



SEAWATER DESALINATION PROJECTS IN MOROCCO

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FEATURES OF THE NEW WATER ACT

As part of its sustainable development strategy ahead of COP 22, Morocco has chosen seawater desalination as one of the solutions to deal with the shortage of water in certain regions. This technology, which requires a sizeable supply of energy, is to be developed in conjunction with green energies such as wind power.

Following the operation by the *Office National de l'Eau Potable* (the Moroccan National Drinking Water Authority or ONEP) of about ten small plants, Morocco is preparing to start work on building major infrastructure in this domain, in close collaboration with the Kingdom's institutions including the ONEP and certain ministries such as the Ministry of Agriculture and Fisheries where the desalination projects are intended for irrigation.

The recent changes in legislation, particularly Water Act No. 36-15 of 25 August 2016 (which includes a section on the desalination of sea water), are intended to support such large-scale projects to tackle Morocco's strategic challenges. DLA Piper Casablanca has set out below a legal analysis of the desalination projects in the Kingdom.

Although Water Act No. 10-95 published in 1995 enabled the management of water resources to be modernised, it was no longer suited to the changes that the water sector went through following Morocco's economic and environmental growth. Act No. 36-15 now introduces legal and institutional reforms for the management of water so as to

increase access to drinking water, and to deal with the issues faced by the Moroccan authorities in providing all its citizens with drinking water. Thus, the management of water will be more organised and the *Conseil Supérieur de l'Eau et du Climat* (the Higher Council for Water and Climate), whose mission is to direct water policy, will be kept in place. The Council is supported by a new *Conseil du Bassin Hydraulique* or Rivers and Dams Council (whose responsibilities are set out in the new Act) and nine *agences des bassins hydrauliques* (rivers and dams agencies) who will in turn protect water resources. Act No. 36-15 also deals with several legal shortcomings relating to the management and protection of water but also the development of new techniques, so as to establish a "complete, clear" regulatory framework.

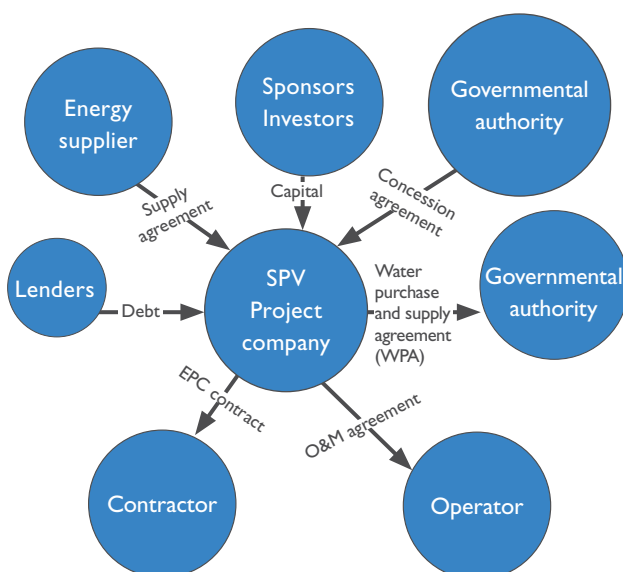
As regards seawater desalination specifically, the main innovations by the Moroccan parliament are as follows:

- Any individual or legal entity may satisfy its own water needs or those of other users;
- A right to desalinate sea water is granted to any individual or private law legal entity by means of a concession agreement and a set of terms and conditions known as a *cahier des charges*. The terms for producing and approving such agreements will be dealt with by means of regulations;
- Seawater desalination by individuals or private law legal entities to satisfy their own water needs may be subject to the permit regime that will be set out in regulations;

- Concession agreements must specify, *inter alia*, the purpose of the agreement, the assets to be bought or returned at the end of the concession, the term of the concession (which may not exceed 30 years subject to renewal), the nature of the structures and installations and the timeframes and conditions for their construction, the conditions for the operation of the concession, the concession holder's specific duties and obligations, the financial regime governing the concession (e.g., the concession holder's remuneration), the terms for the return of the structures at the end of the concession, and the clauses relating to the penalties to be applied for breaches of the contractual obligations; and
- The seawater desalination permit or concession agreement lapses if the structures and ancillary equipment are not built within four years (although the authorities are able to grant a further period of up to two years) and the concession may be assigned or transferred with the prior consent of the authorities.

