

FUNDAMENTAL PRINCIPLES IN PPP LAWS: A REVIEW OF LATIN AMERICA AND THE CARIBBEAN

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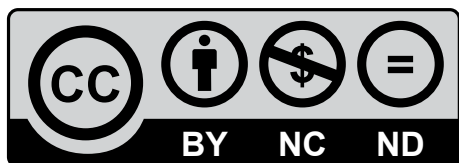
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INTRODUCTION



Investment in infrastructure is one of the main forms of economic development. Traditionally, the Public Administration implements infrastructure projects using taxpayer funds. Over the past few decades, demand for infrastructure has increased, but public funds have remained the same or been reduced. This is in part because the public finances of many governments have reached a point where long-term borrowing is not available. In a recent study, GI Hub estimated the cumulative 'global infrastructure need' from 2015 to 2040, and the 'investment gap' for the period. The investment need is US\$ 94 trillion while the gap is US\$ 15 trillion.¹ This has led many states to accept the growing importance of the private sector participation in the financing and management of infrastructure projects, and as a result they have sought out alternative means of procurement.

Public-private partnerships (PPPs) have become more frequent as a result of these limitations on state budgets. One advantage of leveraging the private sector is that well-prepared infrastructure projects can generate a high social rate of return and improve well-being, whereas inadequate infrastructure represents an obstacle to growth and improved quality of life. At the same time, when infrastructure projects are poorly

planned, they remain a financial burden for the sponsor state, but do not provide any rate of return.

In Latin America and the Caribbean, investments represent around 3.5% of the GDP, below the level recommended in order to close the infrastructure gap in the region.² According to Infralatam's study, it is imperative that, both the public and private sectors invest in infrastructure projects to achieve the recommended levels of investment.³

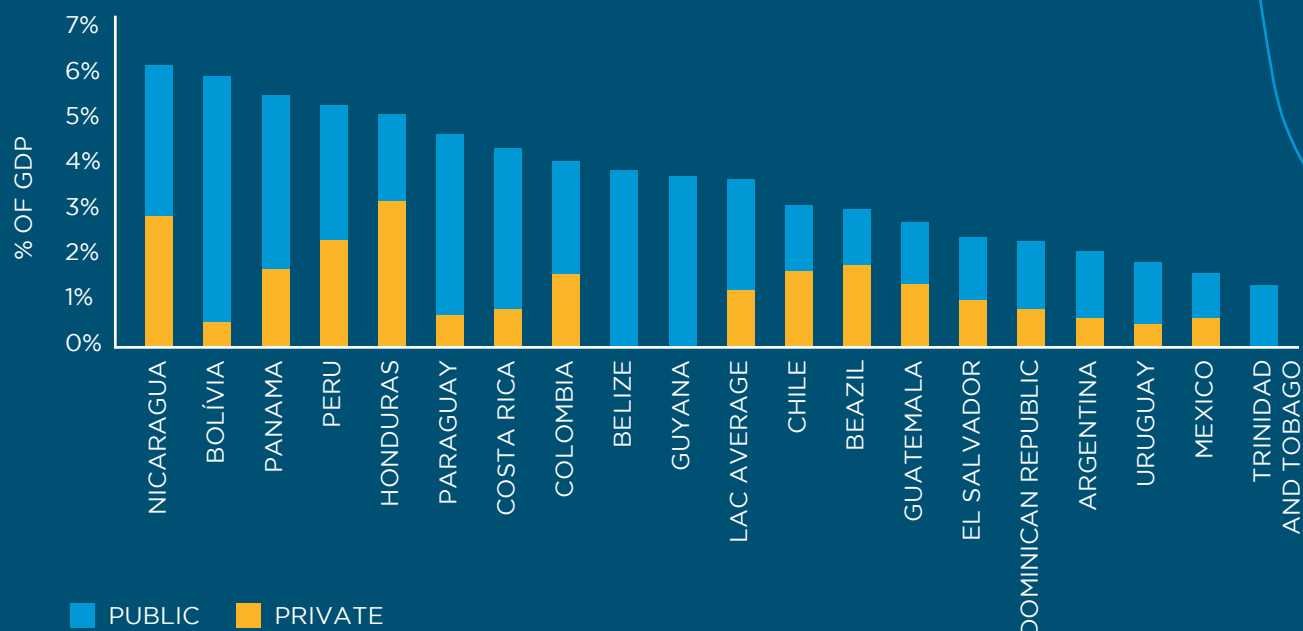
¹ <https://outlook.gihub.org>

² There is a wide range of studies dealing with the infrastructure gap in the region. While they all agree on an average of 5%, figures range between 3.7 and 7.4% according to different demand scenarios (ECLAC, 2017, World Bank, 2019).

³ <http://scielo.sld.cu/pdf/eyd/v156n1/eyd12116.pdf>

INTRODUCTION

PUBLIC AND PRIVATE INVESTMENT IN INFRASTRUCTURE AS A SHARE OF GDP BY LAC COUNTRY, AVERAGE 2008-2015



Although not all infrastructure is suitable for a PPP approach, those policy-makers that choose to shift from public infrastructure financing to private partners have several important differences to consider. The first consideration is the nature and motivations of long-term investors and their need to generate value for money. For a successful PPP, the interests of both the public and private sectors must be met.

For the public sector, choosing a PPP for economic infrastructure projects can be a preferable choice, particularly when the revenues of the asset can cover a significant part of the debt service obligations. For social infrastructure, the public sector may

want to allocate its public expenditure directly through traditional public procurement in some sectors while accelerating larger programs in other sectors. There are other possible reasons to select a PPP, for example if a government cannot afford to use its human resources or if it desires to introduce private sector technology and innovation into public projects.

With the participation of a private partner in a well-prepared investment project, there may be larger investments providing greater benefits to the population in the long term.



PPPs are a way to introduce private sector technology and innovation into better public services through creative planning and design, and efficient project management.

Building and maintaining infrastructure is essential for economic expansion and social development. If delivered efficiently, it can translate into economic growth. However, the world is not developing the quantity and quality of infrastructure necessary to meet the demand.

A solid legal and institutional framework is necessary to attract long-term private investment to develop infrastructure projects. It is also important not to forget the importance of the technical capacities of public officials for the preparation, structuring and monitoring of PPP projects.

For this reason, the Inter-American Bank (IDB) conducted research on the legal framework for PPPs in Latin America and the Caribbean Region to establish guidelines on PPP law leading practices. The Global Infrastructure Hub also worked closely with the IDB in both the development of the framework and the delivery of this report.


For this study, questions were prepared and sent to the body responsible for PPPs in each of the 17 selected countries in the region.⁴ The questions address the main topics identified as necessary to understand and develop an adequate PPP

regulatory framework. After that, all relevant PPP legislation in the countries was recorded and, based on the information gathered, a table capturing the data from each country was created.

For this exercise, IDB PPP experts, GIHub experts and the advisory team of Madrona Advogados established, based on studies and their large experience, 14 principles that are fundamental for any Public Administrator to design a comprehensive legal and institutional framework for PPPs:

- 1 Legal and institutional framework;
- 2 Applicable sectors and activities;
- 3 PPP monitoring and regulation;
- 4 Modelling PPP projects;
- 5 Procuring a PPP project;
- 6 Income structure;
- 7 Dispute settlement;
- 8 Dealing with changes;
- 9 Financing, funding and warranties;
- 10 Extraordinary events;
- 11 Public authority's prerogatives;
- 12 Risk allocation;
- 13 PPP termination; and
- 14 Transparency and accountability.

⁴ Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago and Uruguay.




This paper starts by examining the peculiarities of the **legal and institutional framework for PPPs in each country analyzed**. To achieve this, there is analysis of each country's PPP law, how it works, what is a PPP according to the applicable law, and if there is an institutional framework to support it. The paper also provides a conclusion on whether or not a successful PPP is possible within the current legal framework of the analyzed countries.

The paper also makes determinations regarding which **sectors and activities are applicable for PPP projects**. Some projects may be more politically or socially challenging than others - particularly if there is a public sector workforce that feels threatened by private sector competitors.

PPP monitoring and regulation refers to the supervision of the PPP agreement and regulatory matters. These include price regulation (usually by the Treasury or by the sector regulatory body), compliance with the service and performance standards established in the PPP contract. It is important to establish security and continuity for the project and to guarantee that there are specific bodies to supervise the project. One of the main problems identified in the development of infrastructure projects is the absence of contract governance, often aggravated by institutional weakness. Regarding governance, it is necessary to remember that PPP governance requires managing the whole project, not simply the contract phase. Designing and structuring the contract/legislation with efficient governance procedures and mechanisms is essential to achieve a successful PPP program. In many cases, contractual provisions will govern agreement enforcement. This is particularly true in sectors where there is no current regulatory agency or effective regulation.

Risk sharing is another key variable to consider when identifying and selecting PPP projects. The most common justification for PPP projects is that allocating risks between the public and private sector creates better results for the partners and the end users. PPP arrangements are more complex than conventional public procurement projects. PPPs require detailed project preparation and planning, complex transaction structures, and proper management of the procurement phase to encourage competition among bidders. They also require careful contract design to set service standards, allocate risks and reach an acceptable balance between risks and returns to attract long-term private investment.

The next principle is **procuring the PPP project**. When the Public Administration is contracting, it must pursue public interest, so it is paramount that the bidding process has features that guarantee not only equality between the participants, but also ensures that the contract is more economically advantageous for the Public Administration. In practical terms this means less expenditure of public funds and more value per dollar spent. It is important that the private partner who wins the contract has financial capability, experience and technical capacity to comply with the agreement.



PPP income structure is another important element of the project because it is a reflection of the services delivered. Indeed, the private partner's primary goal is to profit from their investment. The payment mechanism is very important to achieve bankable projects since there are mechanisms that assign demand risks to the private sector and others in which the government holds the risk. The source of payment for the project depends on the project sector. Social infrastructure projects do not generate their own income, and so in this area the government will make periodic repayments to their private partner based on the performance of the project. On the other hand, projects in the economic sector generate their own revenues by charging fees to users. Even in those projects though, it may be that the government makes payments to its private partner. In each case, because it is an agreement, there are at least two parties with conflicting interests and it is possible a dispute will have to be resolved. The provision of **alternative dispute resolution mechanisms** is one of the factors that can make foreign private parties interested in investing in other countries. The dispute is not under governmental jurisdiction and offers efficiency, impartiality, and security to the project. Having external experts resolve disputes is often advantageous because the government is not administering over an arbitration in which it has an interest.

As for the **characteristics of PPP projects** (a long-term agreement), initial conditions almost always change during the course of a project. These changes are virtually inevitable. When such changes occur, it is important to verify how the government deals with these developments. For increased stability, the agreement or the law may provide indemnity parameters.

It is also possible that the project is influenced by **extraordinary events** such as acts of God and force majeure events. This may cause the suspension or even the dissolution of the agreement.

Financing and Funding are issues that need to be analyzed and that have a major impact on projects as a whole. These two areas are a source of the motivation to seek a private partner in the first place. Financing PPP projects it is not an easy task due to the large investment required. Legislation usually establishes that financing a project is the private partner's responsibility. Some governments establish special right or guarantee to the investor, such as step-in rights or special credit guarantees to provide a safer environment for the investor.

PPP projects are agreements executed with the Public Administration to guarantee public interest. Thus, governments have a few **prerogatives** that prevail over the private partner. Two of the most important powers available to the Public Administration are the right to extinguish an agreement and the ability to apply penalties to the private partner in case of noncompliance. Cases of early termination for reasons attributable to the government should also be anticipated in the relevant legislation. It is important that the law in this area is clear, so that neither partner is surprised by their ultimate liability.



Risk allocation is essential to the formation of effective PPP projects. When the parties discuss how risks will be allocated, they also discuss the structure of the allocation of responsibilities and functions within the partnership. This causes several different effects and is not a separate legal activity but a multi-disciplinary one. **Risk allocation** should include technical considerations, economic and financial considerations that bearing on the feasibility of the project and then a legal assessment related to relevant regulations and contract structures. Inadequate allocation of risk can lead to project failure or non-viability.

Next, this paper analyzes **PPP contract termination**: stipulations defining the conditions under which the agreement may be terminated, whether there will be damages paid, and what will happen to the assets involved in the project after termination. It is important that there are clear rules for the agreement's termination so that the result is not arbitrary or against the public good.

Public transparency is an important feature of modern governance. **Transparency and accountability are also crucial components of PPP projects.** Democracy is based on the power of the people and a democracy is only legitimate when the voter receives accurate information from the Public Administration. Public transparency then is a measure of the citizens' access to government information. Effective transparency makes relations between the government and civil society closer and more democratic. Accountability may be defined as the obligation to be responsible for the impacts of a choice made by those in power. The right to public information is a fundamental guarantee for the promotion of transparency and accountability of public managers, and essential for the democratic process. Likewise, these guidelines are powerful and effective instruments in the fight against corruption.

By analyzing these 14 principles, we have an overview of the cycle of a PPP project and can verify whether legislation has considered the pillars of public-private projects.

There are many differences between different countries' legal frameworks, resulting from distinct cultures and histories, but the same principles apply in each case. Although most of the countries analyzed have a civil law system, Jamaica and Trinidad and Tobago are common law countries, which makes the legal precedents very different and legislation less specific. Whereas civil law states are generally characterized by codified statutes and regulations, common law economies are less reliant on them, and rely more on existing case law as precedent.

This report was prepared to serve as a guide for public administration in Latin America and the Caribbean region, the report will offer insights on how to improve PPP legal frameworks, and also how to prepare and improve each country's PPP regime.

INTRODUCTION

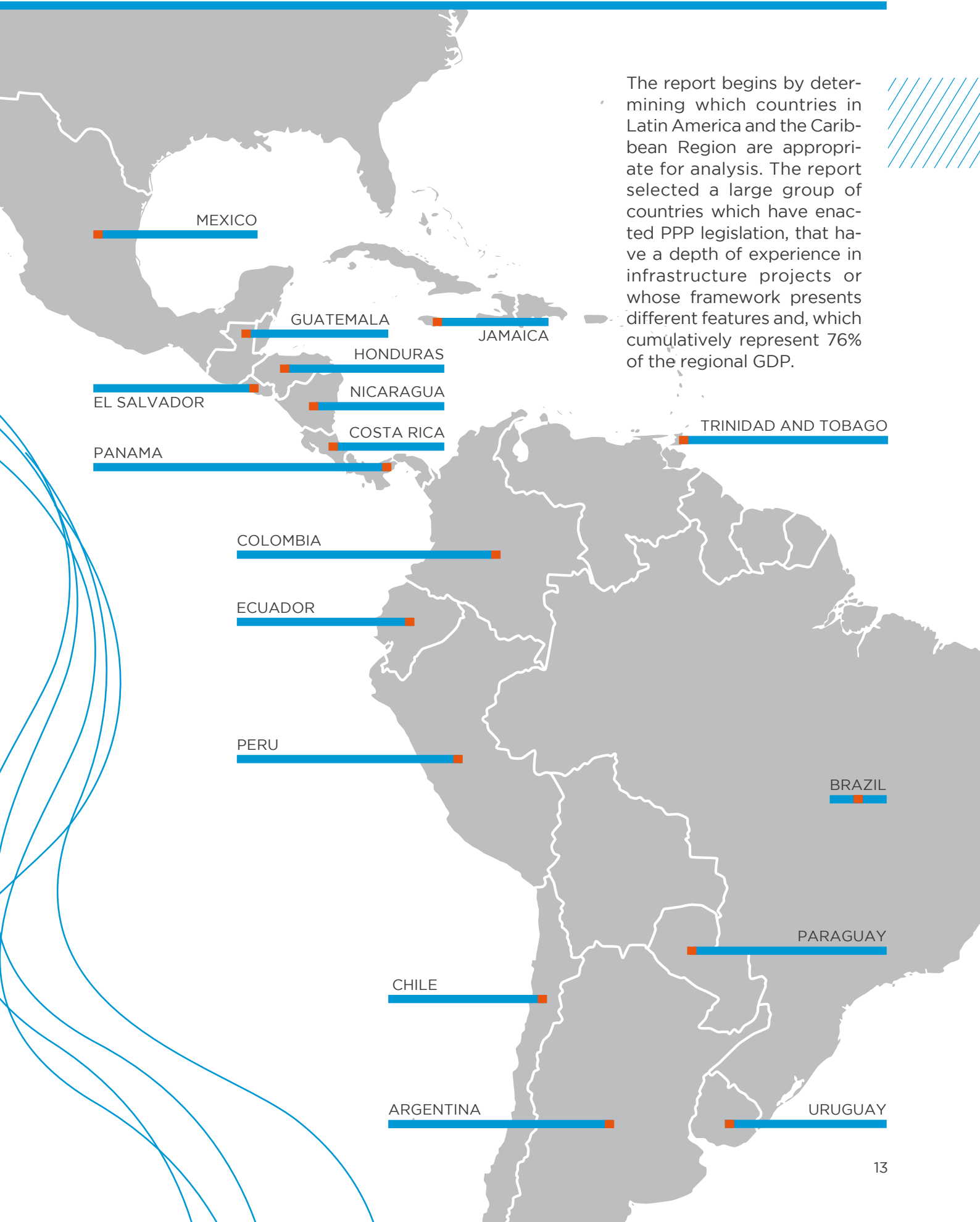
This report summarizes each country's legal framework in reference to PPPs in order to provide more evidence for recommendations.

Argentina	Argentina is a federal state whose new PPP Law was enacted in 2016 with regulatory decree in 2017. It is a country that wants to promote new investment and is currently structuring more projects. Although there is no local or state PPP law, there are provincial public procurement rules.
Brazil	Brazil is a federal state with a large territory under civil law. It has a federal PPP law but also local laws that regulate private investment in infrastructure for state and local projects. It is a large economy and one of the countries with the most PPPs in the region.
Chile	Chile is one of the countries in the region with the best environment for private investment in infrastructure. It has experience in PPP projects that have faced problems like corruption.
Colombia	Colombia's PPP environment is marked by a strong regulatory framework bolstered by a new PPP law implemented in 2012. The country has a long tradition of PPPs alongside with Brazil and Chile and was considered by Infrascope to hold additional capacity to develop PPPs. Colombia is constantly modernizing project modeling.
Costa Rica	Costa Rica is a small country with a federal PPP framework focused especially in energy projects. It has a defined and stable legal framework for PPPs.
Ecuador	Ecuador's PPP Law, enacted in 2015, can be used for state and municipal PPP projects. The current PPP projects were developed by the State through the Ministry of Public Works and there are some local projects that are waiting to be launched.
El Salvador	El Salvador is a small country in Central American that is maturing its PPP legislation to attract private investments in infrastructure. In 2018, the first 2 PPP projects started development.
Guatemala	Guatemala's PPP Law was established in 2010 but investment in PPP projects are still in development. The country has some projects under review and is preparing to tender its first PPP project. Municipalities and associations of municipalities can carry out infrastructure projects under the legal framework established in the Law.

INTRODUCTION

Honduras	Although it is a small country, Honduras has implemented several PPPs in the last few years. A new PPP Law was established in 2010 and the government wants to attract more investment by developing a better regulatory framework with greater transparency.
Jamaica	Together with Trinidad and Tobago, Jamaica is one of the only countries analyzed that uses common law. Jamaica does not have a PPP law, but a policy that provides guidelines for PPPs. It is a market still in development.
Mexico	Mexico is a federal state with large territory under civil law. It has a federal PPP law, which was enacted in 2012. Mexico also has local laws that regulate private investments in infrastructure. Mexico has a long tradition of private investment in infrastructure and public services in order to satisfy public interest objectives. The main activities involved with PPP's in Mexico are transportation, security, energy and water related services.
Nicaragua	A new PPP Law was enacted in Nicaragua in 2016 to facilitate investments in infrastructure. However, the current political landscape may impose challenges for investors.
Panama	Panama does not have a special PPP Law, however, during the past 20 years the country has adopted laws that privatized state-owned companies and developed PPP projects to boost infrastructure and public services. These projects were in the areas of energy, telecommunications and ports.
Paraguay	Paraguay is a federal state under civil law. It has a federal PPP law that does not address whether subnational regulation may exist. The law is regulated by a decree.
Peru	Peru has a long tradition of PPPs and concessions. Following the award of 104 projects between 1998 and 2018, Peru has updated its legal and institutional PPP framework to generate higher quality projects. However, the country faces challenges related to transparency and corruption.
Trinidad and Tobago	Trinidad and Tobago is a unitary state, which does not have a specific PPP law, but a general draft policy that provides guidelines for PPP projects. The country is governed under common law.
Uruguay	Uruguay is improving its framework to attract investments. It has a PPP Law that is complemented by decrees that can be used by both federal and local governments.

GENERAL OVERVIEW



GENERAL OVERVIEW

The report includes recommendations regarding the legal frameworks and practices involved in PPPs in these countries. These frameworks and practices will be described in this chapter but analyzed more deeply in subsequent chapters.

An initial analysis of the legal models adopted by these countries shows that 2 of them are under a common law system (Jamaica and Trinidad and Tobago) while the other 15 are under civil law. For the purposes of this report, PPPs are defined as long-term infrastructure projects that bundle the implementation and the operation phases of the project, alongside investments made by the private party with financing structures. Some countries have provisions for PPPs even though they are not called PPPs, and the report in-

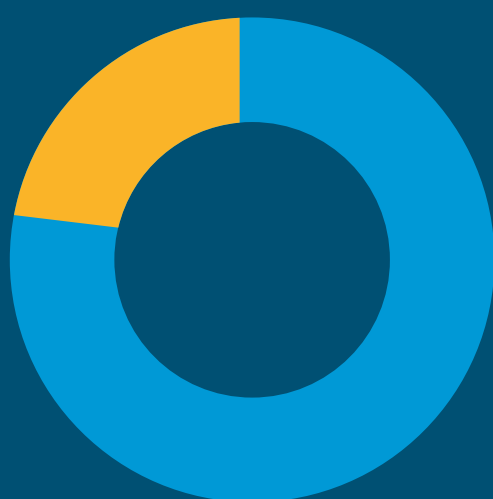
cludes analysis of the relevant legislation (usually concession law). For countries with both PPP and concession laws, the report only examines the country's PPP law.¹

Thirteen countries have a specific law for PPPs.² Jamaica and Trinidad and Tobago only have a PPP policy, and the specific obligations are negotiated in each individual contract.

In some of these countries, the concept of delegating public work and/or services to the private sector is very recent. In others, such partnerships have been in use since the 90s. This context can be verified when analyzing the main practices of each country.

Although it may help a country to have a PPP law, it is not necessary to stimulate private participation in infrastructure projects. It is often advantageous for country's to have a specific PPP Law because it consolidates the rules and provides guidance to potential foreign investors.

Brazil has the highest number of projects awarded between the Public Administration and private parties but most of them are at the state and municipal levels: 860.³ Mexico and Colombia also have a large number of PPP projects.



HAVE PPP LAW ■
DO NOT HAVE PPP LAW ■

¹ Concessions in countries where there is no PPP law will be named as PPPs in this report.

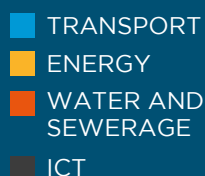
² Trinidad and Tobago have a draft Policy and, on the top of that, "Public procurement and Disposal of Public Private" Law applies. The Public Procurement and Disposal of Public Property Act will apply to PPP arrangements as defined in its section 7(1) when it is fully proclaimed. The Act's partial proclamation (Legal notice No. 150) did not include the section related to PPP arrangements.

³ <https://pppknowledgehub.org/countries/brazil>

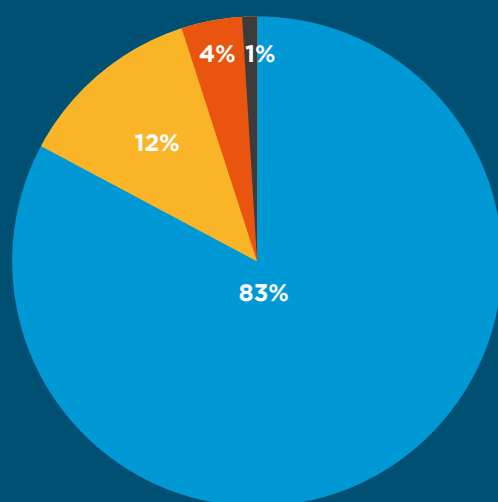
GENERAL OVERVIEW

Most of the infrastructure projects in Latin America and the Caribbean are in the transportation sector. In Colombia, for instance, transport projects account for 83% of all investment in infrastructure:⁴

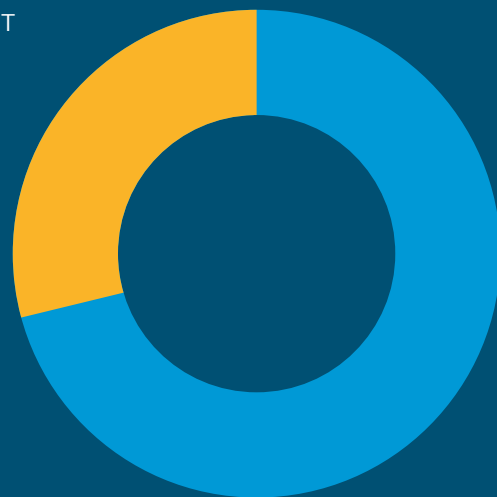
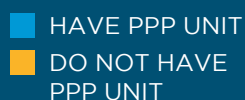
**COLOMBIA
INVESTMENT
BY SECTOR
(% OF TOTAL)**



Source:
Author's calculations,
PPI Database



All the countries analyzed in this report have a law defining the nature of a Public Private Partnerships and 12 have PPP units:



Most of the countries examined have a regulatory agency that works on PPPs. In 8 countries, legislation establishes that there must be a PPP management team for each project. In 4 of the countries, there are also regulations from the Court of Auditors (Brazil, Uruguay, Argentina and Honduras).

All the countries have regulations related to transparency. These include a guarantee of transparency during PPP bidding processes and transparency laws⁵ and legislation. Trinidad and Tobago is the only country included that lacks such laws. All civil law countries address how to deal with extraordinary events in their legal framework. However, in the last few years there have been numerous corruption-related scandals linked to infrastructure projects. Therefore, although legislation provides transparency in projects and relations with the government, there is still room for improvement regarding enforcement and accountability.

⁴ <https://publications.iadb.org/bitstream/handle/11319/9026/Bringing-PPPs-into-the-Sunlight-Synergies-Now-and-Pitfalls-Later.pdf?sequence=1&isAllowed=y>

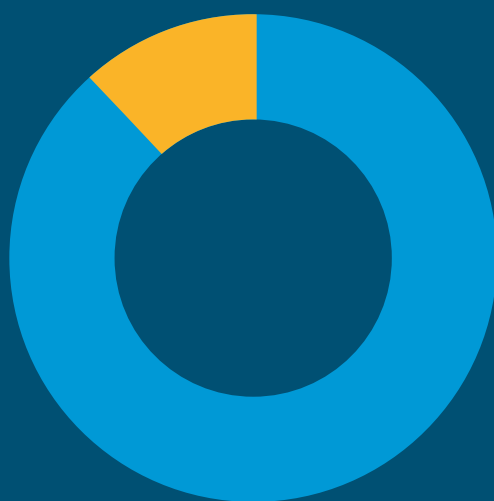
⁵ Trinidad and Tobago's Public Procurement and Disposal of Public Property Act, 2015 does not establish any particular aspect concerning PPP arrangements. However, it is foreseen the particular aspects will be established in the Procurement Regulations which currently are in the review process by the Ministry of Finance and in the implementation documents such as handbook and specific guidelines presently being drafted by the Office of Procurement Regulation.

GENERAL OVERVIEW

Furthermore, alternative dispute resolution mechanisms are provided in legislation of almost all countries (only Trinidad and Tobago and Panama⁶ do not have such a law). All others allow for arbitration at a minimum.

ALTERNATIVE DISPUTE RESOLUTION MECHANISM PROVIDED

■ YES
■ NO



In addition to the general themes analyzed above, there are also practices which are unique to each country. These practices are particularly relevant to procurement due to the particularities of each legal system.

Peru allows projects to be directly awarded in the case of unsolicited proposals. Brazilian law accounts for the possibility that the preselection and evaluation phases are inverted. Uruguay is the only country in which the negotiation of the contract is allowed between the award and the signing of the agreement.

In El Salvador and Argentina, bidding takes place in 2 distinct phases. Though this practice is not widely used, it may be advantageous to more countries because it allows for partner selection at a later phase

when more specifics of the project have been determined.

As for income, there are 2 different approaches. In Brazil, Paraguay, Costa Rica, Nicaragua, Jamaica and Uruguay legislation authorizes periodic payments to be made by the contracting authority to the private entity and there may or not be a tariff charge. In El Salvador and Peru, legislation provides that tariffs are always charged to the end users of the services whether there is a periodic payment made by the contracting authority or not.

