes has attracted in-depth analysis from both supporters and critics of IFIs' work.

This paper aims at becoming part of said literature and will focus primarily on the role of the WB Group even if the concomitant role of the IMF is referred to.² Secondly, it will specifically tackle the provision of drinking water and sewerage services in urban areas. Lastly, it will be centered on the privatisation in the city of Buenos Aires, though it may also incidentally refer to experiences in other regions of Argentina when appropriate.

It is by now undisputed that the privatisation processes of the water sector that the WB encouraged in this country have been less than successful. Popular distress provoked by deficient services and high tariffs, mutual accusations of violations of the terms of the contracts and suits filed before international dispute settlement organs such as the International Centre for Settlement of Investment Disputes (ICSID) have been some of the unfortunate consequences of the Argentinean experience with privatisation that led to the revocation of contracts and return of water services to the state. The main purpose of this paper is thus to provide the reader with a chronological survey of the events that determined the failure of privatisation in the city of Buenos Aires and to examine the part the WB Group played throughout the whole process. This work also aims to contribute to the determination of whether the WB Group has appraised its own performance, learned from its mistakes and changed in any way its approach to water privatisation in other parts of the world.

The paper will be divided in three main sections. Section I will briefly describe the WB's role on the international scene, its mission and lending mechanisms, and will also address its support of water privatisation. Section II will review the case of the city of Buenos Aires; chronologically, one of the first Latin American exercises in privatisation of water services that was lauded as a model for many similar processes in the region. Section III will attempt to draw lessons from the previous sections before concluding with some personal views on water privatisation in general and on the work of the WB Group in Argentina in particular.

I. THE WORLD BANK AND THE PRIVATISATION OF WATER SERVICES

A) Privatisation as a Condition of Access to World Bank Lending

The WB is formed of two development institutions: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Together with their affiliate

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- 1 Privatisation in this paper is a term that includes selling assets to a private company, tendering a water concession to a private company, or awarding management contracts to a private company. For reasons that we will see later, in the case of water services, private companies currently prefer the latter type of contract.
 - 2 Both IFIs are regarded as working in unison for similar ideals and policies, from their respective spheres of action. Resorting to IMF references for asserting the policy behind WB action is sometimes unavoidable, given that the IMF has traditionally been more open to the disclosure of loan negotiation documents, while the WB has only recently reviewed its transparency policy and given access to the public to policy and project lending documents. See IBRD/WB, *The World Bank Policy on Disclosure of Information*, (Washington DC: WB, 2002).

agencies³ they form the WB Group, whose main mission is to reduce poverty and improve living standards through financial and technical assistance to developing countries. The WB provides these countries with low-interest loans, interest-free credits and grants in an effort to help them meet the Millennium Development Goals.⁴

IBRD and IDA credits can be classified in two different groups according to their purpose. The first category ('project or investment lending') covers loans destined to finance infrastructure projects that contribute to reach higher standards of development, such as the construction of roads, dams for power generation, or schools. The second category ('policy lending') is formed of those loans that are destined to 'help a borrower achieve sustainable reductions in poverty through a program of policy and institutional actions that promote growth and enhance the well-being and increase the incomes of poor people'.⁵ In order to optimise the results of policy lending, the WB coordinates this kind of loan with IMF offices, should the country be also benefiting from IMF's lending programs.

In policy lending programmes the procedure for borrowing resources from the Bank, much like its counterpart in the IMF, is initiated with the state submitting a project proposal for assessment of its economic, financial, social and environmental viability. The state declares in a document called 'Letter of Development Policy' (LDP) how the funds will be spent, and when and how the sum will be reimbursed to the Bank. The borrower also accepts monitoring of the execution of the project by WB staff. However, policy loans are available to member states only after the borrower has agreed on satisfying a set of legal conditions shaped in concert with the Bank; usually, the implementation of a number of reforms that are considered critical for the country's social and economic development.⁶ This is known as conditionality in both IMF and WB circles and its main function, according to the Bank itself, is to ensure that the commitments taken by the country in its LDP are respected.⁷

There is no formal definition of 'conditionality' in the Bank's legal framework or operational policies, as it had not been expressly foreseen in the IBRD or IDA's Articles of Agreement. Conditionality is, in fact, the product of WB practice associated with its lending under 'special circumstances',⁸ though a few provisions in the Articles of Agreement seem to have been at the origin of the practice of attaching conditions to disbursements.⁹ Currently, there is an express mention to conditionality in the form of paragraph 13 of Operational Policy (OP) 8.60, which identifies three essential requirements for the Bank to make disbursements in a policy-based loan: (a) maintenance of an adequate macroeconomic policy framework; (b) implementation of an overall program in a manner satisfactory to the Bank; and (c) compliance with critical policy and institutional actions.¹⁰ A focal point for discussion has

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- 3 The affiliate agencies of the WB are the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Center for the Settlement of Investment Disputes (ICSID).
 - 4 The Millennium Development Goals (MDG) are eight goals that all 191 UN member states have agreed to try to achieve by the year 2015. Particularly relevant for the present work, they aim to eradicate extreme poverty and hunger, improve health conditions -reducing child mortality in particular-, and ensure environmental sustainability. One of the goals is specifically 'to halve the proportion of people who are unable to reach or to afford safe drinking water' (UN General Assembly Resolution 55/2, United Nations Millennium Declaration, UN Doc A/res/55/2, 2000, para. 19). In the 2002 Declaration on Sustainable Development it was additionally agreed to reduce by half the proportion of people without access to basic sanitation (See Report of the World Summit on Sustainable Development, UN Doc. A/Conf.199/20, 2002, para. 8, p. 11 and para. 25, p. 27).
 - 5 WB, Development Policy Lending, OP 8.60, August 2004, para. 2.
 - 6 Conditions are not usually attached to project lending programs. On the contrary, the use of conditionality in them is actually discouraged by the WB (See WB/OPCS, Disciplined Use of Conditionality in Lending Operations, 2004, and WB/OPCS, Policy Conditions in World Bank Investment Lending: A Stocktaking, 2006).
 - 7 The rationale for conditionality 'is the Bank's due diligence obligation to ensure that its resources are used effectively and responsibly by the borrowing country' (WB/OPCS, Review of World Bank Conditionality: Modalities of Conditionality, SecM2005- 0390/1, 2005, Executive Summary, para. 2).
 - 8 IBRD Articles, Article III, Section (4) (vii) and IDA Articles, Article V, Section (1) (b) provide that 'loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development'. Originally, therefore, only project lending was explicitly regulated in the Articles of Agreement.
 - 9 As the World Bank's Legal Vice Presidency explains, 'the Bank's policy-based loans must be in accordance with the "purposes" identified in the Articles. Thus, where certain policy and institutional actions and measures are considered necessary for an operation to achieve the Bank's development purposes, these "conditions" may be validly justified under the Articles (IBRD and IDA Articles, Article I)'. In addition, 'the IBRD Articles recognise that the institution may provide financing for productive purposes on "suitable conditions", while under its Articles, IDA may provide financing on appropriate terms. (IBRD Articles, Article I (ii) and IDA Articles, Article V, Section 2 (b).)' (WB/Legal Department, Review of World Bank Conditionality: Legal Aspects of Conditionality in Policy-Based Lending, SecM2005-0390/2, 2005, Executive Summary, para. 4).
 - 10 *Id.*, para. 9. In the WB context, therefore, conditionality can be defined as 'the set of conditions that must be satisfied for the Bank to make disbursements in a development policy operation'.

been the actual degree of participation of the borrower in the design and adoption of those ‘critical policies and institutional actions’ that condition for the granting of a loan by the Bank. Additionally, critics of conditionality and IFI action in developing countries claim that conditionality policies are excessively intrusive in the domestic affairs of states and, most worrisomely, that they benefit transnational corporations and reflect ‘the neo-liberal agendas and the geo-political imperatives’ of G-7 governments that are in actual control of IFIs.¹¹

The WB started to use conditionality in its policy lending programs in the early 1980’s, mirroring the IMF’s use of it in its own ‘structural adjustment programmes’. WB conditions at that time addressed only short-term macroeconomic imbalances and economic distortions. By the early 1990’s conditionality spanned reforms that emphasised improvements in public sector governance; more specifically, support for government efforts to strengthen public financial management, fiduciary arrangements and public expenditures. To achieve these ends, the Bank has put forth a range of distinct policies that included trade liberalisation, de-regulation, fiscal austerity and privatisation; this set of measures is comprised under the general term of ‘public sector reform’.

