

**PRIVATE SECTOR PARTICIPATION (PSP)  
IN URBAN PUBLIC SERVICES:  
COMPARISON OF LAWS AND INSTITUTIONS  
IN MENA COUNTRIES**

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*The findings, interpretations and conclusions expressed in this paper are entirely those of the author. They do not necessarily represent the view of the World Bank.*

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## FOREWORD

This paper is based on a presentation made at the Urban Environment Workshop on the Mayor's responsibility for providing efficient services, organized by the World Bank Knowledge Networks Agency for MENA in cooperation with the city of Marseille (Alexandria, Egypt, 6 March 2006).

The paper is meant to be a quick source on key legal and institutional issues in the MENA region when it comes to private sector participation in urban water, wastewater and solid waste services. As such, practitioners and policymakers at the municipal and city level are its target audience. But it can also help experts at the national and international level to better understand the issues at stake.

The paper is not a comprehensive study covering all legal and institutional aspects and all countries in the MENA region. It aims at addressing the main problems observed on a selected number of countries, which have an outstanding role in the development of private sector participation. The information on contracts with the private sector in the different countries has been collected to the best knowledge of the author. The document has been updated and completed with comments and input received from participants of the workshop as well as from various World Bank staff working in the MENA region.

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## INTRODUCTION

1. The countries of the Middle East and North Africa have a longstanding tradition of municipal direct service delivery, especially in the water, sanitation and solid waste sector. Private sector participation (PSP) in the delivery of urban public services has developed in the region mainly since the 1980's. However, the legal and institutional frameworks in the different countries are not always adapted to this type of cooperation between the public and the private sector, which is a major factor for difficulties and failures in projects with private sector involvement and a hindrance to their further development in the region.

2. This paper will first clarify the notion of private sector participation and insist on the importance of having an appropriate framework in place for a successful implementation of PSP. The second and third chapter will present and analyze the legal and institutional frameworks in place in the different countries of the Maghreb and Mashreq region concerning three major urban services: water, sanitation and solid waste. Chapter IV will compare the existing legislation that addresses directly the participation of the private sector in public services. Finally, the paper will draw lessons and indicate best practices in terms of engaging the private sector in the delivery of municipal public services.

## D) FRAMEWORK FOR PRIVATE SECTOR PARTICIPATION

3. When discussing the so-called “public-private partnership” (PPP) in urban services, one has to start always with asking the question: What is PPP really about? And what is it not? This is important since PPP has emerged together with the privatization wave of the late 1980's and 1990's in different parts of the World. As is shown Figure 1, the number of infrastructure privatization transactions peaked in the second half of 1990's with over 100 transactions worldwide per year, and has since declined<sup>2</sup>. Privatization is defined as the process of transferring property (of a company or an asset) and/or the management of a service or activity related to this property from the government to the private sector. However, the “privatization” laws and policies as they have emerged in Lebanon, Jordan and Egypt provide actually for many other forms of public-private partnership, which do not include the total and definitive cession of public ownership. As a consequence, there is a risk of confusion between privatization and Public Private Partnership (PPP) in the policy debate of the MENA region.

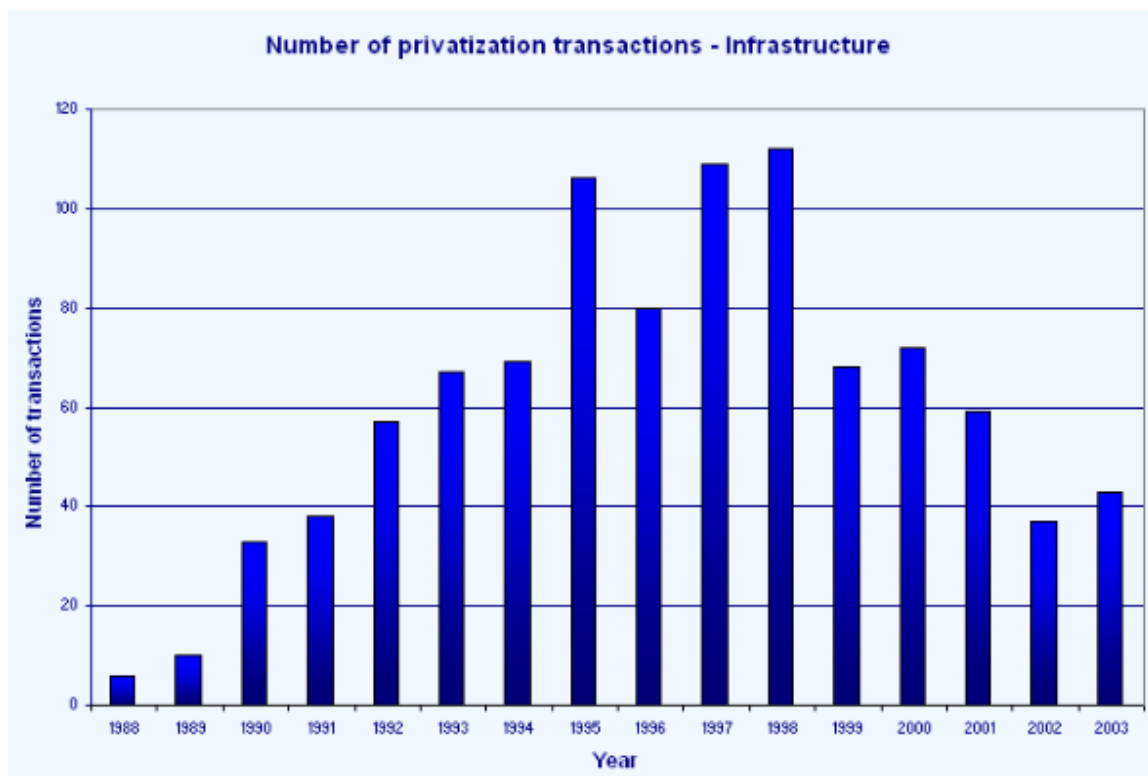
4. Moreover, “PPP” in itself is a problematic notion because of the normative-positive connotation of the term “partnership”. But even if forming a partnership, i.e. a fair, cooperative relationship built on mutual trust, is a vital ingredient to any public-