A few countries (Uruguay, Costa Rica, Panama and Nicaragua), have laws stipulating that the private party must compensate public authorities under certain conditions.

By analyzing the legislation of these 17 countries, it becomes clear that some mechanisms differ between civil law and common law countries. In addition, South American countries have a longer tradition of PPPs, which impacts their legal regimes.

In the following chapters, this report summarizes the most common practices regarding each principle and provides recommendations on how the legal frameworks in each country could improve. However, it is essential to make clear that because the conditions in each country are unique, the ideal conditions for a PPP will also differ.

⁶ Although Panama's law and Trinidad and Tobago's draft policy do not provide the possibility of arbitration in PPP agreements, the countries are part of the UN Convention on the Recognition Enforcement of Foreign Arbitral Awards 1958. Therefore, in Trinidad and Tobago local courts recognize and can enforce foreign arbitral awards according to chapter 20 of the Arbitration (Foreign Arbitral Awards) Act 199.

LEGAL AND INSTITUTIONAL FRAMEWORK



1 LEGAL AND INSTITUTIONAL FRAMEWORK

Main findings in this chapter:

Legal frameworks are crucial for PPPs to provide security to investors and to the project. However, having laws for PPPs does not mean they are present in a country.

There are several definitions of PPP, depending on the country's legislation and experience with delegating public works and services. The specifications of each country are usually connected to the process each country used for the participation of private parties in infrastructure projects.


Not all countries have PPP Units and where they are present, they are usually subordinated to the Ministry of Public Works and Services or to the Ministry of Finance.

Legislation must clearly define which public bodies may hire a PPP and this will depend on the Public Administration organization.

The first question the Public Administration should consider is whether using a PPP is possible in the country. To make this determination, it is necessary to verify the existing legal and institutional framework, determine the definition of a PPP in the jurisdiction and what authority is responsible for the establishment of such a project.

All parties involved in PPPs want to ensure the success of the project. The project has to have bankability: a solid financial, economic and technical assessment with appropriate risk allocation. Each country and project have their own particular needs, risks, technical requirements and challenges.

The legal system must provide a stable context for a project, especially because PPPs are long-term agreements. Instability increases risk for the private party and requires further protection from the government, such as the provision of guarantees.



Legislation plays a central role in promoting private investment in public infrastructure projects. Legislation embodies a political commitment that provides specific rights and obligations. In this way, the more established and well-practiced a legal regime, the more stable context it can offer a PPP.

Latin American and Caribbean countries have a varied history with democracy, and some states in the region remain unstable. In this context, it is even more advantageous to develop consistent legal regimes that provide security to the private partner regardless of political changes in the country.

Argentina, Brazil, Colombia, Costa Rica, Ecuador, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay have PPP laws. In many countries, it is also necessary to have a specific legislative authorization to make PPPs.

Chile does not have a specific PPP Law, but the preparation and implementation of public infrastructure projects with private parties' participation has several recent precedents and there are several current projects with the participation of private entities. Jamaica also lacks a PPP law but has a PPP Policy.

Having laws that apply to PPPs does not guarantee that they will be the preferred method of pursuing infrastructure development in a given country. There are countries such as El Salvador that have a PPP law, but not a single PPP contract awarded.

Others, like Chile, do not have a PPP Law but use its concession law to deal with private partners and have a series of projects under operation.

Regardless of whether the country has a stand-alone PPP law, it is paramount that the main regulation is made through laws and not regulatory provisions or any other lower hierarchy regulatory provision. This is because there is a higher standard to change legislation than regulatory provisions. Having a more complex procedure for legislative changes or amendments ensures there will not be any unexpected changes in the system and creates a safer environment for the investor. Furthermore, having a higher hierarchy if a legal contradiction arises is always preferable for the sake of certainty.

There are sectors with specific regulations because of its particular features. Energy, oil, and gas, for instance, have specific legislation that apply to regulatory matters.

This report includes analysis of how countries without a PPP law execute agreements with private sector participation to invest in infrastructure projects.

All countries have a definition of PPP. In some, any project in which a private party participates is a PPP. In most countries, there is a variety of private sector participation models for different types of projects, but the link between all of them is they are used for infrastructure projects.

Legislation in almost all countries establishes clear risk allocation as a requirement for PPP projects.

In the table below, we see three main groups regarding PPP objectives, even though the characteristics may change from country to country:

Group A

Countries with only a concession Law

- Chile
- Panama

Group B

Countries with both a concession and a PPP Law

- Argentina
- Brazil
- Colombia
- Costa Rica
- Ecuador
- Paraguay
- Uruguay

Group C

Countries with only a specific PPP Law ¹

- El Salvador
- Guatemala
- Honduras
- Jamaica
- Mexico
- Nicaragua
- Peru
- Trinidad and Tobago


These three groups are generally linked by their legal context, but some countries have unique definitions of a PPP.

Panama's PPP legislation, for instance, applies only to the road sector or other works that the relevant body classifies as of public interest.

In Nicaragua, PPPs can include planning, financing, construction, development, use and enjoyment, operation, maintenance, modernization, expansion and improvement of new public infrastructure facilities and associated equipment (greenfield projects). The PPPs may also include the rehabilitation, modernization, exploitation and maintenance of existing public infrastructure facilities and the provision of public services (brownfield projects).

In Mexican legislation, a PPP is a long-term contractual relationship between the public and the private sector that provides a service to the public sector or the final user or those in which infrastructure is totally or partially used by the private sector to increase social welfare and investment levels in the country. There may also be PPP projects carried out under the terms of the PPP Law, under partnership schemes to develop projects in productive investment, applied research and/or technological innovation.

¹ Jamaica only has a PPP Policy and Trinidad and Tobago has a draft PPP Policy because they are common law countries.




Even though there are some differences between the members of the groups, the main characteristics of all PPP definitions is the use or construction of infrastructure and the provision of a public service with private financing.

Some countries have broader definitions (Mexico), and others, like Panama, narrower ones. The three

groups illustrate that it is possible to have a narrow concept of PPPs that nevertheless does not limit its use to a single sector.

The specifications of each country are usually connected to the process that each country developed for the participation of private parties in infrastructure projects.



Institutional frameworks can enhance the use of PPPs because just like legal frameworks, they make the country a more secure place to invest. Having a specialized body means that a given country is better prepared to develop PPPs and deal with their complications.

The lack of a body to guide the government in planning, preparing and implementing PPPs increases the potential for inconsistencies and risks of failure. Decentralized planning of PPPs may create inefficiencies such as a lack of knowledge transfer, inappropriate model selection, cost overruns, misallocation of risks and poorly defined performance measurements.

Not all countries have PPP Units. In some countries, there is not a PPP Unit, but a body responsible for all infrastructure projects. This is more common in small countries that do not have the necessity or demand

to have a specific body for PPPs. It is important to note that some countries do not have a single current PPP project so the creation of a public body may not yet be justified. On the other hand, such body may also stimulate the use of PPPs by promoting its use among contracting agencies and other entities involved.

PPP units are generally linked to the Ministry of Public Works and Services or to the Ministry of Finance in a given country. The Federal PPP Unit of Brazil, on the other hand, was connected to the Ministry of Planning and after the reorganization of the ministries, it was allocated under the Economic Ministry.

In some countries, such as Honduras, the PPP Unit is a decentralized entity linked to the Presidency of the Republic and has its own legal status and assets.



In other countries, in addition to the federal or national PPP body, there may be additional relevant bodies for a region, state or municipality. Peruvian legislation provides for the possibility of having more than one body responsible for contracting in a territory according to the matters, amounts, complexity of projects and economies of scale in the entity². Curiously, in Costa Rica, the Ministry of Public Works also deals with transportation matters and, in Paraguay, with communications.


Jamaica's Cabinet³ is the principal policy instrument responsible for the general direction and control of the Government. The Cabinet is the authority responsible for policy matters in the PPP Policy. However, it is interesting to note that Jamaican PPP Policy provides that there will be a PPP Unit created and subordinated to the Cabinet.

Establishing and operationalizing an institutional and regulatory framework is important to guarantee the bodies act according to technical standards. It is also important to note that large countries like Brazil and Mexico have a PPP Federal Law as well as state or municipal PPP Laws⁴. In these cases, the subnational legislation will provide the procedure used for subnational PPPs while the federal law applies to national PPPs. In Mexico, it is possible for the subnational government to decide which PPP law will be used for a specific project. However, if federal funds are used for a PPP in Mexico the application of the Federal PPP Law is mandatory.

² The legislation establishes the criteria to determine which entity will be in charge of a particular project.

³ That consist of the Prime Minister and a number of other Ministers (not less than eleven) selected from among the Ministers.

⁴ In Colombia, some of municipal or local state entities have guidelines regarding PPP projects, but there are not local or municipal laws or similar regulations because these entities do not have the authority to regulate those issues.



This chapter concludes by summarizing which bodies within the Public Administration may hire a PPP.

Usually, any body within the Public Administration, including public foundations, agencies, state-owned companies and others entities directly or indirectly controlled by the Union, States or Municipalities can use a PPP. This description applies to the arrangement in Uruguay, Argentina, Colombia, Paraguay, Trinidad and Tobago⁵, Nicaragua, Chile and Guatemala. In Colombia, there is a restriction against state-owned companies or municipal utility companies contracting PPP projects because the PPP law expressly excludes them. Nevertheless, these companies are able to work on PPP initiatives that are considered by the State.

In Brazil there is a written statute that excludes the Judiciary Branch from hiring PPPs. This limitation was set in a Federal Supreme Court judgment because it would violate the principle of division of powers. Due to this decision, projects concerning the Judiciary are under the authority of the Executive Branch.

Mexican federal legislation provides that the federal government, federal public trusts that are not parastatal entities, federal public legal entities, autonomous public federal entities, the states, municipalities and their public entities (in case federal funds are used) may enter into PPP agreements. This definition is different from those used in other countries because its parastatal entities may not hire PPPs.

In Costa Rica and El Salvador, the limitation is broader. PPPs may only be used by the Executive Power and state-owned companies at the local or federal level.

Authority to hire PPPs is different in each country according to the history of the concession of services and infrastructure as well as the organization of Public Administration. Some countries do not expressly authorize local or regional governments to hire PPPs. This depends on the country's organization and whether the country has a federalist system. In federal systems, states maintain their autonomy and can hire PPPs.

In small countries, it does not make sense for local governments to hire PPPs. On the other hand, in large countries like Brazil and Argentina it is essential that the local governments have autonomy.

⁵ Trinidad and Tobago's legislation also authorizes ministries to hire PPPs. Section 2 of the PPP policy states: "The Government agency may be a Ministry, a State Enterprise, a Statutory Body, or any other Government contracting authority."



Recommendations

Having a PPP law that addresses these principles and is consistent with the practices adopted in the country, best practices and specific legislation applying to regulatory matters.

Legislation should include a clear definition of a Public Private Partnership.

Legislation should call for a specialized public body responsible for the promotion and management of the PPP project (PPP unit). It is preferable that the unit is only used for PPPs, but depending on the country's level of private investments in infrastructure, the body can be responsible for all projects. The operation of the PPP unit may be defined in law or other regulation.

When necessary, especially in case of a federalist country, legislation should allow the creation of specialized PPP bodies at the regional, state or municipal level.

Legislation must clearly define which public bodies may hire a PPP.

APPLICABLE SECTORS AND ACTIVITIES



2 APPLICABLE SECTORS AND ACTIVITIES

Main findings in this chapter:

Domestic legislation should outline which sectors and activities may benefit from PPPs and make clear why this arrangement is preferable to public projects.

Despite the large potential for PPPs in almost all sectors, they have been traditionally used in the transportation, water and waste management sectors.


PPPs are an alternative model for developing infrastructure projects. Historically, the Public Administration has provided all infrastructure services and works but because of the need for larger investments, many governments have started seeking investment alternatives. To gain access to greater capital, these governments reach out to the private sector.¹

As demand for adequate public services increases, due to population growth or other factors, more countries are utilizing PPPs to develop infrastructure. Although not all projects are suitable for PPPs, there are a number of activities and sectors for which it is ideal, not only because of the access to private capital, but also because of the innovation and technological development that the private sector can apply to infrastructure projects.

Domestic legislation must establish which sectors and activities are suitable for PPPs. This clarity provides security and coherence to potential investors. Furthermore, interested private parties are more likely to present feasibility studies if they know what opportunities exist for PPPs in a given country.

¹ There are two main types of public infrastructure: economic and social. Economic infrastructure is infrastructure that makes business activity possible, such as communications and transportation (for passengers and freight), as well as utilities' networks, and systems and plants such as in water, waste and energy supply systems. Social infrastructure is a facility that hosts public servants/officials or hosts the provision of a social services including health, education, security/prisons, courts/justice and social housing.

2 APPLICABLE SECTORS AND ACTIVITIES



PPPs may be used for greenfield or brownfield projects. Greenfield projects are those that begin with no prior work or infrastructure. Greenfield projects include the construction of infrastructure, exploitation, operation and maintenance all undertaken by the private sector. Brownfield projects improve upon pre-existing infrastructure and then modify or upgrade it, incorporating exploitation, operation and maintenance activities undertaken by the private sector.

Ecuador and Panama do not have any restriction to activities or sectors in which PPPs may be applied. Other countries² limit PPPs to services or works for infrastructure, public assets and services. Guatemala only permits PPPs for transportation and energy projects.

In Brazil and Peru, PPPs may not be used if their sole purpose is:

- to supply labor;
- to supply or install equipment;
- to execute public works to exploit or maintain assets owned by the government.

The Public Administration may contract a private party to provide these activities, but not by using PPPs. Brazil also establishes a minimum investment value for PPPs and that regulation, jurisdiction and police power may not be objects of a PPP agreement. Brazil considers those areas public by nature and therefore the sole purview of the government.

Uruguayan legislation establishes that PPP agreements do not apply to:

- teaching in schools;
- sanitization services in health centers, and
- security, sanitization and resocialization services in prisons.

El Salvador prohibits PPPs for health, social security, public safety, justice, prison systems, water and education projects.


Costa Rican legislation establishes that telecommunication, energy and health services are not subject to PPPs.

Most limitations placed on PPPs regard the provision of specific public services like teaching, security and health services. In these countries, such activities are typically public and provided by the Public Authority.

Although a number of activities are subject to PPPs in Latin America and the Caribbean Region, this mechanism is most often used for transportation projects including roads, ports, railways, urban transportation, and airports. This is in part because of a long tradition of private investment in transportation projects, with many examples of railways, tunnels and bridges financed by a combination of private and public financing. This historic partnership around transportation is present throughout the world, and not only in these regions.

² Chile, Jamaica, Colombia, Trinidad and Tobago, Mexico and Nicaragua.

2 APPLICABLE SECTORS AND ACTIVITIES



Well-prepared and structured PPPs are one way governments in developing countries can meet their critical transportation challenges. Transport is a key driver of economic and social development, creating opportunities for the poor and making economies more competitive. Transport infrastructure connects people to jobs, education, and health services, and is key for the supply of goods and services domestically and abroad. Modernizing ports, airports, roads, railroads and urban transportation systems is essential for development. Experience has shown that private capital, expertise, and commercial discipline can make a meaningful difference in the delivery of critical transport services.

Another sector that is developed enough to benefit from private investors' participation is water and solid waste management³. As populations grow, water utilities struggle to keep up with rapid urbanization. Utility coverage in urban areas in many low and middle-income countries has been declining in recent years and utility companies fail to keep pace with population growth.

This shortfall requires private sector participation to close the gap.

Lack of wastewater treatment and proper sanitation facilities significantly impact the urban environment and citizens' health. Many countries also struggle with water availability. PPPs in this sector can improve operational efficiency, quality of service, reduce losses, increase labor productivity and improve bill collection.

Although health services are not subject to PPPs in most countries, there are examples of successful PPP projects building hospitals. In Peru, PPPs provide ancillary services but not direct medical assistance. In Brazil and several other countries, both ancillary and medical services are provided by PPPs.

These are just a few examples of the application of Public Private Partnerships in Latin America and the Caribbean. There is a great potential for new projects and almost all sectors are authorized to have PPPs.

³ In El Salvador it is not possible to have PPPs in water sectors.



Recommendations

Legislation must explicitly detail which activities or sectors can pursue a PPP and which cannot. This measure provides security and clarity to investors.

It is not ideal for legislation to have a priori restrictions on activities and sectors, but rather should provide a clear mechanism that allows the procurement authority to decide whether to procure a PPP or not. (In some countries, these restrictions are the outcome of democratic processes and it is a political choice.)



PPP MONITORING AND REGULATION



3 PPP MONITORING AND REGULATION



Main findings in this chapter:

Monitoring and regulation are two of the most important activities related to the execution of a PPP. Generally, contracting authorities, regulatory agencies, specific bodies or independent third parties undertake these activities.

There are several ways to supervise the execution of a PPP: the establishment of a PPP management team; specific supervision-related agreement's provisions; application of penalties for failure to comply with schedules and performances; periodical report submission; and/or performance assessment through pre-established key performance indicators ("KPIs").

Because PPPs provide a public work and/or service, monitoring the execution of the project is the duty of the Public Administration. The Public Administration must ensure both that the project is properly executed and also that the public interest is achieved.

Because infrastructure is usually linked to a specific sector, sector regulations have major influence over the project. This is particularly true in the cases of tariffs and performance standards. If the regulator does not manage these issues well, it can undermine the entire project.

This chapter examines the supervision and regulation of PPP projects. Relevant regulations should include sector-specific issues and price regulation. Supervision will apply to the contract management role.

Each country pursues different forms of supervision and regulation. However, there are a few practices that are commonly used.

Supervision of PPPs entails the verification of private party obligations established in the agreement. This task may be undertaken by the contracting authority, by a specific body or even by an independent third party.

In Ecuador and Peru, the agreements must have specific provisions about the functions and duties of the agreement managers as well as of those who will exercise supervision or control.

Uruguayan legislation determines that each procuring authority must establish a PPP management team to advise and oversee the entire project from tender to completion. The same approach is used in Chile, Guatemala, El Salvador, Paraguay, Argentina, Nicaragua and Jamaica¹.

The management team² may be composed of one or more individuals who are also responsible subjecting the private party to penalties when necessary³.

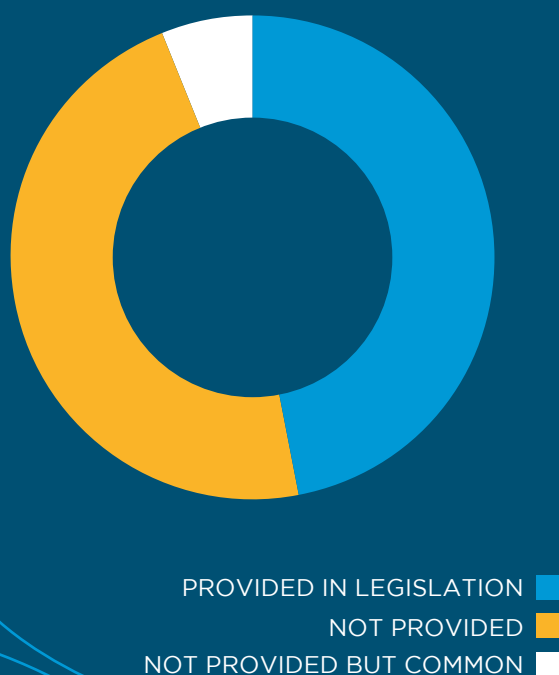
These penalties are examined more deeply later in the report because they are a Public Authority prerogative and may be applied during the construction or operation phase.

Paraguayan legislation also permits the General Controller of the Republic, the Public Company Council and other authorities to monitor PPP projects.

The procuring authority oversees the PPP execution and the regulatory agencies may also monitor and regulate PPPs under their authority. It is important that any monitoring activity is performed according to the criteria provided in the agreement or in relevant sector legislation.

In Guatemala, the Supervision Board (management team) is also in charge of self-regulation mechanisms for the private party in the agreement.

Another mechanism used for supervision is the periodical submission of reports by the procuring authority updating the execution of the agreement. These reports can be audited by a Court of Auditors, by the Ministry of Finance or the PPP Unit itself, depending on the country.



¹ Even though the legislation does not address it expressly, in Brazil it is customary to have a PPP managing team.

² The terminology may vary from country to country.

³ Mexican legislation establishes that failure to comply with the obligations of the PPP agreement will result in penalties provided in the agreement, which may include deductions to the consideration paid to the developer.



The private partner may also be required to provide information at specified junctures to confirm compliance and present audited balance sheets.

Chile, Costa Rica and Uruguay legislation that lays out a specific method for evaluating the progress and completion of a construction project. The body responsible for monitoring the project receives periodical information on the execution of the project. Usually, reports are delivered monthly.

Peruvian legislation establishes that PPP agreements must delineate obligations for the investor to allow the exercise of supervisory activities as well as obligations for the private supervisor related to the supervision of service levels.

Periodic delivery of reports makes sure all parties are aware of developments related to the project and creates documentation regarding progress. These reports can also establish whether the relevant body is monitoring the project properly after the fact.

In some instances, the supervisory mechanism involves tying public party remuneration to its performance according to targets and quality standards defined in the agreement. This is usually analyzed by the monitoring body.

A PPP contract may require that an independent verifier participate in analyzing whether performance standards have been achieved. It is this third independent party that evaluates the private entity's performance through pre-established key performance indicators (KPI's). The independent verifier will monitor the execution of the contract to attest to the quality of the services and to establish whether the terms of the contract have been met. This independent verifier may also have a number of other duties depending on the relevant context.

The Independent Verifier also assesses quality and performance indicators related to the services provided by the private partner. When legislation so establishes, this process makes it possible to determine the value of the pecuniary consideration to be paid to the private entity according to the quality criteria contractually required. This is the case in Brazilian PPP law, for example. In other countries like Mexico, federal PPP officers of the contracting entity are required to measure compliance against KPI's or they can hire a third party for the supervision and control of the project.

Indicators should be stable over time without being subject to wide technological variations. Adequate indicators prevent or reduce conflicts over satisfactory provision of services, establishing the link between remuneration and quality of services. Poorly defined indicators cause inspection difficulties and may increase costs to the government. Adequate indicators help control spending, mitigate risk for the Public Administration and strengthen transparency.

Paraguayan legislation establishes that the Treasury must hire an independent auditor every 4 years to evaluate the project. This is a way of accounting for changes that may take place during the execution of the agreement⁴.

⁴ These changes will be more deeply examined in other chapters.



Regulatory matters in a given sector are rarely covered within PPP legislation. Usually, specific regulations will be addressed in the text of the agreement or by the body responsible for the sector.

Costa Rica's legislation, for instance, provides that the technical office and the services regulatory authority (regulated sectors) are responsible for all oversight of PPP projects. On the other hand, Brazil, Uruguay and Honduras have PPP legislation notes the existence of a Court of Auditors with jurisdiction over PPPs.

The legal framework for PPPs in El Salvador establishes a body (*Organismo Fiscalizador de Asociaciones Público-Privados*) responsible for both supervising and regulating PPP agreements in addition to sectoral agencies. The responsibilities of the *Organismo Fiscalizador* include inspecting the service level, the tariff regime, users' rights and compliance with the public notice and agreement. In Nicaragua and Panama, one public body is responsible for both activities. In other countries like Peru, there is a specific legal framework for the regulatory bodies for private investments in public services.

There is no standardization regarding the regulation of PPP agreements, and different countries use differing approaches. However, it is key that legislation establishes a competent body to be responsible for regulating PPPs. If the sector is regulated, there must be an agency responsible for enforcing those regulations.

Costa Rica's and Brazil's legal frameworks establish that the private entity must pay for inspection and control to the technical office. This ensures that the regulation and monitoring of the agreement are conducted properly. This provides security for the Public Administration and also the private party.

It is important that there be specific supervisors for each agreement, so monitoring is conducted in a fashion most appropriate for the specifics of the project.



Recommendations

Supervision

Legislation should determine that PPP supervision and monitoring are done by a public body empowered with regulatory authority (i.e., a regulatory agency). This could also be defined by the PPP agreement.

Legislation should establish that each PPP has a specific body responsible for monitoring the agreement. Legislation should also establish the procedures and powers that this inspector will have.

Legislation should establish that the agreement expressly defines performance standards with which the private party must comply.

Hiring an independent verifier to monitor the compliance of design, construction, operation and maintenance plan, and performance standards may lead to the best execution of the project. Domestic legislation could account for this possibility.

It is also possible for legislation to require a state auditor be appointed to monitor compliance with KPIs. The auditor must have capacity to verify the compliance and be a neutral party.

Regulation

Proper inspection of the project is incentivized by requiring that private parties pay regulatory taxes to the relevant regulatory agency.

It is possible for legislation to create or permit the creation of an independent regulatory agency for PPP contracts. Such an agency can minimize the risk of government interference in the contract and maintain the regulations of the agreement. However, it is important to keep in mind that any change in tariffs/taxes by the regulatory agency after the signing of the contract may affect cash flows and the economic viability of the project as a whole. The PPP contract should provide mechanisms to adjust or mitigate this risk.

Legislation may establish that the agreements anticipate directives made by the regulatory agency to avoid breach of contract during the operational phase.



MODELLING PPP PROJECTS

4 MODELLING PPP PROJECTS

Main findings in this chapter:

Institutional knowledge and technical understanding are paramount for public agencies and governments to design long-term, operational contracts. This knowledge and understanding deliver high “value for money” to the public sector.

Authorities can model PPPs either independently or by gathering contributions from the private sector. In either case, the establishment of a PPP pipeline and/or the preparation of feasibility studies will help the public authority deliver higher “value for money”.


Feasibility studies should cover aspects related to financial and commercial feasibility, technical feasibility, value for money, affordability, and an assessment of environmental and social impacts.

The Public Administration should evaluate all the costs and benefits in supporting unsolicited proposals including the different approaches to regulating such proposals. The PA must have sufficient technical capacity, ensure transparency and provide clear rules throughout the process.

The reason to use a PPP arrangement instead of conventional public procurement rests on the idea that optimal risk sharing with private partner delivers superior “value for money” for the public sector and better infrastructure to the end user. PPP arrangements are more complex than conventional public procurement schemes. They require detailed project preparation, planning and structuring as well as proper management of the procurement phase to incentivize competition among bidders. PPPs also require careful contract design to set service standards, key performance indicators, efficient risk allocation and to reach an acceptable balance between commercial risk and anticipated return on investment. Contract clause design is key for the success of a PPP project.

Public Authority’s should select the technical option that maximizes social profitability (the technical solution that best fits the need) and pre-assess the suitability of the project as a PPP. This preparation prevents the allocation of resources into technical assessments and preparations for unworthy projects. There are a number of different technical options that must be carefully assessed to fit a specific PPP.

4 MODELLING PPP PROJECTS



Before determining a procurement method, the Public Authority must determine the best technical solution for the relevant public need. Transaction costs associated with PPP development are often higher and of a longer duration than with traditional procurement. Depending on the project, these larger development costs may not be justified.

Any procuring body pursuing PPPs needs deep institutional knowledge related to quality control, policy formulation, identification, selection, assessment, preparation, structuration, contracting and monitoring of PPP projects, and technical specifications before it can successfully establish effective PPP agreements. The public body engaging in a PPP must understand all the complexities and details of the arrangement to which it will commit. It also has to make predictions about all possible outcomes of a PPP, including failure. This type of forecasting and analysis is not easy, especially for agencies with limited experience. It is not uncommon for public agencies and governments to lack the necessary institutional knowledge and technical understanding to design long-term, operational contracts.

Authorities may model PPP projects in different ways:

- Independently, using their own technical body or by partnering with institutions such as the Inter-American Development Bank or World Bank to gain access to technical expertise; or

- By gathering contributions from the private sector.

Honduran legislation requires that PPP initiatives from the public sector must be accompanied by preliminary feasibility studies, which include a cost-benefit analysis and possible also be deemed compatible with the relevant local and national development goals.

In some countries, domestic legislation establishes a PPP project pipeline (a list of priorities for authorized projects) that must be updated with the projects that could be pursued via a PPP.¹ In some cases, the Public Administration must publish this list annually. In other instances, there may be specified time periods for submitting potential project lists, or they may be updated on a rolling basis. In Peru, for instance, each Ministry and local government must identify projects they believe are of national interest for procurement.

Having a pipeline helps the Public Administration organize its priorities regarding investments in infrastructure and may stimulate the presentation of studies and proposals by private parties.

Feasibility studies are essential, as they determine if a project is realistic and sustainable. In Nicaragua, these studies are prepared by the contracting authority.

¹ In Honduras, the feasibility assessment must be completed before projects are incorporated to the National Public Investment System under PPP models.

