

Making water privatisation illegal: – new laws in Netherlands and Uruguay

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1. Introduction

This note presents basic information about the way in which two countries are making water privatisation illegal: Uruguay, and the Netherlands. In both cases, the new laws outlaw not only the sale of water systems but also the delegating of the operation of water supply to private companies.

These developments are in contrast to the commonly expressed view that there is an inexorable historical trend towards privatisation. They also demonstrate that international laws or trading rules – including EU law – are no obstacle to a national choice to make water privatisation illegal.

[Note: PSIRU is not aware of other countries where water privatisation is effectively illegal. However, some constitutions may still include provisions which have this effect, and there may be regional, provincial or local laws which outlaw water privatisation. We would be interested to hear of such cases].

2. Uruguay: referendum supports constitutional amendment

On Sunday 31st October 2004, in Uruguay, a referendum proposing a constitutional amendment on water was approved by 62.75% of voters. The amendment includes a number of elements, including the statement that access to piped water and sanitation are fundamental human rights, and that social considerations take priority over economic considerations in water policies. It also includes the statement that:

“The public service of sewerage and the public service of water supplying for the human consumption, will be served exclusively and directly by state legal persons”

(“El servicio público de saneamiento y el servicio público de abastecimiento de agua para el consumo humano serán prestados exclusiva y directamente por personas jurídicas estatales.” See Annexe for Spanish and English text of constitutional amendment.)

2.1. History

The referendum was promoted by the National Commission for the Defence of Water and Life, which included FFOSE - the trade union representing workers in the publicly owned water and sewerage company Obras Sanitarias del Estado (OSE) - and several civil society organisations, including REDES-Amigos de la Tierra (Friends of the Earth). Water supply has been privatised through concession contracts in two places in Uruguay, and the campaign was based on dissatisfaction with the performance and behaviour of these concessions, the pressure for new privatisations from IMF loan conditionalities, and further threats arising from trade liberalisation negotiations in the WTO, the FTAA, the EU-Mercosur and other free trade and investment agreements. The campaign was also based on concern for the environment, including the exploitation of water resources, and on concern for the untransparent management of the public utility (whose directors were themselves in favour of privatisation).¹

2.2. Implementation and effect

The next step under Uruguayan law is that the parliament is now obliged to draft legislation outlining the mechanisms for implementing the constitutional reform. Presidential and parliamentary elections were also held on the same day in Uruguay, with a victory in the presidential election for Tabaré Vázquez, the candidate of the left-wing EP-FA (Broad Front - a popular front, in political terms) coalition, which was one of the supporters of the constitutional reform: the Broad Front also won an absolute majority in both houses. There is some disagreement on the effect on existing concessions, but the amendment states that the compensation which may be payable will only cover past investments which have not been fully recovered, not compensation for lost future earnings.²

2.3. Use of referenda and plebiscites

The Uruguay referendum appears to be the only example so far of such a device being used to make water privatisation illegal. However, laws providing for referenda and plebiscites now exist in many countries. Switzerland is best known for this practice, and there is a long tradition of referenda and citizen initiatives in different parts of the USA³, but increasing numbers of countries in all parts of the world provide the right to some kind of initiative, including most European countries⁴, and the new EU constitution includes provision for EU-wide citizens' initiatives⁵.

These laws have sometimes been used as part of campaigns against privatisation of water or electricity. There is in 2004 an active campaign in Hamburg, Germany, which is using new referendum laws to reject proposals for water privatisation: in Louisiana, USA, a new law was passed in 2003 requiring future privatisation of water or sewerage to be subject to a popular referendum⁶ (this law itself resulted from a referendum campaign).

3. Netherlands water law: Waterleidingwet 2004

The Netherlands has just passed a new law which prevents any privately owned company from providing drinking water services to the public. It passed the lower chamber on 9 December 2003 and the upper chamber on 7 September 2004, and comes into force on publication in the official record.

3.1. History

In September 2000 the Dutch Environment Minister, Jan Pronk, introduced a bill that would prevent private companies from providing water services. Public water companies would retain exclusive rights to the production and distribution of drinking water in their distribution area.⁷ In 2001 a law to this effect was being drafted, but following the resignation in 2002 of the Dutch government (over a report into the Srebrenica massacre in Bosnia in 1995, when Dutch peacekeepers failed to act), the new government shelved the bill. The law could be considered a follow-up to a 1997 government paper, which made clear that water supply concessions would only be given to government-owned companies.⁸

The new water law was eventually passed by the main chamber of the Dutch Parliament (Tweede Kamer) on 9 December 2003 with the support of all the major parties but one, and was passed by the Eerste Kamer on 7 September 2004.⁹ It will pass into law on publication in the official record, following Royal Assent.

