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Effects of Corruption on Public–Private Partnership Contracts

Consequences of a Zero-tolerance Approach

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CONTENTS

Abstract v

1. Introduction 1

2. Public–Private Partnerships and Corruption: "Before" and "After" The Illegal Act 5
   PPP and Corruption: Brief Overview of Existing Literature 5
   New Approach to PPPs and Corruption 8

3. Responses to the Problem 15
   Measures Adopted in the Region 15
   Colombia 15
   Panama 16
   Peru 17

4. Final Considerations 21

5. References 25

ABSTRACT*

Recent experience shows the negative consequences that corruption cases can have on the development of infrastructure, specifically on the market of public–private partnerships (PPP). Unlike traditional literature on the matter, which focuses on the analysis of mechanisms to prevent corruption in these types of projects, this paper analyzes the main legal consequences of an event of corruption on the management of PPP contracts. The paper argues that the economic and legal particularities of the inherent structured financing of these contracts mean that their annulment, as a legal response in most countries of Latin America and the Caribbean (LAC), leads to significant economic costs for society and economic development. In light of this, some countries in the region have promoted legal reforms of their regulatory frameworks.** Based on these experiences, this paper presents its main features and the challenges faced, together with other reform alternatives and the principles that could guide them. In particular, this paper highlights the need to develop tools that sanction corruption, ensuring at the same time the continuity of the project, the business opportunities of stakeholders uninvolved in the illegal act, and the public interest of society as a whole.

JEL codes: G23, G28, K10, K23, O16, Z18
Keywords: corruption, nullity, public–private partnerships, zero tolerance

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1

INTRODUCTION

In December 2016, U.S. authorities and the Odebrecht Corporation executed the plea bargain agreement Cr. No. 16–643 (RJD) before the District Court for the Eastern District of New York by which the company recognized the payment of a series of bribes to senior officials from 12 countries in the LAC region and Africa (United States District Court, s/f).[1] The recognition before judicial authorities that certain public contracts had been procured through the payment of bribes triggered the potential legal sanction traditionally associated with this and other irregular acts in continental legal systems: the declaration of nullity of the corresponding contracts (UNECE, 2017; Lambsdorff, 2013)[2] by an administrative or judicial authority.

Declaring contracts null and void is one of the tools contemplated in the so-called "zero-tolerance" approach (UNECE, 2017; Davis, 2009).[3] There is a well-established legal principle in both the Anglo-Saxon and Continental legal systems by which acts contrary to the law cannot create legal rights (*ex injuria jus non oritur*).[4] In other words, corruption should not be profitable and, therefore, the proceeds of crime must be sought and recovered or, where appropriate, equivalent economic sanctions must be imposed.

The annulment of awarded contracts and, in some cases, the mere possibility or prospect of potential annulment by the various stakeholders involved in

[1] For an analysis of the similarities and differences between the so-called *Lava Jato* and other notorious cases of corruption, please refer to De Michele (2017).

[2] This paper does not seek to analyze the legal nature of nullity of contract given that its specific characteristics, causes, and consequences may vary from one jurisdiction to another, particularly with regard to common law legal systems. Notwithstanding, all legal orders set forth conditions for the validity of juridical acts, the non-compliance of which may lead to, among other consequences, said acts being rendered null and void. Upon declaration of nullity, the main consequence is the loss of enforceability of the juridical act at stake, be its effects *ex nunc* (retroactively voided in effect as from the execution of the contract) or *ex tunc* (voided in effect only as of the declaration of nullity). The United Nations Convention against Corruption (UNDOC, s/f) constitutes a reflection of the application of nullity as a tool against corruption in public procurement. In this sense, Article 34 establishes that "[…] States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument […]." Similarly, Civil Law Convention of the Council of Europe on Corruption (Group of States against corruption, s/f) in its article 8 sets forth that "[…] Each Party shall provide in its internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void […]." The authors would like to thank Richard E. Messick for his valuable suggestions related to the terminology under common law legal systems.

[3] According to Davis, the zero-tolerance approach punishes companies for procuring contracts by way of bribery and performing investments derived from said contracts. For a brief analysis of the different meanings of the concept of zero tolerance, please refer to Stephenson (2014).

[4] In *The Model of Rules,* Dworkin (1967) analyzes this principle on the basis of the landmark case of *Riggs v. Palmer* of 1889, in which a New York court held that "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime" (115 N.Y. 506, 22 N.E. 188 [1889]). As can be seen, the principle of *ex injuria jus non oritur* (a legal right or entitlement cannot arise from an unlawful act or omission) is, in turn, related with the *clean-hands doctrine*, by which a claimant must have its *hands clean* to seek equitable relief or claim a right in court. In this regard, please refer to Schwebel (2011) and Herstein (2011). For an analysis of the origins of the referred principles in connection with corruption, please see Espinoza Quiñones and Chinga Flores (2015).

infrastructure works, has brought about the paralysis of a significant number of works undertaken as part of public–private partnership (PPP) projects. In some countries of the region, it has even led to the interruption of the respective payment chains, the bankruptcy of certain suppliers and the dismissal of thousands of workers (Vieyra and Barón, 2018),[5] in addition to the exacerbation of the existing distrust of society toward its authorities and public officials (Casas-Zamora and Carter, 2017). For example, according to an article published on March 4, 2018, by the Peruvian newspaper *La República* (Palacios, 2018), 562 suppliers were affected by the Odebrecht scandal, 175 of which filed for bankruptcy and lost their machinery, buildings, and vehicles, while the remaining 80 percent were to find themselves in a similar situation in the first quarter of 2018. Furthermore, some 60,000 workers were dismissed as of February 2017 as a result of the US$260 million owed by the construction company to various suppliers. The Peruvian case is significant in this respect, given that "total investment (including PPP and public works) to be executed by companies linked to acts of corruption, confessed and under investigation, is equivalent to more than thirty billion Peruvian soles [approximately US$9.14 billion]. This investment is equivalent to the total yearly investment budget (PIA) for 2018, 4.2 percent of GDP and a fifth (20 percent) of total investment (public and private) [of 2018]" (Government of the Republic of Peru, 2018). The Brazilian case is also representative of the problem, as the so-called *Lava Jato* has reportedly led to a stoppage of public works amounting to R$90 billion, equivalent to almost US$27 billion (Pereira, 2017).

The countries affected by these acts of corruption are at a difficult crossroads, with challenges that are not easy to surmount. Governments have been forced to take measures to prevent impunity and punish those responsible for acts of corruption while ensuring the continuity of major infrastructure projects to prevent downturns in the local economy as a consequence of the eventual interruption of the works that would, in turn, lead to unemployment and a potential reduction in the flow of investments. The *Ruta del Sol II* highway aimed to connect the center of Colombia with the Caribbean coast—an important PPP project involving an approximate investment of US$1.71 billion—is a good example of the situation under analysis, as the project was originally expected to be completed in 2017, whereas now completion is expected to occur closer to 2022 (*El Economista*, 2017). This delay is estimated to cost the country some US$279 million per year (*El Tiempo*, 2018).

The argument put forth in this paper is that nullity of contracts as the main (and in some cases the only) legal tool against corruption cases results in particularly negative economic consequences for PPP contracts. This is largely due to the fact that PPPs are structured under the so-called project finance modality. As such, they involve an indeterminate number of players in addition to the sponsors of the project and a myriad of legal instruments designed to finance, execute, and repay the work over time through the flow of funds generated by the project. Unlike traditional public procurement, the potential nullity of the contract poses particularly high risks for the project financier. These risks increase if the likelihood of acts of corruption is high and the only legal response is the nullity of the contract.

This situation discourages investment in this type of projects and can lead to the paralysis of the sector. The reason for this is that the nullity of PPP contracts not only invalidates the main contract between the State and the contractor, but also all of the contractual relations associated with it. Thus, it prevents both the continuity of the project and the realization of the expectations of people unrelated to the illegal act who invested in the project (financiers and contractors), while also affecting their workers and all the potential

[5] Similarly, please refer to Lucchesi, Marques, and Oyamada (2018); Margolis (2018); Mellizo (2018); Calderón (2017); Fieser (2017); and Agencia EFE (2017), among others.

beneficiaries, who expect these investments to provide better roads, transportation, and services.