4 MODELLING PPP PROJECTS

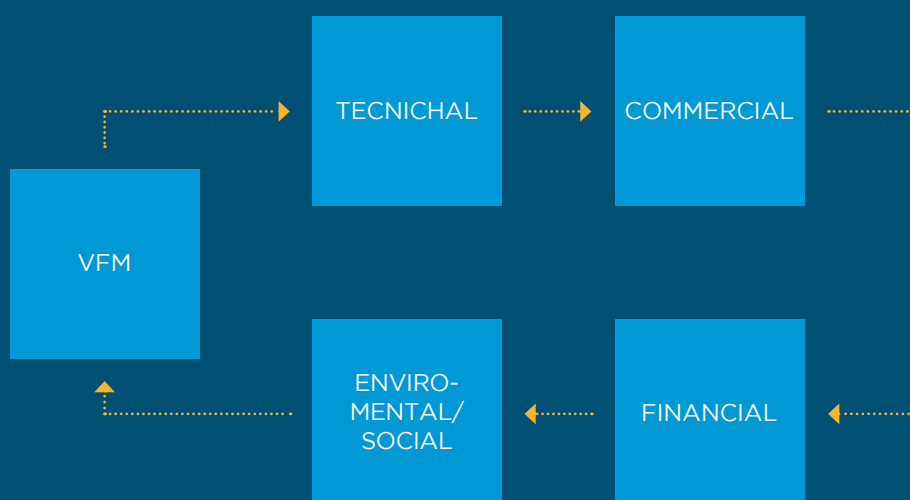
In Costa Rica, all projects initiated by a public body must go through preparatory steps that involve:

- general studies,
- preliminary studies, and
- feasibility studies


After the studies are prepared, the project is sent to the regulatory authority of public services so that tariff and periodic adjustments can be established. This structure is also used in other countries.

In Uruguay, authorities have a fixed period to present feasibility studies to justify the PPP project to the Ministry of Finance. Studies must also be delivered to the Office of Planning and required to include assessments of value for money, technical, legal, financial and economic/social impacts.

It is possible to appoint independent advisors who will assist the contracting authority in these studies. The contracting authority may need to retain the services of independent experts or advisors to establish appropriate qualification and evaluation criteria, define performance indicators (and, if necessary, project specifications) and prepare the documentation to be issued to bidders. In Mexico, participation of the Agent (public party) consists of advising, preparing projects and proposals, and offering logistical, technical and other forms of support that will help the contracting procedure. The Agent's services may include conducting financial, legal, and technical workshops as well as any other activity that will allow the private investors to become aware of the specifics of the project.



4 MODELLING PPP PROJECTS



Whether they are prepared by a public body or a private one, feasibility studies typically cover the following areas:

- **Financial and commercial viability/business model.** It is essential to establish needs for project outputs and to evaluate and forecast these needs over the proposed operational life of the project. These needs may include expected demand (e.g., traffic forecasts for roads) and pricing (e.g., tolls). These factors will bear on a project's financial viability. Mexico's federal PPP legislation requires that analysis of project viability uses reasonable economic and financial assumptions; income and expenditure flows of the project during its term, and the adequate distribution of risks between public and private sectors during the stages of design, construction, operation and maintenance of the project draft. The viability of the project is determined by these measures.
- **Technical feasibility.** It is necessary to demonstrate the *suitability* of a proposed technology including equipment and processes, national, local and environmental conditions, the *performance* level and the adequacy of the *construction methods and schedules*. Technical feasibility studies should also define the proposed organization, methods and procedures to operate and maintain the completed facility.
- **Value for money and affordability.** In order to achieve “value for money,” PPP projects must be well understood, the government payment commitments affordable, and the level of fiscal risk must be acceptable. PPPs must be transparently identified, developed, procured, and managed. This analysis should include a determination of whether a PPP is the most viable approach with respect to the government's finances. Value for Money (VfM) analysis is the most common (and popular) evaluation approach to compare PPP procurement to traditional methods. This VfM approach attempts to estimate/maximize all benefits (measurable and non-measurable) to the public sector that may result from engaging in a specific partnership model with the private sector. The best value is determined through a careful analysis of PPP aggregate costs that includes overall risks, project quality, timing, lifecycle costs and other factors. A rigorous VfM analysis is often able to anticipate whether or not a PPP is the best procurement option for a given project. The main strength of this approach is that it provides a very detailed comparison of different procurement options when done correctly. VfM analysis also provides the public and the private partners with the opportunity to genuinely evaluate the degree of risk they will take on in the project.
- **Environmental and social impact.** Environmental and social impact studies should identify possible adverse effects on the environment as a consequence of the project and indicate corrective measures. Often, corrective measures are necessary to ensure compliance with applicable environmental standards. Such a study should consider the relevant environmental standards of international financial institutions and of national, provincial and local authorities. In some countries, legislation also requires that social impact be considered.

4 MODELLING PPP PROJECTS



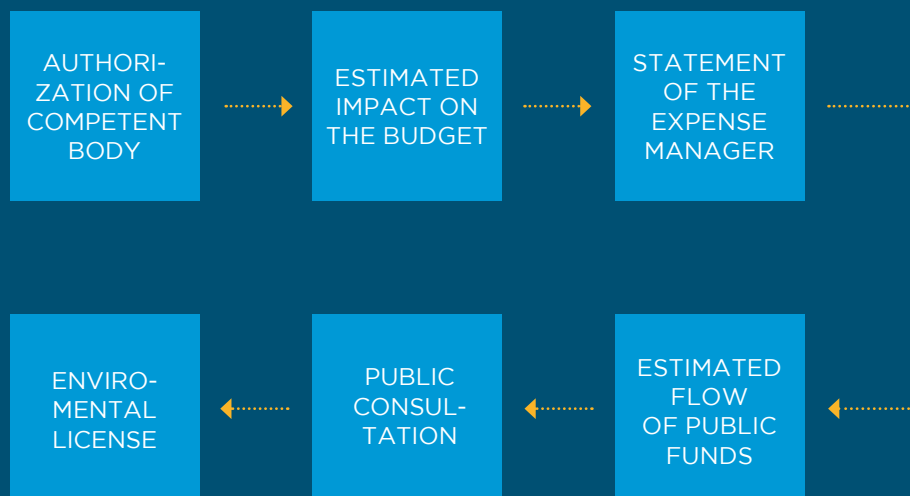
It is extremely important that not only project risks but also mitigation mechanisms are considered during the feasibility study phase. The contracting authority will formulate qualification and evaluation criteria to ensure there is continuous provision of and, as appropriate, universal access to the public service. Furthermore, given the long duration of infrastructure concessions and /or PPP contracts, the contracting authority will need to be satisfied as to the viability of the arrangements proposed for the operational phase and will also consider the service elements of proposals.

After these studies have been prepared, they should be analyzed by the competent authority to determine whether or not to proceed with procurement. In some countries, there is a procedure for approval (gateways) before the project's PPP Contract can be tendered or awarded. For example, Brazilian legislation establishes that a PPP project cannot begin unless it has:

- authorization from the competent body, based on a technical study;²
- an estimation of the impact on the budget of the contracting government entity for the duration of the agreement;
- a statement from the expense manager establishing that the obligations undertaken by the Government for the duration of the agreement are compatible with the budgetary directives law;
- an estimate of public cash flows that are sufficient to meet the yearly obligations contracted by the Government. The scope of the entire financial obligation must be set forth in the multiannual plan in force to which the agreement is related;
- a draft of the call for tender and the agreement for public inquiry that is published in the official press for broad circulation. This draft should include the justification for contracting, the identification of its purpose, the agreement effectiveness, and the estimated contractual amount. This draft must be available for at least 30 days to receive suggestions and the deadline should fall at least 7 days before the date established for the publication of the call for tender;
- a prior environmental license or enactment of directives for the environmental licensing of the undertaking whenever the agreement purpose so requires.

² This is also provided in Nicaragua's legislation.

4 MODELLING PPP PROJECTS




In Peru, the final version of the PPP agreement draft requires a favorable judgment from the Ministry, Regional Government and/or Local Government, the appropriate regulatory authority, the General Controllershship Office and the Ministry of Economy and Finance prior to its awarding and execution. This ensures that all authorities involved in the PPP project are aware of their obligations.

Feasibility studies are the basis of the structuring phase where tender documents and the agreement's draft will be designed. It is important that these studies include those items which are ordinarily included in solicitation documents or requests for proposals for the procurement of goods, construction and services. It is particularly important that the contracting authority discloses the criteria it used to decide which proposal is the best suited for the project purpose, including the relative weight of different criteria.

4 MODELLING PPP PROJECTS PRIVATE PARTICIPATION IN MODELLING

Private parties may participate in the PPP modelling process. This may be achieved via unsolicited proposals (when there is no selection procedure open) or by solicited ones. In most countries, there are regulations regarding the participation of private parties in PPP modeling.

Public authorities are sometimes approached directly by private companies that submit proposals to develop projects with no selection procedure open. Unsolicited proposals may result from private sector identification of an infrastructure need that may be met by a privately financed project - thus the



importance of a project pipeline. Private parties may also approach a public authority directly when they have an innovative approach to infrastructure management. In some countries, it is not possible to present a private study if the project is in the pipeline (e.g., Honduras).

There is generally no fee to present an unsolicited proposal (except for the costs of the studies that were borne by the private party). However, in Uruguay, a bid bond is required for an unsolicited proposal to be presented.

The cost of formulating proposals for large infrastructure projects may be different for companies concerned about their ability to match proposals submitted by competing bidders. In contrast, the private sector may be motivated to submit unsolicited proposals by rules that allow a contracting authority to negotiate such proposals directly with their authors. The contracting authority may elect to engage in direct negotiations to stimulate the private sector to formulate innovative proposals for infrastructure development.

The benefit of direct negotiations should be weighed against the opportunity costs losing the competitive pricing tension in a traditional procurement process. Allowing direct negotiation can also encourage corrupt practices.

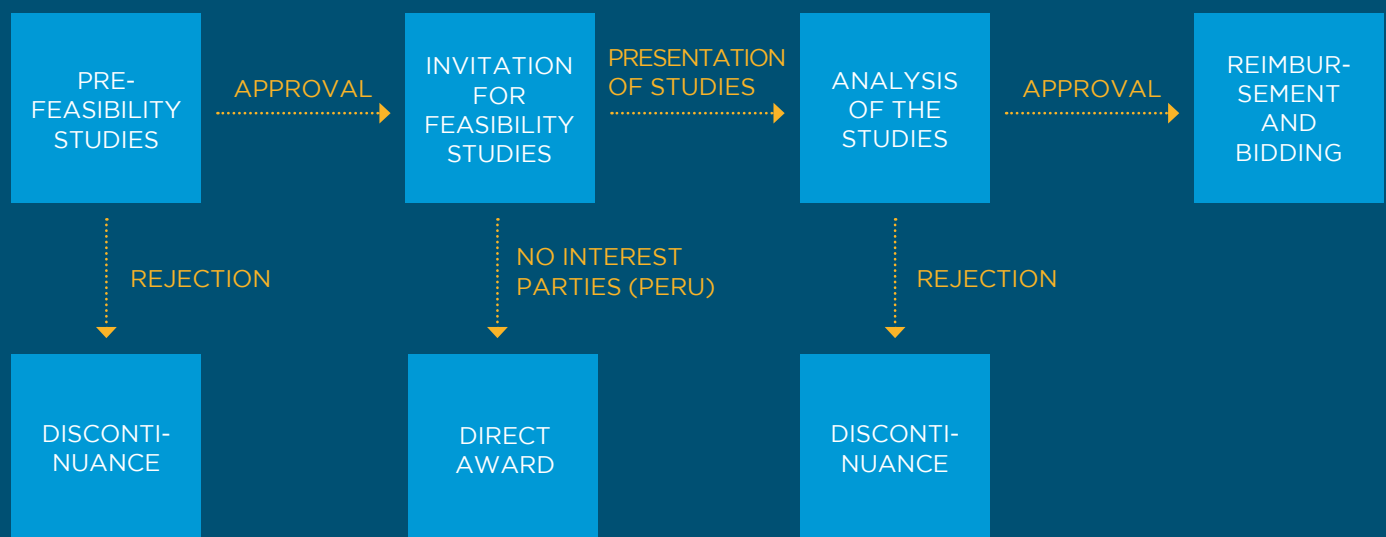
In Mexico, the Public Authority may publish proposals for PPP projects that they are willing to receive. In Nicaragua, the General Authority for Public Investments calls for an unsolicited proposals contest once each year, which must be accompanied by the corresponding pre-feasibility study. The unsolicited proposals are sent to the corresponding public authority for evaluation, and the authority must then issue an opinion regarding national interest. If a proposal is approved, it will be considered as conveyed to the corresponding public authority and a public tender will be called in a period of less than two years.

The presentation of studies performed by the private sector may be divided into the pre-feasibility and feasibility phases. In the first phase, the private partner describes the project, including general information - such as design, demand studies, estimated cost, revenues and resources. The project idea, containing sufficient information to allow the contracting authority to make an assessment of whether the conditions for unsolicited proposals are met and whether the project is in the public interest, is submitted to the government authority. The competent body needs to decide whether the proposal is interesting and feasible within a certain period. The initial proposal may include: a statement of the author's previous project experience and financial standing; a description of the project; details about the site; and a description of the service and the works.

After a preliminary examination, the contracting authority may refuse or accept the proposal, in which case the private partner may continue its studies (feasibility phase). This phase must take place in a reasonably short period. If the project idea is accepted, the company is invited to submit a formal proposal. In Brazil and El Salvador, after the first assessment the Public Administration publishes an invitation to present studies. After this invitation is issued,


any interested party may also present their studies to model the project in order to improve upon the one presented. Interested companies must comply with the requirements in the invitation to present studies. It is common that interested companies are required to present an authorization in which they attest to their qualification and experience and provide a schedule proposal to present their studies.

In Peru, direct award is possible if no other interested parties emerge in the period after the invitation is issued – it must be highlighted that direct award may not be the best model and should only be used in a few cases with specific justifications.



Ecuador's legislation establishes that in projects initiated by the private sector the notice may contain:

- the minimum reimbursement amount to be paid to the private entity that is not awarded the project (not less than the cost of the studies carried out to prepare and structure the project);
- additional bonuses for the qualification of the Bidder's Economic Offer, which includes an added percentage to the qualification process depending on the amount of the initial investment on the project;

- 
- the right of the private proponent to improve the offer when other bids have been presented in the public tender; and
 - the right of private proponents to request a response from the PPP Unit if the public delegating entity fails to issue a decision within a certain period.

During the feasibility phase, the private party must describe the financial model of the project, the phases, the duration, and risk assessment, and other details. The studies presented in the feasibility phase must address the same matters as the Public Administration's studies.

When all required information is provided by the participants, the contracting authority should decide whether it intends to pursue the project and if so, what procedure will be used. If the public authority approves the project, the private companies will be reimbursed for the costs of the studies if theirs are selected by the authorities and if the private project is submitted for public tender.³ In case of a successful bidding process, the party that is awarded the project pays for the studies.⁴ In some countries, this value is already defined in the legislation. It is also possible that the private party has some benefits in the project procurement later on, as provided by Chile's legislation.

In Uruguay, companies or entities in the same economic group that advises the procuring authorities during the modeling of the PPP project may not participate in the tender.

In Jamaica, unsolicited proposals follow a different procedure. The private party must provide a complete Business Case. If the project is in the pipeline, the PPP Unit will move the project up the priority list and then will develop and procure the project under the standard PPP process. If the project is not in the PPP List, the PPP unit will consider whether it meets the PPP criteria (viability, achievement of value for money, bankability and fiscal responsibility and affordability).

If the proposal does not meet the criteria, the PPP Unit will reject the proposal. However, ideas emanating from unsolicited proposal may be incorporated into the design of other projects, if it seems likely they will promote value for money. If the proposal meets the criteria, the PPP Unit may recommend to the Strategy Committee that the project be developed by the Proponent utilizing the Swiss Challenge procurement system.

³ In Ecuador and a few other countries, the reimbursement is only due if the private party does not win the tender.

⁴ This must be provided in the bidding documents and in the PPP agreement, as provided by Costa Rica's legislation..



The Swiss challenge system allows third parties to make better offers (challenges) for a project during a designated period. This is designed to avoid frivolous projects and exaggerated project development costs. Accordingly, the original proponent has the right to match any superior offers made by a third party. One issue with this system is that new bidders are discouraged from spending resources bidding when the original bidder will always have the right to see and match their bids.

If the contracting authority decides to move forward with the project, it will draft the tender documents and procure the PPP.

Although unsolicited proposals are sometimes beneficial, they also have significant downsides. Unsolicited proposals suffer from perceived corruption, fraud and lack of transparency. They can also generate information asymmetry between bidders and create a project that is more profitable than efficient.

For these reasons it is crucial that the Public Administration conduct a deep analysis of the costs and benefits of unsolicited proposals, including the different approaches to regulating unsolicited proposals. The Public Administration will also need sufficient technical capacity and a commitment to transparency and clarity to proceed with unsolicited proposals.



Recommendations

Public initiative

Specialized public bodies (PPP unit) enhance the modelling of PPP projects of public initiative;

Legislation should permit the contracting of private consultants that demonstrate the technical capacity for designing, preparing and structuring PPPs in order to help the Public Administration. The law should also detail the main issues related to contracting: contracting procedures and conditions, prohibition to participate in the bidding process, and how the payment will be delivered;

Establish a PPP projects pipeline in the country to verify the priorities of the Public Administration;

Legislation must address the necessity of verifying if a PPP is the best option (Value for Money or other method) and outline the criteria that must be examined in the pre-feasibility and feasibility studies (social, commercial, financial, environmental);

It is important that legislation determine which bodies of the Public Administration must analyze and approve the studies and drafts produced.

Private initiative

Where unsolicited proposals are permitted, clear processes must be in place to ensure only quality proposals are submitted and processed.

There are several methods of incentivizing the preparation and submission of unsolicited proposals that still allow for a transparent and competitive procurement process. For example, the initial proponent of the unsolicited proposal may receive bonus points in the bidding process, or receive the benefits of a Swiss Challenge mechanism;

If the legislation provides the possibility of direct award, (which will not receive the benefit of a transparent bidding process), it is important that the law is clear regarding when this is permissible. At the same time, the government needs to ensure it has the capacity, practices and staffing to ensure it is receiving value for money, so that there is no doubt about the superiority of a direct award;

Legislation may provide the procedures for presentation of unsolicited proposals and for invitations for private parties to present studies. This includes establishing parameters for reimbursement and firm grounds;

PROCURING A PPP PROJECT



5 PROCURING A PPP PROJECT

Main findings in this chapter:

Transparency, efficiency and confidence are achieved in bidding processes by establishing formal procedures as well as objective and predictable rules.

Requests for proposals must be published in advance, so that bidders have time to prepare their proposals. It is recommended that they be published at least 90 days in advance.

Bidders should be required to demonstrate they possess the professional and technical qualifications, financial and human resources, equipment and other physical facilities, managerial capability, reliability and experience needed to carry out the project.


Whether to pursue a one- or two- stage procedure to request proposals should depend on:

- the nature of the contract;
- how precisely technical requirements can be defined; and
- whether output results will be used to select the private entity.

Technical evaluation criteria are designed to facilitate the assessment of the technical, operational, environmental and financing viability of the proposal. This will be carried out by taking into consideration the recommended specifications, indicators and requirements the bidding documents established in the tender documents.

When the Public Administration awards a contract it must also ensure the public interest is met. It is essential that the bidding process guarantees not only equality between the participants, but that the Public Administration has advantages when contracting. This chapter will explore how legislation deals with the selection of a private partner to execute the PPP.

Although there is no international legislative model, domestic laws usually have a detailed procedure for public contracting. **All countries researched for this report use a competitive bidding selection and there are only a few situations in which the private party is entitled to a direct award.** In Brazil, for instance, PPPs may only be procured under a specific procedure and in Uruguay, there are several processes that can be used depending on the type of the project.



Peru¹ and Ecuador both have legislation that allows for the use of simplified processes based on feasibility studies carried out by the delegating entity. These processes must be conducted in accordance with regulations, ordinances, general or specific guidelines, and technical notes issued by the PPP Unit, or in Ecuador by the Inter-Institutional Committee.

Formal procedures, objectivity and predictability characterize a competitive selection process. This generally provides optimal conditions for competition, transparency and efficiency. Procuring PPPs is usually a complex exercise that requires careful planning and coordination among the parties involved. By ensuring that adequate administrative and personnel support is available, the Public Administration plays an essential role in promoting confidence in the selection process.

Bidding procedures should be public to promote transparency and competition. Legislation in each country require that the Request for Proposals and the tender documents be published in the Federal Register or other official publication in which the invitation to the pre-selection proceedings is also published. To promote the participation of foreign companies and maximize competition, the contracting authority may also publish the documents in a language customarily used in international trade². These foreign language documents may also be published in international trade publications or major international news sources. Another way to promote the project is to publish the documents on public websites or even on government web pages.

In some countries, the bid notice and the tender documents are published

in the country's native language and in English to attract the interest of foreign bidders.

There is no evidence of restrictions on the participation of foreign parties in PPPs. It is important that the special purpose vehicle (SPV)³ that will be organized to execute the agreement be established in the host country and subject to its laws. In Argentina and Brazil, certain advantages are sometimes given to local companies during the bidding process.

There are limitations on this process imposed by other legislation. For example, restrictions on foreign investment must be observed in PPP projects. Almost all of these countries have limitations on foreign investment in a certain sector or economic area, even though Chile, Colombia and Peru are very open economies⁴.


Requests for proposals must be published in advance so that bidders have time to prepare their proposals. Requests should be published at least 90 days in advance, but there is no standard defined by law. With enough time to prepare proposals, private parties can familiarize themselves with the project's particularities and analyze all the relevant documentation.

¹ This kind of process is designed for services linked to infrastructure and public services, applied research and/or technological innovation, as well as the PPPs which do not have an investment component.

² For Latin America and the Caribbean, the documents should be available in the native language and in English.

³ A special purpose vehicle is a legal entity (usually a limited liability company of some type or, sometimes, a limited partnership) created to fulfill specific or temporary objectives.

⁴ <http://iab.worldbank.org/-/media/FPDKM/IAB/Documents/Regulating-FDI-in-Latin-America.pdf>



Requests for proposals should also contain sufficient information for bidders about the object and main characteristics of the project. The more technical detail is provided in the request, the better companies can determine if their own characteristics are a good match for the project. The bidding notice should identify the infrastructure and contain information on other essential elements of the project (such as the services to be delivered by the private entity), financial arrangements and the main required terms of the project agreement.

Generally, bidders should be required to demonstrate that they possess professional and technical qualifications, financial and human resources, equipment and other physical facilities, managerial capability, reliability and the experience necessary to carry out the project.

Additional relevant criteria for PPP projects may include the ability to manage the financial aspects of the project, previous experience in operating public infrastructure or in providing services under regulation.

Qualification requirements should cover all phases of an infrastructure project, including financing management, engineering, construction, operation and maintenance (if applicable). In addition, bidders should be required to demonstrate they meet all other qualification they would be subject to under general procurement laws. These requirements must be applied equally to all bidders.

Given the scale and complexity of most infrastructure projects, interested companies often participate in the selection proceedings with con-

sortia especially organized for that purpose. When considering the professional and technical qualifications of bidding consortia, the contracting authority may consider the individual specialization of the members and assess whether the combined qualifications of the consortium members are adequate to meet the needs of all phases of the project.

In some countries, a bid bond must be presented to guarantee the proposal presented. This helps to avoid frivolous bids and guarantees that the bidder with the best conditions will enter into the contract if it is awarded.

In Argentina, the Public Authority provides advantages to Argentine bidders, as well as companies that use national goods or employ local labor. Such preferential treatment is sometimes provided as a material qualification requirement (for example, a minimum percentage of national participation in the consortium) or as a condition for participating in the selection procedure (for example, to appoint a local partner as leader of the bidding consortium).

During the procurement process, the contracting authority should respond to requests for clarification from bidders regarding the pre-selection documents. The contracting authority must receive the requests within a reasonable time prior to the deadline for the submission of applications. This enables bidders to submit their applications in a timely fashion. Responses to questions that are relevant to other bidders should be provided to all bidders to which the contracting authority provided the pre-selection documents.



The suitability of a one or two stage procedure to request proposals depends on:

- the nature of the contract;
- how precisely technical requirements can be defined; and
- whether output results will be used to select the private entity.

If the contracting authority deems it feasible and desirable to formulate performance indicators or project specifications to the necessary degree of precision or finality, the selection process may be structured as a single-stage procedure. In this case, after pre-selecting the bidders, the contracting authority would issue a final request for proposals.

All country's mentioned in this report have legislation that provides for a pre-qualification stage depending on the complexity of the project. In Colombia, it is obligatory to have a pricing process that consists of pre-qualified interested parties selected by a public call when there is an unsolicited proposal and an interested third party.

There are other cases in which the contracting authority is not able to sufficiently detail its requirements, provide precise project specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly according to those specifications and indicators. This might happen if the contracting authority has not determined the type of technical and material input that would be suitable for the project. In such cases, it is undesirable for the contracting authority to proceed on the basis of specifications or indicators it has drawn up in the absence of discussions with bidders as to the exact capabilities and possible variations of what is being proposed. In such an instance, the contracting authority should divide the selection proceedings into two stages and allow a certain degree of flexibility for ongoing discussions with bidders.

The two-stage procedure is not commonly used and is only referenced specifically in the legislation of El Salvador and, to some degree, in Argentina. In El Salvador, the government may hold a procedure called *diálogo competitivo* (competitive dialogue) with parties approved during the pre-qualification phase. Participants may suggest adjustments to the project documents. This phase ends when solutions to all of the project's issues have been resolved. When this phase is over, participants are asked to submit their offers.

Where the selection procedure is divided into two stages, the initial request for proposals typically calls upon the bidders to submit proposals relating to output specifications and other characteristics of the project, as well as to the proposed contractual terms. The invitation for bids would allow bidders to offer their own solutions to meet the particular infrastructure needs in accordance with defined standards of service. The proposals submitted at this stage would typically include a conceptual design for performance indicators without detailed financial elements like the price or level of remuneration. In Argentina, this participation sometimes depends on the complexity of the project

It is important for bidders to know certain contractual terms, such as risk allocation intended by the contracting authority.

5 PROCURING A PPP PROJECT



This knowledge allows bidders to formulate their proposals and discuss the bankability of the project with potential lenders. The initial response to those contractual terms, in particular risk allocation, may help the contracting authority assess the feasibility of the project as originally conceived.

In a single-stage procedure, after the Request for Proposals is published, the interested parties will be asked to submit their offers. Requests for proposals should generally include all the details bidders need to know about the requirements of the contracting authority and that the contracting authority can compare objectively and fairly.

The contracting authority may modify requests for proposals to obtain what is required to meet its needs. It is therefore advisable that the contracting authority be authorized, whether by its own initiative or as a result of a request for clarification by a bidder, to modify the request for proposals. The change is made by issuing an addendum at any time prior to the deadline for the submission of proposals. However, when the amendments made would likely require bidders to spend additional time preparing their proposals, the deadline for the submission of proposals should be extended accordingly.

In most countries, proposals are required to be submitted in writing, signed and placed in sealed envelopes. A proposal received by the contracting authority after the deadline for the submission of proposals cannot be opened and should be returned to the bidder. To ensure transparency, national laws often provide formal procedures to open the proposals at a specified time in the presence of the bidders or their appointed representative. This helps minimize the risk that the proposals are altered or otherwise tampered with and represents an important guarantee of the integrity of the proceedings.

Because privately financed infrastructure projects are complex and evaluation criteria varies, most countries use a two-step evaluation process whereby technical criteria is considered separately and often before financial criteria.

In some countries, bidders are required to formulate and submit their technical and financial proposals in two separate envelopes. The two-envelope system is used because it permits the contracting authority to evaluate the technical quality of proposals without being influenced by their financial components.

Technical evaluation criteria are designed to facilitate the assessment of the technical, operational, environmental and financing viability of the proposal prescribed specifications, indicators and requirements the bidding documents request. To the extent possible, the technical criteria applied by the contracting authority should be objective and quantifiable, so proposals can be evaluated and compared objectively. This reduces discretionary or arbitrary decisions. Regulations governing the selection process often detail how such factors are to be formulated and applied.

The contracting authority needs to define criteria to assess and compare financial proposals. Criteria typically used for the evaluation and comparison of the financial and commercial proposals.

5 PROCURING A PPP PROJECT



These criteria may include the present value of the proposed tolls, fees, unit prices and other charges over the concession period, and the current value of the proposed direct payments by the contracting authority.

There are several financial criteria provided in legislation and the ones mentioned above are among the most common. Financial criteria may differ depending on what is most favorable to the Public Administration and that will guarantee the provision of service.