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<sup>2</sup> There are no comparable global statistics on PPP.

private project, partnership is not a given that defines these public-private setups, and it is not possible without balanced contractual arrangements. Therefore, in what follows, we will use “Private Sector Participation” (PSP) instead of PPP to describe a contractual risk-sharing relationship between the public and the private sector that seeks to bring about a desired policy outcome with mutual benefit.

**Figure 1: Number of privatization transactions worldwide 1988-2003 (World Bank privatization database, <http://rru.worldbank.org/Privatization>)**



#### a) Classification of Private Sector Participation arrangements

5. There are various forms of Private Sector Participation, which have to be distinguished. In most of them, the public sector retains important responsibilities such as asset ownership, investment financing, facility use or commercial risk. In any case, it is up to the public authority to determine the rules of participation according to its objectives and principles. The risk sharing will have to vary according to the option chosen, keeping in the mind the basic rule that each stakeholder should bear those risks which he is best able to manage and to mitigate. Table 1 contains a general presentation of the spectrum of PSP with the specificities of each type of PSP. At the left end, the public sector takes over most of the risk (financial, commercial, operations and maintenance etc.), while the private sector steps in progressively when moving to the right end of the table.

**Table 1: Classification and characterization of Private Sector Participation arrangements**

	<b>Service (or Management) Contract</b>	<b>Lease Contract/Affermage</b>	<b>BTO/DBO/DBFO, BOT/BOOT</b>	<b>Concession</b>	<b>Privatization</b>
<b>Asset ownership</b>	Public	Public	Public	Public/Private	Private
<b>Capital investment</b>	Public	Public	Public (BOT: Private)	Private	Private
<b>Operational efficiency</b>	Limited	Yes	Yes	Yes	Yes
<b>New services</b>	No	Yes	Yes	Yes	Yes
<b>User fee</b>	No	Yes	No	Yes	Yes
<b>Typical length</b>	1 – 15 years	5 – 25 years	15 – 30 years	10 – 50 years	Undetermined (unless limited by license)

6. In a **service contract**, the public sector contracts out specific operation and maintenance activities to a private entity that acts on behalf of the contracting authority. The typical length of such an arrangement is between 1 and 5 years, though longer **management contracts** (up to 15 years) can be established if a broader range of operation and maintenance activities is entrusted to the private entity. The compensation fee in a service or management contract is partly fixed, and partly based on the private operator's performance, often through a profit-sharing mechanism. The structure of a management contract is shown in

Figure 2.

7. A common form of private participation in infrastructures is the **lease contract or affermage**, in which a private entity operates a facility that has been built by or on behalf of a public body or with public funds. The operator is granted the right to charge for the services it provides, but is obliged to pay a portion of the revenue generated to amortize the construction cost. The public authority retains responsibility for planning and financing capital expenditure, while the private entity is responsible for meeting service standards with the assets available. This type of contract can vary in duration between 5 and 25 years. Its structure is outlined in

