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**Background paper prepared for the expert consultation**

**on private sector participation**

**Consultation convened by the Special Rapporteur on the human rights to safe drinking water and sanitation**

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# Typology of private sector participation models in the water and sanitation sector

1. The operation of the water and sanitation sector in States requires a considerable amount of resources, both human, financial and material, in order to ensure it works efficiently and effectively, meeting all of the requirements of the normative framework of the rights to water and sanitation. States are sometimes unable or unwilling to fulfil all of these resources across the entire chain of supply by themselves, and, for this reason, it is common for private actors to operate within the sector by, inter alia, supplying materials and equipment, developing engineering designs and building the infrastructure necessary for water and sanitation provision to be achieved. This traditional function of the private sector in water and sanitation provision – as a third-party providing services to public providers of water and sanitation – is not the focus of the Special Rapporteur’s report. Rather, this report looks at the situation of the direct participation of the private sector in providing water and sanitation to populations over the long-term, particularly the model of privatization of public services that was adopted in certain States in the 1980s and 1990s, and which continues today.
2. There are a number of different models through which the private sector can participate in the provision of water and sanitation services, and it is important to note that the framework for the human rights to water and sanitation does not explicitly specify a preferred model for service provision, suggesting that what matters are the outcomes of the provision, that need to be compliant with the human rights standard.. However, for several other aspects of the implementation of the human rights to water and sanitation, not only the outcomes matter, but also processes of implementation of the rights, such as the legal framework, the institutional arrangements, policies and programs in place. This report therefore seeks to develop an analysis on the effects of private sector participation in water and sanitation provision on the realization of the human rights, departing from the principle that the way the service is provided can determine its performance in terms of human rights. The Special Rapporteur seeks to map risks related to this modality of service provision. With this exercise he intends to give guidance to States on decision-making relating to the incorporation of private sector on service provision, to assist the private sector to gain a greater understanding of human rights and to share with the general audience his concerns on this matter. The overall purpose of the report is to highlight that service provision is a key step where measures must be taken to ensure that all human rights, including the rights to water and sanitation, are respected, protected and fulfilled at all times.
3. Models of private sector participation in water and sanitation provision that are seen around the world include ‘full privatization’, ‘concession contracts’, ‘build-operate-transfer’ (BOT) and ‘joint ventures’.

## Full privatization

1. Where full privatization takes place, the government undertakes a complete transfer of the entire publicly run water and/or sanitation provider, including all the relevant infrastructure, to the private company on a permanent basis. In doing so, the private entity assumes full, indefinite responsibility for asset management, capital investment, operations/maintenance and human resources of entire water or wastewater systems.[[1]](#footnote-1) Having done so the role of the State changes from the direct provision of water and sanitation to members of the population, to overseeing, through the introduction of legislation and regulations, the activities of the private provider.
2. Where full privatization takes place the challenges that are faced with regards to the enjoyment of the rights to water and sanitation are increased as the control of provision by profit making private businesses is indefinite and absolute, and control can only be reassumed by the public sector through political intervention that is likely to take considerable time and political and economic costs.
3. Full privatization is very uncommon but has taken place since 1989 in England and Wales where ten private actors operate regionally to provide water and sanitation services under strict regulation.[[2]](#footnote-2) Full privatization has also been the dominant water and sanitation provision model in Chile since 1998.[[3]](#footnote-3)

## Concession contracts

1. Under concession contracts whilst the government retains ownership of all water and sanitation assets, the private actor will assume responsibility for using these to provide water and/or sanitation services for a stated period of time (usually 25-30 years).[[4]](#footnote-4) During this period, the private actor is responsible for all capital investment into improving, expanding, repairing and rehabilitating those services and assumes all the commercial risk involved in providing water and sanitation services.[[5]](#footnote-5) In some instances, however, the public authorities may contribute human resources to assist in the operation of the services and may provide some capital expenditure.[[6]](#footnote-6) Private actors granted concession contracts by governments are remunerated via “revenues collected from the users after deduction of a concession fee to be paid to the public entity.”[[7]](#footnote-7) Usually, at the conclusion of the period stated in the concession contract, if the revenues collected over the course of the contract were sufficient to pay back the private sector’s investments, the assets will pass back to the government to be run publicly once more, or to be reprivatized.
2. Concession contracts have been utilised to bring private actors into water and sanitation provision in the Philippines. In 1997, the Government entered into a 25-year agreement with the Manila Water Company to provide water services in the east zone of Manila, and a similar agreement was struck with Maynilad Water Services (a joint venture between Suez Environment and Benpres Holding) for the west of the city.[[8]](#footnote-8)

## Build-Operate-Transfer (BOT) contracts

1. This model encompasses various variants, such as BOOT (build–own–operate–transfer), BLT (build–lease–transfer), DBFO (design–build–finance–operate), DBOT (design–build–operate–transfer), DCMF (design–construct–manage–finance). Where authorities enter into such types of contracts with private actors the private entity may be in charge of a number of activities, including and operating new water and sanitation facilities, which are subsequently transferred to the government at the end of the contract (usually after 20-30 years).[[9]](#footnote-9) During the period of private sector operation, revenues generated via tariffs cover “operating costs, maintenance, repayment of debt principal, financing costs and a return for the shareholders of the [company] created for the project.”[[10]](#footnote-10)
2. BOT contracts form the bulk of new water provision contracts currently being utilised to bring private actors into the sector in China.[[11]](#footnote-11)

## Joint ventures

1. Joint ventures, which have been utilised in Mexico and Colombia,[[12]](#footnote-12) are arrangements whereby the public and private sectors join together to provide water and sanitation services through a single entity. In general, there are two main ways in which water and sanitation joint ventures occur. Firstly, a joint venture can involve a private company and a public sector actor forming a company together, with the participation of investors, which is then utilised to perform water and sanitation service provision contracts.”[[13]](#footnote-13) Secondly, a joint venture may occur when a significant proportion of the shares in an existing public utility are sold to private investors, thereby generating joint ownership of the public utility. In the latter scenario, the State may still retain enough voting shares to maintain primary control of the utility, but the private sector nevertheless becomes an owner and influential shareholder of the provider, and will often negotiate powers of veto or weighted voting rights to enable it to manage the company efficiently.[[14]](#footnote-14)
2. Within joint venture models, the question of costs and investments is important as risks related to maintenance costs are typically retained by the public sector, with the private actor only responsible for investing in initial infrastructure.

## Other models

1. Whilst those above are the main models of private sector participation, others too are available for use in bringing private entities into water and sanitation provision, including:
2. **Lease and affermage contracts**, which are common in France,[[15]](#footnote-15) and are agreements that take the form of a written contract between the public body and the private actor wherein water and/or sanitation services are transferred entirely to the private provider, which also takes on all of the financial risks involved in repair and maintenance, in exchange for a lease fee. This arrangement will last for a specified period of time at which point services will pass back to the public sector. During the duration of the lease the public sector retains responsibility for investment in the improvement and expansion of systems.[[16]](#footnote-16)
3. Private sector participation is also a de facto reality when water and sanitation is provided by **informal actors and small-scale providers**. Particularly in rural and poorer areas of developing States, independent water vendors, sometimes operating outside of the State’s legal framework, sell water to populations using trucks, standpipes, kiosks. These providers also offer sanitation services, such as waste removal and the provision of hygiene products. Whilst these vendors are not to be covered by the Special Rapporteur’s report, due to the fact that focus within the report is primarily on large-scale, formal private sector involvement, it is important to note that small-scale and informal providers are often important actors in water and sanitation provision, particularly where a state’s infrastructure is lacking (A/HRC/15/31, para. 11).