Privatisation, in this sense, has been one of the main reforms that the WB has succeeded in introducing in many countries through its lending programs.¹² Together with the IMF, the WB encourages privatisation as a polyvalent measure that simultaneously aims at regularizing fiscal accounts and reducing the role of the state in sectors where IFIs have deemed its participation ineffective. They exhort governments to retreat from managing public services and to discard protectionist and regulatory instruments and practices that deter foreign investment. In this way, they set an ideal environment for the privatisation of said services. However, the participation of the WB Group in the privatisation of water services is not limited to policy lending to states, but also encompasses the work undertaken by its private sector arm, the IFC, which has been investing along the years in privatisation projects by lending to the companies that have become concessionaries of the service.

In the following subsection we will specifically tackle the reversal in WB policy that has led it to support privatisation of public services and of water and sanitation in particular.

B) World Bank Policies on Water

The WB has quickly become ‘one of the most, if not the most important actor in the global water sector, be it in terms of financial aid or in terms of general policy-making in the developing countries’.¹³ The furtherance of privatisation of water services, in the framework of WB policies is in effect relatively recent. In fact, for decades the WB stood behind the public management of water resources.¹⁴ This stance was not due to the belief that there were not any possible alternatives to public management of water resources, but mainly to the fact that the Bank was involved in project rather than policy lending, granting loans for the construction and development of

11 S. Grusky, *The IMF, the World Bank and the Global Water Companies: A Shared Agenda*, International Water Working Group, 2001, available at: www.citizen.org/documents/sharedagenda.pdf. The leverage bestowed on conditionality is magnified because the non-implementation of public sector reform policies would not only entail difficulties with the creditor, but also negative word can virtually shut the country out of any other available source of financing and investment. Fund officials have been among the first to notice this phenomenon. Joseph Gold affirmed in 1979 that ‘the Fund’s endorsement, and the member’s observance, of a program have become, increasingly, conditions for the entry into loan contracts by other lenders or for making resources available under contracts’ (Joseph Gold, *Conditionality*, IMF Pamphlet Series N° 31 14, Washington D.C.: IMF, 1979).

12 The identification of privatisation of services -together with other distinctive liberal policies- with IFIs’ action has led analysts to create the expression ‘Washington Consensus’ for grouping the set of free market-oriented economic reforms that IFIs have been sponsoring and spreading since the late 1980’s. These policies have been summarised by the WB in its 2000 Global Poverty Report, available online at: http://www.worldbank.org/html/extdr/extme/G8_poverty2000.pdf.

13 M. Finger and J. Allouche, *Water Privatisation: Trans-National Corporations and the Re-Regulation of the Water Industry* 62 (London and New York: Spon Press, 2002).

14 From 1960 to 1990 WB loans to developing countries were mainly destined to building, expanding or maintaining public water utilities, especially to large projects such as dam construction. The Bank was convinced ‘that investment in public utilities an other infrastructure projects would trigger the development “take off” and that water utilities were natural monopolies ‘that precluded market competition and therefore required public ownership or government regulation’ (Public Citizen/Critical Mass Energy Program, *Profit Streams: The World Bank & Greedy Global Water Companies* 2, report available at <http://www.citizen.org/documents/ProfitStreams-World%20Bank.pdf>). For a comprehensive review of WB thinking along the years, see E. Mason and R. Asher, *The World Bank since Bretton Woods*, (Washington DC: The Brookings Institute, 1973).

infrastructure that would be operated and managed by the state, and that private companies themselves did not regard the provision of water services as profitable ventures. Notwithstanding, once the scarcity of water resources came to the forefront of public attention, corporations realised how lucrative the water sector could become. Coincidentally, in the early 1990's, this change of attitude of private companies happened in parallel with the change of paradigm in WB thinking regarding the role of the state in public services provision. It started to endorse the retreat of the state from any area where its presence was deemed inefficient by the Bank - among them the management of public services - and to favour private sector participation as a viable option for improving performance indicators in said areas.¹⁵

The WB's preference for privately operated water services in particular was also boosted by a simultaneous global movement for the recognition of the economic value of water. This shift at the international level was reflected in many declarations and reports of the time. The 1992 Dublin Statement on Water and Sustainable Development, for instance, called 'for fundamental new approaches to the assessment, development, and management of freshwater resources', among them the recognition of water as an economic good.¹⁶ This new approach is referred to as 'integrated water resource management' and aims at achieving optimal management of the scarce resource by addressing all activities related to it and thus at solving the problems caused by competing uses of water stocks. Agenda 21, the program for action issued after the 1992 Earth Summit, specifies that integrated management is 'based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilisation'.¹⁷ The United Nations Development Program (UNDP) quickly followed and embraced this holistic new approach to water management, making it a pivotal part of its Safe Water 2000 decade.¹⁸

The WB's answer to these trends was the delineation of new policies that considered water as an economic good. The Bank argues that competitive market pricing and allocation will improve efficiency in water management, reducing wastage, preventing environmentally harmful uses of water and thus maximizing the benefits that can be derived from this scarce resource. In the Bank's view, the incorporation of the economic side of water into integrated water resources management serves multiple purposes. It works for a more environmentally friendly management of water, but also for raising the necessary budget for maintaining and expanding water services networks.

Given that the WB was at the same time exhorting the withdrawal of the state from public services, the private sector soon became identified with integrated water resources management as the new main actor in the revamped scheme of management. The WB's own promotion of privately operated water services is said to have formally started with the publication of a 1993 Policy Paper.¹⁹ The Bank expressed its disappointment over the efficiency records of water utilities handled by state companies while admitting to have learnt lessons from the review that its own Operations Evaluation Department (OED) had conducted of WB-funded water endeavours; this review concluded that the management of its past projects in public hands had been less than stellar.²⁰ The WB claimed that in developing countries water services under public management were on the verge of collapse; specifically, that those states that lacked resources were incapable of extending the service network so as to reach the poorest sectors of the population or of modernising it to meet current salubrity and environmental standards.²¹ Basically, the WB argued that the private sector could provide a remedy to many characteristic problems of publicly-managed water services, such as corruption, inefficiency, obsolete technology, pollution and waste of resources. The Bank equally underlined the importance of pricing water services as any other private good, charging the user according to their actual consumption.²² This latter statement actually 'constitutes the main change in the policy adopted by

15 In the foreword to the World Development Report 1994, Lewis T. Preston (then president of the WB) stated that 'most of this report shows how the functions of the state need to be changed in infrastructure services according to the World Bank' (WB, *World Development Report 1994: Investing in Infrastructure*, New York: Oxford University Press, 1994). See also WB, *The State in a Changing World*, 1997 World Development Report (Washington DC: World Bank, 1997).

16 See principle 4 of the Statement on Water and Sustainable Development, issued following the International Conference on Water and the Environment, Dublin, Ireland, January 31st 1992, available online at: <http://www.inpim.org/files/Documents/DublinStatmt.pdf>.

17 Agenda 21, chapter 18, paragraph 18.8, in Report of the United Nations Conference on Environment and Development, Rio de Janeiro, UN Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex II (1992).

18 United Nations Development Programme, *Safe Water 2000 3* (New York: UNDP, 1990). See also United Nations, *A Strategy for the Implementation of the Mar del Plata Plan for the 1990s*, (New York: UN Department of Technical Cooperation, 1991).

19 WB/IBRD, *Water Resources Management: A World Bank Policy Paper*, (Washington DC: WB, 1993).

20 WB/OED, *Water Supply and Sanitation Projects: The Bank's Experience: 1967-1989*, para. 36 (Washington DC: WB, 1996). See also Water Resources Management 67, note 19 above.