In most countries, the technical envelope is analyzed first. If the proposal meets the bidding criteria, the bidder is qualified to participate in the second phase where the financial envelopes are opened. If the proposal does not meet the criteria, the financial proposal is not even analyzed.

After determining whether to use a two-envelope system or a two-stage evaluation procedure, the contracting authority should disclose the relative weight of each evaluation criterion and how the criteria are used in the evaluation of proposals. The proposal that meet the criterion provided by the bidding document may be considered the most competitive. Alternatively, the price proposed might be the deciding factor in establishing the winning proposal among the responsive proposals.

To promote transparency within the selection process and to avoid improper use of technical evaluation criteria, it is advisable that the awarding committee be required to provide their reasons for awarding the contract in writing. Sometimes the reasons may be cost-related. In Brazil, the examination of technical proposals, for purposes of qualification or judgment, will be made by a motivated act, based on requirements, parameters and outcome indicators pertinent to the object defined in the public notice.

In almost all countries it is possible for bidders to appeal the decision that awards the agreement.

The contracting authority should rank all responsive proposals based on the evaluation criteria set forth in the request for proposals and invite the best-rated bidder to execute the agreement.

In Uruguay, there may be final negotiations limited to setting forth the final details of the transaction documentation and satisfying the reasonable requirements of the selected bidder's lenders. In Mexico, on other hand, any negotiation regarding this matter is expressly forbidden.

Negotiations with the selected bidder must be conducted effectively so the price or risk allocation originally contained in the proposal is not changed. Changes to essential elements of the proposal should not be permitted, as they may distort the assumptions on which the proposals were based and rated.

After the analysis of the competent body, the bidder awarded the project and the contracting authority may execute the agreement, which sometimes requires the approval of another body. In Guatemala, the congress must give its approval while in Jamaica the cabinet's approval is required.

Recommendations

Legislation should contain a clear procurement procedure;

All relevant documents must be published;

Request for proposals must contain all information necessary for the bidders to present their technical and economic proposals and should be published in multiple languages and outlets at least 90 days before the proposals are due in ;

Foreign parties should be allowed to participate in PPP procurement. Legislation may establish limits or provide for preferential treatment of domestic entities since it does not prejudice the equality between the bidders. Also, because it is a political decision, the technical recommendation and the motivation of the decision must be made public;

PPP law should allow the interested parties to request clarifications about the drafts of the tender documents;

The legislation must establish the conditions for the presentation of the proposals – whether in a single envelope or two-envelopes – and establish the main technical and financial criteria that will be used to analyze the proposals;

There may be a provision allowing two-phase procedures for more complex projects with a pre-qualification before the financial and technical offers.⁵

There may be a provision allowing for the reversal of sequence of the preselection and evaluation phases;

All decisions made by the Public Administration during the bidding process must be motivated by the public interest, particularly when ranking proposals;

There must be a permission in the legislation for bidders to appeal the decision that awards the contract;

If negotiations are possible, the legislation must provide the terms and conditions for such negotiation. Negotiation of risk allocation and essential elements of the project should not be permitted.

⁵ In France, for instance, the most common procedure for PPP is the competitive dialogue which allows the public authority and the candidates to address all the issues (specifically on the design and technical part) during the call for tender to avoid major financial impasses after the signing of the contract.

INCOME STRUCTURE

6 INCOME STRUCTURE

Main findings in this chapter:

The project must have clear and defined revenues and income structure.

Each country's legislation establishes how payments will be made, but they are most often paid by tariffs, by periodic payments made by the contracting authority or both. In all countries project income depends on its particularities.

PPP laws in most countries do not provide for how payment will be made. This is because payment will interact with the country's annual budget and the Public Administration will make decisions in the context of the overall budget.

Payment for services is extremely important for PPP agreements. The private partner's primary goal when executing a public work or providing a public service is to amortize its expenses and earn profit. It is very important, therefore, how payments are made.

The project must have clear and defined revenues that will be sufficient to cover its costs. These costs include operation and maintenance expenses, service principal and interest payments on the project debt over the term of the loans and a return on equity that is proportional to the development and risk of long-term project taken by equity investors.

The income structure must be provided in the bidding documents so a theoretical private partner understands the financial reality of the project. A bad financial plan can result in the amendment of the original agreement to guarantee the provision of services.

With the exception of Panama, legislation in all countries provides parameters on how payment must be made to the private entity. These parameters usually involve periodic payments made by the contracting authority to cover operation and maintenance expenses, amortize the investments with its expected return and/or payment of tariff or prices charged directly from the user, such as tools.



The logic behind income varies according to the country. In Brazil, Paraguay and Uruguay, there must be a periodic payment made by the contracting authority and there may be, in some cases, payments by tariffs or prices charged directly from the user to cover the costs of the project. The same reasoning is established by the legislation of Costa Rica, Nicaragua and Jamaica. In Trinidad and Tobago, the draft Policy establishes that payments can be made by tariffs, by a periodic payment made by the contracting authority or both.

In other countries such as El Salvador and Peru, PPP projects may be self-sustained (by tariffs or other similar mechanisms) or co-financed (a combination of tariff and compensation). The main difference between the two systems is that in the first one, there will always be compensation paid and in the second group of countries there will always be a tariff charged.

This difference results from each country's unique history with foreign and private investment. For example, Brazil and Argentina began allowing private investments in infrastructure in the 1990s. In that moment, those countries started delegating public services to private parties (especially roads) and developed relevant legislation. In this legislation, the private party was paid only by charging tariffs.

In this context, PPPs emerged as a distinct project in which there may be a tariff charge component, but this charge is not the principal one.


This difference is due to the varying kinds of PPP projects and the commitment of public budget to execute the project. If it is not possible to charge a tariff from the user or if it is not sufficient to amortize the investment, the contracting authority must pay compensation in the form of an upfront investment or through periodic availability payments for the project to be successful.

This reality is a consequence of the path taken by each country as they created legal frameworks. Both models have costs and benefits but the salient issue is whether the private party manages to provide proper services and amortize its investments with income from the project.

Depending on the type of PPP project, Ecuador's legislation establishes that the private party may receive different types of income, such as:

- payments through tariffs paid by the recipients;
- deferred payments from the public sector;
- a combination of both or others established by the PPP Law.

Though each country has general guidelines within relevant legislation, the profit source depends entirely on the nature of a particular project. As a result, when modeling the project the Public Administration or whoever is responsible for the studies, verifies the sector, the activity and the specific details of each project to ensure it is successful.



Brazilian and Colombian legislation establish limitations for public resources in PPPs when tariffs are charged. In Colombia, public funds may not exceed 30% of the total agreement value¹ and in Brazil, 70%. This limitation ensures that, if a tariff is to be charged, there will be a balance between this charge and the public resources paid to the private party.

In addition, the PPP agreement may provide that compensation to the private partner varies according to their performance in achieving project goals as per quality and availability standards defined in the agreement. To do so, the agreement must provide key performance indicators (KPIs). This variable will be calculated from the compensation paid by the contracting authority.

The need for more efficient and effective PPP projects makes performance management increasingly important, especially with respect to stakeholders' expectations. Establishing KPIs that directly impact payment to the private entity is a good way to monitor adequate execution of the project. A later chapter will address how to ensure KPIs are reached.

Brazilian legislation also establishes that the contracting authority may make payments before the services are available for the project to progress and be implemented. In Colombia, there can only be a payment when the project is functional and meets some service standards. In a few cases, the project can be divided into functional units (completing service standards) which allows payments before the project is completed.

Brazil and Chile also have laws that allow private entities to collect revenues from alternative, supplementary, ancillary, or associated project sources - that is, different from the primary source provided in the contract. This may result in lower tariffs. However, if there is no tariff in the project, the consideration paid by the Public Administration should be reduced or the revenue shared.

Revenue generated by the operation of ancillary or complementary activities normally belongs to the private entity, **but the division of revenue in concession agreements has become complex**. Ancillary revenue may become larger than the primary revenue and this may benefit the Public Administration if it is able to share in this unexpected revenue.


There are a number of ways that a contracting authority may make payments.

Legislation in Brazil and Uruguay establishes that payment in PPP agreements either concession contract and/or PPP contract may be made by:

- bank order;
- assignment of non-tax credits;
- granting rights with the government;
- granting of private property of the government;
- other means allowed by law.

¹ For road projects the limitation is 20%

6 INCOME STRUCTURE



In Honduras, the Public Administration may assume firm commitments if the amounts are certain and known. The PA's contributions in the PPP model may be made in cash or contingent liabilities for uncertain events; technical studies; subscription of shares or purchase of other securities traded in the financial market; granting certain public assets (concessions without transfer of ownership), including those that have been expropriated to serve public use; granting permits or licenses to perform authorized activities; granting temporary rights to government property (in case of Municipalities); providing public services; and other forms of contributions authorized by law.

PPP laws do not usually insist upon the method of payment. In most cases, this decision will be made by

the National Treasury. This can become complicated however, as payment for PPP projects is one aspect of an annual budget with myriad complexities and obligations.

Although most PPP laws do not address this matter, it is important that the amounts and method of payment are established by the Administration and other stakeholders when executing the agreement.

Income in PPPs may depend exclusively on the Public Authority or the private party. In most cases, both parties contribute. The correct income structure of a project depends on the nature of the source of payments as well as how the private party will be paid. Without these facts established, the project has a high chance of failure.



Recommendations

PPP legislation must establish acceptable payments mechanisms for the project (availability and or use, tariff or other) and direct feasibility studies to take the sector and nature of the project into account when deciding upon a payment mechanism;

PPP legislation should recommend the development of KPIs in the agreement and that failure to meet these benchmarks may result in a reduction in payment by the contracting authority;

PPP legislation should also permit the collection of alternative revenues by the private party and provide the procedure for its implementation and potential sharing with the Public Administration;

It is paramount that the legal framework establishes how a contracting authority will make payments.

DISPUTE SETTLEMENT



7 DISPUTE SETTLEMENT

Main findings in this chapter:

Alternative methods of dispute resolution, meaning those outside the Judiciary, are quite new. This is particularly true regarding disputes that involve the Public Administration. Nevertheless, non-judiciary resolution methods have become necessary as large-scale PPPs have become more prevalent and complex.

Disputes arising from PPP agreements must be resolved in a timely fashion so they do not compromise the provision of the public service. At the same time, the projects involve complex technical issues that may not be easy to resolve. Alternative dispute resolution mechanisms are an option that may address both concerns.

Disputes may be settled by conciliation or mediation such as the establishment of technical boards and dispute resolution boards. It is also possible to use domestic or international arbitration.


The rules for the use of alternative methods and their procedures are different in each country.

Domestic legislation has a major impact on how country's approach resolving disputes that arrive from PPPs. Access to non-judicial dispute resolution mechanisms is an asset in this context because of the scale and complexity of infrastructure projects (long term and high value).

Conflicts arising from PPP agreements, either concession contract and/or PPP contract (between private entity and the government) may be based on a technical, financial/economic or legal issue. No matter the source of the conflict, it can be addressed by an alternative dispute resolution mechanism.

Disputes arising from PPP agreements must be resolved in a timely fashion so they do not compromise the provision of the public service. At the same time, the projects involve complex technical issues that may not be easy to resolve. Alternative dispute resolution mechanisms protect the relationship of the parties; judicial measures may be too intense and threaten the relationship.

7 DISPUTE SETTLEMENT



Traditionally, any dispute arising from an administrative contract was under the jurisdiction of the judiciary. This is because the Judiciary was an independent political body, responsible for almost all conflict resolution. In this context, alternative conflict resolution mechanisms are very new, but they are an absolute necessity to deal with the scale and complexity of large infrastructure projects.

Arbitration was the first alternative dispute resolution method utilized to resolve a conflict arising from a PPP. After that, different countries' legislation adapted to the new reality and other mechanisms emerged.

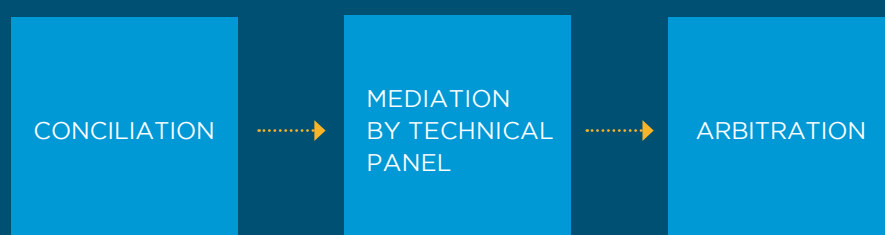
Alternative dispute resolution methods may prevent the escalation of disputes, ensuring that the execution of the project is not derailed entirely.


There are many benefits associated with alternative dispute resolution mechanisms, but also some limitations. In some countries, disputes arising from PPP agreements, either concession contract and/or PPP contract, are under the exclusive ju-

risdiction of the domestic judiciary or administrative courts and in other legal systems the parties are free to choose the procedure.

Most legislation establishes some limits and parameters for the use of alternative mechanisms. Paraguay establishes levels of dispute resolution mechanisms. Colombia does not provide any specific alternative mechanisms, but prevents the Public Administration from forbidding their use.

The use of conciliation, mediation and arbitration is the most common alternative approach and is sometimes referenced in the legislation. The application of this method depends on its provision in the PPP agreement, either concession contract and/or PPP contract, where it is established and has its procedures outlined.





Often, the first mechanism that is used is conciliation or mediation. Mediation involves one or more impartial third parties that assist the contracting parties in finding a resolution. The decision is not always binding, depending on the legislation. Peruvian¹ and Ecuadorian laws explicitly provide for mediation. Other countries encourage the parties to reach an agreement before resorting to any dispute resolution mechanism.

Technical Board

In Mexico, legislation establishes that in disputes about technical or economic issues, the parties in the PPP agreement must try to resolve them in good faith by mutual agreement. The negotiation stage will last an agreed upon period of time. If the parties do not reach an agreement within that period or its extension, they will then submit the issue to a panel of three experts. Each party appoints a member; the third expert is appointed by the two other members that had been already appointed. The committee will analyze technical or economic issues, but will have no specific expertise regarding the law.

Independent experts may also be appointed to review technical disputes. This provides a possible solution to a problems restricted to technical matters.

Chilean legislation establishes the ability to create a Technical Panel: a specialized body that analyzes technical issues and issues non-binding recommendations on technical or economic aspects of a dispute.

The PPP legal framework in El Salvador establishes that the agreement can provide national and international dispute resolution mechanisms, and must include at least one phase of direct dialogue and another phase with the intervention of experts. This approach may not be used in the following circumstances, which fall under the jurisdiction of the normal legal authority:

- labor issues;
- issues that have already been decided in a court decision;
- inspection and penalties applied by monitoring bodies;
- the government's right to terminate the agreement due to public interest or project abandonment.

In cases where it is possible to use alternative methods, the parties will start by attempting to forge a direct agreement in which each side may appoint an expert to help resolve the matter. The experts appoint a third qualified individual for the "Expert Panel". If the panel cannot help resolve the conflict, it is possible to start an arbitration procedure.

¹ A Dispute Board can also be used.

Dispute Resolution Board

Dispute Resolution Boards can be established at the beginning of the execution of the agreement and have various benefits. These boards can provide real time consultation related to disputes and make recommendations about questions asked by the contract parties. It is an impartial and capable body of experts that can resolve disputes, always considering the particularities of the project. The specific operational regulation is provided in the agreement.

Even though Dispute Resolution Boards can be effective, a few issues must be taken into consideration when they are used. First, because they are designed to be established at the beginning of a PPP contract, they are costly to maintain throughout the duration of the project, particularly if they do not prove necessary.

The advantage of a permanent Dispute Board is that it maintains familiarity with the project in real time.

Forming the board on an ad hoc basis saves on the costs of a permanent board, but results in the board being less familiar with the particularities of the project as it develops.

Decisions rendered by a Dispute Resolution Board may be subjected to review, whether judicial or in arbitration, if there is not a foreclosure in the agreement.

Ideal legislation will allow for the possibility of alternative dispute resolution mechanisms. Informal dispute resolution mechanisms are faster than arbitration and judicial procedures, and technically capable of determining when a conflict arises from an issue that is addressed in the contract agreement.

The procedure provided in the agreement may take into consideration the characteristics of the project, even though the standardization of procedures in the country could bring more stability, especially to foreign investors.

7 DISPUTE SETTLEMENT ARBITRATION

Arbitration was not a widespread practice in Latin America twenty years ago. Over the past two decades, as the regions economies grew and integrated with global markets, new methods were required to address the needs of commercial partners who prefer neutral forums for resolving disputes and ease in enforcing arbitration awards. These factors undermined Latin America's historically hostile attitude toward

arbitration. Today, almost all countries in the region have entered into the major international arbitration treaties and have adopted modern arbitration rules based on the UNCITRAL Model Law.²

² <https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/latin-america-overview-a-long-road-travelled-a-long-road-to-the-journeys-end>



With the development and modernization of the legal framework that governs arbitration, local arbitration institutions have developed in the region. Investors are not afraid to use arbitration in the region, as was the case in the 90s. However, domestic arbitration is more common than international.

Arbitration has also become more popular because it is fast and the arbitrators are technical experts in the matters discussed. Also, the confidentiality involved in the proceedings makes it a good option for the private party. The parties may choose the language, location and relevant law for the arbitration process so it is able to address the specific matter in question.

Arbitration can be used to settle technical matters or in situations arising from the contract agreement³. Not all legislation permits the use of arbitration to solve every dispute arising from PPPs. For example, Brazilian legislation limits the use of arbitration to the available rights and any dispute with the Public Administration is considered an unavailable right. Law 13,448/2006 defines the available rights.

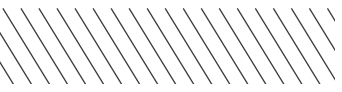
Peru's legislation establishes that arbitration may not be used if the claim concerns administrative decisions issued by regulatory bodies or other entities. Ecuador excludes tax matters and any other act deriving directly from the legislative and regulatory power of the Ecuadorian government from arbitration.

Even though the nature of arbitration gives the parties the right to choose the law, location and language, legislation in each country determines the location and language of the arbitration proceedings. Usually, the language is the one spoken in the country, the country's legislation is applied and the country is the location of the arbitration. In Ecuador however, disputes arising from the agreement are submitted to international arbitration, a regional Latin American arbitration body. The parties to the agreement may designate the arbitral jurisdictions in the Latin American Region.

Therefore, procedures involving a public body are less flexible than private arbitration, but more flexible than a typical judicial process.

Costa Rica's legislation precludes the possibility of an additional appeal procedure. In other countries, it is possible to resolve disputes by formal request provided to the public contracting entity for the project. The rules of this administrative procedure must be based on general principles of administrative law.

³ Mexican legislation provides that disputes about the interpretation or application of contracts concluded on the basis of the Law are submitted to federal courts.



The arbitral procedure may also have two phases. Chile's concession law establishes that the Arbitral Commission for a mixed arbitration procedure takes place in a single phase. The powers of the arbitrator regarding the procedure and assessment of the evidence are made according to the rules of sound criticism. The arbitrator must issue a final award in accordance with the law, stating the reasons and the factual, legal, technical and economic considerations.

In some countries, the procedure can be divided by subject (technical or non-technical). In Peru, technical issues may be submitted to arbitration in equity (arbitrators are not legal professionals). Non-technical issues must be submitted to regular arbitration. This has the same objective as establishing a technical board: to guarantee the expertise of the arbitrators in the relevant subject.

The flexibility provided by arbitral procedures and the expertise of the arbitrators provides an appealing mechanism for the private party as long as its award is binding and enforceable in the host country. It is important that a country's legal framework provides security, otherwise these processes have no significance.

Public Administration often carries a certain guarantee into the arbitration process. In this case, providing that the arbitration will protect the public interest is essential.



Recommendations

PPP legislation should permit the use of alternative mechanisms of dispute resolution and establish these procedures including arbitration. It is also important that a country's legislation establishes an award enforcement mechanism, such as the UN Convention on the Recognition Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").⁴

PPP legislation may also permit the use of international arbitration such as the mechanism offered by the World Bank (International Center for Settlement of Investment Disputes - ICSID).

⁴ Currently Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago and Uruguay are signatories of the Convention.

A woman in a dark suit is shown from the chest up, holding a mobile phone to her ear with her right hand. She is also holding a large sheet of paper with a diagram or map on it. The background is blurred, showing some architectural elements. The text "DEALING WITH CHANGES" is overlaid on the image.

DEALING WITH CHANGES

8 DEALING WITH CHANGES

Main findings in this chapter:

PPPs are long-term agreements and the circumstances of the project may change, impacting its execution. These changes may or may not be foreseeable. Some changes may not easily be included via an automatic adjustment mechanism or the parties may prefer to exclude them from such a mechanism. These changes may occur due to legislative or regulatory developments or by unexpected shifts in economic conditions.

In some countries the agreement may provide periodical revisions, which allows the project to be updated at regular intervals, resulting in better service provision.

The economic equation of the PPP agreement may be rebalanced by several mechanisms, depending on the nature of the contract. In order to decide which alternative to use, the Public Administration must analyze the situation and the whole financial structure of the project.

Any renegotiation must be thoroughly analyzed in order to preserve public interest.


PPP projects normally span a long period, during which many circumstances relevant to the project may change. These changes may be attributable to the government, private entity or Force Majeure and Acts of God. The impact of many changes may be covered automatically in the project by either the concession contract and/or PPP contractor via assumptions and risks built into the contract.

The Public Administration may amend the agreement to include new investments¹, but the agreement may also be impacted by other factors. When this occurs, it is important to have mechanisms to preserve the economical balance of the agreement.

It is imperative that successful contracts attempt to foresee and calculate predictable changes, and these must be provided in the agreement as a risk and duly allocated.

¹ It is a Public Authority prerogative.

8 DEALING WITH CHANGES




There may also be extraordinary changes that correspond to unforeseeable or foreseeable events, that come with incalculable consequences that are not covered in the agreement. Because the agent cannot foresee these changes, the private party cannot generally be held accountable for these risks. In Brazil, the risk of extraordinary events must have optimal allocation, but it can be shared between the parties.

When the contract becomes financially unbalanced for reasons that were unforeseeable to the private entity, its consequences must be borne by the contracting authority through the review of the balance.

A private entity may not foresee the unilateral amendment of the contract measures impact the financial relationship initially agreed upon, the private entity is entitled to have the clause changed back.²

Some changes may not easily be included via an automatic adjustment mechanism or the parties may prefer to exclude them from such a mechanism. This occurs via legislative or regulatory changes or by unexpected changes in economic conditions.


8 DEALING WITH CHANGES PERIODIC REVISIONS



In Brazil, the agreement may provide for periodic revisions of the contract. This allows the project to be continually updated, resulting in better service provision. This revision is not the same as a tariff adjustment for inflation.

Periodic revisions may impact economic provisions as well as technical ones. For example, in a concession or PPP agreement for electricity distribution services, tariffs are reviewed periodically to reflect long-term changes in the costs of public service.

² In France, if the public contracting authority imposes a unilateral measure that changes the economic balance of the contract, the private entity has a right to be compensated.



Legislation in most countries include rules that permit the project agreement language be reviewed after changes in the economic or financial conditions. This takes place when changes do not prevent the party from meeting its contractual obligations but render the performance of those obligations substantially more onerous than originally foreseen at the time of the agreement.

Nicaragua's legislation establishes that the private party may request compensation for unforeseen acts of the public authority that substantially increase the cost to execute the agreement or reduce the amount provided in the initial calculation of the benefits of its execution. However, this may only happen if:

- the act occurs after the execution of the agreement;
- it could not be included in the Bid Terms and Conditions;
- it is an administrative measure or a legislative or regulatory change with specific effects on the sector of the PPP Project, and;
- it significantly alters the economic regime of the agreement.

In Uruguay, PPP agreements may be renegotiated in case:

- there are costs changes made by public authorities that affect the agreement's economic and financial balance and the agreement itself (not a policy on other situations);
- of force majeure events and acts of God; and
- in any case provided in the PPP agreement.

If the parties cannot agree and renegotiate the PPP agreement, they may sue for damages in courts. The Ministry of Finance and the Office of Planning must render a prior analysis of the revision of the agreement.

Under normal circumstances, wage costs being higher than anticipated would not be sufficient reason to revise the project agreement. There must be a more significant change.

Nicaraguan legislation establishes that any amendment made by mutual agreement, that is not substantial, must be previously approved by the Ministry of Finance and Public Credit. The Ministry assesses the socio-economic profitability and fiscal sustainability of the project based on the modification requested. The government contracting institution must compensate the private party for these changes in the agreement.

To determine whether an unforeseeable event has occurred, the context must be analyzed by comparing conditions established at the beginning of the agreement and that found at a later time. If an imbalance in the financial equation resulting from a larger number of unpredictable charges at the contract's conclusion is discovered, the private entity has the right to reset the "broken" equation.



The economic equation of the PPP agreement may be rebalanced by several mechanisms, depending on the nature of the contract.

The Chilean legal framework establishes that economic compensations may be:

- Government subsidies;
- payments made directly to the private entity by third parties interested in the development of the work;
- modification of the current value of the total income of the concession;
- change to the concession term; and
- change of rates or other elements of the economic regime.

One or more of these factors may be used at the same time.

In El Salvador, legislation also establishes rebalance mechanisms including:

- compensation;
- voluntary payment from third parties that are interested in project completion;
- Income review;
- term extension;
- review of tariffs or other financial elements of the agreement.

Not all these measures are authorized in all countries. For example, In Costa Rica and Guatemala the only legal provision for amended .financial balance is adjusting the term of the agreement.

The Public Administration must analyze the situation and financial arrangement of a given project before determining which rebalancing mechanism to utilize. If the project does not provide that tariffs will be changed, it is obvious that this cannot be a measure to rebalance the agreement.

A contract's economic balance may prove negative to the private party or even to the Public Administration. The pre-established equation in the bidding process is composed of charges and advantages. To maintain its equilibrium, it is sufficient to make changes to both sides of the scale. If the government is prejudiced, the agreement must be rebalanced and the conditions changed.

If an extension is the means of adjusting the financial balance of a project, the new term need only be sufficient to cover taxes, operations and maintenance expenditures and amortize the investments provided for in the amendment term guaranteeing the capital return. The public budget for compensation paid by the Public Administration to rebalance the equation also must be taken into consideration.



Under ideal circumstances, the changes to the financial assumptions of a contract agreement must clear a minimum threshold value to be eligible for rebalancing. This value must be proportional to the total project cost or the private entity's revenue. This measure would prevent the occurrence of frequent revisions in response to minor changes.

It is also important that the agreement establishes periodic review and revision of its own contents to account for these smaller changes. The interval should correspond to the sector and the nature of the project, as different sectors are more vulnerable to economic or political developments than others.

Any renegotiation must be conducted with a commitment to preserve the public interest. If the private partner perceives the Procuring Authority as excessively open to renegotiation, this may encourage opportunistic private sector bidders to make more aggressive (and potentially unrealistic) bids to secure a project, hoping to then renegotiate the PPP contract after they have secured the award. In this circumstance, the private partner may attempt to transfer risks back to the Procuring Authority that were contractually allocated to the private partner in the agreement. This rewards private sector partners who are not efficient, but opportunistic negotiators.³

Bearing this in mind, periodic revisions should only be allowed under particular conditions and depending upon the private entity's overall performance under the PPP contract.

Legal regimes as well as the PPP agreement itself should allow for extraordinary revisions of the economic balance under extreme circumstances. The parties cannot be penalized by events that are beyond their control and the control of the end user of the public service.

³ <https://managingppp.gihub.org/report/renegotiation/>



Recommendations

Possible changes

Legislation must provide examples of foreseeable changes that impact a contract, and also outline mechanisms to address these changes.⁴

For unforeseeable events, legislation should at least account for such an eventuality, and outline adjustment mechanisms that can be used in these instances.

Periodic revisions

PPP legislation should provide for the periodic revisions of economic and technical conditions. These changes should only be permitted in certain situations.

The frequency of revisions should be based upon the sector and nature of the project.

Procedure

The legislation should permit extraordinary revisions of the agreement's balance when necessary;

Legislation should delineate the conditions under which the private party may ask for a renegotiation (if there is a standstill period, i.e.);

Legislation must establish procedures for rebalancing agreements, and define when such renegotiation is necessary. This must include the agreement's requirement for indemnity;

Legislation should also establish a minimum value threshold to be met before renegotiation is permitted to avoid frivolous renegotiations resulting from small changes.

⁴ The European Union Directive has the same concepts regarding contract changes for both European common law and civil law countries.

FINANCING, FUNDING AND GUARANTIES



9 FINANCING, FUNDING AND GUARANTIES



Main findings in this chapter:

Financing is the source of the money required to meet the costs of building infrastructure and is the private party's responsibility. Funding generally refers to another source of money required to meet payment obligations.