# Background

1. It is somewhat challenging to determine any particular trend regarding preferred models of private sector participation either regionally or globally. Despite this, some historical trend towards, and away from, private sector participation can be identified.

## The growth of private sector participation in the late 20th Century

1. The rise of neoliberalism in the 1980s, with its rationale of reliance on the market being preferable to reliance on the state, instigated a drive towards the privatization of a number of services traditionally owned and operated by the public sector, including electricity, telecommunications and transport.[[17]](#footnote-17) This trend greatly increased at the beginning of the 1990s, and the water and sanitation sector was highlighted as a potential new frontier for private sector participation,[[18]](#footnote-18) with this being seen as a way to “create efficiency gains, generate new flows of finance and provide greater accountability.”[[19]](#footnote-19)
2. Whilst having commenced in the developed world, globalisation has led to the neoliberal ideology being used to push for greater private sector participation in water and sanitation in the developing world as well. This reality was, in part, spurred on by, the Dublin Principles of 1992 defining water as an “economic good”,[[20]](#footnote-20) which, “has led to a set of cooperation programmes in developing countries with radical conditionalities that impose privatization of services and commodification of water, with little consideration for the human rights framework…” (A/71/302, para. 50). In particular, international financial institutions providing assistance to developing states have “promoted neo-liberal reforms advocating for States to reduce public spending and avoid greater investments” (A/HRC/15/31, para. 6), with some of these reforms being forced on states through “loan or aid conditionalities, debt reprogramming or loan forgiveness.”[[21]](#footnote-21) For instance, in 2002 the IMF issued 12 loan agreements which “included conditions for water privatization and/or cost recovery.”[[22]](#footnote-22) Of those states accepting these loan agreements, many had high levels of poverty, including Rwanda, Honduras and Angola.[[23]](#footnote-23) According to Taylor, between 1995 and 2016 international financial institutions have provided more than US$75bn in soft loans for the privatization of water services.[[24]](#footnote-24)
3. The World Bank has been one of the most active proponents of the privatization agenda, issuing, in the early 1990s, several reports calling for the private sector to be more actively involved “in management, financing and ownership in infrastructure to ensure commercial orientation of the sector.”[[25]](#footnote-25)
4. The trend of increasing private sector participation in water and sanitation services largely continued until around 2005, with 56 countries introducing some form of private sector participation between 1990 and 2005. However whilst, as will be shown, private sector involvement has decreased in many regions since this time, private sector participation in water and sanitation is still ongoing, and, in fact, sources suggest that the proportion of people who obtained their water from private sources in fact rose, from 5 per cent in 2005[[26]](#footnote-26) to between around 10 per cent and 13 per cent in 2016, depending upon the source consulted.[[27]](#footnote-27)

## The growth of remunicipalisation

1. Despite the rise to prominence, in both developed and developing States, of private sector participation in water and sanitation provision, starting in the early 2000s the involvement of private actors began to decline, with major water companies withdrawing from provision, particularly in developing States. Suez, for example, moved away from providing services in Latin America and other developing regions, to focus its activities on China. Equally, Rheinisch-Westfälisches Elektrizitätswerk (RWE) withdrew from all markets bar Germany and Central Europe.[[28]](#footnote-28) Prasad notes that this withdrawal occurred “following a series of economic and financial crises, natural disasters, incidence of corruption, risky operating environments, miscalculation by the multinationals, or non-compliance with contractual obligations.”[[29]](#footnote-29) States too, however, began to undertake greater reflection on whether private sector participation in water and sanitation was able to bring with it the hypothetical benefits that had formerly been touted, identifying underperformance of providers. In Dar es Salaam, Accra and Maputo concerns were raised regarding the operational performance of private companies.[[30]](#footnote-30) In Berlin and Buenos Aires issues of under investment were discussed.[[31]](#footnote-31) And in Kuala Lumpur the affordability of water bills was highlighted.[[32]](#footnote-32) Even the World Bank began to acknowledge that private sector participation in water and sanitation may not be the panacea for poverty it had previously predicted, noting that “getting the private sector to focus on the alleviation of poverty and to design tariffs in a way that does not discriminate against the poor has proved hard to achieve in practice.”[[33]](#footnote-33)
2. As a result of the significant concerns generated by private sector involvement in water and sanitation provision, many States whose services were previously in the hands of private providers have begun to shift these back into public hands through ‘remunicipalisation’, defined as “the transfer of water [and sanitation] services from private companies to municipal authorities.” Kishimoto et al. have studied this phenomenon and determined that between 2000 and 2017 there were “at least 235 cases of water remunicipalisation in 37 countries, affecting more than 100 million people.”[[34]](#footnote-34) The prevalence of remunicipalisation of water and sanitation services have earmarked this practice as a significant global trend. Indeed, Lobina notes that the practice is gaining pace in the global North, highlighting that between 2005 and 2009 there were 55 cases of remunicipalisation, however between 2010 and 2015 there were 104.[[35]](#footnote-35) A prominent example of remunicipalisation has occurred in Paris where, in 2008, city authorities chose to not renew contracts with Veolia and Suez due to concerns about rising tariffs, and a lack of transparency and accountability.[[36]](#footnote-36) The process has been held up as an example of how remunicipalisation can be undertaken with minimal disruption, and can provide affordability for users and greater levels of investment into water and sanitation infrastructure.[[37]](#footnote-37)
3. The rejection of the private sector, due to its failures to provide adequate services, in favour of renewed public ownership of those services has led commenters to suggest that remunicipalisation “represents a new form of water service provision that goes beyond ownership change to incorporate collective aspirations for social and environmental justice and offer new possibilities for creating progressive water policies.”[[38]](#footnote-38)

## International arbitration panel decisions

1. Decisions made by international arbitration panels regarding disputes between private water and sanitation providers and host states highlight something of a trend in favour of business interests. Claims by water and sanitation providers against states typically arise in the context of regulatory action taken by the government to protect users access to affordable water and sanitation, although typically such actions only occur following considerable pressure from populations. Most reported cases concern private providers operating in South America.