The bill only covers drinking water provision to households, not sewerage and wastewater treatment.

3.2. Key provisions

The new law¹⁰ states that drinking water services to consumers may only be provided by a "*gekwalificeerde rechtspersoon*" (qualified legal person). "Qualified legal persons" are, in essence, entities which are 100% public or publicly-owned; see 3.2.1 below for the precise definition.

3.2.1. Legal definition of permitted types of ownership

The key Dutch phrase regarding who may provide water services under the terms of the bill is "*gekwalificeerde rechtspersoon*", meaning literally "qualified legal person". This is defined at the beginning of the bill (Art. 1f):

- 1°. "*publiekrechtelijke rechtspersoon*" (public legal person), defined here as state, province, municipality, water board.
- 2°. "*naamloze or besloten vennootschap*" (public limited company or private limited liability company) that meets the following conditions:
 - i. the statutes prescribe that all shares in the company's capital are held directly or indirectly by public legal persons and
 - ii. the company has not committed itself to share its controlling rights with others than a public legal person or a company as defined in this article
- 3°. "*coöperatie*" (joint venture), whose members comply with the conditions set under 2°;

In addition, under Art. 1g:

- “*bestaand waterleidingbedrijf*” (existing water company): water company that delivered drinking water on 1 September 2000, as well as its legal successor under general or special title, provided that this successor is a qualified legal person

3.2.2. Legal form of prohibition on private provision of drinking water

The form the ban takes in law (in Article 3i), is the prohibition of *all* production and supply of drinking water for consumers:

Article 3i

“It is forbidden to

- a) produce drinking water for consumers or
- b) to deliver drinking water to consumers.”

Article 3j then lifts that ban for certain organisations and circumstances only, the key exception¹ being existing water companies controlled by “qualified legal persons” (see above).

Article 3j

“1. The prohibition of Article 3i in respect of part (a) does not apply to:

- a. an existing water company over which control is exclusively exercised by qualified legal persons;”
(...)

2. The prohibition of Article 3i in respect of part (b) does not apply to:

- a. an existing water company over which control is exclusively exercised by qualified legal persons: in the distribution area established by ministerial regulation for each company.”

Later articles provide some specific protections, or clarifications of the overall position, to ensure that the ban cannot be circumvented:

Article 3m:

“It is prohibited to create a legal transaction, the result of which is that, directly or indirectly, alone or together with third parties, someone other than a qualified legal person gains control over a water company or part thereof or over the management of a water company or part of the management.”

The responsibilities for and control of this service may however be passed on to other water companies exclusively controlled by qualified legal persons (Art 3k).

The next article specifies a number of specific actions which will always fall foul of Article 3m, including

Article 3n

“a: changes in the terms of the statutes of a water company such that the possibility is given that third parties, not being a qualified legal person, becomes a share owner;”

b: the transfer of shares in the capital of a water company to third parties as in part a;

c: the transfer to a third party of property of water treatment works or works needed for the production of drinking water within a water company;”

¹ Other exceptions include businesses supplying consumers on their own property; and 2(c), “the owner of a collective supply network”. Part 3 of Article 3j also permits the Minister to permit exceptions to Article 3i.

4. Relationship of Netherlands legislation to EU law

The Dutch parliament was advised that its legislation to outlaw private operation of water services does not conflict with European law. The advice states that as long as no European measures apply to a sector then it remains outside and free for member states to do as they please.¹¹

4.1. Treaty: neutral on public or private ownership

There is no EU directive that prevents a member state from making the privatisation of water illegal, whether by sale, or by delegation by concession. It would be contrary to the treaty for the EU to enact any such law, as the treaty provides explicitly (art 295) that: “This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”¹² The same article is retained in the draft constitution.