8. Figure 3.

Figure 2: Structure of a management contract

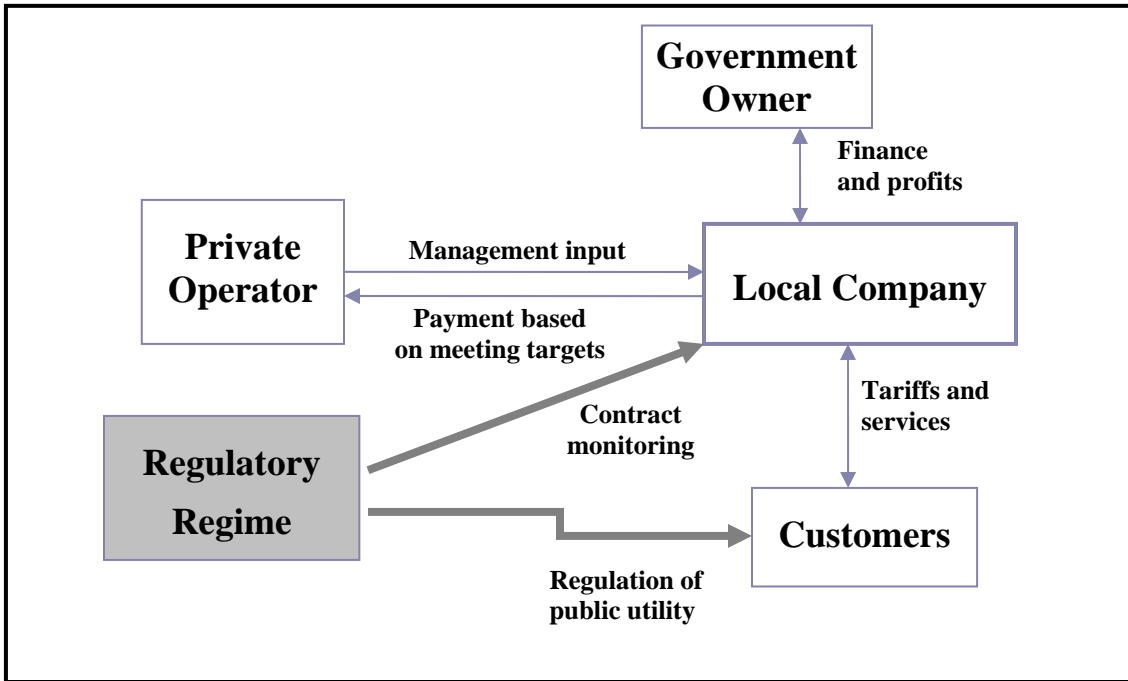
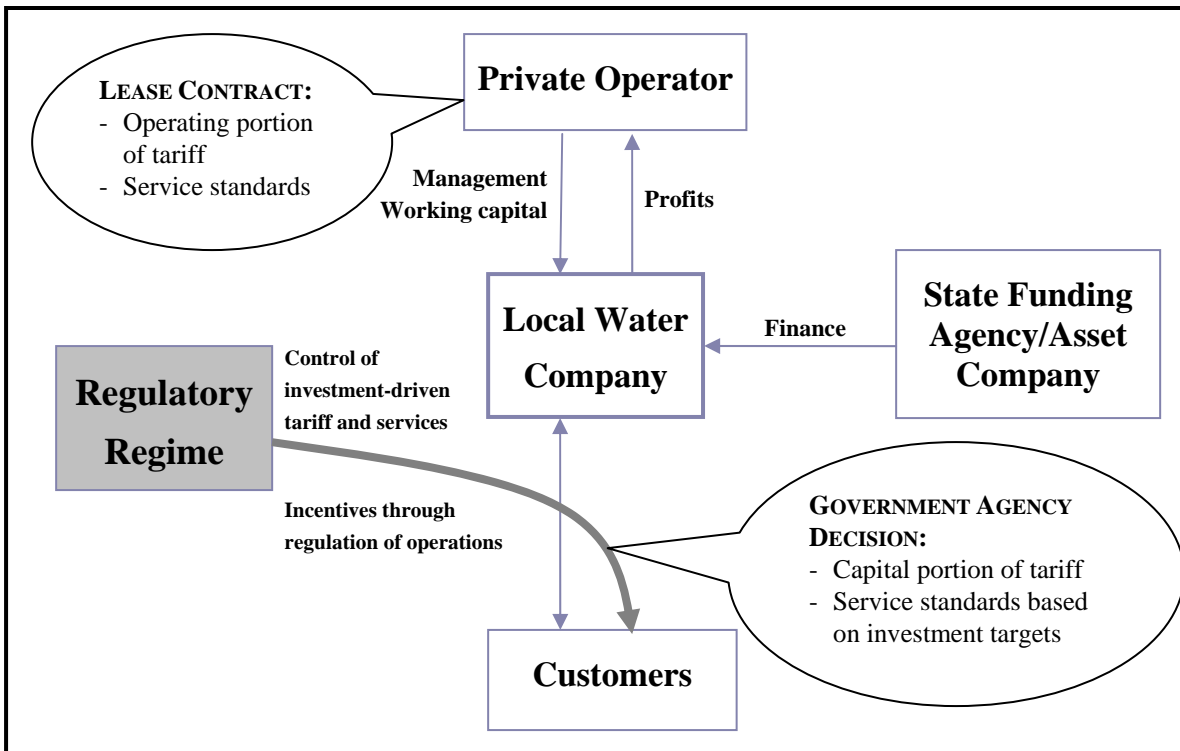