21 See Water Resources Management 27, note 19 above.

22 See World Development Report 1994 23, note 15 above.

the main World Bank's water specialists',²³ since it is central to the integrated management of water resources by private operators that the IFI favors.

Another major policy at the core of the Bank's suggested reforms for the water sector is that of decentralisation, a measure which relates closely with privatisation processes. Decentralisation is defined by the WB as 'the transfer of political, fiscal and administrative powers to subnational governments'.²⁴ This definition is actually incomplete. Decentralisation indeed was originally a measure of reorganisation strictly within the public administration for improving its functioning and the quality of the services provided by it; however, said delegation of powers is currently vested on civil society and the private sector as well. The Bank regards decentralization as critical to its mission of poverty alleviation and achievement of the MDG since it is important for accomplishing such goals that states establish a well functioning public sector that delivers quality public services consistent with citizen preferences and that fosters private market-led growth while managing fiscal resources prudently. Consequently, the Bank has started to support the implementation of programmes encompassing not only political decentralisation, but also administrative, fiscal and market decentralisation, transferring authority and responsibilities for public functions from the central government to subordinate government organisations, autonomous entities and the private sector. Decentralisation, as a result, is a process that is not only limited to the reorganisation of governmental structures, ascribing new and more important functions to lower levels of the administration. It is, on the contrary, an all-encompassing phenomenon that divests the state of certain powers, though not –as it is commonly affirmed- redistributing them only among 'subnational governments' but also among non-governmental entities and private companies.

Decentralisation has the benefit of incorporating to a greater extent user participation in the overall scheme of management of water, since at least political decentralisation is identified with the involvement of civil society and elected representatives, and with granting them greater power in public decision-making regarding water management (democratisation). However, as certain analysts have pointed out, the basic function of user participation in the WB rationale 'seems to be to make economic and fiscal decentralisation acceptable, in particular by (1) seeking the users' consensus on the overall project and by (2) getting them to pay the increased fees at the local level'.²⁵ In other words, to pave the way for a privatisation process (economic decentralisation) that rests on an initial seal of approval from users that is later turned into forced compliance.

As part of its promotion of decentralisation of public services and privatisation in particular, the WB has participated in setting the proper conditions for their domestic implementation. Through structural adjustment/policy lending programs, and under IFI supervision, indebted countries have engaged in substantial changes to the legal and regulatory framework of said services in order to turn the water sector into an appealing opportunity for private investment.²⁶ The WB, through its technical advisory departments,²⁷ has played a role in this process of modification of local laws, decrees and administrative resolutions and in shaping their new contents in order to ease the transition from publicly-managed to privately-operated services. The leverage of WB policy advice is, in this sense, not to be underestimated: together with loan conditionality, policy advice forms a tandem for the imposition of public sector reform and for making its actual implementation possible.²⁸ One of such policy pieces of advice has been the suggestion to separate profitable from unprofitable areas of exploitation of water services, offering the profitable ones to private bids and keeping the unprofitable under public administration. This decision would naturally attract private investors to the former group (which usually coincides with urban areas) while relieving them from servicing rural and poorer areas, but contradicts the initial argument of privatisation as a tool for the incorporation of the poorest to the water and sewerage networks. Another piece of advice has been to discard full asset sales or concessions and instead privatise in the form of management or service contracts. This entails that the state keeps its ownership and responsibilities over infrastructure –usually fulfilling its obligation to expand it and maintain it through indebtedness with international and regional development banks- while private companies easily make profit from urban users, running the service and taking their income abroad.

23 See Finger and Allouche 76, note 13 above.

24 WB, Decentralisation Home Page: <http://www1.worldbank.org/wbiop/decentralization/>

25 See Finger and Allouche 86, note 13 above.

26 Since 1993 the Bank acknowledges as one of its priorities that « its economic and sector work, lending, technical assistance, and participation in international initiatives [aim] to promote policy and regulatory reforms » for the implementation of privatisation (See Water Resources Management 65, note 19 above).

27 These are the Private Sector Advisory Services (PSAS) and its Foreign Investment Advisory Service (FIAS), which provide governments and enterprises with advice on policy, transaction implementation, privatisation, and investment climate.

28 Policy advice in preparation for the arrival of private operators may arise even prior to the actual loan discussions and might be used by the IFI as a pre-condition for opening the negotiation rounds. See Grusky 3, note 11 above.

These changes in national norms and policies embody at a local level the public sector reforms that the Bank is perceived as sponsoring or imposing. The WB is not alone in its quest for the modification of the legal and regulatory framework of an indebted state in order to attract the presentation of bids by companies keen on becoming private operators of public services. It is undeniable that the IMF, the WTO and transnational corporations share certain WB goals, such as the liberalisation of capital controls and of other legal and regulatory provisions that are locally in force putting obstacles to the entry and exit of goods, services and capital.²⁹

Yet, even though such reforms are indispensable for the transition from public to private management, a sound legal and regulatory framework is one that ensures that all the interests at stake (those of the private sector, of the government and of the population) are adequately addressed and correctly balanced. Such a framework is specially needed in the case of potable water and sanitation. The most essential of public services should not be left in a legal and regulatory vacuum at the mercy of potential excesses of transnational companies seeking easy profits in a context of monopolistic exploitation. The following section assesses whether that was the case in the city of Buenos Aires and whether that can be deemed to be the main reason for the failure of privatisation in that particular instance.

II. THE PRIVATISATION OF WATER SERVICES IN BUENOS AIRES

A) The Concession Contract and Early Problems

The modifications to the legal and regulatory framework that allowed for the privatisation of water services in the city of Buenos Aires can be traced to 1989, when one of the very first legal initiatives of the recently-elected president Carlos Menem became Law 23.696, also known as State Reform Law.³⁰ This instrument was the result of the dialogue and negotiations that the country had initiated with IFIs in seeking a solution to the major crisis hitting the country. As a reflection of the policies that the WB was sponsoring at the time, Law 23.986 heralded a comprehensive privatisation process of public enterprises and enterprises in which the state participated, whether or not it provided public services. The first years of President Menem's period in office saw the WB participating intensively in the reform process through non-lending services (particularly informal Economic and Sector Work and policy dialogue). The Bank readied loans that became essential to the initial success of the public sector reform.³¹ In 1991 it granted to Argentina a Public Enterprise Adjustment Loan and a related Technical Assistance Loan which supported the comprehensive privatisation program.³²

At that time, water services were managed by public enterprises at the province level and consequently the national government did not have the authority to implement privatisation initiatives beyond its own jurisdiction. A single national enterprise, Obras Sanitarias de la Nación (OSN), covered the whole Argentine Republic; however, under the pressure of the WB, water services were decentralised and management was ceded to the provinces in 1980.³³

29 See World Panel on Financing Water Infrastructure, *Financing Water for All* 51, Report available online at: http://www.financingwaterforall.org/fileadmin/www/Library/Publications_and_reports/CamdessusReport.pdf

30 Approved on August 17, 1989; promulgated the next day, reglamented by national decree 1105. Published in *Anales de Legislación Argentina* n° XLIX-C, 1989, August 23, 1989, pp. 2444-2457. Menem had taken office in July 8, 1989. Argentines were at that moment suffering 'the trauma of extended recession and hyperinflation', which had created a 'fertile ground for reform' (WB/OED, *Argentina: Country Assistance Review*, Report 15844, Executive Summary 6, para. 5, Washington DC: WB, 1996).

31 *Id.*, para. 8 & 9. As a consequence of the 1989 Argentinean crisis, 'the Bank reduced its lending program in Argentina but continued, or intensified, its policy dialogue, and the respective roles of the Bank and the Fund were clarified through a concordat whereby the Fund agreed to take the lead in short-term macroeconomic programming and monitoring, while the Bank agreed to deal with the institutional underpinnings of macroeconomic policy' (para. 8).

32 *Id.*, 24. OSN had previously endured budget cuts under the pressure of IFIs' structural adjustment programs from the times it used to cover the whole Argentine Territory.