4.2. No agreement to liberalisation directive on water

There is no directive which requires any form of liberalisation in the water sector, and there are no grounds for saying that any such measure is imminent or even likely. The EC proposed considering such a law in the 2003, but it has been extremely contentious and was specifically rejected by a resolution of the European parliament in March 2004:

“47. Rejects efforts to make water and waste-disposal services subject to single market sectoral directives, considers that liberalisation of water supply (including wastewater disposal) should not be carried out in view of the distinctive regional characteristics of the sector and local responsibility for provision of drinking water as well as various other conditions relating to drinking water; calls, however, without going as far as liberalisation, for water supply to be 'modernised' with economic principles in accordance with quality and environment standards and the needs of efficiency; 48. Takes the view that water and waste services should not be subject to Community sectoral directives, but emphasises the fact that the Union should keep its full responsibility for these sectors as regards quality and environment protection standards”¹³

The subsequent EC white paper on SGI notes that “diverging views are expressed as to whether a specific regulatory framework is desirable at Community level... No agreement exists with regard to the opening of the water sector at Community level”; and stated only that: “As far as the water sector is concerned, the Commission will publish before the end of the year the results of the assessment it has undertaken”¹⁴.

4.3. Draft directive on services

While there are concerns about the possible impact of the draft directive on an internal market in services, the EC white paper on SGI in 2004 specifically states that this proposal will not impose any obligation to restructure the water sector: “in this proposal, certain activities which may be considered by Member States as services of general economic interest are excluded from the scope of the proposal such as transport or are subject to derogations from the country of origin principle, such as postal services and electricity, gas and water distribution services. More important, the proposal does neither require the Member States to open up services of general economic interest to competition nor does it interfere with the way they are financed or organised”¹⁵.

5. Annexe: Text of Uruguayan constitutional reform

from *Redes website*,¹⁶ www.redes.org.uy

(A) Spanish

ARTÍCULO 47. Agréguese:

El agua es un recurso natural esencial para la vida.

El acceso al agua potable y el acceso al saneamiento, constituyen derechos humanos fundamentales.

1) La política nacional de Aguas y Saneamiento estará basada en:

a) el ordenamiento del territorio, conservación y protección del Medio Ambiente y la restauración de la naturaleza.

b) la gestión sustentable, solidaria con las generaciones futuras, de los recursos hídricos y la preservación del ciclo hidrológico que constituyen asuntos de interés general. Los usuarios y la sociedad civil, participarán en todas las instancias de planificación, gestión y control de recursos hídricos; estableciéndose las cuencas hidrográficas como unidades básicas.

c) el establecimiento de prioridades para el uso del agua por regiones, cuencas o partes de ellas, siendo la primera prioridad el abastecimiento de agua potable a poblaciones.

d) el principio por el cual la prestación del servicio de agua potable y saneamiento, deberá hacerse anteponiéndose las razones de orden social a las de orden económico.

Toda autorización, concesión o permiso que de cualquier manera vulnere estos principios deberá ser dejada sin efecto.

2) Las aguas superficiales, así como las subterráneas, con excepción de las pluviales, integradas en el ciclo hidrológico, constituyen un recurso unitario, subordinado al interés general, que forma parte del dominio público estatal, como dominio público hidráulico.

3) El servicio público de saneamiento y el servicio público de abastecimiento de agua para el consumo humano serán prestados exclusiva y directamente por personas jurídicas estatales.

4) La ley, por los tres quintos de votos del total de componentes de cada Cámara, podrá autorizar el suministro de agua, a otro país, cuando éste se encuentre desabastecido y por motivos de solidaridad.

ARTÍCULO 188.- Agréguese:

Las disposiciones de este artículo (referidas a las asociaciones de economía mixta) no serán aplicables a los servicios esenciales de agua potable y saneamiento.

Disposiciones Transitorias y Especiales

Agréguese la siguiente:

Z'') La reparación que correspondiere, por la entrada en vigencia de ésta reforma, no generará indemnización por lucro cesante, reembolsándose únicamente las inversiones no amortizadas.

(B) English translation

provided by *Redes* www.redes.org.uy

ARTICLE 47.- *(To be added)*

The water is a natural resource essential to life.

The access to drinkable water and the access to sewerage, constitute fundamental human rights.

1) The national policy of Waters and Sewerage will be based on:

- a) the arranging of the territory, conservation and protection of the environment and restoration of nature.
- b) the sustainable management, *solidary* with future generations, of water resources and preservation of the hydrologic cycle that constitute matters of general interest. The users and the civil society, will take part in all instances of planning, management and control of water resources; *establishing* the hydrographic basins as basic units.
- c) the establishment of priorities for the use of water *by* regions, basins, or parts of them, being the first priority the supplying of drinkable water to populations.
- d) the principle by which the providing of the service of drinkable water and sewerage, will have to be done *placing* reasons of social order *before those* of economic order.