Legal structures for desalination projects

Taking a simplified approach, one of the potential legal structures for a desalination project could be as follows:



Once the investors have been chosen, the desalination project may be developed using a project financing arrangement based on a public-private partnership agreement which could be in BOT (Built-Operate-Transfer) form or in BOOT (Build-Own-Operate-Transfer) form, between the Moroccan State and the sponsor, via a Project Company (SPV) that is formed to support the Project.

The choice of agreement (BOT or BOOT) will be determined with the State. That said, until very recently, we have observed that large-scale projects were financed in Morocco using BOT schemes. Insofar as the project site often forms part of the State's public land, the project company is given a temporary right to use the site (rather than a right *in rem*). Thus, no charge could be granted in favour of lenders. As public land is inalienable, the site cannot be transferred to another entity for an indefinite period. To make these projects more bankable, another project financing scheme has been adopted. Thus, using BOOT schemes, the Moroccan State can change the classification of the relevant zones from public land to the State's private land and grant a *droit de superficie* (a right to build, being a right *in rem*) to a private entity, where the right to build is capable of being charged in favour of the private entity's lenders.

Types of partnership applicable to a desalination project

Morocco has a long tradition of partnerships with private operators, that one could categorise as "*ad hoc*" given that the partnerships were developed outside the specific PPP legal framework. These partnerships were often entered into on the basis of sector-based laws (energy, transport, construction and management of ports, etc.) or on the basis of the regulations relating to the delegation of public services.

AD HOC PUBLIC-PRIVATE PARTNERSHIPS

Partnerships formed on the basis of sector-based laws

Although Morocco has this long tradition of *ad hoc* partnerships, it is our view that the sector-based laws on which they are founded are not sufficiently suited to the global nature of a seawater desalination project due

to the fact that the laws often only apply to a specific sector, and that desalination projects, by their very nature, benefit multiple sectors (e.g., water, agriculture and energy). In the past, this plurality of sectors could complicate a project's development due to a potential conflict between the different laws, caused by applying the various pieces of legislation.

Partnerships based on a delegation of public services

A second option could be to use the regime applicable to delegations of public services (of which concessions are a typical example) and which consist of transferring the building and/or operating of public infrastructure to a private operator in order to provide a public service to users, with the party who has been given the delegation thus bearing the operating risks and obtaining most of its revenue from users.

However, Act No. 54-05 (brought into force by *Dahir/Decree* No. 1-06-15 of 15 Muharram 1427 (14 February 2006)) relating to the delegated management of public services only applies to contracts entered into by local authorities (or their associations) and by public bodies. The State and public corporations are excluded.

PUBLIC-PRIVATE PARTNERSHIPS INTRODUCED BY THE PPP ACT

Act No. 86-12 of 5 February 2015 relating to public-private partnerships (the "PPP Act") defines a public-private partnership agreement as "a fixed-term contract, by which a public entity appoints a private partner to

be responsible for providing a complete service relating to the design, partial or total financing, construction or redevelopment, maintenance and/or operation of a structure or infrastructure or relating to the provision of services that are required for the supply of a public service."

This type of partnership may be entered into by the State, public bodies belonging to the State or public corporations.

The public-private partnership agreements that were introduced by the PPP Act therefore enable global contracts to be entered into pursuant to which the State appoints the private partner for the development, the financing, the building, the operating and the maintaining of infrastructure that are all required for the provision of a public service, in return for remuneration where the terms for calculating the remuneration remain relatively flexible because, unlike delegations of public services, agreements that are governed by the PPP Act allow remuneration to be agreed that is borne by the public authority and not by users alone.

Indeed, the provisions of the PPP Act regarding the private partner's remuneration provide that such remuneration may be paid (i) in whole or in part by the public entity and/or (ii) in part by the users and/or (iii) from the income derived by the operation of the structures, assets and equipment that form part of the project. In return, the terms of the remuneration must provide that the service is made available and that performance targets are met.

Furthermore, partnership agreements governed by the PPP Act, by virtue of their general and global nature, may cover multi-sector projects.

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