Figure 3: Structure of a lease contract

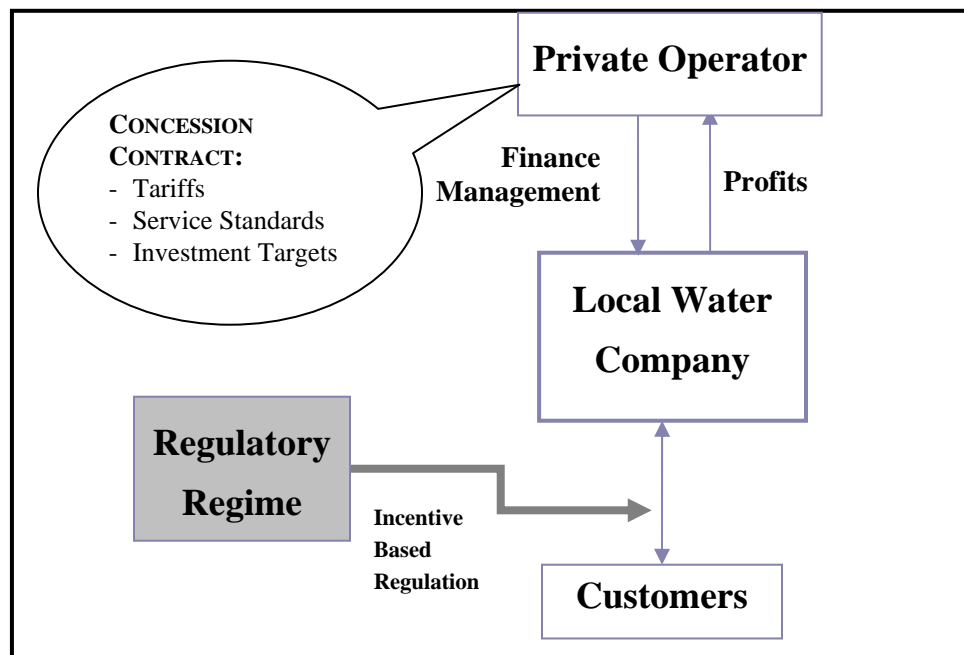




9. A project is a **BTO (Build-Transfer-Operate)**, when the private operator chosen by the public authority finances and constructs a facility or system, transfers it to the public upon its completion and has the right to operate it commercially for a limited period of time. BTOs are sometimes also called **DB(F)Os (Design-Build(-Finance)-Operate)** to underline the operator's responsibility for designing (and financing) the facility. If the facility is transferred to the contracting authority at the end of the contract period, this arrangement is called **BO(O)T (Build-Operate(-Own)-Transfer)**. Both approaches refer to new (so called "green field") projects. In other cases, the private operator might have to refurbish, operate and maintain an already existing facility (**ROT or Refurbish-Operate-Transfer**). All these arrangements last typically between 15 and 30 years. In each case, the private sector is not charging user fees, but is being paid by the contracting authority, based on its performance. The operator has however the possibility to develop new services in connection with the facility or service he operates to generate additional revenue.

10. A **concession** is the most extensive form of PSP. A private entity takes over public facilities or builds facilities to operate them with the right to collect revenues for the services provided to final users/consumers. Among the obligations of the concessionaire are operation and maintenance, as well as building or extending facilities (such as water networks), and delivering services to designated consumers with discrimination at prescribed levels of performance. At the end of the concession (10 to 50 years), the public or private assets return to public ownership. Concessions can be completely performance-based, with the private party taking over commercial and performance risks and controlling staff, fee collection, and the optimization of investments. This combination of public ownership and private operation is known in certain legal systems as "**public works concessions**" or "**public service concessions**". Figure 4 presents its typical structure.

Figure 4: Structure of a concession



11. Finally, **privatization** can take two forms. The public authority can either decide to privatize the asset, i.e. transfer a certain facility, its operation and maintenance to a private owner and operator, while the service (e.g. providing water to a community) remains a public service. Or it can privatize the public service itself by tendering it on the market to the best-bidding private operator (e.g. telecommunication technology).

#### **b) Justification of Private Sector Participation**

12. Mayors have large responsibilities in terms of public service delivery in most countries of the MENA region. Hence, their objective is double:

- deliver the best public service possible in terms of quality, continuity and equality;
- manage public funds efficiently under budget constraint while maintaining public services and infrastructures (networks, plants, vehicles, equipment etc.).

13. Since the start of private involvement in the delivery of public services, there has been an ongoing discussion about whether a privately run facility or service actually does fare better than an equivalent facility or service under public control. Numerous studies have compared the operational, legal, economic, financial and social implications of both options. Some have argued that private sector participation is justified if (1) the public sector operator fails to deliver satisfactory services and to maintain existing infrastructure as necessary; or if (2) the public sector lacks financial resources to carry out infrastructure investments that are vital for the satisfactory delivery of a service.

14. **But PSP always has to demonstrate Value-for-Money.** The public authority has to prove that a private operator will deliver better results than a comparable publicly controlled company at a given price. And it must make sure that the suitability, quality, and other criteria of the goods and services purchased are worth the price paid. The British Private Finance Initiative (PFI) has established a “Public Sector Comparator”<sup>3</sup> that verifies for each potential PFI project that it delivers Value-for-Money. In this context, it can be noted that the British government, which by 2005 had delivered more than 500 projects under its PFI scheme (mainly in the health, school, and transport sector), uses PFI only for around 10 to 15% of the total investment in public services, while the vast majority of investment in the UK continues to be conventionally procured<sup>4</sup>.