To mitigate the risk involved in financing the project, some governments establish special guarantees for the investors. These guarantees include lenders' step-in rights, incentives for the private party to invest in infrastructure, minimum guarantee revenues, geological contingency funds and the creation of funds to provide credit enhancement and a safer environment for the investor.

Legislation in most countries does not specify which mechanisms must be used to obtain financing, so the private party may finance the development of PPP projects by using the modalities, instruments and financial transactions recognized and used in national or international financial markets.

Most countries in Latin America and the Caribbean do not have a matured capital market and this environment suppresses the use of project finance.

It is necessary for PPP agreements to anticipate how to guarantee income for the private party in case the project provides periodic payments (availability and/or use) by the Public Administration.

There are two major justifications for PPPs. The first is that PPPs open fiscal space for governments. The second is that they are more efficient than public delivery. In other words, PPPs deliver services with the same or better quality for less money. That is, PPPs allow more investment in public services with better outcomes.

The investment is composed by funding and financing. Conceptually, it is necessary to distinguish between funding and financing.

9 FINANCING, FUNDING AND GUARANTIES



Financing is defined as the source of money required to meet the costs of constructing infrastructure. Financing is typically sourced by the government through surpluses or government borrowing (for traditional infrastructure procurement) or by the private sector raising debt and equity finance (for PPPs).

Funding generally refers to another source of funds required to meet payment obligations. In the context of a PPP, funding refers to the source of long-term funds to pay the private partner for the investments, operating costs, and maintenance costs of the project. Funding is typically sourced from taxes (in government-paid PPPs) or from user charges (in user-paid PPPs). Governments may also utilize more specific sources of funds including “land value capture”.¹

In all the countries analyzed in this report, PPP legislation makes clear that financing is the private party’s responsibility.

Public Administrations utilize PPPs in part to distance themselves from the financial burden and risk of the project by transferring these obligations to the private party. However, governments must be aware of the complexity of PPP models and their potential impacts on public expenditure. Although the direct liabilities are in theory incurred at a later stage, the contingent liabilities must be accounted for at the outset of a project (and are recorded on the balance sheet from the signing date in many countries). In that respect, PPPs may not deliver as expected if the government is looking to diminish their own financial obligations early in an infrastructure project.

To mitigate the risk involved in financing the project, some governments establish special guarantees for the investor including lenders step-in rights, incentives for the private party to invest in infrastructure, minimum guarantee revenues, geological contingency funds and funds that provide credit enhancements or a safer environment for the investor. There is no one single best approach, but several options that have advantages depending on the context in the country and the nature of the project.

Legislation in most countries does not address which mechanisms must be used to obtain financing. As a result, private parties may finance the development of PPP projects using modalities, instruments and financial transactions recognized and regularly used in national or international financial markets. Brazil provides basic financing guidelines that establish possible sources of funds as an agreement with a bank, issuance of bonds or by using the company’s equity. Chile also addresses the matter in a generic way by providing that financing may be made by direct credits, guarantees or any other bond.

¹ <https://ppp-certification.com/ppp-certification-guide/7-how-private-finance-ppp-project-financed-where-money-pay-construction>

9 FINANCING, FUNDING AND GUARANTIES



Nevertheless, Chile has had modifications General Banking Law to extend loans to private entities and construction companies, amendments to the legislation of Pension Fund Administrators, Insurance Companies, Investment Funds and Investment Funds of Foreign Capital. These measures allow the Chilean government to intervene in the financing of the private entity and potentially securitize the flow of the concessions. After that, the local capital market began to develop.


In Colombia, local pension funds can also fund infrastructure projects, but not directly. In order for this to happen, the pension fund must invest in larger fund that makes an investment in the project.

It should be noted that most countries covered in this report do not have a mature capital market, and this suppresses the availability of project financing. Special investment vehicles regularly struggle to find sources of financing in this context.

In Jamaica, the PPP Unit and the Ministry of Finance identify the best financing option. This may come in the form of low-cost debt financing to the Government, grant financing from multilateral institutions, infrastructure funds or bond floats on the local or international capital markets.

Normally, financing is not a precondition that bears on the execution of a PPP agreement, but sometimes it may be included as a way-out clause. Under a way-out clause, if the private partner does not obtain enough funds within a certain period, the agreement is terminated. This measure provides a guarantee for the Public Administration so it is not left shouldering all the financial burden of a project that failed to receive financing. In Uruguay, legislation requires that the private partner provide information about financing and this information is taken into account during the award process.

It is obvious that financing is very important for the success of the project, as are the mechanisms of securing financing and the warranties related to the source of funds.




Most countries permit the private partner to provide guarantees based on assets and cash flows from PPP agreements (Project Finance). This is very common in PPP projects and does not depend on the presence of a developed capital market.

In most countries, the rights of the developer derived from the PPP and the respective authorizations for the development of the project may only be transferred to third parties (bondholders) with prior authorization from the agency or federal contracting entity. This authorization maintains the Public Administration's control over the agreement, given that the object of the PPP is a public work and/or service. In Peru, however, this authorization is only necessary when:

- the agreement provides so; and
- the developer wants to offer a mortgage as a lien on affect the concession.

Paraguayan legislation establishes a special guarantee: a pledge or security trust with respect to the rights arising from the PPP agreement. This guarantee clarifies the future flow of funds generated by the project, and the share package of the company that acts as a private participant.

Legislation should also encourage formal separation between the company/consortia awarded and the special-purpose vehicle created for the execution of the project to protect bondholders from the risk of private party insolvency. Some countries have such legislation and in other instances this may be established in a PPP agreement.



Most Latin American and Caribbean countries do not have developed capital markets, diminishing the potential sources of financing. In this context, it is sometimes necessary for economic assistance or guarantees to be provided by the government, particularly where the central government is not a party to the key project agreements.

The Public Authority may give incentives to the private party to execute PPPs when the conditions established by domestic legislation are met. Law in Ecuador requires that the incentive must be totally or partially


provided in the bidding documents available during the bidding process and also included in the financial plan awarded. In order to provide for these incentives from the outset, the project must be registered with the Technical Secretariat of the Interinstitutional Committee and approved by the Interinstitutional Committee.

Governments may provide financing directly to a PPP via loans or upfront grant subsidies. Capital contributions can also reduce the project's costs for the government by making financing available under more favorable conditions.



Many countries have established publicly-owned development banks or other financial institutions that may provide a range of financial products to PPP projects. These financial institutions are sometimes capitalized by the government. In some cases, establi-

shed development banks may expand their activities into the PPP sector. For example, the Banco Nacional de Desenvolvimento Econômico e Social (BNDES) has been a major lender to private infrastructure projects in Brazil.



Another matter in some countries is the lender step-in right, which provides that lenders in PPPs may “step in” to the project company’s position in the contract to take control of the infrastructure project if the project company is not meeting the project standards.

Step-in rights must be regulated in the PPP agreement. In Guatemala and a few other countries, the body responsible for monitoring the PPP agreement must authorize the replacement of the private partner, even in the case of exercised step-in rights.


The ultimate objective of the step-in right is allow for continuity of a project even in the event of private partner default. This step safeguards the lender’s credit and may even take part in preparing the private partner company for sale when necessary. Obviously, this instrument should only be used in extreme situations of serious cases of default, as it creates massive new responsibilities for the lending party.

The step-in right is also a guarantee for the Public Administration that

service provisions will continue at an adequate level and that end-users of infrastructure will not be negatively impacted by the financial struggles of the private party. Contracting authority and lenders may also engage in a direct agreement; although often this relationship is limited to the provisions in favor of the lenders included in the PPP agreement, such as step-in rights or senior debt repayment guarantees.

In some countries, legislation is waived for the lenders to exercise the step-in regarding their technical capacity and financial stability. Such requirements could make it impossible for the funders to exercise their right of assumption of control. A lender will usually not possess the technical attributes necessary to provide the service, and will have a completely different financial profile.

A lender’s inability to meet these requirements will not impact the quality of services, as during the exercise of a step-in right, financiers only assume the control of the private entity, not the effective and direct provision of services.




Presumably, the private entity already owns the assets, technology and human and financial resources necessary for the adequate provision of the service, and in this sense, changing the control of the company would not change these resources.

Brazilian PPP legislation also provides that project lenders may receive da-

mages for early termination of the contract, and payments made by PPP, if necessary.

The provision of such rights to lenders may encourage companies to invest in the country's infrastructure, especially foreign firms. Therefore, it is important for the PPP legislation to provide such remedies.



Another guarantee for the private party to invest in the country is the possibility of hiring insurance. In general, the guarantee insurance is intended to cover risks related to the fulfillment of obligations by the insured, in this case the Public Administration. In the event of a claim, the insurer pays the beneficiary the indemnity amount corresponding to the obligation that was not fulfilled. It can be also structured considering the lenders as beneficiary.

This insurance mechanism, usually used by both parties (public and private,) guarantees that parties meet their obligations. Normally, it is the responsibility of the private party to secure the object of the agreement. From the public point of view, this responsibility is the counterpart of guarantees of payment made by the Public Authority.

A large number of risks are transferred to the private sector in PPP projects, and it is in the private entity's interest

to insure against these risks. There are coverages for construction risks, material damage claims and civil liability before third parties. In addition, a concessionaire often obtains insurance against business interruptions, political risk, strikes and terrorist attacks (unless these events are considered "extraordinary events" in the PPP agreement).

Insurance mitigates most of the risks allocated to the private party. Insurance represents the most basic way to mitigate risk. In Chile, for instance, earthquakes are not considered extraordinary events because of their frequency; therefore, the concession law provides that it must be covered by insurance.² Hurricanes are very common in the Caribbean and legislation requires they are insured against.

²<https://pppknowledge.org/guide/sections/15-climate-change-and-natural-disasters#passage-47>

It is possible for the Public Administration to establish a single-purpose fund to guarantee its pecuniary obligations in the PPP. This fund is usually private, contains its own equity and is endowed with its own rights and obligations.

The government participates as the fund's shareholder, paying its share of money, public debt, real estate, movable property including sufficient shares of a mixed-capital corporation to maintain its control by the Union, or other rights with equity value.

Mexico, for example, has the Fondo Nacional de Infraestructura (FONADIN) that provides loans and capital grants, but also helps agencies provide grants for initial project studies. Infrastructure and Public Service National Bank (BANOBRAS) also grant credit to PPPs at low interest rates. During the last year, BANOBRAS successfully assigned \$2.3 Billion Mexi-

can pesos to different Project Finance structures.

Costa Rica also has a fund, managed by its PPP Unit, whose purpose is to finance projects in the country.

These financial arrangements are meant to provide security to a private party investing in infrastructure, particularly investors from outside the country. These devices are crucial for successful PPP projects because they allow the private party to feel secure while financing an expensive, long-term project.

Providing financial security to the private party is even more important given that Latin America and the Caribbean do not have developed capital markets. Therefore, when legislation allows the Public Administration to provide certain guarantees to its private partner, this creates a much more favorable environment for private investment.

PPP agreements must anticipate how to guarantee the income for the private party in case the project provides periodic payments (availability and/or use) by the Public Administration particularly at subnational level. When it is not possible for the Public Administration to honor its payment agreements, legislation provides for the provision of guarantees. It should be noted that the guarantee granted may be financial or non-financial.

Most countries do not address this matter or establish that the bidding documents or the agreement will provide the guarantees. However, in some countries outlines possible instruments. This is the case in Brazil, Uruguay, Ecuador and Argentina, such as:

- The specific affectation and / or the transfer of tax resources, goods, funds and any kind of credits and / or public revenues;

- The creation of trusts (or funds) and / or use of existing trusts. In this case, the fiduciary property of tax resources, credits, assets, funds and any kind of property may be transferred in an exclusive and irrevocable manner with the purpose of resolving and / or guaranteeing the payment of the pecuniary obligations assumed in the contract.

- The granting of bonds, guarantees, guarantees by entities of recognized solvency in the national and international market that are not controlled by the Government and/ or the constitution of any other instrument that fulfills the guarantee function.

- Contracting of insurance-guarantee with insurance companies that are not controlled by the Public Authority.

These instruments are the most common examples of Public Administration guarantees but the practice is not restricted to them. Legislations permits other practices to be defined in the PPP agreement. This is mostly to allow for the appearance of new mechanisms in the market.

Recommendations

PPP legislation should allow the private entity to give guarantees based on assets and incomes from PPP agreements on a non-recourse project financing;

Legislation should also provide some rights to the lenders, such as step-in right to ensure continuity for the project.

In order to improve the participation of private parties in infrastructure projects, the Public Administration may provide incentives or benefits for those interested in investing. The legislation should outline possible benefits and when they may be granted.

Legislation should provide guarantee instruments provided by the Public Administration that mitigate the financing risk assumed by the private party.

To this end, multilateral organizations and development banks are particularly important.

A large, semi-transparent image of a person's profile wearing glasses, looking over a city skyline. The person's face is in the foreground, and the city is in the background. The image has a warm, orange-tinted overlay.

EXTRAORDINARY EVENTS

10 EXTRAORDINARY EVENTS

Main findings in this chapter:

Extraordinary events are those caused by force majeure events and acts of God that interrupt the execution of the project. These events may not only damage the infrastructure under construction or being operated but also cause damages to the operation itself and the private entity's cash flow.


Because of the particularities of each case, legislation cannot be too specific when addressing extraordinary events that may occur and affect the project's execution.

It is important to have at least a few procedures and concepts established for extraordinary events, the agreement should allocate the risk for extraordinary events in the best way possible and provide mechanisms for risk mitigation.

As stated above, PPPs are long-term agreements with complex objects, so the conditions in the project's design may be subject to changes. One of the situations that may directly affect the execution of the project are extraordinary events. For the purpose of this report, extraordinary events are those caused by force majeure events and acts of God. In these cases, the project's execution may be interrupted by unforeseen events, such as natural disasters or political and special events, such as war and civil disturbances. Interruptions like the ones outlined above often cause losses for both parties

The definition of "force majeure" varies from project to project and in relation to the country in which the project is located. "Force majeure" events generally include "risks beyond the reasonable control of the parties, incurred not as a product or result of the negligence of the afflicted party, which have a materially adverse effect on the ability of such party to perform its obligations."¹

¹ Delmon, Jeffrey. Private Sector Investment in Infrastructure: Project Finance, PPP Projects and Risk. Kluwer Law International, 2009.



Extraordinary events are a relevant risk that need to be properly allocated. Nevertheless, in most legislation, the risk of force majeure is generally allocated to the government. The idea is that the grantor is best able to manage force majeure risks, as it partially relates to the activities of the host country's government and its relations with other countries and/or its population. As a result, the grantor is the only party able to bear such risk, given its size and the difficulty of obtaining adequate insurance.

Extraordinary events may damage the infrastructure being constructed or operated but also cause damages to the operation itself and the private entity's cash flow. The consequences cannot be foreseen and that is why it is important to have a plan in place before an event occurs. Even though real damages will only be analyzed if the event occurs, it is relevant to have provisions for such damage.

Sometimes even stricter requirements are imposed, such as impossibility of fulfilment of an obligation. This is very difficult to prove and could result in the private entity's bearing an unacceptable level of risk. Parties should also consider whether it is appropriate to exclude consequences which could reasonably be avoided by either party.


Force majeure events are not reasonably foreseeable and are unlikely to occur. For instance, where supply of electricity is necessary for the operation of the facilities but is inconsistent, the parties must se-

cure an alternative source of power. A power outage, in this case, is not an extraordinary event. In other circumstances, however, intermittent supply would be unusual and not reasonably foreseeable and it would be appropriate to consider it a force majeure event.

The reasonable foreseeability of the event depends on the characteristics of each project. A power plant is not subject to the same force majeure events as an image diagnostics services project or a road.

Because of the particularities of each case, the legislation cannot be too specific when addressing extraordinary events that may impact the project's execution. That is why the distinction of extraordinary vs. ordinary events must be specifically tailored for each project. Despite the differentiation, the occurrence of an extraordinary event may cause suspension of the contract or even its termination, depending on the consequences to the physical infrastructure or to the financial balance of the agreement.

PPP legislation in the two common law countries (Jamaica and Trinidad and Tobago) do not address this matter in any way. As already addressed, the legislation of common-law countries does not specifically address these matters but the contract agreements usually do.



Most domestic PPP legislation addresses the possibility of extraordinary events in general terms. According to almost all of them, PPP agreements or the bidding rules must define how to deal with extraordinary events. This is consistent with the reality that every project has its own special risks.

If extraordinary events occur, the agreement must establish how the parties should act. These provisions are important for the Public Administration because of the effects they can have on the project.

Depending on how an extraordinary event bears on the execution of the project, the parties may reach an agreement in which the private entity receives compensation for damages caused or the term of the project may be extended.

Paraguayan and Brazilian legislation, on the other hand, establishes that risks arising from extraordinary events may be shared between parties depending on the project. Further, these laws establish that it is the Public Administration's responsibility to make sure there are mechanisms that promote the economic and financial balance of the agreement.

In Chile legislation requires that the Treasury pay for damages caused by extraordinary events if the bidding rules provide so. This is a solution that allocates all the risk to the Public Administration if it is considered necessary for the project's execution.

This approach is also present in Colombian legislation, and Public Authorities must include an amount in the annual budget to cover extraordinary events.²

In addition, the agreement may be suspended for a period and then resumed when conditions stabilize. Nevertheless, if the consequences are too serious, it is possible that the project's status does not normalize and the agreement may be terminated early. In Ecuador and Guatemala, force majeure events may cause early termination if the parties do not agree on how to deal with the consequences of the event.

From the analysis of the domestic PPP legislation, we believe that it is important to have at least a few procedures and concepts established in general terms. More importantly, the agreement should allocate the risk for extraordinary events in the best way possible and provide mechanisms for risk mitigation. It is more difficult, more expensive and time consuming to negotiate and reach an agreement when an event occurs than it is establishing guidelines to deal with the consequences.

It is not reasonable to recommend that all countries have provision as detailed as Colombia's or Chile's. Nevertheless, it is desirable to have minimum guidelines on how to manage the effects of an extraordinary event.

² In Colombia this is mandatory whenever the PPP project involves public funds.



Recommendations

Legislation should define extraordinary events;

PPP legislation should provide that the risk for extraordinary events is expressly addressed in the agreement;

It is desirable that legislation provide minimum guidelines on how to manage the effects of an extraordinary event;

Legislation must establish that the PPP agreement will provide the procedure for indemnity, suspension or early termination.



PUBLIC AUTHORITY'S PREROGATIVES

11 PUBLIC AUTHORITY'S PREROGATIVES

Main findings in this chapter:

The Public Administration has the prerogative to maintain levels of service and to ensure public interest is protected. To do that, it may:

- amend the agreement so it better suits public interest;
- suspend the execution of the agreement;
- have the agreement terminated early because of public interest.

The Public Administration may also apply penalties to the private partner in case of noncompliance with the agreement. More than a prerogative, this is a duty of the Public Administration.


All these prerogatives shall be exercised according to legislation that establishes the Public Authorities rights and responsibilities.

If these prerogatives cause damage to the private entity when exercised, damages must be paid.

PPP projects are agreements executed with the Public Administration to ensure the public interest is protected. The object of a PPP is executing a public work and providing a public service. The agreement must always intend to provide an adequate level of service. Thus, the Public Administration has a few prerogatives so it can oversee the execution of the project.

As already discussed, the Public Administration must maintain the levels of service and ensure public interest is protected. These prerogatives allow it to prevail over the private party in certain instances; the parties are not on totally equal grounds.

Administrative Agreements have clauses that would not be permissible in private law. They allow the Administration to acquire privileges with the guarantee of several prerogatives. Colombian legislation, for instance, establishes that the agreement must have so-called exceptional clauses.




One of the prerogatives is that the Public Administration may amend the agreement so it better suits public interest while respecting the contractor's rights. In these cases, the Public Administration may request the private party make new investments.

This obligation is not without limitations. Most domestic legislation determines the maximum investment amount that may result from changing a percentage of the total investment amount. The amount varies from country to country. In Chile, it is 25%; in El Salvador, 15%; in Colombia and Uruguay, 20%. Jamaica does not have such a limitation.

While Costa Rica limits new investments to 25%, it also provides that these changes must be approved by the Office of the Republic's Comptroller General. This provision ensures that the decision is not made by the contracting authority without supervision, so the private party's rights are considered.


The Public Administration must also ensure the agreement is economically and financially balanced. Chile's legislation establishes that the Ministry of Public Works may modify the characteristics of the works and services contracted to increase the service levels and technical standards established in the bidding rules, or for other reasons of public interest. Consequently, the government must provide financial compensation to the private entity when appropriate for additional costs incurred.

There are several ways to maintain the balance of an amended agreement including extending the agreement's term, changing the tariff amount (if applicable) and paying damages to the private party. The regulatory body must analyze these mechanisms to determine which one better suits the project's characteristics. It is essential that the private party is compensated so that it is not prejudiced and there is no abuse of the Public Administration's prerogatives.



Legislation in some countries also provide the Public Administration with the prerogative of suspending the agreement's execution. PPP law in El Salvador establishes that the government may temporally suspend the agreement for 45 days based on any reason provided in the public notice and that this suspension does not generate any liability for the procuring authority.

Peruvian legislation permits suspension when public infrastructure or its elements are partially destroyed, and impossible to use for a period under the provision of the agreement. Peruvian law also allows for suspension when there is war or force majeure which impedes the execution of the contract as well as any other reason stated in the contract.




During the suspension period, the term of the agreement is interrupted. The interruption of the term protects the private party's rights since it is not obligated to provide services during this period. Of course, this does not apply if infrastructure cannot be used because of an act performed by the private party.

Honduran legislation establishes that the Superintendent may suspend the PPP agreement. For the services not to be interrupted, the Superintendent may temporarily hire services until a new public-private partnership agreement is executed for one year.

Limiting the period and situation in which the agreement may be suspended is a security measure for both parties. The private party knows an agreement will only be suspended under particular conditions and the Public Administration knows it can suspend when necessary. Also, con

tracting temporary services guarantees that the service users are not harmed by these circumstances.

If the cause for the suspension is the private entity's failure to perform, the legislation in most countries authorizes the contracting authority to take over the operation of the facility temporarily and continue delivering the public service. In some legal systems, such prerogative is considered inherent to most government agreements and may be presumed to exist. In this case, because it is an extreme measure, the legislation must define as clearly as possible the circumstances in which this prerogative may be exercised. It is important that the legislation clarify that the contracting authority's intervention in the project is temporary and is intended to remedy a specific, urgent issue the private entity has failed address.




Early termination of the agreement because of public interest is provided for in the legislation of all countries. This is examined in a later chapter in more depth, but it is important to highlight that the decision to terminate the agreement must be motivated by factors more severe than the consequences of termination.

El Salvadorian legislation establishes that the contracting authority must request the approval of the PROESA Board of Directors, which will provide its approval after obtaining a favorable opinion from the Ministry of Finance about the fiscal per-

spective and of OFAPP, on matters within its authority. In Panama, it is also necessary to obtain an authorization.

As in cases of suspension, Nicaraguan legislation determines that if there is serious breach of contract or if the Project is abandoned, as declared by the DGIP (competent body) at the request of the contracting institution and the project auditor, an intervening party must be appointed with the authority to ensure compliance with the PPP agreement for efficient, effective and uninterrupted service provision.



The last relevant prerogative is the right of the Public Administration to apply penalties to the private partner in case of noncompliance with the agreement. More than a prerogative, in administrative agreements, the Administration has the duty to apply direct sanctions to the private party - provided in the legislation or in the agreement. The Administration is put in a privileged position of contractual relation. This measure is a way to oversee compliance with the agreement and is part of the regulatory function of the Public Authority.

However, this prerogative may not be exercised without due process and the private party's right to fully defend itself. Also, the penalties must be established in the PPP agreements.

Honduran legislation establishes that in case of a breach of contract, the Superintendent may apply fines and penalties, in accordance with regulation or the agreement. This must be approved by the Superintendent no more than 60 days after the superintendent is appointed. In addition to the penalty to the offender, there may be other sanctions to legal representatives or members of the

legal entity's board, depending on their participation and liability with respect to the offenses committed.

The Public Administration has these prerogatives because PPPs are administrative agreements and public interest must be guaranteed. However, the legislation also provides limits to these prerogatives so that there is no abuse of power.

It is crucial that legislation establish limitations to the exercise of these powers, especially in cases in which the private party is financially affected to the prejudice of the execution of the project. Therefore, legislation should at least set a value threshold for cases of changes or establish that the agreement provides such a value.

Ideally, legislation will clearly outline when the prerogatives may be exercised and for how long.

Any penalty to be applied to the private party must be previously defined in the agreement and must have been the object of an administrative procedure in which the private party has the right to defend itself.



Recommendations

Unilateral change

If the legislation does not provide any limits for unilateral changes, any request in this matter must be motivated and justified. These changes should be allowed only under very strict conditions. From the private sector's perspective, there must be certainty regarding unilateral changes. At times it may be in the interests of the government to limit unilateral changes in the interests of providing such certainty. At other times, the PA will need to use its prerogative, due to public interest concerns. These considerations should be appropriately balanced;

Legislation should provide that any unilateral change results in appropriate compensation to the private party. The procedure must be determined by the legislation;

Legislation should set some value threshold for cases of changes or establish that the agreement provides such a threshold.

Suspension

The legislation must establish the conditions under which the agreement's execution will be suspended and for how long.

Legislation should also provide how the Public Administration will maintain the public services provision;

If a project will be re-contracted, the legislation should establish a maximum period for the new contract.

Unilateral early termination

Legislation must establish the conditions under which early termination of the agreement is possible;

Legislation must establish how the private party will be indemnified;

There should be legal provisions establishing how an early termination can be authorized by a competent public body.

Penalties

Any penalty applied to the private party must be previously defined in the agreement and must have been the object of an administrative procedure in which the private party had the right to defend itself.

The background of the slide is a complex financial visualization. It features a grid of numerical data in various colors (blue, orange, green, pink) overlaid with several line charts and bar graphs. The numbers are arranged in a structured, grid-like pattern, suggesting a data table or a financial report. The overall aesthetic is modern and data-driven, typical of a financial or investment presentation.

RISK ALLOCATION

12 RISK ALLOCATION

Main findings in this chapter:

Having an adequate allocation of the project's risks is necessary for an efficient PPP.

Risks may be allocated to the private party, to the Public Administration or shared between them and this balance should depend on the ability of each party to mitigate those risks.

There are a lot of risks involved in PPPs, extraordinary ones, political, construction and operation, commercial, financial, environmental and demand risks.

PPP risks are potential outcomes that would negatively impact the project. To mitigate these risks, PPPs must properly allocate risks to the relevant parties.

When the parties discuss how risks will be allocated, they also talk about the main structure of the allocation of responsibilities and functions in the partnership. This is not a separate legal activity but a multidisciplinary activity involving legal, technical and financial aspects as well. Inadequate allocation of risks can lead to project failure or non-viability. Risk allocation should include:

- the best technical considerations for the PPP to be operated;
- economic and financial considerations that resulting from the technical aspects that impact the feasibility of the project;
- promotion of the adjustments needed; and
- submission for assessment of lawfulness, procedures and legal arrangements necessary for contracting the project.

Allocation of contractual risks should be made taking into account which of the parties is in a better position to prevent and support them. This way, the private partner is prevented from taking legal action with unreasonable claims to reestablish the financial balance of the contract. At the same time, the private party is able to assess the risks and attractiveness of the investment, making the concession more transparent and efficient.



The concept of risk allocation in PPPs is relatively straightforward: risks should be allocated to the party that is best suited to manage them. In other words, the party that can better understand a risk, control the likelihood of the risk occurring and/or minimize the impact of the risk should also be responsible for managing it. When the party that manages the risk also bears its financial cost, it is incentivized to mitigate the risk. Risk allocation based on these principles is assumed to generate the most efficient risk allocation, the lowest costs to the project and the greatest VfM.

Optimal risk allocation is one of the key VfM drivers in a PPP model, because it allows the public agency to transfer risks to the private party, relieving it of bearing the cost of risks that it cannot manage — such as cost overruns during the construction phase, construction delays and long-term maintenance of the asset. For the private party, efficient risk allocation is key to ensuring that the project is financeable and has an attractive risk-return ratio.

Improperly allocated risks will affect the entire project. Risk assessments are typically guided by two questions:

- Which party can better control the occurrence of the risk?
- Which party can better manage the outcome of the risk or control its ultimate cost?

Maximizing VfM requires that PPP modelling consider the extent to which parties may have incentives to influence the total impact of the risk. Even if a party is not able to prevent materialization of risks, it may still assume them if it has control over the ultimate cost.


Risk may be allocated to the private party, to the Public Administration or shared between them. The party to which the risk was allocated must be responsible for risk mitigation measures.