Nullity of contract thus stands as a legal sanction that has not only proven to be inadequate to prevent acts of corruption but also inconvenient to address the challenges arising from unlawful acts in PPP projects. Notwithstanding the fact that the annulment of the contractual relationship constitutes a tool available to governments, it seems appropriate to analyze other options that are more balanced. These include a combination of personal and material sanctions (removal of personnel, fines, replacement of suppliers, etc.) on those responsible for corrupt activities, while ensuring the continuity of the infrastructure project and the contracts of law-abiding third parties if the project has a positive socio-economic impact (Expert Advisory Group on Anti-corruption, Transparency and Integrity, 2018).

The following section first explains the specific characteristics of PPP structures with respect to traditional public procurement that render the economic effects of the nullity of awarded contracts particularly detrimental. Second, it focuses on the analysis of the measures or legislative reforms implemented in Colombia, Panama, and Peru to avoid the stoppage of infrastructure works due to corruption. Third, it explains the main differences between these measures, highlighting that the solutions implemented by each country range from protecting the assets of the public administration by punishing the contractor company, to safeguarding the interests of investors to prevent a severe paralysis in the sector. The paper concludes by underscoring the importance of finding an alternative legal framework that is complementary to nullity of contract in PPPs, and identifying options and principles that should guide its design.

2 PUBLIC–PRIVATE PARTNERSHIPS AND CORRUPTION: "BEFORE" AND "AFTER" THE ILLEGAL ACT

This section briefly reviews the characteristics of PPPs[6] and their relationship to corruption. It highlights how studies conducted to date have focused mainly on analyzing the risks of corruption in each phase of the PPP cycle and the preventive measures aimed at deterring illegal acts. However, recent experience shows that the number of these crimes detected in infrastructure projects has not diminished despite mounting efforts that are essential to combat them. On the contrary, as a consequence of these efforts and of the occurrence of other events, even more cases of corruption have been discovered in connection with public works. In this scenario, it is no longer relevant to simply address the way in which the institutional framework operates "before" the illegal act, but also "after" the illegality is committed. For this reason, emphasis is placed on the need to study the effects of corruption on PPPs once the precautionary measures on transparency and integrity have failed to prevent the illegal activity. In particular, this work highlights the way in which the absence of mechanisms and institutional frameworks for adequate regulation to sanction corruption in PPPs brings about effects that are especially harmful for the sector.

PPP and Corruption: Brief Overview of Existing Literature

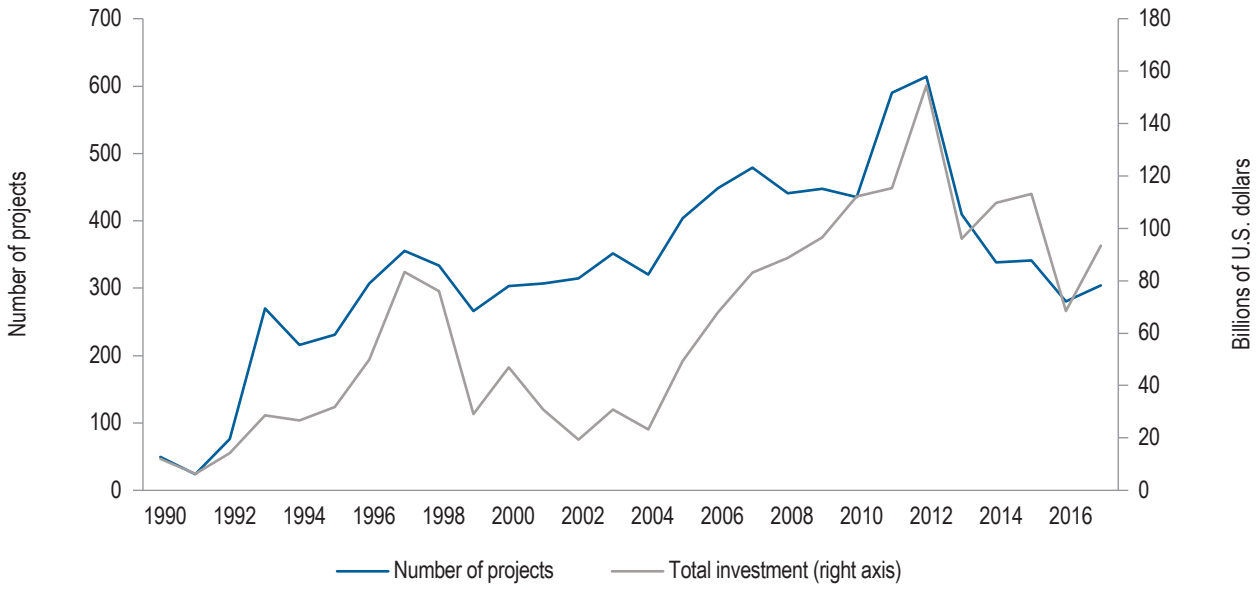
PPPs are long-term contracts between a private party and a government entity for the provision of a public asset or service, in which the private party bears significant risk and management responsibility, and in which remuneration is linked to performance (World Bank, 2017). The importance of PPP contracts has grown steadily over time, both in developed and emerging countries, but particularly in the latter, as of the 1990s, as shown in Figure 1.

The pressing need for investment in infrastructure and the growing limitations faced by countries in terms of fiscal space to finance traditional public works have made PPPs an attractive mechanism for many governments. PPP contracts confer added value if compared to traditional public procurement when there exists an appropriate allocation of risks and benefits between the public and the private sectors. In this sense, the public sector assumes those risks that it is better qualified to control, mitigate, or bear, while transferring the remaining risks to the private sector.[7] The value of the PPP modality is also positively influenced

[6] For a detailed analysis and at the level of certain sectors, please refer to Reyes-Tagle (2018) and Frigerio and Gómez Kort (2018).

[7] In general, the most relevant risks of any project are divided into two phases: the design and construction phase and the operation and maintenance phase. Once the risk has been identified, it is determined which party is in a better position to control or take on this risk. For instance, during the construction stage, the private sector must comply with environmental protection regulations and the measures recommended in the corresponding environmental impact assessments, adjusting their processes and construction methods so that their work is in compliance with the applicable legislation. Similarly, throughout the operation and maintenance phase, the public sector should ensure periodic update mechanisms in line with current inflation indicators, so as to avoid cost overruns in the operation and maintenance of the infrastructure.

FIGURE 1
Number of Projects and Total Investment in PPPs in Emerging Economies



by the ability of the public sector to manage complex contracts and by the economic efficiencies provided by the private sector through improved technology and its incentives to build and operate infrastructure under a PPP model.

Undoubtedly, the institutional framework that regulates PPPs is a key element for the proper alignment of incentives for each of the parties involved (ministries, entities, banks, and companies, among others) throughout each phase of the project cycle (design, approval, bidding, selection, contracting, and monitoring and control). Most countries in the region have developed legal and institutional frameworks to regulate the different stages of the project cycle, adapting them to the size of their economy and their degree of decentralization (Prats, 2016).

The literature on PPP and corruption has focused mainly on analyzing the way in which the institutional and contractual characteristics of this type of contract differ from those of traditional public works procurement in terms of their capacity to prevent illegal acts throughout the different stages of the project cycle. Contracts entered into with the public sector are generally more advantageous than those entered into by private parties, and they pose specific risks of fraud and corruption (Rose-Ackerman and Palifka, 2016). Some argue that the risks of corruption in this type of contract could be even greater (Iossa, Spagnolo, and Vellez, 2007). This is because PPP contracts entail specific risks inherent to their very nature (Klitgaard, 2012; Knorr and Schomaker, 2016). These risks derive from the contracts' flexibility and high degree of indeterminacy, particularly since they are incomplete, long-term contracts, which makes it impossible to foresee all the circumstances that could unfold throughout the lifecycle of the contractual relationship. Similarly, PPPs may present specific institutional risks, such as those caused by the lack of agencies that specialize in public–private relations, or those caused by weak control tools or by defects in the mechanisms to ensure transparency and access to information (Kwak, Chih, and Ibbs, 2009).