 Aguas del Aconquija v. Argentina 1995[[39]](#footnote-39)

1. When Aguas del Aconquija, a subsidiary of French multinational Compagnie Générale des Eaux (GCE), was granted a concession to provide water and sanitation in the province of Tucumán, Argentina, this resulted in substantial price hikes for users. Popular unrest caused the provincial authorities to seek price limitations for the company’s tariffs. GCE initiated proceedings in the International Centre for Settlement of Investment Disputed (ICSID) claiming that Argentina had changed the terms of the contract with the subsidiary and therefore had failed to protect its investments and had indirectly expropriated its property, breached the contract to provide ‘full protection and security’ and violated the fair and equitable standard of treatment. The tribunal found that “under the fair and equitable standard there is no doubt about a government’s obligation not to disparage and undercut a concession … that has properly been granted … based on falsities and motivated by a desire to rescind or force a renegotiation.” Accordingly, following a ten-year legal battle, the Tribunal found in favour of Aguas del Aconquija and GCE, which at this point had become Vivendi, and Argentina was forced to pay Vivendi US$105m.

 Azurix v. Argentina 2001[[40]](#footnote-40)

1. In 1999 Azurix, a subsidiary of US multinational Enron, was granted a concession contract for drinking water provision and sanitation services in two districts of Buenos Aires. It subsequently brought a claim against the government claiming that Argentina had indirectly expropriated its property, undertook ‘arbitrary, unreasonable and/or discriminatory measures’, breached the contract to provide ‘full protection and security’ and violated the fair and equitable standard of treatment. These claims arose for a number of reasons, including the Government seeking to freeze tariffs. The Tribunal found in favour of Azurix and Argentina was required to pay the company US$165m.

 Sociedad General de Aguas de Barcelona v. Argentina 2005[[41]](#footnote-41)

1. Another case arising from the Argentinian government’s decision to freeze tariffs. Here, a concession was granted to Suez in 1993, and in 2000, in the face of the country’s financial crisis, price freezes were introduced across many sectors, including water distribution. Suez brought a claim before the ICSID and the Tribunal found that the actions taken by the government breached the contract and amounted to an unfair and unequitable standard of treatment. This was despite an amicus application being filed that raised Argentina’s human rights obligations pursuant to the human rights to water and sanitation. Argentina was required to pay Suez US$223m.

 Biwater Gauff v. Tanzania 2005[[42]](#footnote-42)

1. Water and Sanitation management concession covering the Tanzanian capital of Dar es Salam was granted to an Anglo-German consortium. The Government subsequently revoked the concession, citing numerous difficulties it had generated, in particular a decline in the availability of water in many areas of the city. The consortium subsequently initiated proceedings against the government. An amicus brief filed within the proceedings challenged the consortium’s position on the basis that as a company engaging in activities that posed risks to the population, it had the ‘highest level of responsibility to meet their duties and obligations.’[[43]](#footnote-43) This included human rights obligations regarding water and sanitation, which the claimant had acknowledged existed.[[44]](#footnote-44) Despite these contentions, the Tribunal found that Tanzania had expropriated Biwater Gauff’s investments, however due it also found that the company had failed to establish any of its claims for damages.

 Aguas del Tunari v. Bolivia 2005[[45]](#footnote-45)

1. Aguas del Tunari were a subsidiary of Bechtel, an American infrastructure firm. Bolivia granted Aguas del Tunari a 40 year concession to provide water and sanitation services in the city of Cochabamba. Following widespread discontent and protests about steep rises in water tariffs the government revoked the concession. Aguas del Tunari filed a claim in the ISCID however this was eventually dropped and both parties settled.

## Sustainable Development Goals

1. Some scholars have argued that the SDGs ‘are constitutively embedded in a neo-liberal politics of development’ and the drive to ensure states attain the Goals therein, including achieving universal access to safe water and sanitation by 2030, could trigger a renewed trend for increased private sector involvement in water and sanitation service provision.[[46]](#footnote-46)
2. This is, in particular, stated to be an outcome of SDG 17, which helps set the agenda for the implementation of all of the SDGs, by calling on States to ‘strengthen the means of implementation and revitalize the global partnership for sustainable development’.[[47]](#footnote-47) SDG 17 is stated to offer ‘a framework for enabling and accelerating progress in all aspects of SDG 6, including the challenging issues of international water resource management and eliminating inequalities, which will be essential for achieving SDG 6 and leaving no one behind.’[[48]](#footnote-48) The framework that SDG 17 advocates holds partnerships between the public and private sector to be a vital resource in the achievement of the SDGs. Indeed, SDG 17 Targets 17.16 and 17.17 explicitly call for public-private partnerships to be entered into in pursuance of the SDGs, respectively asking states to ‘enhance the global partnership for sustainable development, complemented by multi-stakeholder partnerships … in all countries, in particular developing countries’ and ‘encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships’.[[49]](#footnote-49)
3. SDG 6a is also recognised to be a potential driver for increased private sector participation in water and sanitation provision. The Goal recommends that States ‘expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies.’[[50]](#footnote-50)
4. However, the language of the SDGs is not necessarily conducive to increased private participation in the water sector. The way the SDGs are interpreted and implemented is much more under the discretion of the States and therefore it is for them to determine whether increasing private participation is the best method of achieving their targets by 2030. The recent trend of remunicipalization is possibly a signal of a mixed way of implementing SDG 6.1 and 6.2 which does not favour private participation, but instead recognises that the public retention of water and sanitation services reflects a promising alternative to privatization, as far as the SDGs are concerned.
5. Accordingly, the human rights framework applied to SDG 6 highlights the need to reconcile the call for increased partnerships by the SDGs, and the understanding that the definition of service provision should be guided by the maximization of benefits to the achievement of human rights.

# International human rights law and private sector participation

1. Given the ongoing prevalence of private sector participation in states’ water and sanitation sectors, it is necessary to determine how private sector participation fits within the framework of human rights protections afforded to users, and to what extent actors operating within the framework of private sector participation can be deemed to have obligations and responsibilities under international human rights law.

## Identification of actors involved (from different models)

1. Private sector participation in water and sanitation provision is not straightforward. Rather, “the water and sanitation market is fragmented and accommodates a large variety of different agencies,”[[51]](#footnote-51) which may operate independently or jointly, consecutively or concurrently with one another, and for short or long periods. Actors in privatised water and sanitation markets may also operate on a timeline with their roles and responsibilities, and their obligations, shifting over time. Furthermore, in the context of contemporary globalization, “foreign investors’ share in past and ongoing [public-private partnerships] significantly overshadows the share attributed to domestic private investors”,[[52]](#footnote-52) thereby meaning that the identification of actors should not be limited to those operating in the State where services are being provided, but must take a wider look at authorities and agencies in third party countries where international actors are registered.
2. It is essential to properly identify the actors involved in the privatized provision of water and sanitation and to establish how they fit into the framework of water and sanitation provision. Only by doing so can proper assessment be made of the responsibilities, obligations and liabilities of these entities with regards to the human rights to water and sanitation.