When risks are allocated to the private party, it is important to understand the extent to which the private party is willing to accept risk. It is not reasonable to allocate risks to the private party if it cannot mitigate them in any way, or if doing so would come at a prohibitive cost.

Most domestic legislation in the relevant countries establishes that the agreement or the tender documents will establish how the risk is allocated. Each project has its own unique characteristics, circumstances, requirements, relationships and parties. Therefore, it is not ideal for legislation to require a one-size-fits-all approach.

In Argentina, legislation also provides that the agreement must establish mitigation measures for each risk allocated.

Honduras limits the Public Administration's liability according to the risk allocation to its contribution to the PPP.



Risks may be divided in categories including: extraordinary, political, construction and operation, commercial, financial, environmental and demand.

Extraordinary risks

Extraordinary risks are caused by force majeure events and acts of God and are outside the parties' control. In these cases, the project's execution may be interrupted by unforeseen events of a physical nature, such as natural disasters or political and extraordinary events, such as war and civil disturbances. Such events often result in losses for both parties. One possible way to mitigate these risk is by forcing the private to purchase insurance to cover these events when possible.

Political risks

Political risks involve situations caused by acts of the contracting authority or another body within the country in which the project is being developed that may negatively affect the project. In this case, we may also consider acts of foreign countries that affect the execution of the PPP. For example, a boycott of the host country that makes it impossible for the government to pay the concessionary is a political risk.

As the private party cannot foresee risks in this category, it is natural that the contracting authority assumes these risks by compensating the private party for loss of revenue. Multilateral agencies usually have instruments that help mitigating these risks.

Construction and operation risks

Construction and operation risks impact the private party, the contracting authority and users of the service provided.

The construction phase often involves, the project's costliest risks. The project infrastructure must be built in accordance with the requirements of the PPP agreement. Some construction risks are:

- problems to complete the project;
- costs exceed the original estimates;
- the utility fails to meet performance criteria at completion;
- inadequate design of the works;
- unforeseen weather conditions that may delay the works;
- environmental risks that arise during the construction;
- cost of completion, and
- any other risk that may affect the construction.

These risks are usually allocated to the construction company of the SPV that designs and builds the project. This is the case in Chile and Costa Rica.



The operation may be impacted by the materialization of a performance risk (if the facility cannot be effectively operated) or for cost overrun. This outcome can arise from inadequate management of the assets, for acts of the contracting party or even by extraordinary events. The only legislation that allocates this type of risk is found in Ecuador, where construction, operation and maintenance risks are allocated to the private entity.

Even though domestic legislation usually does not establish which party takes on these risks (with the exceptions above,) the risks that are not considered extraordinary and that occur during these phases are usually borne by the private party.

Commercial risks

Commercial risks are risks impacting the generation of the expected revenue due to changes in market prices or demand. Such risks may cause serious damage to the capacity of the concessionary to continue the service or work. These risks vary greatly according to the sector and type of project, and as such must be allocated based on the modelling of each project. The more commercial risk is allocated to the private entity, the greater the cost of capital because the security for the investor is lower.

It is also important to differentiate demand risk (the number of users of the infrastructure) and capacity risk (if the infrastructure has enough capacity to absorb the users). When the payment for the PPP is for availability, the risk of demand is lower than when users are charged fees. At the same time, under these circumstances the capacity risk is higher.

Financial risks

Financial risks involve the exchange rate, inflation and financing risks. The exchange rate relates to possible changes in foreign exchange rates that affect the project and may limit availability in the local market. Inflation may also have a direct impact on the cash flow of the project.

Financing risks are usually allocated to the private party that is responsible for the project. If the private entity contracts loans in a foreign currency, changes may result in larger financial costs. However, the Public Administration may give guarantees to mitigate this risk. This risk may also be addressed in the agreement where it is limited and mitigated.

Environmental risks

Environmental risks are related to the effects on environment during the implementation of project. Environmental risks and liabilities fall into a number of discrete categories including: Land contamination (historic) liabilities, construction risks and operational environment risks.



Demand risks

The risk of demand refers to variations in the estimated PPP revenue due to the use of the PPP's infrastructure by users. If the property object of the PPP project experiences less demand than anticipated in the PPP agreement, this will have negative impacts on revenue.

In the context of the risks detailed above, considering risks in isolation is not ideal, because they interact. It is important to analyze the project as a whole and to allocate the risks properly, bearing in mind the entire risk profile of the project with project execution as the priority.

Brazil's legal framework¹ establishes that if the Public Administration assumes more than 40% of either demand, construction or availability risks, the value of the constituted and recognized assets of the SPV must be registered in the contracting authority's balance to support the risks assumed.

Although there are a variety of risks, parties are usually insured to mitigate against these risk. In most countries, the private party must have specific insurance the main risks it is responsible for. When risks become reality, the insured party and the overall project are not catastrophically impacted by ordinary risk.

It is also important to note that parties may also mitigate or reallocate risks by executing other agreements – such as loan agreements, construction agreements, agreement to supply equipment, operation and maintenance contracts, direct agreements between the contracting authority and the lenders. Therefore, risk mitigation can be achieved in many ways if risks are allocated to the party that can better deal with them.



Recommendations

The legislation should establish that the PPP agreement allocate the risks involved and its due mitigation. This is sometimes achieved via a risk matrix.

¹ Ordinance n. 614/2006 of the Brazilian National Treasury.



PPP TERMINATION

13 PPP TERMINATION

Main findings in this chapter:

There are several reasons for the termination of a PPP agreement besides its term. Early termination should only be used as a last resort given its negative impacts on all parties.

The main causes of early termination are serious breaches by the private entity, insolvency/bankruptcy of the private entity, public interest, serious breach by the contracting authority and by mutual consent.

After the termination of the agreement, the Public Administration must decide what will happen with the assets and the technology involved in the project. This may cause payment of damages to the private entity or to the Public Administration. In both situations the criteria must be established in the legislation or the agreement.


All agreements expire when the term ends or when its object is complete. However, there are some situations in which projects may be terminated earlier. In this chapter, these situations are analyzed including how they are dealt with in local legislation.

The domestic legislation of the countries analyzed authorizes the parties to terminate the project agreement following the occurrence of certain types of events. The main interest of all parties involved in a PPP is to ensure the satisfactory construction of the facility and the adequate provision of public services. That means that terminating an agreement is not the first measure used to resolve compliance issues.

Terminating an agreement has serious consequences because public services may be interrupted or even discontinued as a result. Therefore, the conditions for either party to exercise this right should be carefully considered.

In addition to identifying the circumstances or types of events that may give rise to termination, it is advisable that the parties consider procedures that are appropriate to establish whether there are valid grounds for termination of the project agreement. It is particularly important to determine whether the project agreement may be unilaterally terminated, if it requires a judicial decision or a decision from another dispute settlement body. Some countries' legislation addresses this issue.

It is possible for the agreement to be terminated either by the contracting authority, by the private entity or by mutual consent. The private entity is usually not allowed to terminate the project agreement without cause.



The contracting authority's termination rights usually relate to three categories of circumstances:

- serious breach by the private entity;
- insolvency or bankruptcy of the private entity; and
- termination for reasons of public interest.

Serious breach by the private entity

The project may be terminated when the private entity does not perform its obligations, causing severe effects to the execution of the project. That is, an act that can be attributed to the private entity makes it impossible for the agreement to continue.

Legislation must establish how to measure or determine the adequacy of service provision. The private entity's breach of its contractual obligations may only be determined if there is clear and objective criteria to assess quality of service. Inadequate or insufficient provision of services must necessarily be seen as a serious and repeated occurrence to give rise to a decree of forfeiture, which is the most serious sanction in a contract. The breach of contract must be serious enough to risk interruption in the provision of the service.

Unilateral termination must be justified by the occurrence of one of the hypotheses defined in law or in the agreement, in an administrative process, ensuring the parties have a right to defend themselves.

In a few countries the legislation establishes that the private entity must indemnify the public authorities by making a claim under their performance bond (Uruguay and Costa Rica, for instance). Panama

and Nicaragua also establish that in this case the contracting authority must be indemnified.

Insolvency/Bankruptcy

In case the private entity goes bankrupt and there is a judicial liquidation of an insolvent debtor, it is absolutely impractical to maintain the concession agreement. In this case, the Public Administration takes control over the project to prevent service discontinuity.

In most cases, treats insolvency in a similar way to a breach by the private entity. However, Costa Rica's legislation also provides that in case of bankruptcy, the project can be subject to a new bidding process.

Public Interest

The administration must demonstrate that maintaining the agreement will cause serious injury to the public interest. This involves irreparable damage, in view of the nature of execution or object performed. That is, it may not occur for indeterminate or dubious reasons. The agreement must be terminated because maintaining it will have harmful consequences. In this case, the decision is not based on any act or omission by the private entity.

Domestic laws often allow the private entity to terminate the project agreement if the private entity's performance has been rendered substantially more onerous because of an unforeseen change in conditions. Termination is not the first form of recourse, and in this instance the parties have already failed to agree on an appropriate revision to adapt the project agreement to the change in conditions.

Public Interest

As a preparatory measure for expropriation, studies and surveys must identify the assets to be reverted and the damages due to the private entity. In this case, the amount of damages to which the private entity is entitled is based on administrative liability for lawful acts, since there is no fault to the parties. The amount must be determined in an administrative proceeding, in which the private entity may participate.

The Administration must reimburse the private party for proven damages suffered, and is also entitled to the return of the guarantee, payments due for the execution of the contract until the date of termination and payment of the cost of demobilization. If this were not the case, the administration could enrich itself unjustly, which is not permitted by law.

Serious breach by the contracting authority

The termination of the contract can also take place when the contract is terminated by initiative of the private entity, due to a breach of contract by the government. In this case, like in case of breach by the private entity, there may not have been any default. Failure to comply with legal and contractual obligations must be serious and repeated to prevent the continuation of the contract.

In addition to the termination of the contract, with the interruption of the enforceability of contractual obligations, the private entity has the right to receive damages for the unmortized or depreciated portions of

the reversible assets and for the losses and damage suffered. The composition of the indemnification due to the private entity caused by the government's default resembles that of the indemnification that can be justified in case of expropriation.

Mutual consent


Mutual consent termination relies on the preference of both parties. There is no litigation, because both parties desire the same end. Still, there are conditions that must be met in order for a mutual consent termination to proceed.

In this case, the consequences of the termination of the agreement are established by mutual consent, including damages due to the private entity.

PPP legislation in Mexico establishes that the provisions in the agreement apply to breaches, and that any dispute in this respect must be resolved by amicable means in a first instance, arbitration or federal courts, as the case may be. It is not possible, therefore, to terminate the agreement without a decision.

Some countries also provide that the agreement may establish other termination models that suit the project.

Colombian and Ecuadorian PPP laws provide that the agreement must define a mathematical formula to determine compensation in case of early termination. In Jamaica and Nicaragua, legislation does not address this matter and establishes that the agreement will provide causes for termination and possible compensation.



Legislation also must define what will happen with the assets and the technology involved in projects the when the agreement is terminated.

The private entity's right to operate the infrastructure and to provide services typically end when the agreement expires or the project ends. Unless the infrastructure is to be permanently owned by the private entity, the termination of the project agreement requires the assets be transferred to the contracting authority or to another private entity that takes over the operation. In addition to the procedure for the transfer itself, there are other consequences for agreement termination including other financial liabilities (i.e. outstanding amounts) and the condition that the assets be transferred. In general, the assets must be transferred to the Public Administration as soon as the agreement ends.

To deal with termination decisions, Guatemala's legislation determinates that a 3-person committee will be appointed to decide on how assets and technology will be transferred. This practice is ideal when the committee is formed by representatives of the contracting authority and the private entity.


When the facility is transferred to the contracting authority at the end of the concession period, the parties may need to make a series of arrangements to ensure that the contracting authority will be able to operate the facility at the agreed efficiency and safety thresholds. The

project agreement may provide the private entity must transfer certain technology or know-how required to operate the infrastructure facility.

Although most countries' legislation deals with the transfer of assets and technology, they do not usually define the conditions. It is important that legislation provides which rights and assets subject to the concession are transferred to the Public Administration in good, functional condition. This is provided for in Costa Rican law.

Mexican PPP legislation establishes that real estate property and public rights that were incorporated into the infrastructure or were essential for the services to be provided are transferred back to the contracting agency or entity once the PPP is terminated. Other assets necessary for the provision of the services will be subject to public domain of the Federation or contracting entity, under the terms of the agreement.

Paraguay PPP law provides that the transfer of assets may trigger a compensation for the private party. There is a similar law in Brazil. Colombian legislation determines that the transfer process will be detailed in the agreement but that there will be no compensation due to the fact that it is understood that the concessionaire has achieved its compensation and its profit during the contract period. In case of early termination, the contract shall use a formula to calculate the compensation to the concessionaire.



The project agreement may also provide for the continuation, during a transitional period, of certain obligations of the private entity with respect to the operation and maintenance of the facility. The agreement may also establish that the private entity will be obligated to supply or facilitate the supply of spare parts that may be needed by the contracting authority to carry out repairs in the facility. This measure should not be found in legislation but in the text

of the contract agreements, considering each project has different features and equipment

The consequences of the termination or extinction of the agreement (when it expires or earlier) should be defined in the agreement. Legislation should only provide guidelines on how the Public Administration ought to calculate any possible compensation for either party.



Recommendations

Hypothesis

The hypothesis for early termination must be expressly defined in the legislation and in the agreement;

In case of serious breach by the private entity, the legislation should establish that the private entity has access to due process;

In case of expropriation, the legislation must provide justification for the decision. It must also determine that the private entity receives compensation;

PPP legislation may establish that other hypothesis of early termination will be provided in the agreement.

Indemnity

The financial consequences of the termination or extinction of the agreement (when it expires or earlier) should be defined in the agreement;

Legislation should only provide guidelines on how the Public Administration ought to calculate any possible compensation for either party.



Recommendations

Reversibility

The legislation should address the condition of the assets that will be transferred to the Public Administration;

PPP legislation should also establish that the agreement provides how the transition of service will be achieved and the procedure for transference of assets;

Legislation should provide whether the private entity will be entitled to compensation and if so, under what conditions.



TRANSPARENCY AND ACCOUNTABILITY

14 TRANSPARENCY AND ACCOUNTABILITY

Main findings in this chapter:

Transparency is one of the pillars of democracy and allows stakeholders to defend their interests and avoid abuses.

Having an effective transparency law or providing information for the stakeholders may guarantee transparency for PPPs. However, having a transparency framework may not be enough and practices must also be a concern, due to the corruption incidents in Latin America and the Caribbean region.

Democracy is based on the power of the people and its legitimacy requires that the individual has access to the information of the Public Administration. Transparency of the Public Authority is achieved through citizens' access to government information, which makes relations between the State and civil society more democratic.

Clear rules, fairness and transparency can ensure an attractive environment for private investors and other potential partners of local government. Transparency and information sharing can also eliminate conflicts caused by incomplete or distorted knowledge.

Transparency includes sharing information and acting in an open manner. It allows stakeholders to gather information that may be critical to uncovering abuses and defending their interests. Transparent systems have clear procedures for public decision-making, open channels of communication between stakeholders and officials and open access to a wide range of information.

Transparency is not an end in itself, but an auxiliary instrument of the population for monitoring public management. It allows management to be collated and evaluated daily and has a preventive character, inhibiting situations of diversion and misuse of resources.

Transparency is characterized by its pro-active nature, wherein a citizen does not have to make special requests to access information. Open data and pro-active disclosure can play a fundamental role in demystifying PPPs, making their content, scope and progress accessible and understandable by everybody. Public foreknowledge of PPP projects translates into strong and sustainable development outcomes.

14 TRANSPARENCY AND ACCOUNTABILITY



The processes of bidding and contracting by the public administration are public. Its acts and documents must be made available to any interested party, except when they contain information pertinent to the security of the state. The rule is disclosure and secrecy, the exception.

Regarding PPPs, principles of transparency apply to the bidding process and the execution of the project and is applicable to all parties. The Public Administration and the concessionary are both obligated to behave in a transparent manner.

Several countries have specific legislation addressing transparency. Having a legal framework likely enhances the probability that parties will comply with principles of transparency. Almost all countries have a transparency law even though the PPP legal framework does not address the concept directly.

Transparency is at the very least guaranteed by law through the bidding process and the execution of the agreement. Latin America and the Caribbean have both experienced corruption scandals related to infrastructure projects. Therefore, the existence of a transparency law is not, in itself, a guarantee that the Public Authority or the private entity will act in good faith. The law is a necessary but not sufficient first step.

All countries analyzed consider transparency one of the pillars of the public activity and therefore should bear on the entire bidding process.

In order to ensure transparency and accountability, the Public Authority should be required to keep an appropriate record of key information pertaining to the selection proceedings. This is provided by law in Brazil, Paraguay, Peru, Ecuador, Uruguay and Mexico.

In Mexican legislation the Secretariat of Finance and the Secretariat of the Comptroller must publish information related to Federal PPP projects and their viability online. The proceedings for granting projects under the PPP Law in Mexico are subject to Federal Anticorruption Law for Public Bids.

The legislation of Peru deserves special attention as it provides that all information to support decisions made during the evaluation, development, implementation and rendering of account stages must be disclosed to the public. Only the information used to determine the competition factor for the bidding process is confidential. This framework is also present in Colombian law.

Law in Ecuador law establishes that the Annual Contract Plan must be published on the website of the Contracting Entity. This is also the case in Jamaican law.

All countries require that the PPP public notices and draft agreements be available online.

14 TRANSPARENCY AND ACCOUNTABILITY



Law in Peru establishes that interested third parties may access the tender documents, and make comments and suggestions to the agreement. These parties may request meetings and access the project's public documentation, to the co-financed private initiative and its modifications. The Private Investment Promotion Body must evaluate each consultation and respond to them in writing. The same provision is made by Ecuador's law.

Although this information is public, Uruguay establishes that the studies presented by private parties during the procedure are confidential to other bidders.

After the bidding procedure, all legislation in these regions establishes that the basic information regarding the PPP agreement must be made public. This measure permits public review of the Public Authority's actions and also guarantees that the procedure was duly carried out and was based on applicable principles and standards. In Brazil, any bidder may have access to the terms of the contract and the respective bidding process and any interested party may obtain a certified copy upon payment of fees.

The legislation of El Salvador establishes that the acts must not only be made public but also audited by the competent body.

During the execution of the PPP agreement, the provisions about transparency and accountability are linked with the monitoring of the contract itself. This encompasses the reports made by the contracting authority or by the independent supervisor that attest to the compliance or noncompliance of the agreement.


Paraguay's legislation establishes that all managing reports and audit reports must be available online. The PPP Unit must prepare an annual report about the management of PPP agreements, including the goals achieved.

This obligation ensures that all stakeholders are complying with their obligation: the private party is providing adequate service or work and the other stakeholders are overseeing the execution of the agreement.

In Argentina and Peru, PPP legislation requires the inclusion of an anti-corruption clause in all agreements. This provision is relevant at the moment, as each country analyzed has at least one big corruption scandal regarding private public contracting of infrastructure. Transparency can mitigate corruption by disclosing the government's decision making processes.

Transparency is about including, not excluding, all stakeholders. It is also about building awareness. Stakeholders might include: consumers, voters, bidders and the contracting authority itself. These individuals and groups need proper information about potential impacts, policies, partnership objectives and how partners will be chosen and contracted.

14 TRANSPARENCY AND ACCOUNTABILITY



The original bidding process and any subsequent changes should be made public and should be as open as possible. The breadth of transparency may depend on the circumstances in a given country, but it is imperative that all bidders have access to the same information about the project. Also, it is important that all relevant documents in the bidding process are made available, at least for those interested in participating in the bid.

Regarding the execution of the project after the award, legislation should establish that the reports on which the payment will be based on are made public because these impact the public budget. Nevertheless, if the country's transparency laws already address this matter, it is not necessary for the PPP law to do so.

Because all the countries analyzed have experience corruption related to public-private infrastructure projects, a transparency framework is not enough to guarantee real transparency.



Recommendations

The PPP legislation must provide that the bidding procedure is conducted transparently;

Legislation should also provide that all relevant documents for the bidding procedure are published, such as the request for proposal;

Legislation should establish that the reports on which the payment will be based are made public.

RECOMMENDATIONS SUMMARY



15 RECOMMENDATIONS SUMMARY

1 LEGAL AND INSTITUTIONAL FRAMEWORK

Having a PPP law that addresses these principles and is consistent with the practices adopted in the country, best practices and specific legislation applying to regulatory matters.

Legislation should define a Public Private Partnership.

Legislation should provide the obligation of having a specialized public body responsible for the promotion and management of the PPP project (PPP unit). It is preferable that the unit is only used for PPPs, but depending on the country's stage of development of private investments in infrastructure, the body can be responsible for all projects. The operation of the PPP unit may be defined in law or other regulation.

When necessary, especially in case of a federalist country, legislation should allow the creation of specialized PPP bodies at the regional, state or municipal level.

Legislation must clearly define which public bodies may hire a PPP.

2 APPLICABLE SECTORS AND ACTIVITIES

Legislation must explicitly detail which activities or sectors can pursue a PPP and which cannot. This measure provides security and clarity to investors.

It is not ideal for legislation to have a priori restrictions on activities and sectors, but rather should provide a clear mechanism that allows the procurement authority to decide whether to procure a PPP or not. (In some countries, these restrictions are the outcome of democratic processes and it is a political choice).

3 PPP MONITORING AND REGULATION

Supervision

Legislation should determine that PPP supervision and monitoring are done by a public body empowered with regulatory authority (i.e., a regulatory agency).

Legislation should establish that each PPP has a specific body responsible for monitoring the agreement. Legislation should also establish the procedures and powers that the inspector will have.

15 RECOMMENDATIONS SUMMARY



Legislation should establish that the agreement expressly defines performance standards with which the private party must comply.

Hiring an independent verifier to monitor the compliance of design, construction, operation and maintenance plan, performance standards may lead to the best execution of the project. Domestic legislation could include this possibility.

It is also possible for the legislation to provide a state auditor be appointed to monitor the compliance with KPIs. The auditor must have capacity to verify the compliance and be neutral.

Regulation

Proper inspection of the project is incentivized by requiring that private parties pay regulatory taxes to the relevant regulatory agency.

It is possible for the legislation to create or permit the creation of an independent regulatory agency for PPP contracts. This can minimize the risk of government policy interference in the contract and maintain the regulation of the agreement. However, it is important to keep in mind that any change in tariffs/taxes by the regulatory agency after the signing of the contract may affect the cashflows and the financial robustness of the private partner and the project. The PPP contract should provide mechanisms to adjust or mitigate this risk.

Legislation may provide that the agreements anticipate directives made by the regulatory agency to avoid breach of contracts during the operational phase.

4 MODELLING PPP PROJECTS

Public initiative

Specialized public bodies (PPP unit) enhance the modelling of PPP projects of public initiative;

Legislation should permit the contracting of private consultants that demonstrate the technical capacity for designing, preparing and structuring PPPs in order to help the Public Administration. The law should also detail the main issues related to contracting: contracting procedures and conditions, prohibition to participate in the bidding process, how the payment will be delivered.

Establish a PPP projects pipeline in the country to verify the priorities of the Public Administration.

15 RECOMMENDATIONS SUMMARY



Legislation must address the necessity of verifying if PPP is the best option (Value for Money or other method) and outline the criteria that must be examined in the pre-feasibility and feasibility studies (social, commercial, financial, environmental).

It is important that the legislation determine which bodies of the Public Administration must analyze and approve the studies and drafts produced.

Private initiative

Where unsolicited proposals are permitted, clear processes must be in place to ensure only quality proposals are submitted and processed.

There are several methods of incentivizing the preparation and submission of unsolicited proposals that still allow for a transparent and competitive procurement process. For example, the initial proponent of the unsolicited proposal may receive bonus points in the bidding process, or receive the benefits of a Swiss Challenge mechanism.

If the legislation provides the possibility of direct award, (which will not receive the benefit of a transparent bidding process), it is important that the law is clear regarding when this is permissible. At the same time, the government needs to ensure it has the capacity, practices and staffing to ensure it is receiving value for money, so that there is no doubt about the superiority of a direct award.

Legislation may provide the procedures for presentation of unsolicited proposals and for invitation for private parties to present studies. This includes establishing parameters for reimbursement and firm grounds.


5 PROCURING A PPP PROJECT

Legislation should have a clear procurement procedure.

All relevant documents must be published.

Request for proposals must contain all information necessary for the bidders to present their technical and economic proposals and should be published at least 90 days before the date for presentation of proposals. Proposals should be made available in the country's language and in another language customary used in international trade.

15 RECOMMENDATIONS SUMMARY



Foreign parties should be allowed to participate in the PPP procurement. Legislation may establish some limits or provide a preferential treatment for domestic entities, since it does not prejudice the equality between the bidders. Also, because it is a political decision, the technical recommendation and the motivation of the decision must be made public.

PPP law should allow the interested parties to request clarifications about the drafts of the tender documents.

The legislation must establish the conditions for the presentation of the proposals – whether in a single envelope or two-envelopes – and establish main technical and financial criteria that may be used to analyze the proposals.

There may be a provision allowing two-phase procedures in more complex projects with a pre-qualification before the financial and technical offers.

There may be a provision allowing for the reversal of sequence of the pre-selection and evaluation phases.

All decisions made by the Public Administration during the bidding process must be motivated by the public interest, particularly when ranking proposals.

There must be a permission in the legislation for bidders appeal the decision that awards the contract.

If negotiations are possible, the legislation must provide the terms and conditions for such negotiation. Negotiation of risk allocation and essential elements of the project should not be permitted.

6 INCOME STRUCTURE

PPP legislation must establish acceptable payments mechanisms for the project (availability and or use, tariff or other) and direct feasibility studies to take the sector and nature of the project into account when deciding upon a payment mechanism.

PPP legislation should recommend the development of KPIs in the agreement and that failure to meet these benchmarks may result in a reduction in payment by the contracting authority.

PPP legislation should also permit the collection of alternative revenues by the private party and provide the procedure for its implementation and possible sharing with the Public Administration.

It is paramount that the legal framework establish how the contracting authority will make payments.



7 DISPUTE SETTLEMENT

PPP legislation should permit the use of alternative mechanisms of dispute resolution and establish these procedures including arbitration. It is also important that a country's legislation establishes an award enforcement mechanism, such as the UN Convention on the Recognition Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention")

PPP legislation may also permit the use of international arbitration such as the one from the World Bank (International Center for Settlement of Investment Disputes - ICSID).

8 DEALING WITH CHANGES

Possible changes

Legislation must provide examples of foreseeable changes that impact the agreement and outline mechanisms to address these changes.

For unforeseeable events, legislation should at least account for such an eventuality, and outline adjustment mechanisms that can be used in these instances.

Periodic revisions

PPP legislation should provide for the periodic revisions of economic and technical conditions. These changes should only be permitted in certain situations.

The frequency of the revisions should be based upon the sector and nature of the project.

Procedure

The legislation should permit the extraordinary revision of the agreement's balance when necessary.

Legislation should delineate the conditions under which the private party may ask for a renegotiation (if there is a standstill period, i.e.)

Legislation must establish procedures for rebalancing agreements, and define when such renegotiation is necessary. This must include the agreement's requirement for indemnity.

Legislation should also establish a minimum value threshold to be met before renegotiation is permitted to avoid frivolous renegotiations resulting from small changes.



9 FINANCING, FUNDING AND WARRANTIES

PPP legislation should allow the private entity to the private partner (financial institutions) to give guarantees based on assets and incomes from PPP agreements on a non-recourse financing

Legislation should also provide some rights to the lenders, such as step-in right to ensures continuity for the project.

In order to improve the participation of private parties in infrastructure projects, the Public Administration may provide incentives or benefits for those interested in investing. The legislation should outline possible benefits and when they may be granted.

Legislation should provide guarantee instruments provided by the Public Administration that mitigate the financing risk assumed by the private party. To this end, multilateral organizations and development banks are particularly important.

10 EXTRAORDINARY EVENTS

Legislation should define extraordinary events.

PPP legislation should provide that the risk for extraordinary events is expressly addressed in the agreement.

It is desirable that the legislation provides minimum guidelines on how to manage the effects of an extraordinary event.

Legislation must establish that the PPP agreement will provide the procedure for indemnity, suspension or early termination.

11 PUBLIC AUTHORITY'S PREROGATIVES

Unilateral change

If the legislation does not provide any limits for unilateral changes, any request in this matter must be motivated and justified. These changes should be allowed only under very strict conditions. From the private sector's perspective, they will want some certainty around unilateral changes. At times it may be in the interests of the government to limit unilateral changes in the interests of providing certainty. At other times, it will need to use its prerogative, due to public interest concerns. The considerations should be appropriately balanced.