In this context, PPP projects encompass at least four stages that demand specific anti-corruption measures: (i) the decision to choose a PPP instead of one of the traditional models for the execution

of a project; (ii) the design, drafting, and approval of the project; (iii) the contractor selection process and the awarding of the PPP contract; and (iv) the execution, management, supervision, and termination of the contractual relationship. In this sense, it is deemed essential to adopt measures during the pre-bidding stage to prevent acts of corruption intended to manipulate the transfer of risks or overestimate the efficiencies provided by the private sector in an attempt to promote PPPs that are inconvenient.

This has led some authors to advise against the transfer of risks and the bundling of building, operation, and maintenance phases in contexts of high corruption or institutional weakness (Martimort and Pouyet, 2008). Other opinions aim at guaranteeing the application of robust public–private comparator methodologies and increasing transparency during the pre-bidding phase (UNECE, 2017), including the preparation, development, and approval stage of the project (Reynaers and Grimmelikhuijsen, 2015).

Although the literature on this topic tends to show the existence of certain margins of discretion to manipulate any stage of the bidding phase, transparent competitive bidding procedures, with adequate and reasonable timeframes, have asserted themselves as the most appropriate mechanism to reduce opportunities for corruption during the contractor selection process (Reynaers and Grimmelikhuijsen, 2015; Loxley, 2012; Iossa and Martimort, 2011). This has, for instance, prompted some international organizations to issue best practices documents for public procurement in PPP projects (World Bank, 2018).

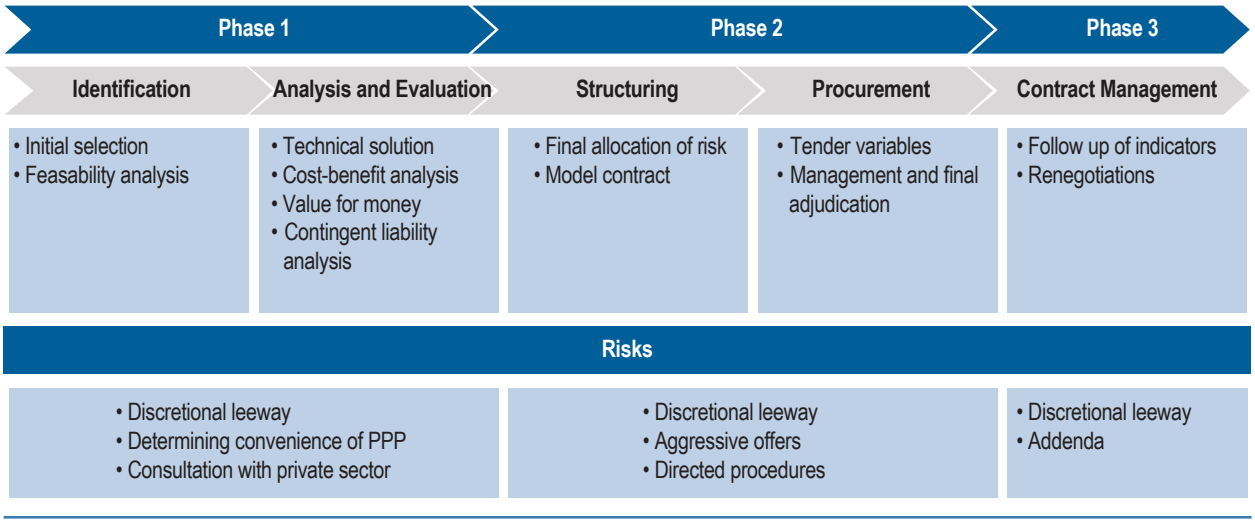
Finally, as Piga (2011) points out, the opportunities for corruption in the post-bidding phase are even greater than in the previous stages. Two years after being signed, approximately 30 percent of contracts are renegotiated (Guasch, 2004), thus creating new opportunities for corruption, this time under rules that are generally far less clear, accessible, and transparent. By the same token, when renegotiations are conducted without competition, they tend to lead to less advantageous solutions, as the competitive mechanism that creates a tender process that is transparent and open to the participation of multiple bidders disappears (Demsetz, 1968).

According to Guasch, "[r]arely has a government denied an addendum request, if the consequence of doing so was the cancellation of the project or the termination of the contract. Only 3 percent of PPP projects in the world have been cancelled. This leads to an inescapable rationale, on the part of the private operator, to trust that the government will accept its requests for addenda, especially if the system or officials with decision-making power have been bought off with bribes" (Guasch, 2017). To prevent this situation, legal limits have been imposed on the percentage of the contract value that can be renegotiated, or special authorizations have been required to allow the signing of addenda (Iossa and Martimort, 2013). Similarly, the inclusion of contingency clauses has been proposed, for example, to extend the duration of the contracts in a pre-determined manner when facing exogenous shocks, such as those derived from changes in traffic flows or in verifiable project costs, among others (Engel et al., 2012).

Figure 2 illustrates the different phases of a PPP project, identifying some of the corruption risks in each of them.

As can be seen, the literature on corruption and PPPs focuses on certain aspects of this type of contract, which, by its very nature, poses specific risks in the event of corruption. Authors focus on the rules that can dissuade and prevent the occurrence of the crime by introducing different mechanisms to ensure transparency and to monitor the project. Responses have also been aimed at strengthening institutional frameworks and those of agencies or units specializing in PPPs, which involve the implementation of mechanisms to guarantee, among other issues, technical and human resources that minimize opportunities for corruption (robust value-for-money analysis, standardization of contracts and procedures, project monitoring, etc.).

FIGURE 2
Phases of PPP Projects and Risk of Corruption



Source: Prats (2017).

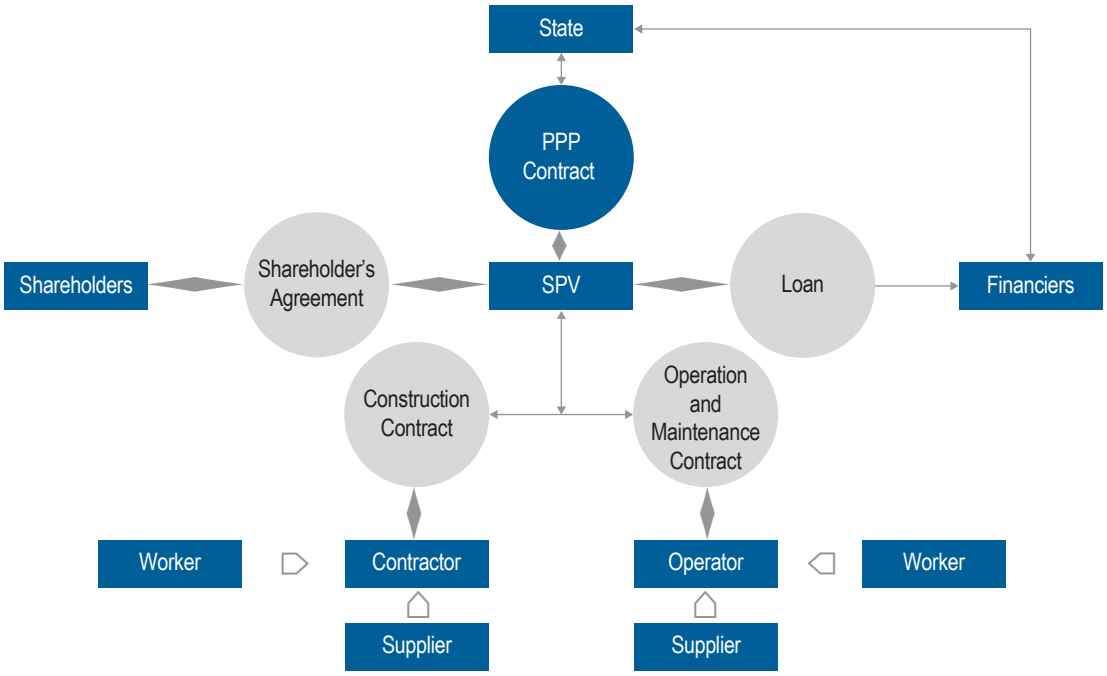
The competencies and authority of specialized units dealing with PPPs may vary from one jurisdiction to another, depending on the institutional framework in which they operate. However, they share the general objective of establishing a permanent government structure with the knowledge required to identify and/or manage the opportunities for linking the public and private sectors (Prats, 2016). These units are complemented by other government agencies that provide advisory, operational, and technical support throughout the different phases of the project. For this reason, in many countries these specialized units play an important role before, during, and after the tender process, though at present their specific role in dealing with corruption in PPPs is not clearly defined. Nonetheless, these government agencies contribute indirectly to the prevention of crime through the correct exercise of their competencies, aimed at ensuring the proper utilization of PPPs under formally established principles of transparency and integrity, but without a control and monitoring function. This function is exercised by those entities created specifically for that purpose, namely anti-corruption offices or the corresponding comptroller's agencies.