|  |  |  |  |
| --- | --- | --- | --- |
| Entity | Definition | Responsibilities | Example |
| Host States | The local, regional and central government bodies and agencies in the state in which water and sanitation services are being provided | Contracting with private entities; issuing legislation and regulations; monitoring activities of private providersOther responsibilities are dependent on model utilised.  | The UK is a host state to a number of private firms which provide water and sanitation services therein. These firms do so under full divestiture.  |
| Home States | States where multinational private water and sanitation entities are based or registered | Establishing legislative frameworks to regulate the activities of entities registered therein | France is home to the two largest multinational actors in the water and sanitation sector, Suez and Veolia, and is therefore a third state when these companies operate abroad |
| Private Actors | Private companies providing services, either in their home state or abroad, for the provision of water and sanitation | Contracting with states; providing services according to contracts | American Water is a private US company which supplies water and sanitation services to municipalities in the United States and Canada, servicing around 15 million people. Its shares are mostly held by institutional investors such as Vanguard and BlackRock. |
| International Financial Institutions | Institutional lenders established collectively by States and operating at the global level to provide financial assistance to governments, particularly during periods of financial crisis | Provision of loans to States for development and non-development purposes. Whilst they might not be directly involved in funding water and sanitation projects, IFIs will sometimes impose privatization as a conditionality for the provision of loans to governments. | The International Monetary Foundation was involved in the privatization of Portuguese water and sanitation services by including within a memorandum of understanding attached to a bailout loan the notion that the Portuguese government should increase private sector participation in the water and sanitation sector. |

## Obligations of States

1. States are the primary subject of international human rights law and, accordingly, are the main bearers of duties under international human rights law. Where States outsource provision of water and sanitation to private actors, they are not suddenly freed from their human rights obligations towards the rights to water and sanitation, but remain under a duty to respect, protect and fulfil those rights. States can be involved in private sector participation in different ways, however, and the extent to which they hold obligations for the actions of private actors providing water and sanitation services may differ depending on their position within the provision framework.
2. In general, States can be ‘host states’, where the private sector is providing services within their jurisdiction, or ‘home states’, where companies domiciled within their territory are providing services in other states. The ‘home’ or ‘host’ state status of a country will have a considerable influence on its human rights obligations.

### Obligations of host States

1. **International human rights law obligations to respect, protect and fulfil**
2. Pursuant to international human rights law, States that have undertaken to contract with private entities for the provision of water and sanitation to their citizens are under a legal obligation to respect, protect and fulfil the rights to water and sanitation.
3. The obligation to respect requires that states do not themselves interfere with the enjoyment of the rights to water and sanitation. In the context of private sector participation, the obligation to respect may, for instance, be invoked when States choose to outsource provision of water and sanitation to the private sector knowing that this will lead to reduced or poorer quality services, or when they continue to be responsible for the provision of some or all services during the transition period between full public sector control to full private sector control. The obligation to respect also requires that states do not “prioritize the interests of business entities over Covenant rights without adequate justification.”[[53]](#footnote-53)
4. The obligation to protect the human rights to water and sanitation requires states to take steps to stop private actors negatively interfering with, or affecting, those rights, and to ensure that they positively respect the rights.[[54]](#footnote-54) In particular, the duty to protect will require that States “adopt legislative, administrative, educational and other appropriate measures to enable protection against violations linked to business activities and access to remedy for victims.”[[55]](#footnote-55) This means that states are under “a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.”[[56]](#footnote-56) Furthermore, regulations imposed in order to control the actions of private actors in the water and sanitation sector should place on them “public service obligations” which, in the context of water provision “may include requirements concerning universality of coverage and continuity of service, pricing policies, quality requirements, and user participation.”[[57]](#footnote-57) As will be seen below, the duty to protect represents an indirect method of ascribing human rights obligations onto private actors who might otherwise not be bound by the contents of international law. By requiring States to implement legislative frameworks protecting against abuse of the rights to water and sanitation by third parties, international human rights law effectively requires the normative content of those rights,[[58]](#footnote-58) and other human rights principles related to them, to be incorporated into domestic law. The final element of the duty to protect, namely that States provide access to remedies for the victims of human rights abuses by private actors, requires that the rights to water and sanitation be given horizontal effect within the domestic legal system, thereby allowing human rights claims to be made against private entities by their victims. This requires States to “provide accountability mechanisms for all providers, including the private sector, to ensure respect for human rights and to prevent human rights abuses.”[[59]](#footnote-59) Under the duty to protect States must ensure that providers not only take into account the normative content of the rights to water and sanitation but also that they reflect other human rights principles, such as access to information and non-discrimination and equality in their operations.[[60]](#footnote-60)
5. Finally, States that have enabled private sector participation in their water and sanitation provision frameworks also remain under a duty to fulfil the human rights to water and sanitation, meaning they must ensure that, where required, they step in to directly provide access to water and sanitation services which meet the normative content of the rights. In the context of private sector participation, the obligation to fulfil will apply to all those elements of provision that have not been contracted out to the private sector, and thus are still run publicly. The obligation to fulfil will also require States to “undertake planning to achieve universal sustainable access”, what includes the definition of the model of service provision,[[61]](#footnote-61) and calls on them to implement policies to ensure that “water is affordable, whether service is from private or public providers.”[[62]](#footnote-62)
6. **Soft law provisions**
7. The obligations placed on States, pursuant to international law, to respect, protect and fulfil the human rights to water and sanitation are further elaborated upon in soft law provisions, most notably the UN Guiding Principles on Business and Human Rights (UNGP). The UNGP sets out a framework for human rights protection in the context of private sector participation, noting that where private actors are involved States should protect human rights from interference by them, including by ensuring appropriate remedies are available in the case of breaches. Principle 1 of the UNGP, for instance, notes that “States must protect against human rights abuse with their territory and/or jurisdiction by third parties, including business enterprises”, through the provision of “effective policies and legislation”.[[63]](#footnote-63) Equally, Principle 3 notes that States should “enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps” and “ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights.”[[64]](#footnote-64) Furthermore, Principle 5 states that governments should “exercise adequate oversight when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.”[[65]](#footnote-65)
8. Where business enterprises do breach human rights, the soft law obligations contained within the UNGP make clear that they must “take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related human rights abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”[[66]](#footnote-66) through state-based judicial mechanisms,[[67]](#footnote-67) state-based non-judicial mechanisms,[[68]](#footnote-68) and non-state-based grievance mechanisms.[[69]](#footnote-69)
9. The UNGP therefore devise an important framework setting out the steps States must take in order to protect human rights from the activities of business enterprises. In the context of water and sanitation provision by private actors, compliance with the UNGP requires states to effectively legislate and regulate to ensure that non-state water and sanitation providers respect the human rights to water and sanitation in line with the normative content of those rights. Where this is not done, States must ensure recourse for victims to effective mechanisms for securing the accountability of providers, including guaranteeing effective remedies. Whilst elaborating on the substantive human rights obligations placed on states pursuant to the rights to water and sanitation, it is important to note, however, that as soft law the UNGP have no binding force, and therefore cannot be authoritatively relied upon to demonstrate specific binding obligations on States, or to bring claims against States in cases where private water and sanitation providers have breached the human rights of users.