33 As seen above, the decentralisation of water services from national to local government control is one the most typical reforms promoted by the WB. At the time it covered the whole Argentinean territory OSN had endured budget cuts under the pressure of IFIs' structural adjustment programs. The WB aid offered to the country since the late 1980's to extend water service coverage, in particular, already insisted on the privatisation of the company, since the Bank was convinced that the downfall of the economic stabilisation programs designed by Argentine authorities 'was the failing of measures to rein in the public sector deficit, particularly that generated by public enterprises...' (See *Argentina: Country Assistance Review* 6, para. 4, note 30 above)

While keeping its name, OSN was limited to the coverage of the services of Buenos Aires and some of its neighbouring suburbs located on the province of Buenos Aires' territory.³⁴ Given that the national government kept jurisdiction over the capital city, in accordance with constitutional provisions, it also kept ownership of what remained of OSN. Through Law 23.696, therefore, the national Executive took the initiative to liquidate and privatise of its own enterprises; and, among them, the provision of water services of the city of Buenos Aires. Nevertheless, this move would eventually launch a similar campaign in other jurisdictions of the Republic, which were pressured to normalise their administrations by a central government that was itself under heavy IFI pressure.³⁵

The privatisation of OSN was undoubtedly the biggest operation in the water sector, both in terms of infrastructure and number of users. The water services of the city and of thirteen of its neighbouring suburbs,³⁶ home to some nine million inhabitants, were privatised in 1993 even if OSN had been appointed for privatisation three years earlier.³⁷ The delay was due to the work that needed to be done in the enterprise previously to its transfer to private management and the strong opposition of labor groups. Workers at OSN expected personnel cuts as one of the first measures to be taken to balance the performance of the entity. However, their ultimate adhesion was won over by using the denominated 'programs of shared ownership' introduced under Law 23.696.³⁸ These programs allowed working forces to purchase a portion or the totality of the privatised entities' shares,³⁹ and the profits expected from the operation gradually managed to convince several labour groups and thus weaken opposition. While workers got a ten percent of the shares of the company, in the months following the operation half of the 7.200 jobs at OSN would be cut.⁴⁰

In the end, the Argentinian government ceded management of the services to a consortium called Aguas Argentinas,⁴¹ formed by French, British and Spanish capital, together with local partners.⁴² The contract, which took the form of a concession of the services of drinking water and sewerage, was granted to this conglomerate not on the basis of the biggest investment commitment but upon presentation of the largest tariff rate reduction.⁴³ Prior to the privatisation operation, the government had however raised tariffs by 62 percent and additionally increased them by eighteen percent through the introduction of a new tax. As many failed to realise that this operation, led by the Argentinian government, was a strategy for preparing public opinion for the idea that privatisation was the sole alternative to deficient and expensive services handled by the public sector. In a context where memories of the penuries endured during the hyperinflationist crisis were still fresh, this tactic was successful.⁴⁴ Aguas Argentinas

34 The water services provided to these suburbs form an indivisible unity with the services provided to the city of Buenos Aires.

35 Provinces such as Santa Fe, Tucuman, Cordoba and Buenos Aires also privatised their water services, with negative results. Many of them had to cancel the contract early and the Argentine government was therefore sued by the private operators before the ICSID. In this respect, see the pending ICSID cases No. ARB/97/3, No. ARB/03/17, No. ARB/03/18, No. ARB/03/19, No. ARB/04/4, and No. ARB/03/30. The restatisation of Buenos Aires' water services was at the origin of another suit (No. ARB/01/12) that concluded with Argentina condemned to pay reparation.

36 The district of Quilmes would later become the fourteenth suburb by joining voluntarily this privatisation. Later, the suburbs became 17 due to the subdivision of the Moron district.

37 National Decree 2074/90, October 10, 1990. The announcement calling for the presentation of bids was made a year after through Resolution of the Secretary of Public Works and Services N° 178 (December 13, 1991).

38 Chapter III of Law 23.696 (arts. 21-40).

39 This strategy is criticised by privatisation detractors as representing a sophisticated, institutionalised form of bribery. Its use as a common practice in Argentinian privatisations for 'buying' the consent of workers has been acknowledged in IADB papers (See D. Artana, F. Navajas, and S. Urbiztondo, *Regulation and Contractual Adaptation in Public Utilities: The case of Argentina* 21, Washington DC: IADB, 1998).

40 Public Citizen Report on Argentina, available at: http://www.citizen.org/cmep/Water/cmep_Water/reports/argentina/ It is estimated that between 1990 and 1994 280.000 Argentineans lost their jobs in the public sector throughout the whole privatisation process, the majority of which through official programs of early retirement (see art. 7.11 of National Decree 787/93). Only 40 percent of that number was absorbed by the new private operators (See 'El Estado tiene deudas por 7000 millones tras las privatizaciones', Argentinean Journal La Nación [referred to as 'La Nación' hereinafter], September 16, 1996).

41 The operation took the form of a contract of concession of the services of drinking water and sewerage, which was approved by National Decree 787/93 on April 22, 1993.

42 The partners were, respectively, Lyonnaise des Eaux (SUEZ Group), Compagnie Générale des Eaux S.A (Veolia Group), Anglian Water PLC, Aguas de Barcelona S.A and the local partners Meller S.A., Sociedad Comercial del Plata S.A., and Banco de Galicia y Buenos Aires S.A. Lyonnaise des Eaux (SUEZ) was named main operator. See Official Bulletin of the Argentine Republic, March 24, 1993.

43 Aguas Argentinas offered to reduce the rate in 26.9 percent, slightly above the bid of the runner-up (26.1 percent). Only three bidders reached the final stage of the bidding process.

44 It was applied in the same way in relation to the privatisation of ENTEL, the national telecommunications company.

indeed lowered rates as promised, but the disproportionate raise that the Argentinean government had put into effect prior to the arrival of the company had given it margin for doing so and still making considerable profits.

The privatisation of water services was paired with the creation of a regulatory entity in charge of the supervision of the performance of the private operator and its compliance with the terms of the contract, the Ente Tripartito de Obras y Servicios Sanitarios (ETOSS).⁴⁵ The budget of ETOSS was financed through a percentage of Aguas Argentinas' billing, a fact that has shed doubts over its capacity to objectively intervene on tariff-related issues. Moreover, it later became clear that the entity, with its tripartite composition, was victim of constant politicisation. Its composition made it difficult to find agreement among the representatives of the three jurisdictions involved, a fact that prevented it from acting quickly and effectively. The organ seemed to activate only as local, provincial or national elections approached, but what was remarkable was how its work and function would gradually be neglected by highest governmental instances, to the point of being virtually deprived of authority and support as circumstances called for.⁴⁶

In particular with such a failed regulatory entity in charge of the surveillance of the operator's compliance with the terms of the contract, the privatisation of water services in the city of Buenos Aires could not be but one of constant revisions and multiple breaches. Only one year into operation, Aguas Argentinas pressured ETOSS to allow for a rate increase even though the company had agreed not to raise prices for ten years.⁴⁷ ETOSS agreed⁴⁸ and an increase of 13.5 percent for consumption, disconnection and reconnection of the service, and of 42 percent for new connections, was adopted in exchange for accelerating connections to slum communities.⁴⁹ The entity disregarded the fact that this first resolution that had informally modified the terms of the privatisation contract could have serious precedent-setting effects.⁵⁰ In reality, it became the first of many modifications, thereby creating a climate of legal and regulatory insecurity for all actors involved, including users of the service.

Aguas Argentinas succeeded in establishing a connection fee that ranged from 600 pesos/dollars for drinking water and from 1,000 pesos/dollars for sewerage. The WB, using its common rhetoric of full cost recovery and placing the expansion of the service as the main priority, publicly defended Aguas Argentinas' posture and not only granted it new loans through the IFC, but even became its partner through the purchase of a share of the company.⁵¹

Despite tariff increases, in 1996 the company still boasted that it had lowered tariffs by seventeen percent with regard to the numbers that users were paying to OSN in 1993 and that the process was still considered successful.⁵² This statement however took into account the tariffs artificially inflated by the government in order to introduce the privatisation of services. In reality, the 26.9 percent reduction offered in the winning bid by Aguas Argentinas had little chance of materializing, since tariffs started to mount as soon as 1994. If we also take into account that the company was not fulfilling its engagements in infrastructure investment, Aguas Argentinas was making amazing

45 Created by Agreement among the Central Government, the Government of the Province of Buenos Aires and the Mayor of the City of Buenos Aires on February 10, 1992. The 'Tripartito' refers precisely to its composition of representatives from the three jurisdictions involved in the provision of water services by OSN in Buenos Aires: the city, the province and the central government.