New Approach to PPPs and Corruption

The detection of corrupt activities in public works has increased in recent years partly thanks to the improved effectiveness of the controls implemented since the 1990s (Casas-Zamora and Carter, 2017). This new scenario requires an analysis of the economic effects of the existing legal responses for corrupt activities, particularly with regard to the paralysis of the works and investments, and to the damages caused to third parties unrelated to the illicit act, including those who have interests in the project. This paper is not intended to analyze the core causes of corruption in public works and the construction sector,[8] which may derive from patterns of systemic or structural nature (economic informality and institutional weakness, among others).

[8] On this matter, please refer to Matthews (2016), Wells (2015), Transparency International (2006), Kenny (2006), and Susan Rose-Ackerman (1975), among others.

FIGURE 3
Main Contractual Relations in a PPP Contract



What is examined is the way in which the main legal mechanism to deal with corruption interplays with the specific characteristics of PPPs, bringing about particularly pernicious effects that have prompted some countries in the region to readjust their legal frameworks. In other words, the object of analysis is the way in which the potential annulment of an ongoing contract triggers particularly serious consequences in contractual structures that are based on structured financing and "contractual cascades" that combine public and private law.

Figure 3 shows a basic overview of the main contractual relationships that are established in a typical PPP contract.

From a contractual point of view, the key component of a PPP structure is the PPP (or concession) agreement, which is entered into by the government and the contractor to establish, among other issues, the construction obligations and the quality standards. This also creates the flow of funds (tolls, fees, or availability payments, among others) that will be used to repay the financing of the project and to distribute dividends among the shareholders. This constituent factor or "mother contract" is governed by public law, specifically by the PPP Law, and by general provisions of administrative law (De la Riva, 2017). Thus, PPP contracts usually consist of a series of consecutive documents that include the terms and conditions of the tender or bidding process, the corresponding clarification notices, the offer of the successful bidder, the administrative act of the award, and the contract itself and its subsequent addenda.

Under administrative law, upon verification of an act of corruption, the administrative decision that initially conferred validity on the PPP contract, is rendered null and void. Such effect, in principle also entails rendering ineffective any other contract directly or indirectly associated with it. The act of corruption triggers the annulment of the contract as a legal sanction that extinguishes the

normal effects of the PPP contract (Lambsdorff, 2013; Jeanneret de Pérez Cortés, 2005). Therefore, as the contract is rendered null and void, in principle parties must restitute any assets they might have received or, if this were not possible, pay back their value, in which case the contractor shall have no further right, unless this resulted in the unjust impoverishment of the contractor and the unjust enrichment of the State. However, this restitution or compensation does not operate if the parties are responsible for the invalidation, as would occur in corruption cases. Corruption and fraud are contrary to the principle of good faith and, consequently, contrary to any legal system, as it would be contradictory to allow the legal system to protect rights resulting from illegal activities.

As contract annulment is the response contemplated in administrative law, in light of the absence of specific provisions in PPP laws, nullity is thus perceived by financiers and contractors as the most likely consequence of corrupt activities. In this sense, there are two characteristics inherent to PPP projects that render the consequences of a potential declaration of nullity of contracts particularly detrimental. These help explain not only why PPPs in some LAC countries have become paralyzed as a result of acts of corruption, but also the need for legislative reform detailed in the following section.

From an economic-financial standpoint, the characteristic feature of PPPs is that they are an investment that is recouped over time from the flow of funds generated by the project itself (tolls, fees, availability payments, and others). Under this structure, when facing a credit event or an early termination of the relationship, there is no available recourse to the corporate balance sheet of any of the companies that constitute the "project company" (or special purpose vehicle),[9] but rather exclusively to the flow of funds arising from the project, the assets derived from investments made, and other rights and obligations contemplated in the PPP contract. Hence, unlike what happens in traditional procurement for public works, where investment payback occurs as the works are carried out, and upon recognition of public authorities that works have been executed, investment payback in PPP projects occurs over an extended period of time (usually exceeding 15 or 20 years) through the flow of funds generated by the infrastructure and/or through government contributions known as availability payments, resulting from the compliance with the previously agreed levels of service quality.

Therefore, financiers are highly vulnerable to nullity of contract as a response to an act of corruption, given that nullity eliminates the source of repayment, which may even occur after the entire investment has already been made. In PPPs there is also no recourse to the balance sheet of the company, but rather to that of the project company. In contrast, in traditional public works, nullity of contract does not prevent the financier from gaining access to the corporate balance sheet of the construction company that signed the contract. Similarly, the investment payback in traditional public works does not occur over time, but upon acknowledgement of completion of each of the stages into which the work is divided, thus reducing the amount of investment at risk. These characteristics constitute the main reason for both the paralysis of PPP financing in some countries of the region as a consequence of recent corruption problems,[10] and the legal reforms promoted by governments to solve said difficulties.

From a legal and contractual standpoint, the characteristic feature of PPPs is the "contractual cascade" that emerges from the public–private collaboration, combining aspects of

[9] PPPs are based on a structured financing project in which a special purpose vehicle (SPV) owned by a consortium of companies, which may include the participation of the public sector, signs and executes the contract. This "project company" will then be in charge of the development, construction, maintenance, and operation of the works throughout the duration of the contractual relationship, outsourcing, in turn, the goods and services necessary to meet the obligations under the contract.

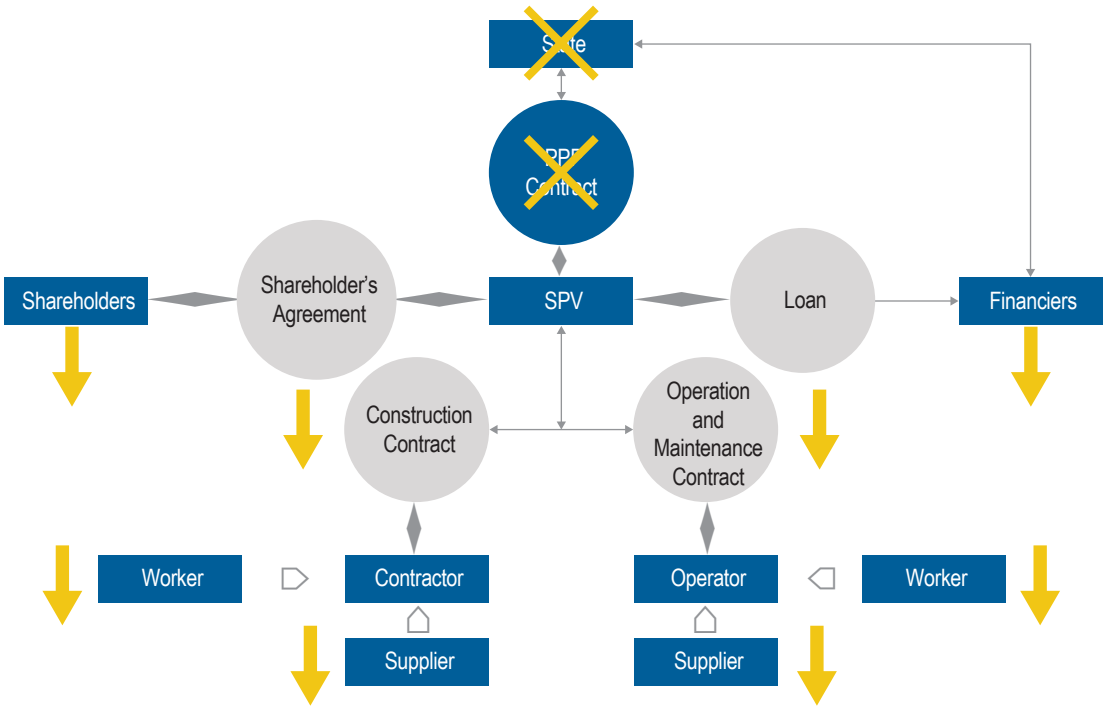
[10] Refer to Céspedes (2017), La República (2017), Tola (2017), and Semana (2017a).

