

Regulation control in Argentina

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Introduction to privatisations

The Argentine Republic developed a widespread process of privatisation in the 1990s which, at the federal level, meant that from being a State that produced public assets and services it became a State that regulates public services. The dimension of the State and its performance changed so much that Argentina is probably at the top of the list of countries that, in a short period of time, radically transformed the relationship between state and public services.

The significant transformations resulting from the privatisation process, far from covering up the consequences of an omnipotent state and attaining and consolidating the “paradigm of the privatising impulse”, accentuated and deepened inequalities due to the high cost of these transformations in terms of social equity.

Incentive to privatisations arose from the policies recommended by the Washington Consensus. The policies were based on the conception of a minimum State, focused on the essential areas – justice, security, defence, education, and health – leaving to the market the ability to define what, how, and when regarding public services.

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The objectives were:

- Reduce state expenditures, eliminating contributions to public businesses aimed at reducing their deficit. This practice caused an impact on external debt since the State was unable to finance these contributions with ordinary resources.
- Obtain greater business efficacy from the privatised entities and a higher level of efficiency from economy as a whole.
- Reduce external debt with the product of the sale of the businesses.
- End the large amount of law suits against the State filed by the concessionaires who, in turn, did not fulfil their contractual clauses.

It was proposed to replace the productive State which was a sector that contributed with around 10% of the GDP. This percentage increased to 25% regarding participation in fixed gross investment. The purchasing power of the sector was equivalent to 10 billion dollars per year and it occupied close to 2.5% of the economically active population. This producing State comprehended the most diverse sectors and represented 90% of the national activity in electricity, gas and water, 50% in mining, 30% in communications and transportation and less than 10% in the manufacturing industry.

It covered the majority of the basic sectors and public services:

Petroleum // petrochemistry // steel // electricity // gas // water // telecommunications // air transportation // railroads // water transportation – sailable routes – ports – ferry boats // highways // radio and tv stations // financial entities // military arsenals, businesses and factories // silos and grain elevators // central farmer's market // horse racetrack // tourism hotel // a large amount of state-owned real estate.

The State Reform Law (no. 23.696) requires that the business or activity must be declared subject to privatisation by means of a congressional law and created a Mixed Parliamentary Committee to work together with the Executive Branch, inform the Legislative branch about all privatisation processes, and issue non-binding opinions.

The General Office of Public Companies acted in permanent co-operation with that Committee, intervening concomitantly in the process of each privatisation. In other cases, the Court of Accounts of the Nation at that time was the one who intervened.

The Office of the Auditor General of the Nation (AGN) began its audit activities in the second semester of 1993 when the privatisation process was already well advanced, intensifying inspection of the activities of the Public Services Regulating Entities and carrying out its mandate to control private entities in charge of privatisation processes regarding obligations resulting from the respective contracts.

THE FRAMEWORKS AND REGULATING ENTITIES

The 1994 constitutional reform incorporated (in clause 42) the obligation that the regulatory frameworks must be sanctioned legally.

In fact, the regulatory frameworks of gas and electricity were created by law. The one corresponding to the water and swage services in Buenos Aires was created by a delegated norm and the other regulations were established by decrees of the Executive Branch.

WHO REGULATES THE REGULATOR?

The new appreciation of the role of control of the legislative branch, as of the 1994 constitutional reform, was complemented by the creation and performance of the Office of the Auditor General of the Nation (AGN) – a technical body that assists the legislative branch in its role of control. The AGN has its own oversight competencies and functional autonomy, among them: control of legality, performance and audit of the Regulating Entities.

The AGN implemented within its structure a managerial department in charge of Regulating Entities. Their responsibility is to carry out compliance, performance, and accounting audits of the activities of the regulating entities and control organisms of the privatised national public services.

The AGN is also in charge of controlling private entities responsible for privatisation processes, with regard to obligations resulting from the respective contracts.

WHAT ARE THE POINTS OF INTEREST OF THIS TASK?

1. Evaluation of the control systems applied by the Regulating Entities to oversee fulfilment of the investment plans.

2. Identification and evaluation of the formal or informal circuits applied by the Regulating Entities to oversee the obligations imposed by the norms on provisions – or on basic services – on the private service deliverers in their relationship with the consumers.