46 See L. Alcazar, M. A. Abdala, and M. M. Shirley, *The Buenos Aires Water Concession*, Washington DC: WB, 2000, who criticise the lack of independence of ETOSS and the inexperience of its members. The WB researchers correctly underlined that the weakness of the regulatory institutions was an obstacle to the success of the concession (p. 9).

47 This compromise emerges after an attentive reading of the original contract. It must also be said that, from what is inferred from art. 12.7 of National Decree 787/93, there was no room for modifications in the expansion plans for at least five years since the beginning of the concession.

48 ETOSS Resolution 81/94.

49 In practice, the company raised tariffs over 16 percent for consumption, disconnection and reconnection. The 42 percent raise for new connections was not noticed by users and did not cause the upheaval it did until the corresponding bills were sent two years later.

50 All price increases that were effectuated in the first five years of the concession 'implied that the contract was negotiable and that the company could push for tariff increases whenever it wished to, particularly if they could show that new demands were extra-contractual and had to be paid for by the consumer.' (A. Loftus., and D. A. McDonald, 'Of liquid dreams: A political ecology of water privatisation in Buenos Aires', *13 Environment & Urbanization No. 2* 179, 191, October 2001).

51 The share was acquired by the IFC and it was actually a exchange for the debts Aguas Argentinas had with it. As Loftus and McDonald affirm, 'not only does this testify to the instant profitability of the firm (the IFC wanted a share in these profits), it raises questions about the objectivity of World Bank research into the privatisation initiative. It also makes the Bank's aggressive promotion of the Argentinean model abroad problematic' (*Id.*, 185).

52 The World Bank was proud of having contributed 'finance and advice for the most far-reaching public enterprise privatisation program ever carried out by a developing country' (*See Argentina: Country Assistance Review 9*, note 30 above).

profits.⁵³ The single problem for Aguas Argentinas back then was that most new users were unable to pay on time the connection charges introduced in 1994.

B) The 1997 Renegotiation of the Contract

In April 1996, Aguas Argentinas approached ETOSS concerning the need to renegotiate the contract on the grounds that if tariffs were not raised as a compensation for the unpaid new connections it would be impossible for them to meet contractual obligations related to network expansion. The sums owed to Aguas Argentinas escalated to 30 million by October of the same year, prompting ETOSS to ask the company to suspend thousands of suits filed by it against users for their delay in payment and to accept to open a dialogue for the modification of the concession contract.⁵⁴ To the Argentinean public opinion, this revision was presented as indispensable on the grounds of 'new exigencies of public order that had not been foreseen in the original contract and had emerged ever since'.⁵⁵ The representatives for Aguas Argentinas concurred on the dialogue rounds not being about renegotiating the original contract, but rather about 'adapting' it to an unforeseen situation that the company was forced to face.⁵⁶

The state representatives in the renegotiations had an ample margin for bargaining in the renegotiations of 1997.⁵⁷ It was the first time ever in Argentina that a concession contract with a private operator would be modified. For this reason, the development and outcome of the renegotiation rounds would be closely watched by IFIs and private companies operating in Argentina, as representing a precedent for eventual changes to similar contracts in force. The WB even decided to send one of its senior water management authorities as a consultant for Aguas Argentinas. It is to be underlined that the WB Group by then had spent millions of dollars in loans to the company, had already invested more directly in it by the acquisition of a share and had put forth the particular contract as a privatisation success story.

Aguas Argentinas agreed to reduce charges for new connections in exchange for a postponement of the infrastructure investments of the original project and the extension of the privatisation contract, a scenario that had been foreseen by the specialised media.⁵⁸ The reduced connection charge (CIF) was paired with a new surcharge called SUMA to be perceived by Aguas Argentinas from 1998 on.⁵⁹ It was argued, once again, that the surcharge would guarantee the expansion of the network in a context of alleged diminution of the company's profits due to the acute recession that Argentina was enduring.⁶⁰

In addition to this, the renegotiation condoned all previous blatant breaches of the contract.⁶¹ According to reports made by both the ETOSS and a panel of technicians recommended by the WB itself, the company had put on the

53 The publication 'The Economist' considered the Argentinean concession the most profitable in the sector worldwide, with rates of return close to 40 percent (*See Artana 21, note 39 above*).

54 By the time the renegotiations started, the company was arguing that its operative deficit had reached 60 million dollar/pesos.

55 National Decree 149/97, art. 1.

56 Interview with Guy Canavy, General Manager of Aguas Argentinas, *La Nación*, February 22, 1997. Jerome Monod, head of the Lyonnaise des Eaux Group, visiting Argentina in March 1997 as part of French President Jacques Chirac's retinue in the latter's official visit to the country, equally insisted on the rounds being more of an 'update' of the original contract rather than a renegotiation (*La Nación*, March 26, 1997).

57 ETOSS was bypassed in favour of the Public Works Secretariat and the Natural Resources and Sustainable Development Secretariat on the basis of the renegotiations would address environmental issues as well, such as the recuperation of the Matanza river, one of the most polluted streams in the world. The official negotiators were entitled by the Executive to bargain on basically every aspect of the contract in order to reach an agreement with Aguas Argentinas (*See National Decree 149/97, February 14, 1997*).

58 'Bajarán un 5 por ciento las tarifas de electricidad', *La Nación*, October 26, 1996.

59 Apparently, the state and the company had agreed to delay the perception of this surcharge until the elections of 26th October 1997. Thus, the official instrument that finally approved all the modifications to the contract was signed shortly after (National Decree 1167/97, November 7, 1997) and SUMA would appear on water bills from March 1998 on.

60 The product of both CIF and SUMA literally meant that Aguas Argentinas' investment in infrastructure would mainly be afforded by the users of the service (which had not been given the opportunity to participate in the renegotiation process) and had to be paid prior to the execution of any works, a measure that eliminates any risks for the company (*See Loftus and McDonald 192-3, note 50 above*).

61 While user associations were denouncing unmet investment goals worth 400 million dollar, the government in the renegotiation rounds had only addressed works worth 201 million that were included in a new schedule. The 8 million dollars in fines that the ETOSS had sanctioned the company with were not even discussed.

table for discussion a proposal that omitted and exchanged several investments projects whose realisation it had previously assumed. The most notable of these was the Berazategui Plant for treating sewerage waters. The reports stated that with each year that its construction was delayed, Aguas Argentinas was increasing its current value of future profits in 35 million dollars. The suggestion of replacing primary and secondary treatment by pre-treatment is specially puzzling in a renegotiation summoned for addressing environmental concerns, since according to the reports under comment this option would increase the rate of polluting substances spilled in the Rio de la Plata River.

Equally perplexing is the introduction in the new version of the contract of a provision that violated the Convertibility Law: the annual indexation of the tariffs, which were issued in pesos, according to the inflation rate of the United States of America.⁶² This provision further relieved the company from a major financial risk in its operations in the country, granting intangibility to its profits. However, the impact of said norm would be a major source of concern for users, since devaluation could hit their household income while tariffs for an essential service would remain untouched. In 1998 Aguas Argentinas profited for the first time of this disposition and asked for a further 11.7 percent raise in tariffs. This raised protests by users, which had been constantly left out of negotiations, denied information and were asked to pay for the investment projects of Aguas Argentinas.⁶³

In summary, the 1997 renegotiation of the contract appeared to be a condemnable maneuver executed in concert by the government and the private company in detriment of the users' interests and allowing the company to increase tariffs throughout 1998 by 36 percent. The renegotiation clearly proved that the combination of a monopolistic private service provider and of the state neglecting its role of regulator can only work in prejudice of the users. It also revealed that the company was ready to threaten to paralyse connection works as a way of exerting pressure, and that the regulatory agency was extremely politicised, institutionally fragile and weak in relation to the service provider. In effect, on the one hand, internal fights within ETOSS, among the directors appointed by all three intervening jurisdictions, demonstrated that the regulatory function was second to the battle for political power and that the protection of users' rights was only important during electoral times. On the other hand, the Secretary of Natural Resources' inexplicable support of the company was puzzling given the pollution record of Aguas Argentinas. The Secretary prevented the ETOSS from participating in the renegotiation rounds and trivialised its work, proving that blind compliance to the transnational company's demands prevailed in the highest spheres of the local government. In conclusion, the Secretary kept disregarding the institutional mechanisms that had been created for guaranteeing the preservation of users' rights and their ultimate wellbeing. In a situation where there was no political will to contest Aguas Argentinas' pretensions, a regulatory framework could not operate as it should have.