### Obligations of home States

1. Whilst host states are under a clear obligation to protect the human rights to water and sanitation in situations where services are being provided by private actors within their own borders, it has been questioned whether this obligation also extends to the home states of companies offering water and sanitation services abroad. The importance of this stems from the common reality that host states may lack the regulatory capacity to properly protect the human rights to water and sanitation against abuse by private providers, for instance, because they have weak legal systems which are unable to properly control transnational companies, or because they are unwilling to implement regulation and legislation which constrains the activities of these entities, for fear of dissuading investment.[[70]](#footnote-70) Where this is the case, without outside protective intervention, the human rights to water and sanitation may be abused freely by private actors.
2. Several authoritative sources have suggested that home states of companies operating abroad may well owe a duty to protect against human rights abuses committed by those companies when providing water and sanitation services in other States. The Committee on Economic, Social and Cultural Rights has, for instance, noted in its General Comment 15 that “States should prevent their own citizens and companies from violating the right to water in other countries.”[[71]](#footnote-71) Equally, the Committee noted in its statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights that “[home] states should prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction … .”[[72]](#footnote-72) This position has also been reflected in the UNGP wherein Principle 2 notes that “states should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”[[73]](#footnote-73)
3. However, whilst such statements represent seemingly strong assertions that home states are under a duty to protect against human rights abuses committed by companies domiciled therein but operating abroad, it is questionable whether there exists, in law, any strong normative justification for placing obligations on home states with regards to protecting against abuses by domiciled companies outside of their territory.[[74]](#footnote-74) Without proper justification, the position that an obligation might be owed in this context becomes difficult to maintain in any authoritative way, and, accordingly, the ability to hold home states accountable for failures to protect against third party abuses in other territories might become less achievable in practice. This represents a gap in the application of international law and in the protection of the human rights to water and sanitation in the context of extraterritorial operations of multinational enterprises. Such a gap could be filled by, for instance, encouraging states to voluntarily implement legislative frameworks to protect against human rights abuses by companies registered therein but operating abroad, however the law as currently stated offers no binding obligation for them to do so.
4. Further complexity also arises regarding home state responsibility for the actions of transnational corporations operating abroad when considered in the context of the standard business practices of these entities. In general, transnational corporations do not operate directly in foreign water and sanitation provision but establish a subsidiary in the host state in order to provide water and sanitations services therein. As a subsidiary is a distinct and independent legal person, the transnational parent company is not immediately legally responsible for any actions or breaches of human rights committed by it, and, resultantly, the home state of the parent company has no direct jurisdiction over it. In order to deem the parent company responsible (and thus give a basis for home state responsibility), Kaufmann notes a specific legal basis is required which can include “the parent company’s negligence to oversee its subsidiary or to intervene in cases of known negative human rights impacts” or to “pierce the corporate veil” and determine the parent company and subsidiary to be the same entity.[[75]](#footnote-75) However, as noted, both options require “extensive knowledge of the parent company and its proximity to the subsidiary.[[76]](#footnote-76)

## Private actors – business enterprises

### Obligations pursuant to international law

1. Within the current framework of international law, business entities have no direct obligation placed upon them to respect human rights, including the human rights to water and sanitation. Rather, businesses responsibility to respect human rights arises indirectly, as a result of States’ obligation to protect against abuses by non-state actors. However, in 2018 the Working Group on Human Rights and Transnational Corporations issued a “zero draft” of a new treaty titled “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”. The document sets out several obligations that are to be placed upon states to introduce legislation and regulation that ensures private businesses properly respect human rights. These include an obligation to introduce legislation requiring businesses undertake human rights due diligence and obliging companies to include terms in the contracts they make to require human rights due diligence. The document also provides that domestic human rights judgments should be mutually recognised and enforced by States Parties.[[77]](#footnote-77)
2. However, draft treaty can be recognised as having several weaknesses. Firstly, the treaty does not directly impose obligations on transnational corporations to ensure that they respect human rights and, instead, simply codifies the duty to protect which already exists in international law. Secondly, as has been noted by the European Union, it only applies to transnational businesses, and therefore excludes domestic actors from consideration.[[78]](#footnote-78)

### Soft law obligations

1. Rather than simply relying on States to regulate the activities of private actors, soft law provisions have been developed which seek to impose obligations, in particular the obligation to respect human rights, including the rights to water and sanitation, directly on those entities.[[79]](#footnote-79) Whilst, as soft law, compliance with these principles and frameworks is purely voluntary, their presence within the framework regarding business and human rights remains useful for norm creation and, from a legal pluralist perspective, such initiatives can be seen as law for those who subscribe to them.[[80]](#footnote-80)
2. The most notable of these soft law instruments is the UNGP. At Principle 11, the UNGP states that “[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”[[81]](#footnote-81) The commentary to this Principle notes that it applies “wherever they operate” and that it “exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations.”[[82]](#footnote-82) In terms of the actions that must be taken by private actors in order to respect human rights, Principle 13 notes that they must “[a]void causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur” and “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”[[83]](#footnote-83) The commentary to this Principle holds that the “activities” of a business includes both acts and omissions, whilst its “business relationships” comprise its “business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services,”[[84]](#footnote-84) thereby ascribing responsibility across the entire supply chain of the entity’s operations, even in relation to activities which have not been directly carried out by the company in question. In order to ensure compliance with the obligation to respect human rights, the UNGP impresses on businesses the importance of exercising human rights due diligence in all of their activities by “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”[[85]](#footnote-85) Due diligence should be continuous and should recognise that risks may change over time and might be dependent on context.[[86]](#footnote-86)
3. Other soft law provisions containing obligations for private actors to respect human rights, including the human rights to water and sanitation, include the OECD Guidelines for Multinational Enterprises, the ILO’s Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy; the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights; and the UN Global Compact.
4. However, whilst soft law provisions might form an interesting framework for promoting human rights compliance by private actors, it is clear that there are significant gaps as regards to their efficacy. For instance, these instruments fail to provide any normative justification for businesses being obliged to respect their contents, or to respect human rights more generally. Indeed, the phraseology used in the UNGP, wherein corporations are deemed to have a ‘responsibility’ to respect rather than an ‘obligation’ to do so implies that failure to comply is inconsequential from a legal perspective.[[87]](#footnote-87) Equally, it has been suggested that the UNGP, and other soft law provisions, seem to rely on pragmatic realities that exist only in stable, developed states and are likely to be less effective in “those states that, due to their precarious political or economic situation, are in a weak position to effectively regulate corporations involved with the provision of water services in privatization scenarios.”[[88]](#footnote-88) Finally, soft law provisions, such as those contained within the UN Framework and Guidelines, are lacking regarding the nature of the responsibilities owed by private actors to specific rights, such as the rights to water and sanitation, and accordingly give only a “general perspective on how corporations should function in relation to human rights.”[[89]](#footnote-89)

## International Financial Institutions (IFIs)

1. IFIs, such as the World Bank (WB), the European Central Bank (ECB), and the International Monetary Fund (IMF), are often key funders of development in States, including for water and sanitation projects, and are sometimes called upon to provide loans to Governments to bail out their failing economies. The financial power that these institutions have, however, means they can represent a dominant force as regards to States’ water and sanitation policies, including by requiring greater private sector participation as a conditionality of loan agreements. This was seen in Portugal, where the ECB, the IMF and the European Commission called on the Government to “accelerate its privatization programme” of water and sanitation services as a condition (albeit a non-binding one) for receipt of bail-out funding.[[90]](#footnote-90)
2. For example, in its General Comment 19 on the right to social security it noted that ‘States should ensure the policies and practices of international and regional financial institutions promote the right to social security”,[[91]](#footnote-91) whilst in its General Comment 18 on the right to work it held that “States that are part of [IFIs] should pay attention to protection of the right to work in their policies, credit agreements and structural adjustment programmes”.[[92]](#footnote-92)