15 RECOMMENDATIONS SUMMARY



Legislation should provide that any unilateral change results in appropriate compensation to the private party. The procedure must be determined by the legislation.

Legislation should set some value threshold for cases of changes or establish that the agreement provides such a threshold.

Suspension

The legislation must establish the conditions under which the agreement's execution will be suspended and for how long.

It should also provide how the Public Administration will maintain the public servicer provision.

If a project will be re-contracted, the legislation should establish a maximum period for the new contract.

Unilateral early termination

Legislation must establish the conditions under which early termination of the agreement is possible.

Legislation must establish how the private party will be indemnified.

There should be legal provisions establishing how an early termination can be authorized by a competent public body.

Penalties

Any penalty to be applied to the private party must be previously defined in the agreement and must have been object of an administrative procedure in which the private party has the right to defend itself.

12 RISK ALLOCATION

The legislation should establish that the PPP agreement allocate the risks involved and its due mitigation. This is sometimes achieved via a risk matrix.

13 PPP TERMINATION

Hypothesis

The hypothesis for early termination must be expressly defined in the legislation and in the agreement.

15 RECOMMENDATIONS SUMMARY



In case of serious breach by the private entity, the legislation should establish that the private entity has a right to due process.

In case of expropriation, the legislation must provide justification for the decision. It must also determine that the private entity receives compensation.

PPP legislation may establish that other scenarios for early termination will be provided in the agreement.

Indemnity

The financial consequences of the termination or extinction of the agreement (when it expires or earlier) should be defined in the agreement.

Legislation should only provide guidelines on how the Public Administration ought to calculate any possible compensation for either party.

Reversibility

The legislation should address the condition of the assets that will be transferred for the Public Administration.

PPP legislation should also establish that the agreement provides how the transition of the service will be achieved and the procedure of transfer of the assets.

Legislation should provide whether the private entity will be entitled to a compensation and if so, under what conditions.

14 TRANSPARENCY AND ACCOUNTABILITY

The PPP legislation must provide that the bidding procedure is conducted transparently.

Legislation should also provide that all relevant documents for the bidding procedure are published, such as the request for proposal.

Legislation should establish that the reports on which the payment will be based are made public.

ANNEX 1 ARGENTINA



ARGENTINA

Legislation analyzed:

Law 27,328, and Decrees 118/2017, 944/2017, 808/2017, Law 27,431.

Date of analysis:

June 20, 2018.



Legal and institutional framework

■ PPPs are regulated by Law No. 27,328, which provides guidelines for the agreements and their bidding process.

■ PPP agreements are those executed between the bodies and entities of the national public sector and private or public entities - as contractors, whose object is the design, construction, expansion, improvement, maintenance, supply of equipment and goods, operation or operation and financing (Article 1 of the Law).

■ Article 2 of the Reglamento created the PPP Unit within the scope of the Ministry of Finance and article 28 provides its functions:

- Advise the Executive Branch in the preparation of programs and development plans for PPP projects;
- Assist the Executive Power in the preparation of regulatory provisions for the general operation of the public-private participation system, as well as manuals, guides and contractual models of general application, among others;
- Advise at the request of the contracting entities in the design and structuring of the projects, including the realization of feasibility studies, preparation of bidding documentation, national and / or international promotion of the projects, and the implementation of the procedures for selection of contractors;
- Advise at the request of the contracting entities in the design, organization and operation of control systems of activities in charge of their respective contractors;
- Attending to the requirements of the contracting entities in the processes of strengthening their capacities for the structuring and control of the development of public-private participation projects;
- Assume delegated functions in terms of structuring and / or control of public-private participation projects from the respective contracting entities, in compliance with the current regulatory framework;
- Concentrate all the antecedent documentation of each of the contracts.

2

Applicable sectors and activities

■ According to Law 27,238, the purpose of PPPs is to develop projects in infrastructure, housing, activities and services, productive investment, applied research and/or technological innovation. (Article 1 of the Law).

3

PPP monitoring and regulation

■ The functions of regulation and police power of the State are non-delegable. The agreement will be subject to the control of the contracting party or of the organ created for that purpose in the respective jurisdiction. The contracting party will have broad powers of inspection and control, being able to require any type of information related to the fulfillment of the contract and development of the project, guaranteeing the confidentiality of commercial or industrial information in the terms of the current legislation. The regulation or the specifications may provide for the possibility of going to external auditors with sufficient technical suitability, independence and impartiality and proven national or international experience in controlling the execution of projects (Article 21 of the Law)

■ All sanctions that may be applicable to the PPP Contractor must be detailed, being prohibited to apply sanctions not foreseen in the Bidding Document or in the PPP Contract or exceed the limits established therein. Prior to the application of the sanction, the adjective due process of the PPP Contractor must be safeguarded for which a reasonable period of time must be granted. (article 9 of the Reglamento)

■ There will be a Technical Auditor to supervise the agreement. Without prejudice to the powers of the Technical Auditor, the Contracting Entity shall be authorized to carry out, at its own expense and through its own officers or by a suitable third party designated by him, the follow-up of the Project. (Article 21 Regulation)

■ Article 2 of the Law provides that in cases where the PPP contract involve the provision of public services governed by specific regulatory frameworks, such regulatory frameworks will be applicable to the provision of such services.

■ The General Audit of the Nation shall include in each annual action plan the audit of all existing public-private participation contracts, their development and result (Article 22 of the Law)

4

Modelling PPP projects

■ When the complexity or amount of the project justifies it, a transparent procedure of consultation, debate and exchange of opinions between the contracting party and the prequalified interested parties may be established, based on the experiences, technical knowledge and best practices available for each one of them. The parties, to develop and define the most convenient solution to the public interest on the basis of which the offers have to be formulated. The implementation of this procedure should ensure the intervention of the public-private participation unit and guarantee transparency, concurrence, publicity, dissemination, effective competition and the simultaneous and equal participation of all prequalified stakeholders, promoting, among other factors and according to the characteristics of the project, the direct and indirect participation of small and medium enterprises and the promotion of industry and national work (Article 14 of the Law).

■ The adjudication must fall on the offer that is considered the most convenient for the public interest, being in accordance with the conditions established in the bidding or bidding rules and with the prior opinion of the public-private participation unit. The bidding documents must promote in their guidelines for the selection of the successful bidder criteria that determine comparative advantages in favor of domestic companies over foreign and those in favor of those considered micro, small and medium enterprises, except that the PPP Unit through a well-founded report, justifies the convenience or necessity of its exclusion in the particular conditions and needs of the project (Article 15 of the Law)

5

Procuring a PPP project

■ The selection of the contractor will be made through the bidding process or public, national or international tender according to the technical complexity of the project, the participation capacity of local companies, economic and/or financial reasons linked to the characteristics of the project, the available contracting capacity, and / or the origin of the funds when dealing with projects that require external financing. Transparency, publicity, dissemination, equality, concurrence and competence in the selection procedures and acts dictated accordingly must be guaranteed. For such purposes, the contracting party must ensure the comparability of the proposals, guaranteeing the homogeneity of criteria, providing and establishing, with clarity, the bases, requirements and other projections that are necessary for the preparation of the offers (Article 12 of the Law)

■ Prior to making the call for bids or public tender for the award and subsequent conclusion of a PPP contract, the grantor must issue an opinion (Article 13 of the Law)

■ There must be a VFM evaluation (Article 13 of the Law)

5

Procuring a PPP project

■ Public bidding or public bidding procedures may be:

- Single or multiple stage.

The tender or the public tender will be of a single stage when the comparison of the offers and qualities of the Bidders takes place in the same act. When the specific characteristics of the Project, such as the high degree of complexity of the object or the extension of the term of the contract, justify it, the tender or the public tender must be implemented under the modality of multiple stage. The tender or public tender will be of multiple stage when evaluating and comparing the qualities of the Bidders, the business and technical background, the economic-financial capacity, the guarantees, the characteristics and contributions that are intended to be made in the Project, the analysis of the economic, technical and financial components of the offers, as well as of any other variable that are contemplated in the selection criteria, is carried out in 2 or more phases and through successive preselection.

■ The tender documents will be prepared and approved by the grantor.

■ The technical specifications of the specifications of the bases and particular conditions must be prepared in such a way as to allow access to the selection procedure under equal conditions of the Bidders and not have the effect of creating unjustified obstacles to the participation of interested parties and competition between Bidders.

■ Offers must be presented at the place and until the day and time determined by the grantor in the call. In the place, day and time determined to celebrate the act, will proceed to open the bids in the presence of officials of the designated units and all those who wish to witness it. No bid presented in term may be rejected in the opening act. Those that are observed will be added to the file for analysis. The possibility of modifying the offer will preclude with the expiration of the deadline to present it, without alteration in the essence of the offers after that circumstance and during the entire Bid.

■ In case of equality in the terms of the bids, the provisions on preferences and tie-breaking mechanisms established by the Bidding Terms and the applicable regulations shall apply.

■ The award must fall on the offer that is considered the most convenient for the public interest, being in accordance with the conditions established in the bidding rules.

6

PPP incomes

■ Article 9 of the Reglamento provides that:

- The payment may be agreed in money or other assets.
- The PPP Contract may provide automatic or non-automatic mechanisms for reviewing the payment for variations in costs, including financial costs. In the case of non-financial cost variations and non-automatic review procedures, these will be enabled in accordance with the provisions of the Bidding Document or the PPP Contract.

7

Dispute settlement

■ For all disputes that may arise as a result of the execution, application and / or interpretation of the contracts concluded under the regime established by this law, the bidding terms and conditions and the corresponding contractual documentation may determine the possibility of establishing mechanisms of agreement and / or arbitration (Article 25 of the Law). In case of opting for arbitration with extension of jurisdiction, this must be approved in an express and non-delegable form by the national Executive Power and communicated to the Honorable National Congress.

■ The contract may provide that the payments accrued by the contractor during the processing of the controversy must be made effective to the extent that they are not reached by it. In this case, if the administration or, as the case may be, the technical consultant appointed for that purpose, verifies that the contractor has duly fulfilled its contractual obligations, the funds reached by the controversy must be deposited by the contracting party, in accordance with the regulations, in an escrow or escrow account until its final resolution (Article 27 of the Law).

■ There may be a Technical Panel that will be integrated by 5 members, who must have a specialization according to the matter of the contract in question and will remain in their functions during the entire period of execution of the PPP Contract. The expenses incurred by the operation of the Technical Panel, including the fees of its members, shall be met in equal parts by the Parties. Unless otherwise provided in the Bidding Document or in the PPP Contract, any dispute of a technical, interpretative or patrimonial nature that may arise during the execution or termination of the PPP Contract, including the review of the penalties that may be imposed, may be submitted to the Technical Panel's resolution. They are imposed on the PPP Contractor and on any other act or measure dictated by the Contracting Entity that has effects on the PPP Contract. The Technical Panel will be issued on the disputes that are submitted to it through recommendations. The recommendations will only be obligatory for the Parties in case none of them has raised their disagreement within the term foreseen for the purpose in the Bidding Document or in the PPP Contract (Article 9 of the Reglamento).

<p>7</p> <p>Dispute settlement</p>	<p>■ In those cases where the bidding process or the PPP Contract had foreseen the existence of a Technical Panel, no controversy of a technical, interpretative or patrimonial nature may be submitted to the competent Judicial or Arbitral Tribunal without first having been submitted to the Technical Panel, with the exception of the termination of the PPP Contract for reasons of public interest. This is without prejudice to the right of the Parties to request at any time from the competent Judicial or Arbitral Court the issuance of the precautionary measures that may be necessary.</p>
<p>8</p> <p>Dealing with changes</p>	<p>■ The PPP Contract must contain mechanisms to reestablish, within a maximum period fixed for the purpose in the Bidding Document, its original economic-financial equation when it is significantly altered for unforeseeable reasons at the time of adjudication and unrelated to the party invoking the imbalance, all this, in the terms contemplated in the Bidding Document. Upon expiration of said period without a satisfactory solution for the affected Party, it may appeal to the Technical Panel, if any, or in its absence to the arbitration or to the competent judicial tribunal, as it had been foreseen in the Bidding Document. It will be considered that an alteration is significant when the parameters that, for this purpose, should be established in the Bidding Document and in the PPP Contract have been reached (Article 9 of the Reglamento).</p>
<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ The payment obligations assumed within the framework of what is established in this law by the contracting party, may be solved and / or guaranteed by (Article 18 of the Law):</p> <ul style="list-style-type: none"> • The specific affectation and / or the transfer of tax resources, goods, funds and any kind of credits and / or public revenues, with the corresponding authorization of the National Congress; • The creation of trusts and / or use of existing trusts. In this case, the fiduciary property of tax resources, credits, assets, funds and any kind of property may be transferred in an exclusive and irrevocable manner and in the terms of the provisions of Article 1,666 and following of the Civil and Commercial Code of the Nation. • Public income, after authorization of the National Congress; • The granting of bonds, guarantees, guarantees by entities of recognized solvency in the national and international market and / or the constitution of any other instrument that fulfills the guarantee function, provided that it is admitted.

9

Financing and Funding PPP agreements and Warrantees

■ Guarantees may be established on the exploitation rights of public or private domain assets that have been granted to the contractor to guarantee the repayment of the financing necessary to carry out the projects (Article 19 of the Law)

■ In order to structure the financing of the Project, the PPP Contractor may contract loans, issue debt securities with or without public offer, set up trusts, financial or otherwise, that issue debt securities or certificates of participation, create mutual funds and / or any other financial structure that could be guaranteed through the assignment of the PPP Contracts and / or the credit rights arising from the PPP Contract and its corresponding guarantees. In particular, the PPP Contractor may be financed by assigning the PPP Contract and, where applicable, its guarantees, to the Financing Entities as collateral. Such assignment in guarantee will not be subject to the requirements foreseen by subsection t) second and third paragraph of article 9 of the Law, but in order for such guarantee to be executed, it must previously comply with these requirements. The cession of the creditor rights arising from the PPP Contract must be notified to the Contracting Entity in the terms of article 1620 of the Civil and Commercial Code of the Nation. The assignments provided for in this subsection may be made as a guarantee or in full or partial payment.

■ In the event that the Project is fully or partially funded by the flow of the consideration for use, it will be considered fulfilled with the publication of the cession for the term of 3 days in the Official Gazette and in its case also in a newspaper of the jurisdiction of the Project. Said cession must be, in all cases, communicated to the Contracting Entity, which -in its case- will provide notification to the users in the event of modifying the payment address to which they are obliged (Article 9 of the Reglamento).

10

Extraordinary events

■ The equitable and efficient distribution of contributions and risks between the parties to the contract, contemplating the best conditions for preventing, assuming or mitigating them, in such a way as to minimize the cost of the project and facilitate the conditions of its financing, including , among others, the consequences derived from fortuitous event, force majeure, extraordinary economic imbalance of the contract and the early termination of the contract (Article 9 of the Law)

11

Public authority's prerogatives

■ Art. 9 of the Law provides that about variations to the PPP Contract.

<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The alterations that are a consequence of the variations to the PPP Contract that the Contracting Entity is authorized to establish unilaterally only in relation to the execution of the Project, shall be compensated to the PPP Contractor by modifying some factor of the economic regime of the PPP Contract. The calculation of the compensations and the adjustment of the factors mentioned above must always be carried out in such a way as to obtain that the net present value of the variations is equal to zero, all this considering the applicable discount rate as provided by the tender documents and / or the PPP Contract and the economic effect that the variations may have on the Project.</p> <p>.....</p> <p>■ The unilateral termination of the PPP Contract for reasons of public interest must be declared by Decree of the National Executive Authority.</p> <p>.....</p> <p>■ The valuation methodology and the procedure for determining the compensation that may correspond to the PPP Contractor in cases of early termination of the PPP Contract by the Contracting Entity, shall be established in the Bidding Document and in the PPP Contract, based on the principles and procedures that, generally and internationally, are accepted in the matter (Article 10 of the Law).</p>
<p>12</p> <p>Risk allocation</p>	<p>■ The equitable and efficient distribution of contributions and risks between the parties to the contract, contemplating the best conditions for preventing, assuming or mitigating them, in such a way as to minimize the cost of the project and facilitate the conditions of its financing, including, among others, the consequences derived from the fortuitous event, force majeure, extraordinary economic change of the contract and the early termination of the contract (Article 9 of the Law).</p>
<p>13</p> <p>PPP termination</p>	<p>■ In all cases of early termination of the contract by the contracting party, prior to taking possession of the assets, the contractor must be paid the total amount of the compensation that could correspond according to the valuation methodology and determination procedure that in this respect are established in the regulations and in the relevant contractual documentation, which in no case may be less than the investment not amortized (Article 10 of the Law).</p> <p>.....</p> <p>■ The specification of movable and immovable property that will revert or that will be transferred to the national State upon termination of the contract, being able to agree that the ownership of the work or infrastructure that is built will only pass to the State upon completion of the execution of the contract (Article 9 of the Law).</p>

14

Transparency and accountability

■ Queries to the Bidding Process must be made in writing (Article 12 of the Reglamento)

■ In the opportunity to make a query to the Bidding Process, the consultants who had not done it previously must supply their basic information (Article 12 of the Reglamento).

■ PPP public notices and draft agreements must be available online (Article 12 of the Reglamento)

■ The Ministry of Finance shall issue an opinion on each Project with respect to the following aspects: (i) the reasonableness of the use of public resources and (ii) the terms and conditions of the PPP Contract in its economic and financial aspects with regard to the assumption of risks and obligations by the National Public Sector. (Article 6 of the Law)

■ One of the guidelines of PPP procurement is transparency on procedures and decisions (Articles 12 and 14 of the Law)

■ The agreement must provide an anticorruption clause (Article 24 of the Law)

ANNEX 2 BRAZIL



BRAZIL

Legislation analyzed:

Law 11,079/2004, Law 8,987/1995, Law 8,666/93, Decree 8,428/2015 and Law 12,527/2011

Date of analysis:

June 07, 2018



Legal and
institutional
framework

■ PPPs are regulated by Federal Law No. 11,079/2004, which provides guidelines for the agreements and their bidding process. States and municipalities may also provide their own rules if they do not contradict or violate federal directives.

■ Subsidiarily, PPPs are regulated by Laws 8,987/1995 (concession rules) and 8,666/1993 (bidding process general rules).

■ PPPs in Brazil are a new concession modality, in which private companies can provide public services, operate public assets and/or provide services directly to the government. The private partner is paid directly by government and may charge tariffs only in some cases. (Article 2 of Law No. 11,079/2004)

■ There are 2 types of PPPs in Brazil: the Sponsored Concession and the Administrative Concession. Both follow the same reasoning provided in federal guidelines:

- sponsored concession: private partner charges tariffs from users and gets paid directly by the government;
- administrative concession: private partner is compensated exclusively by the government (Article 2 of Law No. 11,079/2004).

■ PPPs may be procured by the Executive and Legislative Powers, including public foundations, agencies, state-owned companies and others entities directly or indirectly controlled by the Union, States, Federal District or Municipalities. (Article 1 of Law 11,079/2004)

■ The federal body responsible for federal PPPs is the Managing Committee (*Comitê Gestor* - CGP), regulated by Decree 5,385/2005. Representatives of several Ministries are members of the entity, which must approve matters related to PPP programs, such as authorize the opening of a bidding procedure and evaluate / monitor the execution of agreements.

<div>1</div> <p>Legal and institutional framework</p>	<ul style="list-style-type: none"> ■ CGP has the following responsibilities: <ul style="list-style-type: none"> • propose to the Council of the Program of Investment Partnerships of the Presidency of the Republic priority services for execution in the regime of public-private partnership and the criteria to subsidize the analysis on the convenience and opportunity of contracting under that regime; • discipline the procedures for entering into public-private partnership contracts and approve their amendments; • authorize the opening of bidding procedures and approve the convening instruments and contracts and their amendments; • to evaluate and approve the semi-annual reports of execution of public-private partnership contracts, sent by the Ministries and Regulatory Agencies, in their areas of competence; • prepare and send to the National Congress and the Federal Audit Court an annual report on the performance of public-private partnership contracts, and make available, through a website, the information contained therein, with the exception of those classified as stealthy; • approve the Public-Private Partnerships Plan (PLP), monitor and evaluate its execution.
<div>2</div> <p>Applicable sectors and activities</p>	<ul style="list-style-type: none"> ■ PPPs may not be used if their sole purpose is to supply labor, supply or install equipment and execute public works. Additionally, PPP agreements may not be executed if their total amount is less than R\$ 10,000,000.00 and their term is shorter than 5 years (Article 2 of Law No. 11,079/2004). <p>.....</p> <ul style="list-style-type: none"> ■ Regulation, jurisdiction and the police power may not be objects of a PPP agreement (Article 4 of Law No. 11,079/2004).
<div>3</div> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ Ministries and public agencies are responsible, within their respective fields of authority, for monitoring and overseeing the agreement's execution (Article 15 of Law No. 11,079/2004). <p>.....</p> <ul style="list-style-type: none"> ■ The public partner remuneration can be bound to its performance, according to goals and quality standards defined by the agreement. (Article 6 of Law No. 11,079/2004) <p>.....</p> <ul style="list-style-type: none"> ■ Contracts may provide mechanisms to revise tariffs in order to maintain the economic-financial balance.

4

Modelling
PPP
projects

■ Authorities may model projects in different ways:

- independently, using their own technical body;
- engaging external consultants to help them develop studies and project documents such as the agreement and the bidding notice. Local authorities may also team up with an international organization, promoting a partnership with the World Bank, for example, which will help deliver studies and other documents to launch the project;
- gather contributions from the private sector (Decree 8,428/2015).

■ According to Decree 8,428/2015, authorities may gather contributions from the private sector in 2 ways:

- Expression of Interest (*Procedimento de Manifestação de Interesse* – PMI): for procedures in which the authorities request private companies' contributions in a certain modeling; and
- Unsolicited Proposals (*Manifestação de Interesse da Iniciativa Privada* – MIP): in which private companies present proposals / model a certain project without having been previously requested to do so. After authorities accept the proposal of the company, an invitation to present studies is published, and any interested party may also present their studies to model the project. Either way, interested companies must comply with the requirements in an invitation to present studies. It is common that interested companies are required to present an authorization in which they attest to their qualification and experience, and demonstrate their working schedule to present their studies. In both cases (MIP and PMI), private companies will be reimbursed of the costs of the studies if theirs are selected by the authorities and if the project is awarded to them. In case of a successful bidding process, the winner of the procurement is the one responsible for paying for such studies.

■ Irrespectively of how a project is modeled, the definition of the technical studies have a common scope, essential to structure a concession project or PPP. This scope covers:

- engineering and operational technical studies;
- environmental studies;
- economic studies and business model;
- risk assessment and its definition.

4

Modelling PPP projects

- For a PPP project to be issued, it must cover the following elements:
 - authorization from the competent body, based on a technical study;
 - a estimation of the impact on the budget during the years that the agree-
ment is in force;
 - a statement by the expense manager establishing that the obligations con-
tracted by the Government during the term of agreement are compatible with
the budgetary directives law;
 - estimate of a flow of public funds sufficient to meet, during the term of the
agreement and per fiscal year, the obligations contracted by the Government;
the scope must be set forth in the multiannual plan in force to which the agree-
ment is related;
 - submission of the draft of the call for tender and the agreement, for public
inquiry through its publication in the official press, in large circulation newspa-
pers and electronically, which should inform the justification for contracting,
the identification of its purpose, the agreement effectiveness, the estimated
contractual amount, allowing at least 30 days to receive suggestions, and with
a deadline that should fall at least 7 days before the date established for the
publication of the call for tender;
 - prior environmental license or enactment of directives for the environment
licensing of the undertaking, in the form of regulations, whenever the agree-
ment purpose so requires. (Article 10 of Law 11,079/2004).

5

Procuring a PPP project

- PPP public biddings are guided by Law 11,079/2004, but they must also
obey general rules of Law 8,666/1993.

- The competition procedure is mandatory for PPP projects (Article 10 of
Law 11,079/2004).

- Competition procedure is a type of bidding among any interested parties
that meet the minimum qualification requirements set forth in the invita-
tion to bid, to perform the object of the bidding process (Article 22 of Law
8,666/1993).

- Foreign companies may participate in PPP bidding processes (Article 23
of Law 8,666/1993).

5

Procuring
a PPP
project

■ The tender document and the agreement must be subjected to public consultation for at least 30 days (Article 10 of Law 11,079/2004).

■ The judgment may be preceded by a qualification stage of technical proposals. The bidders that do not reach the minimum score will be disqualified, and will not participate in the following stages (Article 12 of Law No. 11,079/2004).

■ The following judgment criteria may be used in PPP bidding processes:

- the lowest price to be paid by the Government;
- the best bid combining price and technical criteria (Article 12 of Law 11,079/2004).

■ The examination of technical proposals, for purposes of qualification or judgment, will be made by a motivated act, based on requirements, parameters and outcome indicators pertinent to the object, defined with clarity and objectivity in the public notice (Article 12 of Law No. 11,079/2004).

■ The tender document may include a provision allowing reversal of the order of the preselection and evaluation phases (Article 13 of Law No. 11,079/2004).

■ Prior to the execution of any PPP agreement, a special purpose entity must be organized to manage the project (Article 9 of Law 11,079/2004).

6

PPP
incomes

■ The Government payment in public-private partnership contracts may be made by:

- bank order;
- assignment of non-tax credits;
- granting rights with Government;
- granting of private property of the government;
- other means allowed by law (Article 6 of Law No. 11,079/2004).

6

PPP incomes

■ The agreement may provide for the payment to the private partner of variable compensation linked to their performance, according to the goals and quality and availability standards defined in the agreement (Article 6 of Law 11,079/2004).

■ In Sponsored PPPs, in addition to payments made by the Government, the private partner also receives tariffs paid by users (Article 2 of Law 11,079/2004).

■ It is possible to obtain accessory revenue by exploring other activities related to the PPP object, such as advertising (Article 11 of Law 8,987/1995).

■ Public resources in Sponsored PPPs may not exceed 70% of the total amount of the remuneration due to the private partner (Article 10 of Law 11,079/2004).

■ The government may make payments before the services are available, for the implementation and progress of the project. This mechanism is called aporte (Article 6 of Law 11,079/2004).

7

Disputes settlement

■ It is possible to resolve disputes by a formal request to the contracting public entity of the project. It is a type of administrative procedure, whose rules must be based on general principles of administrative law. It is common for each federative entity to publish its own rules on internal administrative processes. For the Federal Government, there is Law 9,784/99.

■ It is also possible that the PPP agreement provides that some technical matters be resolved by a specialized committee, usually with three members (one representative of each party plus a neutral third party), whose purpose is to issue an opinion about a dispute related to technical matters.¹

■ Arbitration Law (9,307/96) and Law 11,079/2004 provide that arbitration may be used to resolve disputes, although its use is limited and subject to discussion. Article 11, III of Law 11,079/2004 requires that the arbitration be conducted in Brazil and in Portuguese.

¹ This mechanism does not have a specific legal provision, but it is currently applied to PPP agreements.

8

Dealing
with
changes

■ Public agreements may be unilaterally amended by the Government when:

- whenever the project or its specifications are modified, for better technical adequacy to its objectives;
- when the amounts set forth in the agreement have to be adjusted because of quantitative increase or decrease of the scope of the agreement, limited to 25% of the initial amount of the agreement. (Article 65 of Law 8,666/1993).

■ PPP agreement may be amended if an unexpected event breaks its economic balance, regarding risk allocation. However, any unilateral change made by the Government must be calculated and compensated (Article 9 of Law 8,987/1995).

■ Sponsored PPP agreements may provide mechanisms of tariff review, to maintain the economic balance (Article 9 of Law 8,987/1995).

■ Except for income taxes, any changes to taxes or legal charges, after the proposal has been submitted, result in tariff adjustment (increase or decrease). (Article 9 of Law 8,987/1995).

■ The control of the special purpose entity may be changed (Article 9 of Law 11,079/2004).

9

Financing
and
Funding
PPP
agreements
and
Warrantees

■ Project receivables may be given as guarantee (Article 28 of Law 8,987/1995 and article 5, Law 11,079/04);

■ The agreement may be transferred to the investors (Article 5 of Law 11,079/2004).

■ Usually, the private party is responsible for financing the project, executing a financing agreement with a bank, issuing bonds or using its equity. Normally, having financing is not a condition precedent to executing a PPP agreement, but sometimes it may be included in a way-out clause. That means that, if the private partner does not obtain enough funds within a certain period, the agreement is terminated.