C) The Service after the 2001 Economic Collapse

The administration that took office in 1999, after President Menem's second mandate came to a close, was unable to provide a remedy for the worsening state of affairs that affected the privatisation of water services in Buenos Aires. On the one hand, the foreign companies that were operating privatised services in Argentina complained about the lack of legal security when the government called for renegotiations to adapt the contracts to the economic crisis situation. On the other hand, the antagonism against foreign economic actors in the country quickly deepened in the context of the recession, since they were seen as exploiters of users that constantly failed to satisfy their own investment commitments.⁶⁴ In the case of Aguas Argentinas, the strategy of making dependent the expansion of

62 Such tactic was forbidden by art. 10 of the 1991 Law 23.928 (Law of Convertibility).

63 The whole renegotiation operation was impugned by the National Ombudsman and users' associations in February 1998 (See 'La justicia definirá los aumentos', La Nación, February 21, 1998). In March 1998, the Justice endorsed the Ombudsman's impugnation and as a precautionary measure ordered the state and the company to suspend the application of the 'SU' part of 'SUMA' (that is, the surcharge that all users were paying for the extension of the service network to low-income areas in the outskirts of Buenos Aires). This setback prompted Aguas Argentinas to warn that 'it would be impossible to continue with the expansion projects in order to connect the 3 million inhabitants that still did not count with basic services', a measure that they put into motion and that caused the mayors of several districts to ask for the revision of the decision on the grounds that the works for sewerage network extension were completely paralyzed. The Executive joined the appeal and finally the Tribunal revoked the suspension ordered in the first instance.

64 One of the early suits was filed by authorities of the Berazategui District on the grounds that Aguas Argentinas was spilling untreated sewerage waters to the Rio de la Plata River. The company argued that the construction of the plant for the district had been postponed in the 1997 contract renegotiations, and thus the government itself had chosen to reschedule the works and overlook the pollution.

the service network and other investment projects on new tariff raises still proved successful for the company and new raises of 3.9 percent were agreed upon in January 2001. The courts started to accept complaints by users and nullified certain tariff raises that had been approved in violation of due procedure, while the ETOSS applied heavy fines to the company for its delay in the construction of new infrastructure.

The beginning of the end for the privatisation contract of water services in Buenos Aires came with the economic, political, institutional and social collapse of Argentina in December 2001. As a result of the ensuing devaluation, the huge profits made by Aguas Argentinas for almost a decade were threatened as inflation increased its mounting debts. In 2002, Emergency Law 25.561 took the first step towards the redefinition of the contractual relation with the privatised firms, calling for a revision of the contracts in force.⁶⁵ The company publicly warned that a minimal profit would have to be granted to Aguas Argentinas or else it would not hesitate to rescind the contract and sue the country. It started an aggressive campaign in preparation of this event and deployed its usual means of lobbying, which included diplomatic meetings of French government representatives with national authorities.⁶⁶ It also conditioned the fulfillment of its contractual obligations on a series of unrealistic demands in the context of the Argentine economic crisis.⁶⁷ Among them, an exchange rate insurance that would have implied that the state (in fact the society as a whole) should bear more than half the firm's external debt, contracted with national and international banks and with multilateral organisms such as the IDB and the WB.⁶⁸ The Argentine government refused to offer such exchange rate insurance and Aguas Argentinas defaulted on April 10th 2002, with an avowed debt of 700 million dollars.

The renegotiations proved unsuccessful in solving the company's problems caused by the devaluation of the currency. As the period prohibiting tariff increases expired, Aguas Argentinas prepared an estimation of losses that amounted to 500 million euro and notified the government of its intention of making use of the recourse foreseen in the bilateral treaty for the protection of investment signed between Argentina and France.⁶⁹ The company eventually filed a suit before ICSID against the state.⁷⁰

In view of mounting hostility between the company, the government and users –who had successfully prevented new tariff increases through the courts - the WB and IMF sent representatives to the country in order to mediate between the involved actors and add a layer of pressure to the government for resolving the conflict. Both IFIs confirmed via a note to the Argentine Ministry of Economy that the mission did not seek 'to make recommendations

65 See Law 25.561 and National Decree 293/02, which entrusted the Ministry of Economy with the mission to conduct the renegotiations. Art. 8 of said instrument eliminated the privileges Aguas Argentinas was holding, such as the 'dolarisation' of prices and their indexation according to variations in the United States' price figures. Art. 4 confirmed on the other hand what had already been stated in judicial decisions, namely that this practice violated the Convertibility Law. This could open the door to the review of all of the water tariffs increases imposed under the contract. At the same time Law 25.561 froze tariffs for six months.

66 The involvement of French government representatives in the many renegotiations of the contract was blatant. Francis Mer, Minister of Economy of France, warned Argentina that France would defend the interests of Suez and other French companies operating in the country, and complained that Kirchner's presidency lacked a genuine will to adjust public services tariffs. He did not hesitate in reminding Kirchner about the importance of France's support to Argentina in reaching an agreement within the IMF after the default (See *La Nación*, January 24, 2004). The linking of tariff adjustment and support before the IMF and WB was also mentioned by Dominique de Villepin (French Minister of Foreign Affairs) during his visit to Argentina in February 2004.

67 Note 35.050/02. These demands included the unilateral suspension of all investment projects, the extension of the contract to compensate for losses and the suspension of the fines imposed by ETOSS. They were grounded in the argument that the company had taken an important external credit (before the World Bank Group and the IADB) in order to finance investment projects and that it needed the state to sell to it dollars at the usual parity for servicing such debt.

68 D. Aspiazu and K. Forcinito, *Privatisation of the water and sanitation systems in the Buenos Aires Metropolitan Area: regulatory discontinuity, corporate non-performance, extraordinary profits and distributional inequality*, paper presented to the First Project Workshop 'Private Sector Participation in Water and Sanitation: institutional, socio-political and cultural dimensions', School of Geography and the Environment, University of Oxford, April 22-23, 2002.

69 Signed on July 3rd, 1991; in force since March 3rd 1993, a month before Aguas Argentinas assumed the provision of water services to the city of Buenos Aires.