Any authorization, concession or permission that anyway *go against* these principles will have to be stopped with no consequences.

2) The superficial waters, as well as the underground ones, with exception of rain, integrated in the hydrologic cycle, constitute an unitary resource, subordinated to the general interest, which is part of the state 's public domain, as hydraulic public domain.

3) The public service of sewerage and the public service of water supplying for the human consumption, will be served exclusively and directly by state legal persons.

4) The law, by the three fifth of votes of the total of components of each Chamber, will be able to authorize *supplying water* to another country, when it is deprived of supplies and by reasons of solidarity.

ARTICLE 188.- To be added:

The dispositions of this article will not be applicable to essential services of drinkable water and sewerage.

Transitory and Special dispositions

Add the following one:

Z ") *The compensation that could arise because of the entrance in effect of this reforms*, will not generate reparation for future profits, *refunding* solely the non amortized *investments*.

Notes

- ¹ See El Agua es a todos <http://www.redes.org.uy/pdfs/folleto%20agua.pdf> ; Hacia un URUGUAY SUSTENTABLE Gestión integrada de Cuencas Hidrográficas. By Marcel Achkar, Ricardo Cayssials, Ana Domínguez y Fernando Pesce. 2004. <http://www.redes.org.uy/pdfs/aguauruguay.pdf>
- ² AMBIENTE-URUGUAY: No a la privatización del agua. Raúl Pierri. <http://www.ipsnoticias.net/print.asp?idnews=31860> (English version) URUGUAY: Referendum Gives Resounding 'No' to the Privatisation of Water by Raúl Pierri http://www.ipsnews.net/new_notas.asp?idnews=26097
- ³ Waters, M. Dane. 2003. *The Initiative and Referendum Almanac*. Carolina Academic Press. Not available online but can be ordered from <http://www.iandrinstitute.org/Library.htm>
- ⁴ Direct Democracy in Europe. IRI. http://www.iri-europe.org/documents/almanac_content.pdf
- ⁵ New IRI Report launches implementation process of the European Citizen' Initiative October 11, 2004 <http://www.iri-europe.org/>
- ⁶ A sample Water Privatization Referendum Act, based on these laws, is available at <http://www.serconline.org/waterPrivatization/referendum.html>
- ⁷ [WaterForum Online](http://www.waterforumonline.com), 7 Sep 2000
- ⁸ Blokland, Maarten; Braadbaart, Okke; and Schwartz, Klaas (eds 1999), *Private Business, Public Owners: Government Shareholdings in Water Companies*, International Institute for Infrastructural, Hydraulic and Environmental Engineering (IHE), p39
- ⁹ <http://eerstekamer.cust.pdc.nl/9324000/1f/j9vvgh5ihkk7kof/vg6hctm6z000>
- ¹⁰ Eerste Kamer der Staten-Generaal (2003), 28 339: Wijziging van de Waterleidingwet (eigendom waterleidingbedrijven), 9 December 2003. (as passed by the Tweede Kamer, not substantially altered by the Eerste Kamer) <http://www.eerstekamer.nl/9324000/1/j9vvgh5ihkk7kof/vgm1kje0bqtk/f=y.pdf>
- ¹¹ Tweede Kamer der Staten-Generaal 2 Vergaderjaar 2001–2002 28 339 Wijziging van de Waterleidingwet (eigendom waterleidingbedrijven) Nr. 3 MEMORIE VAN TOELICHTING. Summary per Jan Willem Goudriaan.
- ¹² Consolidated Version Of The Treaty Establishing The European Community, Article 295.
- ¹³ European Parliament Texts Adopted by Parliament Provisional Edition : 14/01/2004 Services of general interest P5_TA-PROV(2004)0018 [A5-0484/2003](http://www.europa.eu.int/rapid/press.do?lang=en&docId=50484) European Parliament resolution on the Green Paper on services of general interest (COM(2003) 270 - 2003/2152(INI))
- ¹⁴ COM(2004) 374 White Paper on services of general interest Section 4.6
- ¹⁵ COM(2004) 374 White Paper on services of general interest Section 3.7 and Annexe 2
- ¹⁶ Reforma consitucional <http://www.redes.org.uy/agua/reforma.html>