# Human rights risks of private sector participation

## Affordability of services

1. One significant negative impact that can result from private sector participation in water and sanitation provision is its effect on affordability of services. Where private actors take control of water and sanitation provision on terms that allow them to set and collect tariffs, this can lead to an uplift in service fees being applied. This is particularly so in contexts where private providers retain a significant proportion of the activities involved in provision, including obligations to invest and upgrade in infrastructure, the costs of which can lead them to increase user fees in order to ensure full-cost recovery and, even more important, maximise profitability.[[93]](#footnote-93) The effects of this are particularly troubling for low-income communities. As noted by Foster et al., “poverty sets natural limits to water charges. Research in Latin America indicates that full-cost recovery tariffs would present affordability problems for one in five households in the region. For some countries – including Bolivia, Honduras, Nicaragua and Paraguay – reaching cost-recovery would imply affordability problems for nearly half the population. Affordability is an equally serious problem in Sub-Saharan Africa, where about 70% of households could face problems paying bills if providers were to seek full cost recovery.”[[94]](#footnote-94) Equally, the hunt for increased profits by private water providers is noted to be highly controversial when profiteering interferes with the capacity of local populations to meet their basic needs, with this objections to this being “heightened when the profits accrues to multinational corporations based in the wealthiest countries, while the prices are paid by people living in poor countries.”[[95]](#footnote-95)
2. Whilst tariff-raising to obtain full-cost recovery is not a reality unique to private sector provision, the desire for profitability which comes with privatization does make it a more likely occurrence in these circumstances. Examples of water and sanitation tariff raising by private actors are well evident. Shortly after commencing a concession to provide water and wastewater services in Tucuman, Argentina, for example, the new private operator, Compañia de Aguas del Aconquija S.A., doubled user fees for water services that were being provided to a highly impoverished population, without implementing any significant service improvements.[[96]](#footnote-96)

## Lack of availability of services for all

1. Private sector participation in the water and sanitation sector can also have a detrimental impact on the availability water and sanitation. In some instances, this has occurred as a result of private water companies actively seeking to monopolise the sector so as to ensure their profitability. For example, in Indonesia water provision was privatized in 1988, when two companies were given concession contracts to provide water and sewerage services in Jakarta. Prior to privatization, 70% of Jakarta residents received their water from private wells, however as part of the concession process the previous SOE provider “agreed to force water users to shut down private wells and buy their water from the concessionaires.”[[97]](#footnote-97) This reality has been said to have harmed availability for local people,[[98]](#footnote-98) particularly in light of the fact that, in 2017, the Supreme Court of Indonesia ruled that the two concessionaires must have their contract revoked, with services being handed back to a public water utility because of concerns being raised about the “failure of the private companies to adequately service their neighbourhoods” with residents complaining that the firms “provided only sporadic water service, mostly limited to evening hours.”[[99]](#footnote-99)

## Poor quality and safety of the water and sanitation provided

1. The move towards private participation in water and sanitation provision is sometimes touted as a way of achieving better quality, safer services, as these entities are regarded as having access to greater funds and capacity for investment in infrastructure than governments, particularly when operating full cost recovery policies. However, evidence suggests that private sector participation is not a panacea for quality and safety issues, and in many instances the quality and safety of water and sanitation has decreased, or at least shown no improvement in already poor service quality, since privatization occurred. In the example of Tucuman, Argentina, noted above, for instance, following Compañia de Aguas del Aconquija S.A.’s takeover of provision responsibilities, users reported black, undrinkable water being provided to them over a period of many weeks.[[100]](#footnote-100) Equally, in Atlanta, where financial difficulties led the authorities to seek to privatize the entire water and sanitation sector, United Water (a subsidiary of Suez) was put in charge of delivery under a service contract “customers complained bitterly about the quality of water they were receiving and the number of boil water alerts shot up significantly.”[[101]](#footnote-101) This was said to have arisen due to poor prioritization by United Water which chose to focus on maintenance management, rather than meeting the needs of customers.[[102]](#footnote-102)

1. Water and sanitation quality and safety can also be inhibited in privatization scenarios by the political power wielded by private providers. In the US, for example, it has been shown that the National Association of Water Companies, which represents private water firms, “intensively and perennially lobbies Congress and the Environmental Protection Agency to refrain from adopting higher water quality standards.”[[103]](#footnote-103) In Buenos Aires, Argentina, the Government was forced to rescind the concession contract granted to private water provider, Aguas Argentinas, in part due to the poor quality of water being provided, with water having unsafe levels of nitrates present.[[104]](#footnote-104)

## Lack of equality in provision and discrimination against users

1. The operations of private sector participants in the water and sanitation sector have been demonstrated to have led to discriminatory outcomes for many users, particularly the poor, marginalized, and women.
2. As noted above, privatized water and sanitation services often become subject to the desire of private providers to maximise profits, leading providers to raise tariffs to generate greater income. These tariff increases have been shown to disproportionately affect poor households. For instance, in sub-Saharan Africa the spate of water and sanitation service privatization which occurred in the 1990s, and the full cost recovery focus which followed, has been said to have “intensified inequalities in the provision of such services, at the expense of low-income households.”[[105]](#footnote-105) Similarly, it has been noted that in the cities of Detroit, US, and Johannesburg, South Africa, “focus on full cost recovery and profit generation has led to disproportionate impacts on economically disadvantaged and otherwise marginalized users….”[[106]](#footnote-106)
3. Private sector participation has also been shown to have a disproportionality negative effect for people living in rural communities. This is because private firms often see rural areas as less profitable meaning they are more likely to deprioritize them, both in terms of actual provision and service improvement. This reality was identified in Senegal, where private sector participation improved access to water and sanitation in urban areas, but failed to afford equal access to people living in rural areas.[[107]](#footnote-107) This has also been identified as the case in poor countries more generally, as many multinational private water providers have openly stated that “low-income populations do not represent an attractive market because they are too poor to be profitable and represent too great a financial risk.”[[108]](#footnote-108)
4. Finally, private sector participation which leads to the provision of discontinuous services (as was the case in Jakarta, Indonesia), or which leads to the provision of unsafe water (as was so in Tucuman, Argentina) can have a negative impact on women, as it is women who are more frequently called on to collect water when piped services are unavailable, or to care for family members made sick by consumption of poor quality water.[[109]](#footnote-109) This has a negative impact on their ability to access work and education, thereby entrenching poverty, and can leave them exposed to greater chances of violence and injury when undertaking often hazardous trips to waterpoints.[[110]](#footnote-110)

## Lack of sustainability

1. Private sector participation can impact on the sustainability of water and sanitation services, particularly where the drive for increased profitability reduces the investment made by private companies into infrastructure renewal or improvements.[[111]](#footnote-111) Where investment is not made to improve services or repair infrastructure that is at risk of failing, sustainability is affected as continued deterioration will be likely to lead to total or partial loss of service. As noted in relation to water provision, “the evidence points to a lack of investment—public or private—in the maintenance and expansion of utility networks as a general rule, even where [private sector participation] leads to an increase in operational efficiency. This lack of investment raises concerns about the long-term sustainability of the operational improvements achieved.”[[112]](#footnote-112)
2. Furthermore, challenges of sustainability are notable in contracts that are time-limited as private providers do not consider the need to invest to ensure services operate properly beyond their concession period, thereby generating sustainability risks once the concession comes to an end.