70 The Ministry of Economy replied by publicizing an official report revealing that the company was not enduring an operational deficit that allowed it to ask for further tariff raises. This document also surveyed the non-performance of its infrastructure investment plans and how tariffs had risen between 54 and 65 percent since 1993. In this light, user associations demanded that the state ended the contract (See Ministerio de Economía/Comisión de Renegociación de Contratos de Obras y Servicios Públicos, Informe de Cierre Fase II, 2002, available online at http://www.mecon.gov.ar/crc/aguas_final_fase_ii.pdf) Aguas Argentinas' suit was dropped by the company in February 2006 in order to facilitate the transfer of the management of the service to potential replacements in the concession. Suez and Aguas de Barcelona, on the other hand, did not withdraw their individual suits as shareholders of the company.

for specific changes to the contracts or tariffs, but to get acquainted with the general situation of the renegotiation and to assess the framework in which it is being carried out'.⁷¹ The team would meet with executives from the foreign companies operating public services in Argentina to discuss the restructuring of their defaulted debts with the WB Group. It also expressed to local functionaries its concern over the involvement of local tribunals in the tariff renegotiation process, provoking the outrage of user associations and the ombudsmen.⁷²

By September 2003, with a new government in charge of the renegotiations, the attitude towards the companies operating public services became more stringent. Every privatisation contract in force was reexamined and the restatisation of services therefore became a concrete option in official discourse. Aguas Argentinas' failures to meet its commitments made it an early candidate for contract revocation.⁷³ Simultaneously, the IFIs increased their pressure by linking the rescheduling of their credits with Argentina to the success of the renegotiations with all firms operating privatisations, accusing the country of delaying the talks on purpose and of not really having the will to negotiate. The team of technical assistants of the IMF and WB returned in 2004, with the renegotiations still pending, urging the country to conclude them once and for all. A transitory act was signed with Aguas Argentinas,⁷⁴ but the final contract and the new regulatory framework to be sent to Congress was still in the works. In late June 2004, when the WB had to discuss the granting of two credits amounting 700 million dollars to Argentina, the Board of Directors was divided: G7 countries that had nationals affected by Argentina's private debt default opted to abstain or vote against Argentina, and insisted on a final solution to the renegotiation of contracts and tariffs. Analysts deemed that the approval or denial of these credits by the WB would in turn influence the decision that the IMF takes on the restructuring of its own credits and the disbursement of new ones to Argentina.⁷⁵ It became evident that complying with the demands of the private companies operating private services in Argentina would be a precondition to mend the relationship with IFIs after the collapse of the local economy. Once the country committed itself to end the renegotiations processes, the WB Board of Executive Directors unanimously consented to the new loans, which were in part aimed at reestablishing an investment climate in Argentina.⁷⁶ WB Group support to the company was strengthened when the IFC accepted to restructure Aguas Argentinas's private debt with them, reducing it by 35 percent.

Suez threatened to end the contract, warning about the effects that the restatisation could have on the investment climate of the country and on the pending suits before ICSID, which amounted to more than 20.000 million pesos.⁷⁷ The decision to end their operations in Buenos Aires was finally taken by Suez together with the other major share-holder, Aguas de Barcelona, in September 2005, arguing two years of fruitless negotiations for new tariffs. The Argentine state threatened to sue the company if they did not ensure the provision for the following year, while the transition to a new operator was implemented. In March 2006, the state notified the company that it had decided instead to rescind the contract, arguing Aguas Argentinas' many breaches of the contract, and to revert water services to public hands.⁷⁸ Following the announcement, the IFC opted to remain silent.

71 Text of the note quoted in *La Nación*, February 11, 2003. The note was co-signed by the WB and IMF directors for the region.

72 See *La Nación*, February 13, 2003. The executives from the privatised companies expressed to the WB/IMF assistance team the need for an emergency tariff adjustment in order to keep providing the services, the setting of an indexation mechanism for tariffs and that the regulatory framework was redesigned to establish more clearly the concessionaries' obligations.

73 *La Nación*, September 15, 2003. An ultimatum to invest under sanction of revoking the privatisation was released in November 2003 and accepted by the company. The state also wanted to assume a more active role, divesting the company of some of its competences. For example, it started to collect the sums that were destined to infrastructure projects and directed the works, deciding where and when to construct, only leaving to the company the maintenance and management of the service.

74 The agreement included the promise not to raise tariffs until December 2005, the suspension of the payments of the debts accumulated by the company from ETOSS's fines, the implementation of a 242 million pesos investment program and the suspension of the suit filed before the ICSID.

75 *La Nación*, June 29, 2004.

76 *La Nación*, June 30, 2004.

77 Suez, who was also handling the water services of 15 important cities in the province of Santa Fe, announced shortly after, in May 2005, that it would end its operations under the name Aguas de Santa Fe and concentrate in pursuing the renegotiations to save its contract in force for the city of Buenos Aires. It still operated Aguas Cordobesas, in the province of Cordoba, though it would announce in April 2006 its intention to step aside from that concession as well.

78 National Decrees 303/2006 and 304/2006, March 21, 2006. The provision would be in charge of a new public enterprise called AYSA (Aguas y Saneamiento Argentinos Sociedad Anónima), with 90 per cent of its share in the hands of the state and 10 per cent in the hands of the employees of Aguas Argentinas through the programs of shared ownership. Currently, the water services of the provinces of Buenos Aires, Santa Fe, Catamarca and Tucuman are public as well after their own failed experiences with privatisation.

III. LESSONS TO LEARN FROM THE PRIVATISATION OF WATER SERVICES IN BUENOS AIRES

A) The Importance of a Sound Legal and Regulatory Framework

The failure of the privatisation of water services in the city of Buenos Aires is due to the confluence of two main factors. On the one side, privatisation of public services was introduced in Argentina by the Bank through its policy lending programs and technical advice services as a neoliberal measure that would become a first step to remedy the grave crisis hitting the country in 1989.⁷⁹ Consequently, Argentinean popular opinion and statesmen embraced it without previously undertaking the delineation of a solid legal and regulatory framework or the creation of those institutions that are indispensable for protecting users' interests. Many of the problems related to the privatisation of OSN that would be eventually regretted were the result of a rushed and poorly executed privatisation process and had their root in its unprofessional implementation.

The fragility of the regulatory framework is well illustrated by the role of ETOSS. Its independence and efficiency were put in question on several occasions, having been a victim of politicisation and being bypassed many times by higher spheres of the national administration that were suspiciously more willing to comply with the terms of the company. In addition, the inexperience and lack of training of many of the officials involved in the supervision of Aguas Argentinas' performance allowed the company to mold the contract to its convenience within the first five years of its life. Before long, Aguas Argentinas was exerting monopolistic power at will over the fees and directly contributing to the recession that struck the country from 1999 to 2002.

Two of the most significant deficiencies of the legal and regulatory framework included firstly the lack of transparency of the regulatory agency's work and secondly the consequent absence of user participation in the oversight of the company's performance. Indeed, ETOSS neglected its main mission by failing to timely collect the relevant information to assess the compliance of the company with the terms of the contract and to react opportunely. However, by not publicly disclosing available information, it also prevented user associations from performing such a task via available channels within the administration or before the courts.⁸⁰ ETOSS and the government equally minimised the importance of user participation by not convoking them to expose their grievances in the major renegotiations that took place, including the 1997 one. The summoning of public audiences by the regulatory entity to inform users and allowing them to be heard did not happen until later in the process and often coincided with electoral periods where local politicians sought to ingratiate themselves with the population and address their concerns. These hurdles to stakeholder participation in the monitoring of water services provided by a private company represented a direct violation of even constitutional provisions⁸¹ and added to the sense of legal uncertainty that reigned over the concession in Buenos Aires. It must also be said that water users in turn failed to organise themselves appropriately, which prevented them from acting efficiently in defense of their interests since the beginning of the concession. Their activism became prominent only after the effects of the 1997 renegotiation were fully in force and affecting the income of households in the context of a grave economic recession.

Perhaps the main lesson to learn from the forgettable experience of the city of Buenos Aires with privatisation of water services has to do with the importance of establishing clear rules by which both sides of the privatisation contract must abide. These rules must ensure the existence of effective monitoring of private companies by the state, safeguarding of water users' interests, transparency and public participation in water management. Only in the presence of legal certainty and of effective institutions can the state monitor the performance of multinational water companies operating in its territory. This ideal scenario includes the use of the mechanisms and alternatives that democratic institutions offer. For instance, it is essential that the decision to privatise essential public services such as water and sanitation is debated in Congress and that independent parliamentary commissions oversee the

79 'The earlier ESW studies supplied data that provided functional input for the [Argentine] Government's privatisation program, and provided justification for the Bank to begin lending later in the period to help finance the effort' (See Argentina: Country Assistance Review 27, note 30 above).

80 User associations denounced on numerous occasions that ETOSS was putting a major obstacle to their optimal participation in the surveillance of the company by not sharing information. See for example 'El alza del agua es todavía un misterio', La Nación, February 20, 1998.

81 See art. 42 of the Constitution of Argentina, last reformed in 1994.

execution of the contract together with the regulatory entities, drawing the attention of the latter to problems and irregularities. In the case of Argentina, the regulatory role was left early on in the hands of the executive; while this option can accelerate decision-making, it can also mean that decisions are rushed and product of pressure from local and international lobbies.