administrative and commercial law. Stemming from the public–private liaison, a series of legal relations begin to take shape, involving a large, indeterminate, and varying number of players and contracts over a long period of time. This means that a large number of contracts necessary to execute the entire project depend on the main, or mother, contract, among which the following agreements are included: the loan agreement with the banking system and/or the capital markets, the construction contract with the building contractor, the operation and maintenance contracts with service providers (operator), the shareholder and equity contribution agreements for the project company, insurance contracts, and all other contracts derived therefrom. Thus, for example, the construction company outsources a large number of tasks to other companies, and so forth. Likewise, throughout the extensive duration of the project and the public–private collaboration, the parties involved in each of the referred legal relations and contracts may vary. For instance, once the construction phase is concluded, the initial industrial partners can divest themselves of their participation in the project; financiers can sell their credit or the project might be refinanced with other banks or through operations in the capital markets.

Hence, when facing an event that results in the nullity of an existing PPP contract, a large number of links in the public–private contractual chain are broken, which are increasingly distant from the "mother contract" and, over time, also from the parties that initially composed it. Thus, the consequences of nullity have a "trickle-down effect" along the contractual chain, which extends far beyond the origin of the wrongful act, as shown in Figure 4.

At this point, it should be noted that even though the inclusion of anti-corruption contract clauses is positive and necessary, it is also true that these provisions are not sufficient to solve the problem.

FIGURE 4
Contractual Chain



Any contractual stipulation that seeks to regulate the effects of corrupt activities must necessarily be consistent with the general provisions of the annulment regime. If annulment is the only sanction contemplated in the existing general legislation, its grounds, effects, and consequences cannot be modified, negotiated, or agreed upon in a contract, as they fall under the scope of public order provisions that cannot be waived or modified by the parties.

Nonetheless, the inclusion of anti-corruption clauses in public contracts is becoming increasingly common, and constitutes an additional deterrent for the commission of illegal acts.[11] These clauses generally include three components: (i) a representation and warranty of the contractor representing and warranting that no bribes have been paid either directly or indirectly nor corruption acts have been committed during the period of contract formation; (ii) the obligation to conduct business with transparency, honesty, and integrity, which, in turn, implies the prohibition for the contractor, partners, controller's agents, and employees to commit corrupt acts during the term of the contract (to prevent acts of corruption, the parties may agree to the obligation of establishing internal compliance corporate programs and codes of conduct); and (iii) the obligation to promptly report to the competent authorities any act of corruption that might come to their knowledge. The most common consequence for non-compliance included in contracts is the unilateral termination of the agreement without right to compensation, which may often also include the imposition of penalties to the breaching party.

However, as stated above, these contractual provisions come into conflict with annulment provisions in the governing law for PPP contracts. This means that the parties to a contract cannot "convert" the act of corruption into a provision for early termination of the contractual relationship, since corruption triggers a penalty (the nullity of the contract), which, as such, extinguishes all the provisions of the contract and its effects. Therefore, nullity cannot be construed as an event of early termination as it is inherently different from this category, which can be mutually agreed upon by the parties.[12]

The distinction is significant for two reasons. First, early termination involves payment to the contractor of some sort of compensation in accordance with the valuation methodology and calculation procedure established for that purpose. Contrarily, the nullity of contract resulting from a corrupt act does not allow for compensation, as it punishes the bad faith of the parties.

Second, legislation usually contemplates a procedure to be followed when facing an early termination event. It would normally include the possibility of calling a new tender, summoning the bidders that participated in the tender process to complete the contract, or concluding the works through direct government management, among other options.[13] In the absence of specific

[11] Multilateral development organizations also include such provisions in their loan agreements. The IDB, for example, incorporates a "Prohibited Practices" clause that includes acts of corruption, fraud, coercion, or collusion, among others. The occurrence of a prohibited practice enables the Bank to take a number of measures, including denying financing of contracts, declaring the ineligibility of a procurement process or a company to participate in activities financed by the Bank, and imposing other sanctions such as fines.

[12] Common law contracts, such as those executed in the United Kingdom, include clauses that provide for the early termination of the contract on the basis of delivery of corrupt gifts and the commission of fraud (Termination on Corrupt Gifts and Fraud). The provision seeks to strike a balance between the public sector's interest in terminating its contractual relationship with a corrupt partner and the interest of third parties such as financiers who have not taken part in any transaction involving prohibited activities. Contracts specify which actions constitute corrupt gifts and fraud. If the private sector is responsible for the prohibited action, the public sector has the right to terminate the contract upon payment of outstanding financial obligations. In addition, the government must be compensated and given all the project assets. See Her Majesty's Treasury (2012).

[13] In the case of the PPP contract for Improvements to the National Energy Security and Development of the South Peruvian Gas Pipeline, for example, Clause 21 of the contract empowers the grantor to appoint a concessionaire's auditor to supervise the management of the service. The concessionaire must maintain the continuity of the service for a period

regulation on the consequences of nullity, the government can only resort, by analogy or extension and to the extent possible, to the same mechanisms established for contract termination, in an attempt to seek the rapid continuity of the paralyzed works, which will not always be achieved.

Consequently, it is essential for any legal system to define by law clear rules on the requirements prescribed for the validity of legal acts, as well as on the procedures to determine their nullity and the effects derived thereof. The absence of specific regulations on the consequences stemming from the paralysis of a project that is declared null and void due to an act of corruption results in a situation of vulnerability and uncertainty with respect to the protection of the interests of the bona fide third parties that are involved in the project and that have nothing to do with the crime committed (financiers, suppliers, workers, etc.). The core of the problem does not reside in the existence of nullity in current legal systems, but rather in the legal void or the absence of a carefully designed rule to punish corruption cases, which at the same time restricts the legal consequences derived from the nullity of contract and protects the interests of bona fide third parties, thus promoting the development and completion of the project.

of one year or until the concessionaire is replaced. In the event that this period elapses and there is no replacement, the concessionaire's auditor shall take over the operation of the system until it is awarded to the new concessionaire. In turn, the grantor must call a new public auction for the transfer of the concession and handing over of the assets to the new concessionaire, and must pay the concessionaire a maximum amount equivalent to the book value of the goods under concession.

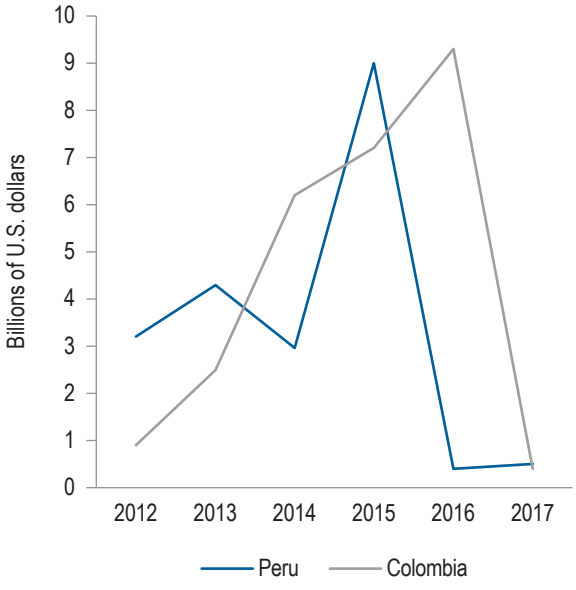
3

RESPONSES TO THE PROBLEM

The previous section details the specific limitations of the existing PPPs legal frameworks to deal with acts of corruption, due to the intrinsic characteristics of these projects. These limitations help explain the paralysis of the sector because of acts of corruption, such as those made public since 2015.