3. Verification of application of the penalties set out in the public auction processes when contract obligations are not fulfilled or when there is some irregularity in the delivery of services.

4. Tariff analysis.

5. Analysis of the contracts signed by the Regulating Entities.

AGN'S EXPERIENCE

I would like to comment that the Minister of Economy asked us to carry out a review of the privatisation processes and that the conclusions reached may be obtained from our web page¹.

What was this task? We had to address, classify and establish the hierarchy of the essential aspects of our reports in the past decade. We also had to identify common denominators that enabled us to systematise the audits performed in each concession, the main deviations or findings detected and the lessons learned from the process in each sector.

What was the use of this task? It reaffirmed a critical opinion about what had been done and gave the government a tool to evaluate the denationalisation process. But it also strengthened Argentina's position in face of the demands of the companies when they stated that the changes in the economic framework had been the main reason why they had not fulfilled their contractual obligations. In this sense, our reports were and are a set of findings and verification of serious neglect of obligations in the years that preceded the 2001 crisis.

AGN'S FINDINGS

These findings can be divided into two main thematic axes:

a) Lack of fulfilment of obligation on the part of those responsible for privatisation processes.

b) Deficit in the control carried out by regulating entities and officials in charge of application. Even when this does not represent a justification for the lack of fulfilment of obligations on the part of the concessionaires, it constitutes an important element for evaluation of the causes of the current state of privatised services.

THE ROLE OF CONSUMERS

Our view is that only a strong organisational context, with a well defined guidance, excellence of human resources and predictability schemes, can create a foundation upon which users, with appropriate information and the support of the organisations themselves, can adequately defend their rights. Otherwise, more than consumers' rights we will have a right of petition more or less safeguarded but whose results won't be significant. In summary, a series of complaint records spread out in different government sectors.

denationalisation

¹ <http://www.agn.gov.ar>, see "Concesionaires: Reports presented to the Executive Branch".

SOME EXAMPLES OF MANIFEST NEGLECT OF OBLIGATIONS

AIRPORTS:

The AGN verified that the debt the concessionaire had with the State reached the amount of 350 million dollars – and the mandatory investments had not been made. The AGN warned that this could lead to termination of the contract due to lack of fulfilment of the clauses by the Concessionaire.

Although the officials are now renegotiating the concession contract, the information provided by the AGN was an element taken into consideration by the government who suspended the terms of a previous renegotiation that had been approved by Decree no. 1.227/03². The advantages of the renegotiation for public interest were not clear.

CONTROL OF THE RADIO-ELECTRIC SECTOR:

In 1997, control of the radio-electric sector was awarded to a company and the AGN showed that the concessionaire had not carried out an initial survey of the uses and users of the radio-electric sector to detect – among other things – those who were and those who were not authorised; neither had it initiated planning, development, provision, installation, maintenance and adequate updating of an integrated IT system designed to manage the radio-electric sector; neither had it managed correctly billing and collection of the “unified collection” for administration of the sector. Persistence of a high level of interference that did not decrease along time is a sign of the deficiencies of the process of technical proof of emissions that was implemented.

It is noteworthy that the gains obtained by the concessionaire had increased at the same pace as the neglect of its obligations: the “average annual profitability rate” was 113%, between 1997 and 2001. This amount exceeds the profitability obtained by the public services sectors. The “internal rate of annual return” regarding the invested capital (after deduction of the tax on profits) is 145%.

Public corruption as an integral concept is seen not only as a moral issue, but also as an alert that affects the possibilities of economic, institutional, and social development.