15. Private sector participation can make a difference through the principles fixed in PSP contracts. First, the build-and-operate approach in the case of a BTO/BOT or a concession pushes the private entity to optimize its investment over the lifetime of the contract and ensure quality construction that will require little maintenance during operations. Second, performance-based payments give incentives to deliver services at agreed-upon standards and levels. Third, the sharing of risk between a public and a private entity in PSP forces both parties to clearly allocate risks (such as planning,

<sup>3</sup> Cf. [http://www.hm-treasury.gov.uk/documents/public\\_private\\_partnerships/key\\_documents/ppp\\_keydocs\\_vfm.cfm](http://www.hm-treasury.gov.uk/documents/public_private_partnerships/key_documents/ppp_keydocs_vfm.cfm)

<sup>4</sup>Source: [http://www.hm-treasury.gov.uk/media/1E1/33/bud06\\_pfi\\_618.pdf](http://www.hm-treasury.gov.uk/media/1E1/33/bud06_pfi_618.pdf)

regulation, vandalism, force majeure etc.) and hence have a better evaluation of the risks of a given project. Fourth, the expertise and experience of the private entity in a given field (such as water and wastewater services) allows it to innovate on technical and business processes. Fifth, the customer-orientation of PSP contracts puts quality of service and customer satisfaction at the heart of the private's success. These inputs contribute to reduced delivery time and cost for building new infrastructure, reduced cost for maintenance and operations, improved service performance, and closer cooperation between public and private actors to deliver better public services.

16. However, the supposed advantages of PSP have been questioned as well. First, PSP places a financial burden on the future, since most PSP contracts are based on fixed annual fees that cover initial construction as well as lifetime operation expenditures, generating additional interest costs for the public authority. The discounting methodology used for calculating costs however favors options that defer expenditure over those, which have high costs in early years. For the higher the discount rate, the more costs at the project end tend to disappear, giving an advantage to spread-out repayment arrangements as they exist in BOT/BTO contracts despite the additional cost of private borrowing, compared to public procurement methods, in which construction costs are accounted for immediately<sup>5</sup>. Second, there are additional hidden costs (additional senior management time, costs for unsuccessful bidders, pre-contract adviser fees, etc.) for the preparation of a PSP contract, most of them due to the complexity of the procurement process or the legal and financial structure. Third, there is no long-term experience with this relatively recent form of public-private cooperation. This can lead to overly optimistic operations and maintenance cost assumption that will materialize in the future.

17. Having presented the pros and contras of PSP, one can claim that the economic and social benefits these infrastructures and their efficient operation provide can set off the additional financial burden. Nevertheless, international experience has shown that private sector participation can also lead to higher cost, worse service and lengthy legal action, mostly for two reasons:

- deficiencies in the legal and regulatory frameworks for PSP,
- deficiencies in PSP contracts themselves.

These failures remind us of the need for all actors involved in PSP, and particularly those at the local level, to know those laws and sector-specific regulations that refer to PSP, the rights and duties these give at the municipal level, as well as the possibilities for action even if there are no laws and regulations in place. Practitioners and policymakers have to look carefully at the initial situation of a given facility or service to understand whether PSP is the right solution, and if so, which form of PSP would best match the requirements of the municipality and its citizens.

18. Before we consider now the framework for PSP in three major urban public services, it is useful to define what the perfect legal and institutional environment would

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<sup>5</sup> For a detailed discussion of the financial implications of PPP: Schramm, Christophe (July 2004): *Risks, contracts and partnership: A case study of public-private partnerships in schools in the UK and Germany* (Master thesis, Oxford University)

be. On the one hand, comprehensive laws on water, sanitation and solid waste would first distinguish the different dimensions these services entail (e.g. concerning the different types of waste) and then clearly allocate responsibilities and financial means at the national, regional and municipal level. Such legislation would also set up an independent regulatory body with strong competencies that would monitor compliance with norms and standards (e.g. water quality) and ensure equal competition between private sector operators. On the other hand, this legal framework would also be enforced through an efficient institutional set-up and strong governance at all levels.

## II) THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR PSP WATER AND SANITATION

19. Concerning the water and sanitation sectors of the MENA region, the following general lessons have emerged from a detailed review of current legislation, regulations, institutions and service contracts:

- Many countries have recently produced comprehensive sector-specific legislation (such as Algeria). However, its implementation and execution are often partial or absent.
- In most countries, water and sanitation are under municipal responsibility according to the law. In practice however, other institutions (e.g. water authorities) often do the work at the local level, creating confusion on respective responsibilities.
- Existing laws usually provide for cost recovery mechanisms. But the regulated tariffs do very often not allow to cover the real cost of operation, maintenance and investment in urban services.
- Even if regulation authorities exist (de iure or de facto) in different countries, they often lack independence and effective regulatory powers.
- Private sector participation is already largely taking place in the MENA region, but only a few countries (such as Morocco, Lebanon, or Jordan) have gathered extensive experience with major contracts.

In what follows, we will explain more in detail the situation in several countries of the region, for which sufficient data could be collected, insisting on the legal or institutional arrangements and weaknesses, as well as taking stock of private sector participation to date<sup>6</sup>.

20. In **Lebanon**, the government officially launched PSP in water and sanitation in 2001, after having already implemented water projects worth US\$ 930 million between 1992 and 2002, through its Council for Development and Reconstruction (CDR). In 2002, 4 public water offices were created to manage water services (Beirut and Mount Lebanon, North Lebanon, Bekaa, and South). The first major management contract was

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<sup>6</sup> All the information on PSP contracts given below is subject to updates or corrections that might not have been available to the author at the time this paper was written.

signed in 2003 with the French group Suez for operating water services of Tripoli over a period of four years. Other management contracts exist in Baalbeck and in South Lebanon.