From this point of view, nullity of contract and the zero-tolerance model have not only proven to be inadequate solutions,[14] but also insufficient tools to put an end to the scandals and consequences derived from the payment of bribes.

FIGURE 5
Total Investment in PPPS in Colombia and Peru



On the one hand, and with the goal to preclude impunity, comprehensive strategies are required to prevent the occurrence of corrupt acts and punish those responsible. On the other, rules must also be implemented to manage contracts threatened by a potential declaration of nullity derived from the corrupt act.

As Figure 5 clearly illustrates, the downturn in PPP-related activities has been abrupt in some countries affected by cases of corruption in public works procurement, as is the case of Colombia and Peru. Faced with this situation, these two countries were the first to introduce significant legal reforms. For example, some jurisdictions are implementing legal and administrative reforms to address the nullity of PPP contracts and the paralysis of projects. It is still too early, however, to judge their impact.

Measures Adopted in the Region

Colombia

The Colombian Congress recently passed several amendments to a series of regulations, such as Law No. 80 of 1993, which regulates the General Public Procurement Statute, and Law No. 1508 of 2012, concerning PPPs. Article 20 of Law No. 1882 of January 15, 2018, modifies Article 32

[14] For an analysis of some of the difficulties in the practical application of zero-tolerance policies, please refer to Leder-Luis (2018) and de Simone and Taxell (2014).

of the PPP Law regarding the early termination of PPP projects.

Article 20 of the new law incorporates two paragraphs to Article 32 of the PPP Law, aiming to regulate certain consequences derived from the nullity of PPP contracts. The first paragraph establishes that in the case of administrative or judicial annulment, the contractor must be compensated for the updated value of the costs, investments, and expenses incurred, including interest, minus the remuneration and the payments received by virtue of its performance under the contract. This compensation is not to include costs or penalties imposed on the contractor by third parties by virtue of the early termination of the contract, except in the case of those associated with credit agreements, financial leasing, or the termination of contracts derived from the financial hedging of the project. The amendment also sets forth the form of payment and the resources that will be used to pay the corresponding compensation.

The second paragraph establishes that the concessionaire responsible for the illegal conduct is to pay the amount specified in the agreed penalty clause, or, should the amount not have been mutually agreed, 5 percent of the value of the contract. This amount is to be deducted from the remaining liquidation balance in favor of the concessionaire, once the aforementioned third parties have been paid. Should the amount not be sufficient, the unpaid balance of the penalty payment shall be borne by the natural or legal persons responsible.

Should there be a credit balance, the funds will remain as a guarantee of payment for a period of five years to cover potential claims that might arise. Furthermore, the competent judicial or administrative authority is authorized to order, as a preventive measure, the application of the pecuniary penalty clause in investigative procedures in progress. The article ends by stating that its provisions do not exclude any fiscal, disciplinary, or criminal liability that may be due.

Panama

In response to Odebrecht's recognition before U.S. authorities that the firm had paid bribes to secure the award of contracts in Panama, the Panamanian government made the political decision to initiate a process that includes a series of administrative measures. These include:[15]

1. Adopting the necessary actions to prohibit Odebrecht from being awarded or endorsing contracts arising from future public bidding processes of the State until the company demonstrates effective and efficient collaboration in the investigations carried out by the Prosecutor's Office and guarantees payment of the sums to be refunded to the State. Additionally, it was established that its participation in future tenders would require a report that evidences compliance with the terms of ongoing contracts.
2. Cancelling, at no cost to the State, the association contract between the State and Odebrecht for the Chan II project (a hydroelectric power plant awarded for an amount close to US$1 billion, on which significant material steps for its initiation had not yet been made).[16]
3. Ensuring compliance with ongoing works in an attempt to preserve their value, maintain the jobs created by them, and guarantee the economic and social development that depends on the completion of the works.
4. Referring to court, all processes that the Executive branch may have knowledge of and creating a conditional arrangement of cooperation in court.

In turn, on August 1, 2017, the Prosecutor's Office announced the signing of a Plea Bargain Agreement with Odebrecht by virtue of which the

[15] In this regard, refer to the Official Communiqué of the Government of the Republic of Panama, dated December 28, 2016 (MEF, 2016).
[16] On this matter, see Forbes (2017).

construction company would be charged a fine of US$220 million.[17] In addition, the firm undertook to provide to the courts all the information related to Panama, which any of its employees, directors, or outsourced third parties could have knowledge of the events under investigation.

Peru

On March 12, Law No. 30737 was published, which "ensures the immediate payment of civil damages in favor of the Peruvian State in cases of corruption and related crimes."[18] This new regulation replaces Emergency Decree No. 003 of February 2017, whose objective was also to guarantee the payment to the State of civil damages in relation to acts of corruption.[19]

The new law establishes a mechanism that regulates the transfer of projects under the control of companies that have been condemned or are under investigation for acts of corruption. Consequently, the norm distinguishes three types of entities that are subject to its provisions. First, legal persons that have been convicted or have admitted their guilt before a competent authority for acts of corruption; second, the entities associated or forming consortiums with those in the first category; third, legal persons that are being subjected to investigation for committing acts of corruption. Likewise, the law includes government officials or representatives convicted either in Peru or abroad for crimes against the public administration, money laundering, or other related crimes.

The regulation states four specific measures to accomplish its purpose:

1. The suspension of transfers abroad of capital obtained from the investments in the country, the profits and dividends derived from said investments, the compensation for the use and enjoyment of the buildings physically located in Peru, and the consideration and royalties for the use and transfers of technology. This suspension of transfers is lifted whenever:

   (i) all outstanding debts regarding labor obligations, suppliers, financial and other obligations with third parties have been paid off; (ii) civil damages in favor of the State and the full amount of the tax debt due are paid off; and/or (iii) a final acquittal sentence is passed in favor of the persons involved or a resolution concluding the proceedings is adopted.

   Notwithstanding the foregoing, the law allows the Ministry of Justice to authorize, by way of exception, transfers abroad to guarantee payment to creditors whenever the lack of payment threatens the value of concessions or other assets located in Peru.
2. The creation of a procedure for the acquisition of goods, rights, shares, ownership participations or other securities, through which the purchaser must deposit 50 percent of the sale price in a "withholding for reparation trust" until the total amount of civil reparations and potential tax liabilities is covered.[20] The norm allows for the hiring of private oversight companies to ensure transparency in the aforementioned sales processes.

[17] See Public Prosecutor's Office (2017). Pursuant to the Plea Bargain Agreement, upon the issuance of a technical report by the Comptroller General of the Republic of Panama, the company undertakes to make the referred payment, to provide all the information related to Panama of which any of its employees, officers, or outsourced third parties may have knowledge, as well as any facts relating to the jurisdiction that may have already been reported to the U.S. Department of Justice and to the Public Prosecutor's Office of Brazil.

[18] It is worth noting that Peru adopted a series of measures including, among others, Law No. 1778 of 2016, which prohibits contracting with persons who have committed crimes against the public administration, and Supreme Decree No. 068–2017-EF, which amends several articles of the Regulations of the then PPP Framework Law, and establishes, on grounds of nullity, the obligation to include an anti-corruption clause during the structuring phase of the contracts, the application of which provides no compensation for damages in favor of the contractor.

[19] According to some publications, the emergency decree did not fulfill the objectives for which it was issued. On this regard, see, for instance, Villalobos (2018a; 2018b).

[20] The law establishes certain exceptions, for instance, transfers of funds performed before emergency decree No. 003 of 2017 entered into effect, except when there is evidence of bad faith intent.