## Retrogression

1. In some circumstances, private sector participation in the water and sanitation sector may also have a retrogressive effect on the enjoyment of the human rights to water and sanitation in states. This is particularly so where private companies implement policies of disconnecting users who are unable to pay their bills. In Jakarta, for example, the two companies who were awarded water and sanitation contracts were accused of “denying water access services to residents unable to pay their bills” which consequently led those users to have to “buy expensive drinking water from street vendors and bathe in polluted public wells.”[[113]](#footnote-113)

## Power imbalances

1. In states where the government has allowed private sector actors to participate in water and sanitation provision, imbalances of power between private providers and the government are commonplace. This is particularly so when private sector actors are large, multinational organisations which have access to financial resources that, in some cases, dwarf those that are available to the government. These power imbalances can cause particular difficulties for all stakeholders within the water and sanitation framework, leaving them vulnerable to the commercial interests of private providers. Private actors can and do use their greater economic power to force the hands of the state and gain more favourable conditions for their operations. In the United States the body representing private water and sanitation providers regularly lobbies to prevent the tightening of quality and safety standards which might require increased investment and, consequently, decreased profits.[[114]](#footnote-114) In other cases providers might simply threaten to withdraw from provision should states seek to tighten regulation surrounding their operations. Furthermore, even where the actions of private providers are challenged in judicial forums, or where states take a stand against poor standards of provision and remove contracts from private entities, the enormous wealth of these actors enables them to expend millions of dollars on court battles, which is often not possible for states, particularly developing states.[[115]](#footnote-115)
2. In Bolivia, for example, pressure from the population over the unaffordable water and sewerage connection fees charged by Aguas del Illimani, the private provider in control of La Paz and El Alto water and sanitation services, and a subsidiary of French multinational Suez, as well as the reality that it was not making water available to every home that it should have done pursuant to its contractual obligations, led the Government to consider cancelling the contract. However, the terms of the contract left Suez entitled to damages should the contract be cancelled unilaterally, therefore leaving the Government exposed to legal action by Suez, which was, in fact, initiated by Suez in 2005. As noted by Spronk and Crespo, this legal action highlighted the “extreme power imbalances” between Bolivia and Suez. For instance, whilst in 2005 Suez had operating revenues of USD 53bn, the entire GDP of Bolivia that year was USD8.9bn, meaning it had far less resources to devote to protracted legal battles.[[116]](#footnote-116)

## Other elements of human rights risks to be included in a more advanced stage of the report

* Corruption
* Insufficient accountability
* Limitations in regulation, considering the feature of natural monopoly of the services, and the asymmetry of power and in the access to information
* The neglect of sanitation service provision

# Annex I. Report of the former Special Rapporteur on the rights to safe drinking water and sanitation on non-state service provision

In 2010 the former Special Rapporteur dedicated her report to the Human Rights Council to the issue of non-state service provision. The report noted that whilst there had been strong outcries against private sector participation in the water and sanitation sector, the scale of the problem of private sector participation was not as large as some had suggested, with the majority of service provision still being provided by the State or informal providers (para. 8). The report acknowledges that the human rights to water and sanitation do not require States to utilise any particular model of service provision, and in this regard the use of private sector actors is allowed (para. 15).

The former Special Rapporteur notes that when utilising private water and sanitation providers it is necessary to understand that the private sector has responsibilities towards human rights and States should be ready to undertake human rights impact assessments when they determine how to provide water and sanitation services. The should also adopt legislation which requires private actors to carry out such assessments in order to ensure that the human rights to water and sanitation are respected, protected and fulfilled (paras. 22-28).

She notes that when assessing how to provide water and sanitation services in States, “a more nuanced approach is needed” that “overcomes the simplistic public versus private debate and acknowledges the existence of a wide variety of actors and arrangements for the delivery of water and sanitation services.”(para. 61) In concluding her report, she reflects that utilising non-State actors in water and sanitation provision does not absolve the State of its responsibilities and obligations towards human rights and the State remains the primary duty bearer. However, she further notes that “the obligations of States and the responsibilities of non-State actors are complementary. The latter can and should support the State in the realization of human rights.” (para. 63)

# Annex II. Issues of privatization raised during country visits of the current and former Special Rapporteur

Botswana (A/HRC/33/49/Add.3)

* People in drought affected areas having to purchase water from private vendors (para. 25)
* To get cheaper pit latrine emptying services, some families use unregulated private companies, raising health concerns as wastewater might not be properly managed. (para. 56)

Tajikistan (A/HRC/33/49/Add.2)

* 2009-2010 legislative reform allows local governments to outsource service provision to non-state actors. (para. 12)
* The central Government has created water associations as part of an effort to introduce public-private partnerships. However, a 2013 report found that Tajikistan was ill-prepared for PPPs, as its institutional strength and capacity was insufficient, and its legal framework was uncompliant with international standards. (para. 15)
* In the context of Tajikistan’s planned PPP expansion, the Special Rapporteur noted that the “Government should carefully assess the risks of jeopardizing the access of the poorest people, given the needs of infrastructure expansion and the lack of a regulatory tradition relating to water and sanitation.” (para 16)

Portugal (A/HRC/36/45/Add.1)

* Privatization of water and sanitation services was imposed on Portugal in a memorandum of understanding regarding economic bail-out conditions. (para. 5)
* SOEs, such as Águas de Portugal, still provide a large amount of water and sanitation services in the State yet no private providers yet subscribe to any soft law provisions for human rights protection or satisfactorily undertakes human rights due diligence. (para. 18 and Recc (u))
* Judicial review of private sector participation in the Portuguese water and sanitation sector found that “the majority of concessions consistently benefitted the private sector to the detriment of municipal budgets and individual consumers” noting that contracts failed to pass the risk of financial non-sustainability onto the private sector, with many contracts covering the private actor in case of financial loss. (paras. 40-41)
* The risks caused by private provision are exacerbated by the legal framework of Portugal which allows water disconnections in cases where users are unable to pay. (paras. 67-70)
* Practices regarding special discounted tariffs differ from provider to provider, creating geographical disparity. (para. 65)

Mexico (A/HRC/36/45/Add.2)

* Mexico has no regulatory bodies which cover either private or public water and sanitation providers. (para. 14)
* In Tuxla Gutiérrez, private water and sanitation service providers have been providing infrequent and poor-quality water to users, and services are cut off in instances where users are unable to pay, even where they are vulnerable. Users consider the private company is overcharging them for the poor-level of services it is providing. (para. 42)