21. In **Jordan**, the Municipalities Law of 1955 counts water provision and the construction and supervision of sewerage among the 39 identified municipal functions. In practice however, the Water Authority is the operator for most water and sanitation services. The amalgamation in 2000 of the 328 existing municipalities into 99 new administrative units has had some success in improving their financial situation and capacities to manage local services. In 1999, the management of the Amman Water Authority was contracted out to LEMA (for an initial period of five years, renewed until 2006). In 2003, Suez-Ordeco was awarded a 25-year concession for wastewater treatment in As-Samra. While delays in the procurement process occurred in As-Samra, the Amman scheme necessitated subsidies to ensure cost recovery. In the case of the 40-year DBO concession for the Disi-Mudawarra to Amman Water Conveyance Scheme, a public body was finally selected in 2005, after private sector bidders had withdrawn their offers.

22. In **West Bank and Gaza**, a water law was passed in 1999, but several of its provisions, such as the creation of a National Water Council as main policy-making body or the unbundling of supply, transmission and distribution have not materialized since. The Palestinian Water Authority (PWA), created in 1995, assumes policy as well as development functions, more than effective regulation, for which it lacks political independence. While water and electricity fees represent up to 80% of municipal revenues, the costs for these services are not covered, since prices are set by the PWA. In addition, municipalities have been found not to pay their water bills to bulk suppliers, forcing sometimes the Ministry of Finance to step in. The only major management contract for water was concluded with Suez / Khatib&Alami for Gaza City in 1996 (initially four years), even if some of the potential benefits of PSP have not been realized because of the lack of an appropriate regulatory and monitoring framework.

23. In **Tunisia**, the Water Act (1975) limits concessions to non-conventional water resources (e.g. desalination) and leaves unclear the scope of PSP, while there is no legal base at all for this when it comes to sanitation. The SONEDE, created in 1968, is the national monopoly for water production and distribution, as is ONAS for wastewater services. The latter has awarded several sewer system maintenance contracts since 1997, while there are plans to delegate also sewerage plant management. A BOT contract is also planned for the desalination plant at Djerba.

24. In **Algeria**, a water law was passed in 2005, that places water distribution and wastewater treatment under municipal responsibility, allows for PSP, and provides for sanitation financing through water fees. Management of these services however, remains a major problem. The public companies (ADE and ONA) in charge of urban water and sanitation have no say in investment decisions since those are financed by the Ministry in charge of water resources (MRE), regions or municipalities. In practice, only 50% of operation and maintenance costs are covered in the water sector, which leaves ONA with no budget for sanitation and forces financially weak municipalities to step in. A BOO seawater desalination project close to Algiers was signed in 2005 with Ionics (General

Electrics) for a period of 25 years. Also, the water services for Annaba, Constantinople, and Oran are currently being tendered out.

25. In **Morocco**, the legal framework provided the delegating authority so far with major privileges (especially concerning contract cancellation or tariff structure), since contracts were ruled by administrative law. This situation has changed since the passing of the law on public service delegation (see Chapter IV). Water tariffs are subject to regulation until the end of 2006 for public companies, while private operators are already only bound by the terms of their contract. Morocco has the largest experience with concessions, having contracted out the water and sanitation services of Casablanca (1997, 30 years, Suez) and Rabat (1999), as well as the water services of Tangier and Tetouan (2002, Veolia Water).

### III) THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR PSP SOLID WASTE

26. Concerning the solid waste sector, the lessons derived from the review of current legislation, regulations, institutions and service contracts are the following:

- A minority of countries has adopted a solid waste management (SWM) policy. Sector-specific laws exist in Jordan, West Bank and Gaza, Egypt, Tunisia and Algeria, but implementation is not always guaranteed.
- SWM (collection, transport, and disposal) is a municipal task in all countries. However, financial and technical constraints as well as conflicts of competence with other actors seriously limit the scope and quality of the service delivered.
- Several countries have adopted environmental laws and set up agencies to address environmental issues and regulate and monitor SWM activities.
- Except for Algeria and Jordan, PSP is established in most countries through contracts with national operators. International companies are mainly present in Lebanon, Egypt, Tunisia and Morocco.
- At the local level, informal collection and recycling networks often play an important economic and social role (e.g. Zabbaleen in Egypt).

In the following paragraphs, we will review the situation in different MENA countries, depending on the availability of data, with the same focus on legal or institutional arrangements and weaknesses, as well as private sector participation to date.

27. In **Lebanon**, waste collection and disposal are municipal responsibilities, but there are barely any funds available, as there is no designated tax for SWM. In practice, the Council for Development and Reconstruction has taken over much of the investment in and operation of sanitary landfills, and has a leading role in developing regional or local SWM plans. Solid waste collection at the municipal level has been mostly contracted out to local contractors. However, as their selection is mainly based on cost and not value for money or competence, the service quality is often poor. Beside the pervasive informal private sector recycling networks, several SWM contracts have been concluded since 1994 for Greater Beirut with Sukleen and Sukomi. The sanitary landfill of Zahle, serving 29 municipalities, is privately operated since 2001.

28. In **Jordan**, a new sector-specific by-law on SWM has been under discussion since 2004. Municipalities can outsource or grant concessions for the collection, transport and disposal of waste. However, the lack of regulatory implementation tools limits concrete applications of this option. Due to inter-municipal arrangements, municipalities have started setting up collective treatment facilities, while keeping collection at the local level. Private participation has been low, despite successful collection contracts in the past (Aqaba and Zarqa). Amman's SWM in particular is fully guaranteed by a public company, while an important informal recycling sector is active throughout the country.