3. A provision stating that a net profit margin be withheld of up to 10 percent of the State's receivables in favor of the affected subjects and the companies or consortia in which they participate. This amount is to be deposited in the aforementioned withholding and reparation trust. In this case, the other members of the consortium are allowed to replace the entity involved in corruption, in which case the mentioned sums will not be withheld.

   The law stipulates that companies in the first category shall be subject to a withholding of 50 percent of the net sale price (after deduction of debts) and 10 percent of payments for public works or co-financing by way of a PPP. The entities in the second category shall be subject to a withholding of 50 percent if a PPP is in place or of 10 percent of the cost of the contract if it is structured as traditional public works.
4. A preventive entry is established in the public registry to record all chattels, assets, rights, shares, quota holdings, and other values representative of ownership participation rights of the entities subjected to the provisions of the law, specifically stating that the acquisition of the property is subject to the procedure established therein.

The firms under investigation can voluntarily adhere to a regime of company intervention. In this case, they are to: (i) set up a guarantee trust for the payment of civil damages, (ii) disclose information to the authorities in charge of the investigation, (iii) implement compliance programs, and (iv) suspend transfers of funds abroad. The withholding shall affect dividends in the case of PPPs and 10 percent of the cost of the contract in the case of traditional public works procurement. The regulation also foresees plea bargain agreements, the existence of which can waive, suspend, or reduce the legal consequences of the crime or reduce the amount awarded for civil damages. To enjoy these benefits, the entities must have complied with all their outstanding labor and social security obligations with employees and committed themselves to complying with their tax obligations within a period not exceeding 10 years.

Furthermore, the law creates the role of process overseer. This is an observer with the authority to access the necessary documentation so as to gather information and verify economic movements and the financial position of the subjects under the scope of the law to effectively monitor the continuity of the chain of payment. Lastly, the law establishes that the legal persons covered by its provisions that fail to comply with the obligations assumed shall be barred from entering into contracts with the Peruvian State.

On a different note, on July 23, 2018, the Peruvian government issued Legislative Decree No. 1362 to replace the legal framework in force for PPP contracts. Pursuant to what is stated in the fourth final provision of the decree, the new rule will come into effect the day after the publication of its implementing regulation, for which a maximum period of 90 calendar days was established. At the time the present work was finished, the norm had not yet entered into effect.

However, for the purposes of this study, it is important to highlight the provisions of Article 58, according to which, upon early termination of the PPP contract, the awarding entity of the project shall assume the provisional management of the project *pro se* or through third parties, for a period of three years, and shall be entitled to carry out whatever actions and enter into any contracts necessary to guarantee the continuity of the project. In turn, the second paragraph of the aforementioned article argues that notwithstanding the applicable regulations, PPP contracts may contain clauses stipulating the compensation to which the investor is entitled, in the event that the State may suspend or annul the contract unilaterally or on the basis of its own breach.

Brief Comparative Analysis of Measures Adopted in the Region

The measures adopted in the three jurisdictions referred to contain substantial differences despite the fact that they all seek to address and provide a solution to the same problem: corruption in large infrastructure projects now discovered as the result of the admission of guilt on the part

of the Brazilian construction company in various jurisdictions. The differences between the Colombian, Panamanian, and Peruvian solutions are not only related to the substance of the proposed measures, but also to the instrument used for that purpose. On the one hand, the tools adopted in Colombia and Peru possess legislative status and constitute rules that specifically address the scandals revealed in 2016. In Panama, on the other hand, it was decided not to adopt any new specific legislation, but rather to resort to measures of an administrative and criminal nature targeted to a specific company within the framework of regulations already in force. This is partly due to the absence of a specific PPP regime in the country, where the concession regime and the so-called turnkey contracts operate. In turn, the new Colombian law aims at both current and future contracts that could be invalidated by acts of corruption. The administrative measures implemented in Panama could also be replicated, since they are based on the regulations already in force. However, it is hard to imagine that Peru's Law No. 30737 could be applied again in future cases, as it would seem to be an ad hoc rule exclusively aimed at responding to the current corruption crisis and ensuring the payment of civil damages in favor of the State. Regarding the new legislation on PPPs and ongoing projects, the new legislative decree distinguishes two cases: (i) unsolicited proposals that were declared of public interest within 180 days after the entry into force of the previous legal regime continue to be subject to the procedure applicable at that time; and (ii) conversely, State initiatives and all other unsolicited proposals are subject to the new legislation, regardless of their status.

From a different standpoint, the purpose of the different solutions is also divergent. Firstly, the Panamanian measures seek to maintain the status quo of the projects under execution and sanction the company with other tools typically associated with administrative law (for example, making the company ineligible to enter into contracts with the State or barring their participation in potential projects).[21] At this point, it is important to note that by virtue of the plea bargain agreement subscribed with the Public Prosecutor's Office, the construction company would have regained its eligible status to enter into contracts with the Panamanian State (Polanco, 2018). However, since there is no specific legislation governing PPPs in Panama, it is not possible to analyze whether the country would have entered into a paralysis similar to that observed in Colombia and Peru.

Second, Article 20 of Law No. 1882 of 2018 enacted in Colombia aims at providing certain guarantees in favor of bona fide third parties that are affected by an absolute and irremediable declaration of nullity, particularly with respect to the project financiers (Fedesarrollo, 2018). As noted above, PPP contracts have special characteristics compared to traditional contracts for infrastructure development in the sense that they adopt a project finance structure that involves a significant number of stakeholders. Among them, the project financiers stand out, subjects that are alien to the contractual relationship of the PPP, but have a vested interested in it, since the collection of their credit depends, to a large extent, on the success of the project. The aforementioned law thus seeks to offer certainty and legal foreseeability to financiers regarding repayment of their credit and forestall a potential interruption in the financing of PPP projects (Gómez, 2018) by compensating the services rendered by the contractor. This will make it possible to obtain the repayment of investment in proportion to the progress of the works performed.[22] In this regard, some analysts had highlighted that the provision "comes into being as a result of the *Ruta del Sol II* case and the uncertainty regarding the formula for termination and liquidation of the contract. In the *Ruta del Sol II* case, the debt accrued under the contract at the time of its termination amounted to approximately COL$2.4 trillion. In the absence of clear rules for the calculation

[21] See *Forbes* (2017); *CNN en español* (2017).
[22] For opinions on the impact of the law, see *El Nuevo Siglo* (2018).

of the reciprocal services to be acknowledged, there is no certainty about whether the resources resulting from the liquidation will be sufficient to pay the debt, nor about the terms and conditions of payment of the liquidation. It is precisely this uncertainty that makes lenders and financial investors uncomfortable."[23]

Similarly, Article 20 also seeks to penalize the illegal conduct of the PPP contractor by including an additional fine consisting of the payment of a penalty clause equal to the value established in the contract or equivalent to 5 percent of the total amount of the contract value.

Third, Law No. 30737 of Peru, as its name implies, aims primarily at ensuring "the immediate payment of civil damages [...] in cases of corruption and related crimes." The statute thus seeks to obtain compensation for damages caused in the execution of works or in the provision of services when there occur acts of corruption. However, a careful reading of the norm also reveals other objectives, such as investigating acts of corruption, as it includes the concept of plea bargain agreement or ensuring continuity of the works and avoiding an interruption in the chain of payments. In fact, when presenting the recent implementing regulation of Law No. 30737,[24] the then head of the Ministry of Economy and Finance argued that the regulation included a set of measures to punish companies associated with acts of corruption while at the same time preventing the paralysis of economic activity, highlighting that some 250 projects amounting to a total investment of approximately 30 billion Peruvian Sols that had been suspended would be reactivated (*El Comercio*, 2018).

To achieve its objective, Peruvian legislation provides three main measures: (i) the suspension of transfers abroad to prevent the reduction of company assets (except in the case of payments to foreign creditors and other transfers that may have an impact on the value of the concession); (ii) the recovery and withholding of the sale price to cover civil damages, the orderly exit of the corrupt company, and the entry of new investors to continue the project; and (iii) the withholding of amounts payable by the State.