Mongolia (A/HRC/39/55/Add.2)

* Where piped water is not available in *ger* areas, users must get their water from kiosks, which service an average of 300 households per kiosk, which is insufficient. With not enough public kiosks available, users must resort to private kiosks, which charge much higher prices. (para 42)
* There is no legislation in place to control the acts of informal private providers. (para 55)
* Residents of *ger* areas who do not have showers at home must use private facilities which proved unaffordable for many poor Mongolians. (para 56)
* Water disconnections in situations where users are unable to pay their bills are still lawful in Mongolia. (para 62)

Kenya (A/HRC/30/39/Add.2)

* Two private companies participate in the provision of water in Nairobi
* The CESCR had, in 2008, issued a recommendation that Kenya should seek to control prices charged by private water service providers and water kiosks, but by the time of the report in 2015 no action had been taken in this regard. Private water services and kiosk water often lacked affordability for the poorest Kenyans (para. 38)
* One of the private companies was accused of buying water from the public supply and selling it to users at a much higher rate, and assessments of the performance of the provider did not cover the price of water or affordability. (para. 41)

Brazil (A/HRC/27/55/Add.1)

* Brazil has established some SOEs to undertake water and sanitation service provision.
* Some of these have been made public by being floated on the Brazilian stock market. This means that profits are no longer primarily channelled into infrastructure improvement and meeting the needs of the poor but instead first go to pay shareholders. (para. 68)
* SOEs utilise social tariffs that are based on consumption, rather than need, with tariffs being available to all up to the first 10 cubic metres of water used per month. However, this is insufficient to guarantee the right to water as the poorest families often have the most members, and therefore use the most water. (para. 74)
* Some sanitation companies charge a full fee for collection and treatment of wastewater, even if they do not treat the sewage. (para. 80)

Thailand (A/HRC/24/44/Add.3)

* Regarding water, a private company is used to provide water services for industrial uses in the Eastern region. Regarding sanitation, local authorities can issue licences to private companies for the disposal of sewerage. (paras. 11 and 15)
* Illegal private sewerage vacuum trucks provide services to some families charging far more than is affordable, yet these illegal trucks are needed as the number of licenced ones is insufficient. (para. 47)
* There is a lack of accountability for all providers, including the private sector. (para. 69 (a))

United States of America (A/HRC/18/33/Add.4)

* A large number of Americans rely on private water and sanitation services
* Private connections are completely unregulated and unmonitored (para. 14)

# Annex III. Reports of Special Rapporteurs relating to private sector participation

Report of the Special Rapporteur on Extreme Poverty and Human Rights (2018, A/73/396)

Report regarding the effect of privatization on extreme poverty and on the enjoyment of other rights that contribute to poverty reduction. Finds that “privatization arrangements are rarely conducive to human rights impact assessments” as “human rights criteria are systematically absent from all such agreements” and “sustained monitoring is rarely undertaken on issues such as the impact on the poor, access to services and service quality.” (para 31)

In relation to water and sanitation, the report highlights that private sector participation in the water and sanitation sector can be especially detrimental to the poor as “infrastructure projects will be more attractive to private providers where significant fees can be charged and the construction costs are relatively low. But the poor are badly placed to pay, cannot afford to use many services, and often live in underservices areas.” As such, “water [and] sanitation … are far less likely to be provided adequately or at good quality levels to the poor.” (para 36)

The report rejects previous methods for mitigating the negative effects of privatization on the poor, which included categorising some services are inherently public, assimilating the private actor into the state, imposing detailed regulation, implementing in-depth monitoring, staging pro-poor interventions, and ensuring broad participation in decision making. (para 50-64). It instead suggests policies such as acknowledging past inadequacies, reasserting basic values such as equality and society, and ensuring the centrality of human rights in the privatization framework. (paras 65-80)

Report of the Special Rapporteur on the right to health (A/72/137)

The Special Rapporteur’s report on corruption and the right to health notes that corruption in both public and private sector service delivery, including for water and sanitation, has an impact on the health outcomes of users, and therefore leads to breaches of the right to health. The report notes that “corruption compromises the ability of the State to guarantee the underlying and social determinants of health, including safe drinking water.” (para 37). The report further states that, “around 10% of water sector investment is lost to corruption” with corruption having the effect of making water inaccessible, unaffordable and of reducing its quality (para 38). It notes that “in some lower income countries, corruption can add an estimated 30-45% to the price of connection to a water network” and states that “the increasing role played by private sector actors in water services requires the state to adopt an appropriate regulatory framework.” (para 38)

Report of the Special Rapporteur on the rights of persons with disabilities (A/71/314)

The Special Rapporteur on the rights of persons with disabilities’ report on disability-inclusive policies also touches upon issues relevant to private water and sanitation provision, addressing the steps that must be taken to ensure privatization scenarios are able to meet the needs of people with disabilities. It notes that “it is important to develop strategies and time-bound action plans to make public and private facilities and services accessible for persons with disabilities” (para 37) and that “regardless of the type of service delivery arrangement (direct provision, PPPs, partnerships with community based organisations)” States must ensure that “persons with disabilities receive quality services and adequate support” and that those services should be “designed to enable direct choice and the control of users over service providers.” (para 50) Furthermore, the report notes that in privatization scenarios efforts must be taken by the government to ensure people with disabilities are recruited to positions in private entities the government contracts with to provide services and that participatory policy review processes regarding private sector participation should be accessible to all. (para 65)

Report of the Special Rapporteur on the right to education (A/70/342)

The Special Rapporteur on education’s report on public private partnerships notes that in many cases it has been found that PPPs are “the most expensive method of financing, significantly increasing the cost to the public purse, typically very complex to negotiate and implement, and all too often entailing higher construction and transaction costs than public work.” (para 54) The report notes that “the concept of ‘private’ in PPPs must be looked at from the perspective of the human rights framework. A public service supplied by any private provider is a ‘public’ function, for which they are socially responsible under human rights law. Any arrangement, contractual or otherwise, between the public (government) and private (a private entrepreneur or entity) is and remains subject to human rights laws.” (para 82) It further notes that seeking to effectively regulate private providers is difficult as “the corporate sector has a long track record of seeking to avoid being regulated and numerous corporations have sued governments for attempting to implement regulations that could harm their profits.”

Report of the Special Rapporteur on the right to education (A/69/402)

The Special Rapporteur on education’s report on privatization, whilst very specifically focused on privatization in the education sector, notes that market-centred approaches to development have exacerbated inequalities around the world and, accordingly, the question of equality must feature more prevalently in development agendas (para 95).

Report of the Special Rapporteur on the right to education (A/HRC/41/37)

The 2019 report of the Special Rapporteur on education discusses how the privatization of education is affecting the implementation of the right to education. It is noted that profit-making in education has led to poor hygiene and sanitation in schools as private schools seek to maximise profits by cutting costs in areas such as maintenance. It is found that in Uganda a for-profit school was closed down partly as a result of “poor hygiene and sanitation” that “put the life and safety of schoolchildren in danger.” (para 15)

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