29. In **West Bank and Gaza**, Jordan SWM law is effective unless it is superseded by a law passed by the Palestinian Authority. Municipalities are responsible for street

cleaning, waste collection and transportation and levy a waste collection tax. The 1997 Municipal Law allows them to form joint service councils. Outsourcing has taken place for the collection and transport of residential waste, such as in Nablus or Jenine.

30. In Egypt, a new SWM law was adopted in 1994, which was complemented in 2000 by a national SWM strategy aiming at involving the private sector. Municipal agencies are responsible for waste collection and disposal through the licensing of waste collectors and contractors. Since 2004, they are also allowed to collect a SWM fee on the electricity bill that is proportional to electricity use, though this right is currently only applied in Alexandria. This explains the continued lack of funds and technical capacities to manage solid waste at the local level. Egypt has the most important informal recycling system in the region: The Zabbaleen offer a door-to-door collection service in urban neighborhoods based on municipal licenses. Many national private operators have SWM licenses or contracts (usually for three years), with an annual payment from the municipality and monthly fees from households. The most important SWM contract with an international operator is with Onyx (Veolia Environment) for the 5 million city of Alexandria (15 years since 2002). Other international companies are involved in Cairo, Suez, and Aswan.

31. In **Tunisia**, a national solid waste management program was adopted in 1993, while an SWM law was passed in 1996 that distinguishes between different waste types and addresses all components of SWM (collection, transport, sorting, recycling, reuse and removal), even if the question of cost recovery is not resolved. A national agency for environmental protection (ANPE) is responsible since 2000 for the implementation of the national SWM program. It monitors regulations, advises municipalities and has also contracted private operators. A consortium composed of a national and an international company runs the Tunis sanitary landfill, while many contracts with national operators exist for waste collection, transport and disposal.

32. In **Algeria**, a comprehensive SWM law was passed in 2001 that establishes the principles of an integrated and environmentally sound approach to SWM, raises the possibility to outsource SWM or privatize the sector and allows for partial cost recovery through household collection fees. The 2003 law on environmental protection established even the “polluter pays” principle, even if its implementation is incomplete. Except for a few collection contracts, there are mainly public entities in the SWM sector, as well as informal actors collecting recyclables on public landfills. The absence of the private participation has led to a lack of experts in the fields of project management, budgeting or output-based planning. Learning programs for municipal actors on contracts, performance monitoring, and accounting and finance have been envisaged to encourage the delegation of public services.



#### IV) TOWARDS A COMPREHENSIVE PSP LEGISLATION

33. Having reviewed the specific situations in the different countries of the MENA region for each sector relevant to the urban environment (water, wastewater, solid waste), we now want to take a legal perspective to look at the specific framework for private sector participation in each of the countries studied.

- Only Lebanon, Jordan, Egypt, and Morocco have set up a framework that encompasses the different forms of contractual relationships between the public and the private sector.
- Lebanon and Jordan have adopted so-called “privatization laws” on PSP and created privatization agencies, but only the Jordanian law provides for complete privatization.
- Egypt and Morocco have adopted more specific PSP legislation. The Moroccan law is exemplary as it provides for all details to efficiently contract out public services.
- No comprehensive, sector-specific regulation has been issued so far in any of the different countries.

34. In the case of **Lebanon**, the privatization law passed in 2000, despite its name, excludes the possibility of total privatization for natural resources (such as water), public utilities and monopolies, since assets have to return to the State at the end of any contract. A Higher Council of Privatization is set up to fix the terms of public subscriptions, but the law does not give any details on exact tendering procedures, sharing of responsibilities or monitoring performance. Moreover, the possibility for municipalities to tender out projects on their own is not mentioned, which indicates the limited local autonomy in this respect.

35. The privatization law of **Jordan** (2000) explicitly provides for all different forms of PSP and defines each of them precisely. An Executive Privatization Commission is created as well as a “Privatization Proceeds Fund” for revenues from privatization and restructuring projects, with among its objectives the plan to pay back government debt and finance infrastructure projects.

36. **Egypt** adopted a PPP law in 2004 that covers all the different forms of PSP. Interestingly, the law cites three conditions that should be satisfied by any PSP: (1) significant technical, economic and social gains; (2) job creation, new technology, and the attraction of foreign currency; (3) the existence of regulations and functioning regulatory bodies. Especially the second condition indicates the very pragmatic, but high expectations placed in PSP. Moreover, the law grants licenses to conclude PSP contracts to local as well as central authorities on an equal basis for specific sectors, which are not specified.