Some stakeholders have pointed out that Law No. 30737 has a positive impact, as the companies involved will be able to resume their activities and honor their debts with suppliers and for civil damages, not only with the proceeds from the sale of assets, but also with the flow of funds generated to serve the withholding and reparation trust.[25] Nonetheless, others voice criticism, doubts, and uncertainty about the potential success of the new regulation to guarantee the continuity of works and reactivate investments (Roncal and Montoya, 2018; Montoya 2018).

This could be the reason why in the new legislation of July 23 governing the PPP regime, the Peruvian government introduced Article 58 to regulate the consequences derived from the termination of PPP contracts. As stated above, this provision enables the State to assume the management of the project in the event of early termination, allowing it to carry out the actions and to execute the contracts necessary to guarantee the continuity of the project. On the other hand, the new law empowers the government to compensate the investor when the State suspends or terminates the contract unilaterally.

[23] See Di Terlizzi and Padilla (2017). With respect to the uncertainty created on financing banks, see *Semana* (2017b).
[24] See Supreme Decree No. 096–2018-EF of 9 May 2018 approving the Regulation of Law No. 30737
[25] On this matter, see Castillo (2018) and de la Vega Polanco (2018a; 2018b). See also *Diario Uno* (2018).

4

FINAL CONSIDERATIONS

This paper finds that, from a legal and contractual perspective, a significant number of the legal regimes of the LAC region and, consequently, of their PPP contracts, present at least one main defect: the occurrence of an illegal event—such as the payment of bribes—triggers the possible application of general rules of administrative law that materialize in a zero-tolerance approach and that imply the suspension of large infrastructure projects and the paralysis of the PPP sector.

This situation has prompted some jurisdictions to put forward specific measures to address the problem. As previously noted, the real impact of each measure cannot be established just yet, as it is their application over time in specific cases that will determine their success or failure. Nonetheless, all present and future efforts of public authorities of any jurisdiction should focus on striking a precise balance that makes it possible to harmonize the different interests at play, which are widely diverse because they comprise numerous players. Therefore, on the one hand, the measures should guarantee the punishment of those responsible for corruption, the possibility of effective cooperation to put an end to impunity, the recovery of assets, and compensation for damages caused by the wrongful act. On the other hand, they should also ensure the continuity and conclusion of the projects, their proper operation and maintenance, job security, investment repayment, and the development of the economy.

All these complex objectives cannot be achieved if the only response is zero tolerance. Rather, they can be attained through an alternative integral approach that, instead of indiscriminately affecting all relations by declaring contracts null and void, prevents the just from paying for the sinners, and allows projects with a positive socio-economic impact to be implemented in a timely manner. In light of this, measures should encourage the admission of one's own crimes and those committed by others, as well as promote, through criminal court proceedings, the conviction of those responsible. A proportional approach is not in opposition to the principles that support a zero-tolerance approach, since—as Davis points out—ensuring that the punishment fits the crime and falls on the person responsible, it reinforces the idea that the sanction imposed is a true reflection of the moral concerns that motivate it (Davis, 2009).[26]

At this point, it is important to highlight that contract annulment may be one of the many alternatives available to the authorities, in which case an orderly exit of the company responsible and its rapid replacement must be achieved through procedures that are clear, transparent, and predictable from the legal, financial, and economic points of view. Thus, mechanisms must be sought that allow for a quick replacement of the concessionaire or operator that is *excluded* from the works due to acts of corruption, and an orderly transfer of the infrastructure, even in those exceptional cases in which the State is qualified to complete its construction and eventually execute its operation and maintenance.

[26] The author suggests that the zero-tolerance approach seems misguided, because it ignores efforts made to prevent and overcome acts of corruption committed by companies, as well as alternative ways in which companies and governments could help combat bribery in public procurement.

Similarly, other tools that are complementary to the nullity of contract must be adopted to constitute a set of available instruments aimed at attaining the balance of all the interests at stake. In comparative legislation, there are precedents that show alternative approaches. For example, as expert in the World Duty Free case, Lord Mustill explained that, according to British law, the party affected by an act of corruption is entitled to rescind the contract and prevent its enforcement in the future. However, this faculty is optional rather than mandatory, as the affected party may opt for waiving its right to rescind the contract and instead enforce it according to its terms.[27]

In the context of European Community law, Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, addresses the issue of ineffectiveness of the award of public contracts. The Directive allows participants of certain procurement processes to contest infringements committed during the bidding processes by means of an independent and fast procedure. In certain cases, the competent body may choose to declare the ineffectiveness of the contract or to maintain its effects if there are "overriding reasons relating to a general interest" that so require it. According to the Directive, the "economic interests directly linked to the contract" in question do not constitute overriding reasons relating to a general interest, and the costs originated by the delay in the execution of the contract or those resulting from the launching of a new procurement procedure are cited as examples. If the competent body decides to maintain the effects of the contract, the declaration of ineffectiveness must be replaced by some alternative, proportional, and dissuasive sanction, such as the imposition of fines or the proportionate shortening of the term of the contract.

The adoption of measures aimed at preventing the paralysis of the infrastructure sector is of paramount importance for the economy of a country. This is not only evidenced by the conclusion of the projects in question, but also through the continuity of investments, the granting of financing for infrastructure works, the call for new tenders, and the preservation and creation of new jobs. This problem could be avoided by considering various strategies, which include:

a. Adopting comprehensive and coherent legal and contractual schemes for PPPs. This should include, at least, a general legal framework that specifically regulates PPPs and the consequences derived from acts of corruption, both during the bidding phase and the execution of the contract.
b. Establishing a public entity (or strengthening the existing one) with sufficient capacity and resources to ensure the monitoring of and compliance with the obligations arising from the PPP throughout the entire cycle of the contractual relationship, providing it with the necessary tools to intervene upon the occurrence of wrongful acts or events. It is important to define an adequate allocation of responsibilities among the different public sector entities involved in each project, to clarify and bring certainty regading which agencies will be responsible for adopting decisions in a PPP.
c. Including in the corresponding regulatory frameworks relevant provisions related to transparency, integrity, and anti-corruption that include a wide range of tools that may coexist with the option of declaring contracts null and void, but allowing its continuity and validity, while corrective and compensatory measures are applied. This may include fines, future debarments, replacement of subcontractors, implementation of compliance programs with judicial follow up, whistleblower protection programs, and others.[28]
d. Adopting specific rules of integrity[29] for officials involved in procurement processes, includ-

[27] In this regard, see World Duty Free Company v. Republic of Kenya. Similarly, see Davis (2009).
[28] The adoption of laws on the criminal responsibility of legal entities by several countries in the region has triggered an interesting debate regarding the compliance or integrity measures referred to herein. See, for instance, article 22 et seq. of Act No. 27,401 of Argentina. Given the novelty of these laws, there is not enough information to perform, for example, a cost-benefit analysis of these interventions. In this regard, see Davis (2016).
[29] For an analysis on matters related to conflicts of interest, see De Michele and Dassen (2018).

ing provisions concerning conflicts of interest, financial disclosure reports, and other supplementary measures, such as those related to the review of professional and personal backgrounds.

e. Using information and communication technology resources throughout the life cycle of the contractual relationship to ensure absolute transparency of all steps related to the PPP contract (in particular, during the process of selecting the contractor and before the signing of amendments, addenda, price redeterminations, etc.).[30]

In future PPP contracts, these and other measures could constitute schemes that inspire more confidence in all the parties involved and, at the same time, respond to wrongful practices in a more consistent manner. The spate of grand corruption scandals in recent years has triggered a regional crisis that created innumerable difficulties for the jurisdictions involved. This shows that it is imperative to work not only with an ex-ante approach for the prevention of illegal acts in public procurement, but also on the creation of instruments that make it possible to manage contracts after the crime has been committed. An integral approach is required that contemplates new legal tools designed to protect the interests of the different parties involved, including safeguarding public interest in the event of the corrupt act.

[30] Throughout the performance of this type of contract, a huge number of secondary interactions are conducted with governments (often local) in terms of permits, authorizations, imports, and other similar administrative procedures. Transparency and integrity in these relationships are equally important. In this sense, see Roseth, Reyes, and Santiso (2018).

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