B) Increasing the Accountability of the International Institutions Involved

The second contributing factor to the failure of the privatisation of water services in Buenos Aires can be seen to go beyond the role of the state and can therefore be categorised as 'external'. The degree of accountability of the IFIs involved in the process, in particular the WB, has a significant part to play. In effect, even though WB staff were aware early on of the negative effects that a deficient legal and regulatory framework could have in the mid and long term on the outcomes of a privatisation process,⁸² the Bank failed to react to the warnings of its own research teams by continuing to support the Buenos Aires water privatisation operation and granting loans to Aguas Argentinas through the IFC despite the poor performance of the company.

Much like the IMF, the WB had put itself in a difficult position by holding Argentina as an example of the benefits that could derive from reform. With its reputation and the adequacy of its trademark policies at stake, the Bank could not but try to save the privatisation in Buenos Aires for as long as possible. The frequent visits by WB/IMF teams to the country, their meetings with governmental and company representatives to intercede during the toughest phases of contract renegotiations, and the disbursements and debt reductions granted by the IFC to Aguas Argentinas are thereby explained.

However, the WB's support of Aguas Argentinas is still remarkable. By the premature end of the concession, 'the World Bank together with the Inter American Development Bank and local Argentine banks [had] provided all but 30 million of the 1 billion dollar needed investment for infrastructure to Suez when it took over the operations...'⁸³ And yet all these disbursements could not prevent that to this day 1.5 million households in Buenos Aires still lack access to drinking water and 3 million are not connected to the sewerage network. They also could not prevent the company's criminal prosecution for the high levels of nitrates in tap water or the legal actions related to the pollution of the Rio de la Plata River initiated before national courts - both suits originating in the constant delays in the maintenance and construction of new infrastructure that had been foreseen in the original version of the contract.

A review of the WB's operations in Argentina by its own accountability organs is essential in ensuring the proper application of Bank policies and procedures.⁸⁴ In particular, since the main involvement of the World Bank Group in the privatisation of water services in Buenos Aires took the form of financial support to Aguas Argentinas by the IFC, the role of the Office of the Compliance Advisor Ombudsman (CAO) can be raised. The aim of the CAO exerting its ombudsman function is to handle a complaint in order 'to identify problems, recommend practical remedial actions and address systemic issues that have contributed to the problems, rather than to find fault'.⁸⁵ The CAO in its advisory function has provided valuable guidelines for the IFC to supervise more efficiently the projects it is involved in and address adverse environmental and social consequences. In this sense, the CAO states that the 'IFC should seek to increase and exercise its leverage. Environmental and social issues should be included in legal covenants. Similar to the World Bank and private banks, IFC should consider suspending loans or withdrawing from projects whose environmental and social performance present unacceptable risks to IFC'.⁸⁶ This explicit recommendation was too late for the city of Buenos Aires, though its strict application by the IFC is yet to be proved.

In summary, the Buenos Aires experience with water privatisation illustrates the deficiencies of a privatisation process dominated by improvisation and disregard of fundamental social and environmental factors by the

82 See Argentina: Country Assistance Review 6, note 30 above.

83 IBON Databank and Research Center, *Water Privatization: Corporate Control versus People's Control* 90 (Manila: IBON Books, 2005).

84 See the role of the OED and the Inspection Panel. The latter, however, covers mainly IBRD and IDA infrastructure projects (project lending).

85 CAO, Information about the CAO Ombudsman Process, at <http://www.cao-ombudsman.org/html-english/ombudsman.htm>.

86 CAO, Review of IFC's Safeguard Policies 53, Washington DC: CAO/IFC/MIGA, 2003. It also affirmed that 'during supervision IFC should track appropriate indicators to monitor whether its project-specific development objectives are being met, particularly whether its intermediary operations are financing sustainable and environmentally sound private enterprises. It should take action if they are not' (p. 58).

government, breaches of established rules and practices by the private operator and unconditional support from an IFI that fails to address its own failings.

IV. CONCLUDING REMARKS

Whether the WB Group has learnt from the failed experience in Buenos Aires and other water privatisation operations such as the ones that have taken place in Manila or Cochabamba is not easy to assess. On the one hand, it still supports the involvement of the private sector in water resources management and service provision as an essential requisite for granting access to everyone to safe drinking water and adequate sanitation. The Bank remains convinced as well that the private sector is key in reducing the cost of services and increasing accountability.⁸⁷ This insistence towards the privatisation of water services is both remarkable and disconcerting. Above all, because there are no in-depth studies by the Bank that have assessed the existence of alternatives to privatisation of the water sector.

If there is a genuine will to improve both the coverage and efficiency of water services, making water available to all groups despite their economic capabilities, then the privatisation solution should be reconsidered. Primarily because, as the privatisation in Buenos Aires demonstrates, private companies will privilege those areas where profit is bigger and risk-free. This means that there is a fundamental contradiction in resorting to privatisation as a means for the expansion of the water and sanitation networks and the connection of the poorest sectors of the population to the service. If the behaviour of Aguas Argentinas is any indication of the general *modus operandi* of private companies, privatisation of water services is going to be characterised by the strict application of market principles to the management of a public service in which not every opportunity for making profit and savings should be enjoyed. WB policy is that private entities will contribute to extending network coverage so as to service new customers and increase profits. However, as Aguas Argentinas proved, sometimes it can be more profitable to service areas already covered by the network and delay every investment commitment related to its expansion; especially the construction of sanitation infrastructure, which is particularly costly.⁸⁸ In situations where there is a lack of regulatory framework, such as was the case in Argentina, a private company will certainly take advantage.

The WB's purpose is confessedly to eradicate poverty, though privatisation of services may contradict its core mission. In Buenos Aires, it was the sector of the population with the lowest income that suffered the most with the constant modifications of tariffs. As Karina Forcinito exposed at the Third World Water Forum in March 2003, Aguas Argentinas succeeded in nine years to change the nature of the original contract, transfer investment risks to users, introduce new fixed charges to the bill and in raise tariffs 88.2 percent. By 2003, the poorest families in the metropolitan area of Buenos Aires were spending nine percent of their income for drinking water and sewerage.⁸⁹

If anything, the Buenos Aires experience should be taken as a case study that demystifies privatisation and proves that it can actually spark benefits or major prejudices, depending on the seriousness and capacity with which it is implemented. The Bank still trusts privatisation for improving water services, though it now seems open to partnerships with the public sector in water infrastructure, and stresses the obligation of the public sector to establish a solid legal and regulatory framework as an essential requisite for privatising public services.⁹⁰ In this sense, recent Bank studies show that the organization is aware of what is needed for privatisation to succeed and which mistakes should be avoided. Taking into account the experience with privatisation of water services in Ghana in 2003,⁹¹ it appears the Bank cannot apply the lessons learnt from past failures to new privatisation endeavours. More discouraging is the fact that this incapacity should be linked to its preoccupation for saving face by not acknowledging and remedying errors.

87 WB/IBRD, *Water Resources Sector Strategy 19* (Washington D.C: WB, 2004).

88 In this sense, the failure of Aguas Argentinas to invest is still perplexing given the huge numbers that it made during the 90's, before it could argue that the macroeconomic policies that Argentina took for trying to palliate the recession had affected the financial balance of the concession contract and prevented them to follow the investment plans as agreed.

89 D. Aspiazu and K. Forcinito, *Privatización del Agua y Saneamiento en Buenos Aires. Historia de un Fracaso*, paper presented at the III World Water Forum, March 2003, on file with the author.

90 'While private investment and management are playing, and must play, a growing role, this must take place within a publicly established long-term development and legal and regulatory framework' (*See Water Resources Sector Strategy 12*, note 87 above).

91 See R. N. Amenga-Etego and S. Grusky, 'The New Face of Conditionality: The World Bank and Water Privatization in Ghana', in D. McDonald and G. Ruiters (eds), *The Age of Commodity: Water Privatization in Southern Africa 275-290* (London: Earthscan, 2005).

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