37. The legal framework for PSP in **Morocco** used to be spread-out in sector legislation, as is still the case in Tunisia today, with many elements being not adapted to the needs of PSP. However, the Moroccan law on the delegation of public services adopted in 2005 provides in detail for all aspects of PSP, the French term of “gestion

déléguée” covering all types of PSP except for privatization. Following are some of the outstanding provisions of this law:

- It obliges the private operator to respect major public service principles: (1) equality of users, (2) service continuity, and (3) adaptation to technological, economic and social evolutions.
- It postulates the principle of financial contract equilibrium that takes into account public service imperatives and fair payment of the operator.
- The delegating authority must select the private operator through competitive procurement and defines the cases, in which direct negotiations are possible.
- The law fixes the setup and the different components of a PSP contract, such as a list of buildings, equipment and personnel that form part of the delegated service, and defines the legal and accounting status of these buildings and equipment brought into the contract by the public entity.
- The conditions for normal and early contract termination of a PSP contract are clearly set out. It is stated in particular that the limited length of a PSP contract has to be adapted to the nature and amortization periods of the delegated services and can only be extended to maintain financial equilibrium.
- The arbitration procedure is established as the common dispute resolution mechanism between the contract parties and between operator and users.
- The law defines the rights and obligations of the delegating authority. It grants a general monitoring right concerning the economic, financial, technical, social and managerial execution of the contract (including penalty rules), and provides for contract revision (at least every five years in the case of contracts of 10 years or longer). The delegating authority has to ensure an appropriate tariff structure.
- The law details the rights and obligations of the private operator. They include the right to sub-contract, the obligation to form a SPV (Special Purpose Vehicle) based in the Morocco, the rules for the collection of taxes or fees and their transfer to the public body, as well as the obligation to set up a corporate information and quality control system.

## V) LESSONS LEARNED ON THE FRAMEWORK FOR PSP

38. Having presented the framework of PSP, the sector-specific situation in the MENA countries and the current legislation in place concerning PSP, we can now turn to the lessons that emerge from this study. To establish a **successful PSP framework**:

- Governments should clearly distinguish between privatization and private sector participation and brand the latter differently, taking into account all the specificities mentioned before, especially as they might impact public procurement.
- The elaboration of PSP legislation should be coordinated with the restructuring of the sectors concerned and with the reform of public procurement in general. In any case, there should be a separate law on PSP or at least a separate regulation on PSP.
- PSP legislation should be designed dynamically so that it can adapt to new realities, such as new sectors, changing financing etc.
- Central governments should support and assist local authorities in applying sector-specific PSP laws and regulations and exerting their roles as delegating authorities.

39. Among the key lessons for **successful contracting** with the private sector are the following:

- Procurement is based on complete and reliable technical data and on a candid assessment of financial resources available to the public authority. This information is gathered before the start of the bidding process.
- The tender documents contain clearly defined specifications for bidders. The bidders then have to show that they can adapt to local or regional specificities (such as informal recycling networks).
- The PSP contract contains adequate provisions covering financial risks (costs recovery, credit risk, foreign exchange fluctuations, inflation, etc.) for both parties.
- The delegating authority disposes of sufficient human and technical capacity to evaluate, enforce, and monitor private operations.

40. This leads us to draw some **implementation lessons** that will be useful to each public decision maker faced with the choice of private participation in urban public services:

- Define first what kind of PSP you need. Understand the legal PSP framework of your country and its implementation regulations.
- Invest time and financial resources in preparation, procurement, and the start of operations.
- Build an informed public debate around your PSP project, addressing public concerns and involving the private sector at the policy level, to prevent confusion between PSP and privatization.
- Negotiate transparent contracts with appropriate risk transfer to the private sector and clear dispute resolution procedures.

- Understand that PSP is possible even if there are no specific laws. Use international best practice (such as the Moroccan law on public service delegation): Do as if you had the ideal PSP legislation in place, especially with regard to procurement.
  - Consider a two-step approach: Sign a management contract for the first years to reorganize operations and measure important parameters before launching a longer-term lease, BOT/BTO or concession to address the main issues identified in the first phase.
41. Finally, it is important to keep in mind the **limitations and risks of PSP**.
- The participation of the private sector is not a one-size-fits-all solution to all the problems encountered in the management of urban services in water, wastewater and solid waste.
  - Selecting appropriate projects is critical, since not all projects, sector or country contexts are suitable to successful private involvement. Moreover, political commitment is an essential element of success, although merely politically motivated projects are also the most dangerous.
  - PSP is a complex business that needs careful and competent preparation and management, be it concerning technical specifications, financial equilibrium, or risk allocation.

## CONCLUSION

42. Having assessed the legal and institutional framework for private sector participation in urban water, wastewater, and solid waste services and made recommendations on how to improve the outcomes of PSP, we would like to add a few considerations that have emerged from the discussions following the presentation of this study. First, the legal framework cannot be considered without taking into account the financial framework as well, since rights without the financial means to exert them are no effective rights. Accordingly, the current tax legislation in the countries of the MENA, which leaves municipalities with insufficient funds to assure their functions, poses fundamental problems for the management of urban public services – even more so, when these functions have evolved and grown over time. Second, without questioning the potential virtues of private sector participation, it must be emphasized, that there is an important role to play for the civil society as final user of a given service. Their participation to ensure certain service standards must be ensured. Third, there is no denying the fact that private sector participation has been brought to the MENA region from other countries. Given the region's culture, some of the requirements for successful PSP, and in particular the need for a strict legal and institutional framework and competitive procurement, have to be explained and implemented carefully. Keeping regional specificities in mind is essential to design and implement successful cooperation between municipalities and the national and international private sector in the countries of the MENA region.

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