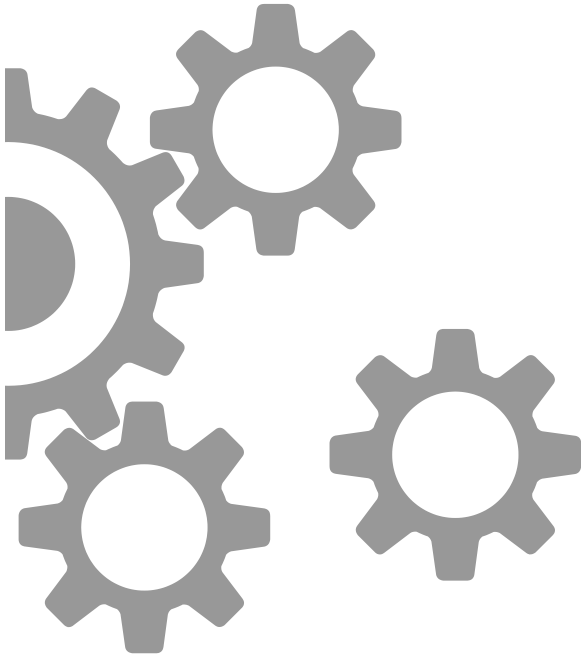
The government decided that the concession contract was null and void. The considerations of the resolution mention the AGN findings as a foundation for the decision.

UNIVERSAL SERVICE FIDUCIARY FUND:

The Universal Service is a set of telecommunications services that should be delivered with a certain level of quality and with prices that are accessible. Initially, the intention was to meet the needs for basic phone services and, in second place, the need for internet access for all inhabitants of the Republic of Argentina throughout the national territory, especially for people who live in regions that are hard to access or who have physical limitations or concrete social needs. For this purpose, the plan was to form a fiduciary fund to be financed by 1% of the total revenue obtained by delivery of telecommunications services. This fund was never created.

A recent resolution issued by the Telecommunications Secretariat - that mentioned in its considerations the AGN findings - ordered the service deliverers who had listed in the invoices issued to their clients and collected from those clients resources to be invested in the Universal Service Fiduciary Fund in an amount equivalent to the mentioned percentage, whatever the title under which they had issued the invoice or collected such resource, to stop this practice. Service deliverers were also ordered to reimburse their clients the total amount of resources unduly collected.

2. B.O. 05/22/2003.



CONCLUSIONS

A. WHAT ARE THE RESULTS OF THE PROCESS?

If one of the manifest objectives of the privatising impulse was to reduce significantly State expenditures by eliminating contributions to public companies in order to cover their deficit, reality shows us that the privatisation process alone is not enough since, currently, the public services concession system receives explicit subsidies, for example, in the railroad sector and in road concessions.

If another of the objectives was to achieve a higher level of business efficacy from privatised entities and more efficiency in economy as a whole, the satisfaction level of consumers is negative and management of the concessionaires did not fulfil many of its obligations – a fact constantly pointed out by the AGN – regarding investment plans, consumer service and quality of service.

With regard to reduction of external debt as a result of sale or concession of companies, it is worth noting that the amounts obtained were not significant.

It is also worth noting that litigiousness against the State did not decrease; what occurred was exactly the opposite. Litigiousness increased. An example is the several suits faced by the Argentine State before the CIADI which amount to more than 3.5 billion dollars.

B. WHAT ARE THE LESSONS LEARNED?

To be successful, the denationalisation process must offer conditions for obtaining investments. Investment is a key element to public services. In second place, it must achieve the highest degree of competence possible. Competence enables improvement of costs and quality. However, we are also aware that in cases of natural monopoly or due to conditions inherent to the infrastructure of an existing public service, the State must intervene and regulate so that the actors perform by simulating market conditions; in this sense, to regulate means to achieve social optimum.

In third place, the process should focus more on consumers. In the beginning of the process consumers act according to cultural traditions but they soon begin to organise themselves, non-governmental organisations that group them emerge, they overlap the informative asymmetry that characterises the relationship between company-individual consumer, they petition against the entities, participate in public hearings, address the City Defence Officer, they appeal to the AGN and demand that AGN reports be followed and, finally, they change the context of the relationship. These are citizens who demand their rights to essential public services and fully understand the concepts of access to minimum social rights and quality with a fair and reasonable tariff.

The State, an ethical entity by excellence, should perform not only within the limits of the law but also taking into consideration social equity and the principles therein. The state should optimise its management and transparency as well as ensure respect to rights that have been left aside.

Public corruption as an integral concept is seen not only as a moral issue, but also as an alert that affects the possibilities of economic, institutional, and social development.

In this context, I would like to close by leaving you with a thought by Aristotle: “One does not study ethics to understand what is virtue but to learn to be virtuous and good”. ■