<p>10</p> <p>Extraordinary events</p>	<p>■ Risks in Extraordinary events are generally shared. Extraordinary risks are managed by the Government by maintenance of the economic-financial balance of public contracting. This mechanism ensures that the economic and financial conditions on which the parties have relied to enter into the agreement will be maintained until its expiration. (Article 5 of Law 11,079/2004).</p> <p>.....</p> <p>■ PPP agreements may be modified to reestablish the relationship initially agreed upon by the parties, with respect to the obligations of the contractor and award by the government by just remuneration for the works, services or supply. The goal is to maintain the agreement's initial financial and economic balance, in case unforeseen events or foreseen events whose consequences cannot be estimated, or if such consequences delay or prevent the full performance of the terms of the agreement or, in case of force majeure event or acts of God that may result in financial losses or liability for economic damages not established in the agreement (Article 65 of Law 8,666/1993).</p>
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The Government may unilaterally amend the agreements so they better suit public interest purposes, respecting the contractor's rights (Article 58 of Law 8,666/1993).</p> <p>.....</p> <p>■ The Government may unilaterally terminate agreements in several cases; for example, when the private partner is not complying with the agreement clauses and obligation (Article 78 of Law 8,666/1993).</p>
<p>12</p> <p>Risk allocation</p>	<p>■ The risks in PPPs must be objectively allocated in the agreement, even those related to acts of God, force majeure events, government acts that affect the contract, and extraordinary economic risk (Articles 4 and 5 of Law 11,079/2004).</p>
<p>13</p> <p>PPP termination</p>	<p>■ Early termination cases (Article 35 of Law 8,987/1995):</p> <ul style="list-style-type: none"> • Agreement's termination – applicable when the government breaches the contract, but a court must declare the actual termination of the agreement; Expropriation by the Government – early termination of the agreement because of public interest; requires a specific law authorizing the expropriation and payment of indemnification by the government to the private entity; • Concession forfeiture – applicable in situations of breach of contract by the private entity (concession law establishes several cases for forfeiture, but the concession agreement must provide all cases applicable); • Annulment of the agreement – upon prior court decision attesting violation of laws;

13

PPP
termination

- Bankruptcy or dissolution of the private entity;
- Force majeure event – if it hinders the execution of agreement's scope.

■ Upon termination of the agreement, the private partner must transfer all reversible assets (used to carry out the contracted activities) to the Government (Article 35 of Law 8,987/1995) and, depending on the case, a compensation may be due (Article 36 of Law 8,987/1995).

■ When the PPP is extinct, the public party must immediately take the project over (Article 35 of Law 8,987/1995).

14

Transpa-
rency and
accoun-
tability

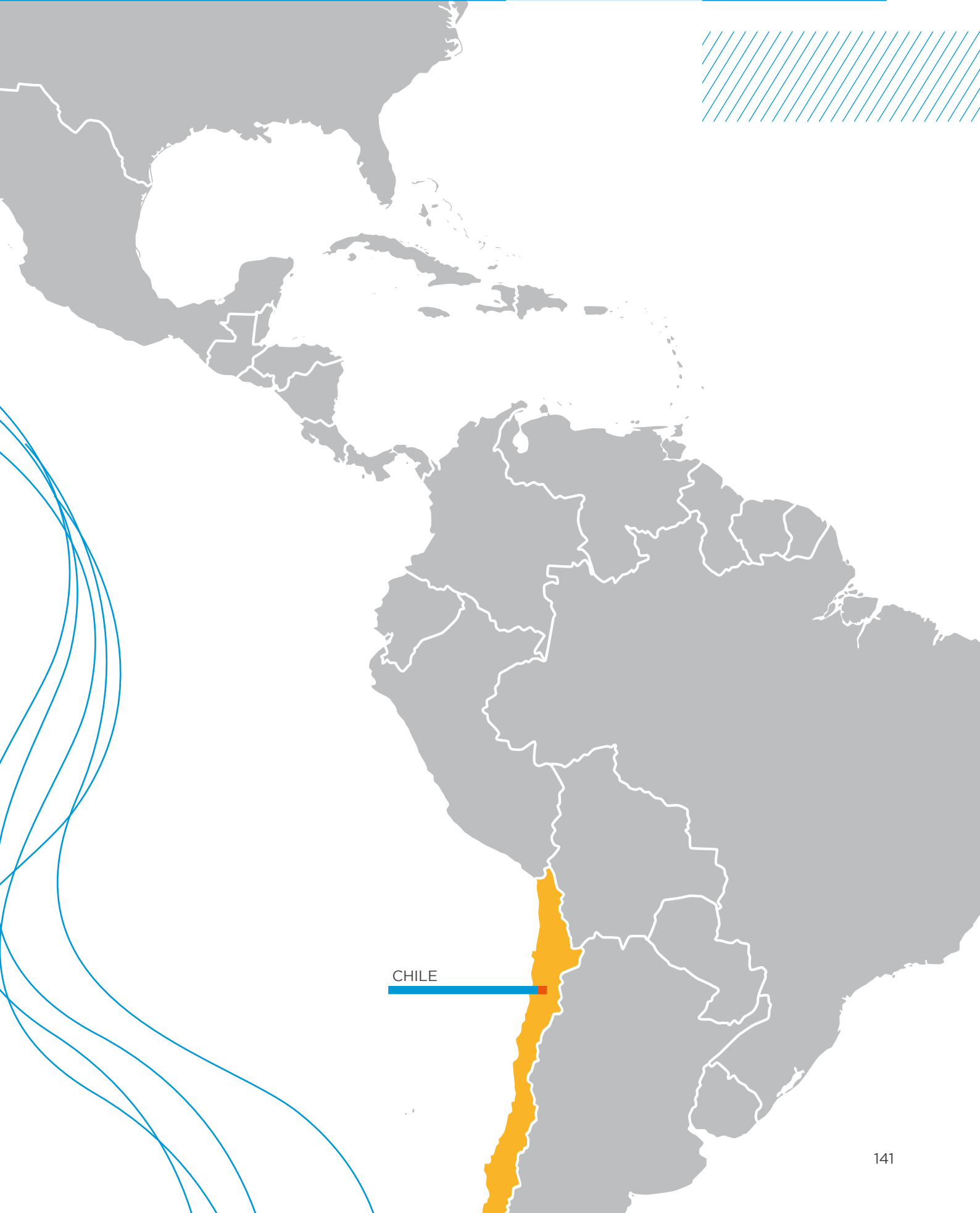
■ PPP public notices and draft agreements must be available online (Articles 10 of Law 11,079/2004).

■ Any bidder may have access to the terms of the contract and the respective bidding process and any interested party may obtain a certified copy upon payment of fees (Article 63 of 8,666/1993).

■ All information regarding the management of public assets, use of public resources, bidding, and administrative agreements must be available (Article 7 of Law 12,527/11).

■ One of the guidelines of PPP procurement is transparency of procedures and decisions (Article 4 of Law 11,079/2004)

ANNEX 3 CHILE



Legislation analyzed:

Decree 900/96 (Ley de Concesiones de Obras Publicas) and Decree 956/99 (Reglamento de la Ley de Concesiones de Obras Publicas)

Date of analysis:

June 20, 2018



Legal and institutional framework

■ There is not a specific PPP law in Chile, but Decree 900 establishes the framework for all concessions of public works and services while Decree 956/99 and the Organic Act of the Ministry of Public Works provides the regulation.

■ PPP agreements may be used for the following objects: execution, repair, maintenance or exploitation of public works and services; use and enjoyment of national goods for public or fiscal use, development of service areas; supply equipment or provision of associated services. (Article 1 of the Law)

■ Public Works Concessions Coordination: It is a functional body, created as a program that depends on the General Directorate of Public Works of MOP (Article 1 bis of Decree 900). It depends on the Ministry of Public Works (MOP) and requires the approval of the Ministry of Finance to call bids, grant awards and modify concession projects. The Public Works Concessions Coordination is the entity in charge of, among other functions:

- Promoting concession projects
- Preparing bids, both the technical-economic aspects and the bidding rules
- Conducting the tender and awarding it
- Supervising the contract both during the construction phase and during project operation
- Supporting the public interest in disputes arbitration

■ The Council of Concessions is chaired by the Minister of Public Works and has 5 members appointed by the MOP, to whom the rules on disqualifications and administrative incompatibilities apply (Article 1 bis of Decree 900)

■ The MOP will be the responsible body for the preparatory actions that are pertinent and any natural or legal person may apply to the Ministry for the execution of public works through the concession system. The qualification of these applications will be resolved by the Ministry of Public Works, in a well-founded manner, within a period of one year, counted from presentation. The regulation will establish the criteria for the qualification of these applications (article 2 of the Law).

<p>1</p> <p>Legal and institutional framework</p>	<p>■ The Ministry of Public Works must request a prior report from the Council of Concessions if it:</p> <ul style="list-style-type: none"> • Declares a public initiative project of public interest. • Determines that a private initiative project is executed with a mechanism other than concessions. • Analyzes the public initiative projects that will be considered to be executed through the concession system regulated in this law. • Establishes the exception for new investments. • Contracts new investments and works under the exceptional conditions in which it is possible to make new investments (Article 1 bis of Decree 900).
<p>2</p> <p>Applicable sectors and activities</p>	<p>■ Any work or service, including sanitation, ports, roads, and any other infrastructure project (Article 1 of the <i>Reglamento</i>).</p>
<p>3</p> <p>PPP monitoring and regulation</p>	<p>■ There is a system to track the progress and completion of the construction works, as provided by article 59 of the <i>Reglamento</i>.</p> <p>.....</p> <p>■ Both in the construction and in the operation phases, the Ministry of Public Works may apply fines (provided in the bidding rules) to private entities that fail to perform their obligations. However, private entities must provide the Ministry of Public Works with information on payments made to contractors, and contractors must do the same with respect to subcontractors. This information is published on the Ministry of Public Works' website and updated monthly (Article 21 of the Law and Articles 37 and 47 of the <i>Reglamento</i>)</p> <p>.....</p> <p>■ The Ministry of Public Works will nominate a fiscal inspector responsible for the monitoring of the construction and exploitation stages of the PPP (Article 38 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ Article 19 of the Law provides that all modifications to the original contract to include additional works, which separately or jointly exceed five percent of the official budget of the work, and provided that such percentage corresponds to a sum exceeding fifty thousand development units, must have a report from the respective Directorate of the Ministry of Public Works on the impact of the change on the levels of service originally committed, in the valuation of the investments to be made, and in compliance with the proportionality and equivalence of the economic benefits mutual funds and the structures and tariff levels provided for in the concession contract.</p>

<div>3</div> <div>PPP monitoring and regulation</div>	<ul style="list-style-type: none"> ■ The modifications that are incorporated into the concession pursuant to the provisions of this article shall be made by a supreme decree based on the Ministry of Public Works, which shall also bear the signature of the Minister of Finance.
<div>4</div> <div>Modelling PPP projects</div>	<ul style="list-style-type: none"> ■ Every year, in January and July, the Ministry of Public Works discloses a register of the projects selected for exploitation by the concession system (Article 4 of the <i>Reglamento</i>) <hr/> <ul style="list-style-type: none"> ■ Interested private parties may initiate a PPP project. The procedure is divided in 2 phases: presentation (to verify the public interest involved) and proposition (development of the project) (Article 4). <hr/> <ul style="list-style-type: none"> ■ The applicant that has given rise to the tender will be entitled to an advantage in the evaluation of the offer if formulated at the time of the tender of the concession. The consideration is provided in the Regulation and in the tender documents (Articles 8 and 10 of the <i>Reglamento</i>) <hr/> <ul style="list-style-type: none"> ■ For highly complex and multifunctional public or private projects, the prequalification basis may require other objective requirements to participate in projects of this nature as set forth in article 13 of the <i>Reglamento</i>, as long as there are no arbitrary elements and participants are treated equally, as provided by article 6 bis of the Law. <hr/> <ul style="list-style-type: none"> ■ The prequalification basis may establish that the prequalified participate equally to finance the studies that the Ministry of Public Works deems necessary for prepare bidding rules, individualizing the studies and their cost. Execution of such studies must be contracted by the Ministry of Public Works to independent entities, with competence in the matter in question (Article 6 bis of the Law)
<div>5</div> <div>Procuring a PPP project</div>	<ul style="list-style-type: none"> ■ Detailed selection criteria is provided in the legislation to select the bidders (Article 25 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ According to article 15 of the <i>Reglamento</i>, foreign companies may participate in PPP processes

5

Procuring
a PPP
project

■ Procuring authorities must publish the bidding notice in newspapers and other media, for greater transparency of the bidding process (Article 14 of the *Reglamento*).

■ Tender documents detail the procurement procedures and must contain all information provided in article 17 of the *Reglamento*.

■ Tender documents specify prequalification/shortlisting criteria.

■ Financial models submitted with proposals and evaluated solely in accordance with published criteria, which may include multiple variables (technical criteria, quality, prices, period to complete works and others) (Articles 19, 20 and 23 of the *Reglamento*)

■ Procuring authority will notify all bidders on the results of the PPP procurement process, including the grounds for the selection (Article 26 of the *Reglamento*).

■ Interested private parties may request consultations or clarifications about the tender documents to the General Director of the Ministry of Public Works (Article 18 of the *Reglamento*).

■ The evaluation system set forth by the authority within the bidding documents considers several factors in order to award the concession including environmental and ecological factors (Article 7 k of the Law) that must be met by the bidders in their technical offer.

6

PPP
incomes

■ Articles 10 and 11 of Decree 900 establish that:

■ The concession agreement must provide other benefits included as compensation for the services offered, such as concessions for tourism services, self-service, advertising or others. When at the execution of the works, the private entity recovers fiscal river land that was previously occupied by the waters, the Ministry may offer in payment part of the reclaimed coastal river lands or other pre-existing areas, together with or alternatively to other benefits established in the legislation.

<div data-bbox="167 376 215 421">6</div> <div data-bbox="162 430 287 504">PPP incomes</div>	<ul style="list-style-type: none"> ■ In consideration for the services provided, private entities only receive the agreed upon price, rate or subsidy and other additional benefits expressly provided. Private entities are not obliged to establish exemptions in favor of any user.
<div data-bbox="167 963 215 1008">7</div> <div data-bbox="162 1014 319 1086">Disputes settlement</div>	<ul style="list-style-type: none"> ■ It is possible to create a Technical Panel, a specialized body that analyzes and issues non-binding recommendations on technical or economic aspects of a dispute (Articles 107 and 108 of the <i>Reglamento</i> and 36 of the Law). <hr/> <ul style="list-style-type: none"> ■ The Arbitral Commission (Article 109 of the <i>Reglamento</i> and article 36 bis of the Law), is a mixed arbitration procedure of single instance. The powers of the arbitrator regarding the procedure and assessment of the evidence are made according to what the parties stated in the arbitration agreement or lack thereof. He/she must issue a final award in accordance with the rules of sound criticism, stating the reasons and the factual, legal, technical and economic considerations. <hr/> <ul style="list-style-type: none"> ■ The parties may settle at any time. <hr/> <ul style="list-style-type: none"> ■ Article 84 of the <i>Reglamento</i> provides that there will be a Conciliation Commission, which may act as an Arbitration Commission under the terms set forth in article 36 of the Law, which will be aware of any controversy or claim that may arise as a result of the interpretation, application or execution of the concession contract.
<div data-bbox="167 1680 215 1724">8</div> <div data-bbox="162 1733 287 1848">Dealing with changes</div>	<ul style="list-style-type: none"> ■ When the changes exceed 10% of the official budget of the works, either during the construction or exploitation stages, the background information must be made available to the Council of Concessions to inform the Ministry of Public Works on the convenience of said modifications (Article 20 of the Law). <hr/> <ul style="list-style-type: none"> ■ Exceptionally during the construction phase and for founded reasons of public interest, when works under concession require redesign or complementation and the total additional investments, including costs with maintenance, operation and conservation, exceed 25% of the official budget, the additional investments and changes to works may be contracted by the Ministry of Public Works with the private entity if all of five requirements provided by the article are met (Article 20 bis of the Law).

8

Dealing
with
changes

■ The private entity may request compensation in case of supervening act of authority with public prerogative that justifies it, only when the following requirements are met cumulatively: the act occurs after the adjudication of the concession tender; it could not have been foreseen at the time of its adjudication; it does not constitute a legal or administrative rule issued with general effects, exceeding the scope of the concession industry, and significantly changing the economic regime of the agreement (Article 19 of the Law).

■ Economic compensations may be made as: subsidies delivered by the Government, voluntary payments made directly to the private entity by third parties interested in the development of the work, modification of the present value of the total income of the concession, change to the concession term, change of rates or other element of the economic regime. One or more of these factors may be used at the same time (Article 19 of the Law)

9

Financing
and
Funding
PPP
agreements
and
Warrantees

■ The legal framework does not address how the PPP financing works, but establishes the concept of “investor”, which is an individual or legal entity or group that allows and facilitates for the private entity. Financing may be made either by the use of direct credits, guarantees or any other bond, in order to achieve the financing of a certain public infrastructure work by the concession system (article 3 of the *Reglamento*)

■ The risk of financing is allocated to the private party.

■ Contractual Warranties: The private entity must provide a construction warranty and an exploitation warranty according to the terms set forth in the bidding documents (article 33 of the *Reglamento*)

■ Article 21 of the Law provides that in regards to its rights and economic obligations with third parties, the private entity company will be governed by the rules of private law and, in general, it can carry out any legal operation, without prior authorization from the Ministry of Public Works, with the only exceptions expressly regulated in the Law and those stipulated in the contract. Thus, among others, the private entity may pledge the contract or pledge future flows and income of the concession to guarantee obligations derived from said concession, freely assign or enforce any payment offered by the Treasury consisting of the contract, without need for prior authorization from the Ministry of Public Works.

<p>10</p> <p>Extraordinary events</p>	<ul style="list-style-type: none"> ■ The concession is temporarily suspended: In case of external war, internal commotion or force majeure events that prevent the provision of the service; when the works or their elements are partially destroyed, so that their use is not possible for a period of time; and for any other reason established by the bidding rules (Article 26 of the Law). <hr/> <ul style="list-style-type: none"> ■ The Treasury pays for damages caused by acts of God or force majeure events, if this is established in the bidding rules (Article 22 of the Law).
<p>11</p> <p>Public authority's prerogatives</p>	<ul style="list-style-type: none"> ■ If the public interest so requires, the President of the Republic, following a report from the Council of Concessions and by means of a decree of the Ministry of Public Works also signed by the Minister of Finance, may terminate the concession in advance (Article 28, ter of the Law). When a change in circumstances makes the work or service unnecessary for the satisfaction of public needs, or demand its redesign or complementation in such a way that the additional investments necessary to adapt the work to the new conditions exceed 25% of the official budget of the works. This prerogative may be exercised exclusively during the construction stage. <hr/> <ul style="list-style-type: none"> ■ The Ministry of Public Works may modify the characteristics of the works and services contracted in order to increase the service levels and technical standards established in the bidding rules, or for other public interest reasons. As a consequence, it must financially compensate the private entity, when appropriate, for additional costs incurred by the private entity for such modifications (Article 20 of the Law).
<p>12</p> <p>Risk allocation</p>	<ul style="list-style-type: none"> ■ Risk allocation will be set in the bid notice and in the agreement (Article 7 of the Law). <hr/> <ul style="list-style-type: none"> ■ Construction risks are allocated to the private partner. However, the Treasury will attend payment of damages caused by the fortuitous event or the force majeure, if so established by the tender documents (Article 22 of the Law).
<p>13</p> <p>PPP termination</p>	<ul style="list-style-type: none"> ■ Article 27 of the Law provides that a PPP agreement is terminated: 1. When it expires; 2. By mutual agreement between the Ministry of Public Works and the private entity (article 77 of the <i>Reglamento</i>); 3. Serious breach of the obligations by the private entity (article 79 of the <i>Reglamento</i>); and 4. In cases provided in the bidding rules (article 78 of the <i>Reglamento</i>).

13

PPP
termination

■ Even in case of Serious breach of the contractual obligations by the private entity, the private entity is legally entitled to receive a payment from the Treasury in the opportunity and terms provided by article 104 of the *Reglamento*, the private entity shall submit in writing to the Ministry of Public Works, a negotiation offer that indicates the value of the investments or works needed for the provision of the service that have effectively been made by the entity and that have not been amortized financially, plus the normal financial costs of such investments, duly accredited, including readjustments and accrued interest, accompanying all the founding documents.

■ The agreement between the Ministry of Public Works and the private entity extinguishes the concession in accordance with the conditions of the agreement that be subscribed by both parties. The Ministry of Public Works can only attend to this agreement of extinction of the concession with the favorable prior written agreement of the creditors that they have established in their favor with a special pledge of public works concession. This agreement will be subject to the formalities established in article 72 of the Regulation (article 77 of the *Reglamento*)

14

Transpa-
rency and
accoun-
tability

■ All information regarding the PPP projects is available on the MOP website (www.concesiones.cl).

■ The Ministry of Public Works may issues a statement about the prequalification and tender documents and any other issues arising from the agreement that may impact the public budget (Articles 13, 32, 69, 77, 86, 104 of the *Reglamento*)

■ The agreement must be sanctioned by Supreme Decree issued by the Ministry of Public Works and signed by the Ministry of Finance and then published in the Official Gazette to be effective (Article 8 of the Law)

■ Law 20,085/2008 (and its *Reglamento*) is the Law on Access to Public Information and Transparency of the Public Administration.

ANNEX 4 COLOMBIA



COLOMBIA

Legislation analyzed:

Law 1,508/2002, Law 80/1993, Law 1,150/2007, Decree 1082 of 2015 and Law 1882 of 2018.*

Date of analysis:

July 4, 2018.

1

Legal and institutional framework

■ Law 1,508/2002 establishes the PPPs legal system in Colombia.

■ A PPP agreement is executed by public authorities and a private party, responsible for providing goods and services (Article 1 of Law 1,508/2012). PPP agreements involve transferring risks between the parties and payment mechanisms and may only be executed when the investment amount is higher than 6 thousand annual minimum wage.

■ PPP's maximum term is 30 years. When the financial structure indicates that the project must have a longer term, previous authorization from the National Council of Social and Economic Policies is needed (Article 6 of Law 1,508/2012).

■ PPPs can be procured by any public body (Article 1 of Law 1,508/2012).

■ The National Planning Department is responsible for the promotion of private management in investment, financing, construction, operation, rehabilitation and maintenance of infrastructure and disposal of assets (Introduction of Resolution 3656)

2

Applicable sectors and activities

■ PPP agreements may be used for construction of infrastructure sectors and its associated services, to build, repair and improve equipment and public services (Article 3 of Law 1,508/2012).

3

PPP monitoring and regulation

■ The National Planning Department is responsible for the "*Registro Único de Asociación Público Privada - RUAPP*", a public register of projects that the National Government and territorial entities consider to be priority projects and of ongoing and finished PPPs (Article 25 of Law 1,508/2012).

* This analysis is also based on the information provided in the World Bank Public Procurement Guide, 2018.

3

PPP
monitoring
and
regulation

■ The monitoring criteria will be provided in each agreement (Article 4 of Law 80/1993)

■ Public bodies must:

- require private partners to perform agreements;
- take measures to identify and execute pecuniary infractions;
- request price revision and adjustment when events can change the financial balance of the agreement;
- inspect the services;
- demand service quality (Article 4 of Law 80/1993).

4

Modelling
PPP
projects

■ Modelling of PPP projects may be initiated by the public or private sector, as provided in Title III of Law 1,508.

■ In PPPs initiated by the public sector, the private partner must be selected in a pricing process that consists of a list of pre-qualified interested parties. There is a public call to prepare the list (Title II of Law 1,508/2012).

■ Before the selection process begins, the public body in charge of the project must have:

- the studies that support the project;
- the value for money evaluation;
- the reasons that justify the PPP model;
- the risk assessment.

■ The private sector structures projects, at its own risk, assuming all costs of PPPs it initiates (Title III of Law 1,508/2012).

■ The private partner must submit the project to public authorities. The structure process is divided into a pre-feasibility and a feasibility phase (Article 14 of Law 1,508/2012)

■ In the first phase, the private partner describes the project, including general information such as design, demand studies, estimated cost and resources. The project idea is submitted to the government authority, and the competent body has 3 months to decide if the proposal is interesting and feasible. It may refuse or accept the proposal, in which case it permits the private partner to continue its studies. The acceptance is not binding.

4

Modelling
PPP
projects

■ In the feasibility phase, the private partner describes the financial model of the project, the phases, the duration, risk assessment, among other details. It also submits the documents that show its legal, financial and technical capabilities. If the public authority approves the project, it will give notice to the private partner of the conditions and value that it is willing to pay for the studies.

■ The projects initiated by the private sector will be evaluated according to the criteria of article 16 of Law 1,508/2012.

5

Procuring
a PPP
project

■ PPPs initiated by the public sector, or those that require public resources, are selected according to which offer is the most favorable to the public entity. To do so, the entity should check the legal, technical and financial capabilities of the interested parties. The most favorable offer is the offer that combines the best technical and financial elements (Article 12 of Law 1,508/2012).

■ If a PPP initiated by the private sector does not involve public resources, the public authority will have the studies and the draft agreement available on the website for the public procuring electronic system and check if there are other parties interested in the project. After a certain period is over, if no one else has shown interest, the government executes the agreement. However, if a third party is interested, the authority will open a simplified bidding process. If the party that submitted the project proposal does not present the best offer, it will have 10 days to present an offer that surpasses the winning one (Article 19 of Law 1,508/2012).

■ If a PPP initiated by the private sector involves public resources, there must be a bidding process to select the partner. The proponent of the project will benefit from having its classification placed between 3 and 10% higher than its initial classification. If the entity that presented the proposal is not awarded the project, the winner pays it the amount spent to prepare the studies (Article 14 of Law 1,508/2012).

6

PPP
incomes

■ Public disbursement related to PPP projects comes from the National Treasury. Payments are conditioned to services availability (Article 6 of Decree 1,467/2012).

<p>6</p> <p>PPP incomes</p>	<ul style="list-style-type: none"> ■ The government can make payments before the services are available, for the implementation and progress of the project (Article 11 of Decree 1,467/2012). This is different from the public disbursement mentioned above. <p>.....</p> <ul style="list-style-type: none"> ■ Public resources in PPPs cannot exceed 20% of the total amount of the agreement (Article 13 of Law 1,508/2012).
<p>7</p> <p>Disputes settlement</p>	<ul style="list-style-type: none"> ■ The parties must try to resolve disputes quickly (Article 68 of Law 80/1993). <p>.....</p> <ul style="list-style-type: none"> ■ Public authorities cannot forbid the use of direct resolution mechanisms in public agreements (Article 69 of Law 80/1993). <p>.....</p> <ul style="list-style-type: none"> ■ The parties can include an arbitration clause in the agreements (Article 70 of Law 80/1993). <p>.....</p> <ul style="list-style-type: none"> ■ Without prejudice to the use of arbitration, the parties can go to court (Article 75 of Law 80/1993).
<p>8</p> <p>Dealing with changes</p>	<ul style="list-style-type: none"> ■ The public authority may increase the agreement value by up to 20% of its original value. Above that threshold, the private party may drop out of the project (Article 16 of Law 80/1993). <p>.....</p> <ul style="list-style-type: none"> ■ The agreement must provide the procedure for changes (Article 14 of Law 80/199) <p>.....</p> <ul style="list-style-type: none"> ■ PPP agreements can only be extended after 3 years from its beginning and before 3/4 of the agreement duration has passed (Article 7 of Law 1,508/2012). <p>.....</p> <ul style="list-style-type: none"> ■ The private partner pays a fee when it requests the agreement term be extended or public disbursement be increased (Article 29 of Law 1,508/2012).

<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<ul style="list-style-type: none"> ■ Proponents that participate in bidding procedures must provide a certification informing the entities that will benefit in case they are awarded the project and the origin of their resources (Article 23 of Law 1,508/2012). <hr/> <ul style="list-style-type: none"> ■ According to article 25 of Law 80/1993, the private party must present a single guarantee for complying the obligations arising from the agreement. <hr/> <ul style="list-style-type: none"> ■ In case of default, investors may take over the project (Article 30 of Law 1,508/201).
<p>10</p> <p>Extraordinary events</p>	<ul style="list-style-type: none"> ■ Public authorities may request the revision of the agreement's prices when Extraordinary events take place. <hr/> <ul style="list-style-type: none"> ■ Public authorities must include on their annual budget an amount to cover price revisions caused by currency and Extraordinary events (Article 25 of Law 80/1993).
<p>11</p> <p>Public authority's prerogatives</p>	<ul style="list-style-type: none"> ■ The public authority may increase the value of the agreement by up to 20% of its original value (Article 16 of Law 80/1993). <hr/> <ul style="list-style-type: none"> ■ The public authority may terminate the agreement unilaterally (Article 17 of Law 80/1993). <hr/> <ul style="list-style-type: none"> ■ The agreements will provide exceptional clauses, such as expiration and unilaterally termination (Article 22 of Law 1,508/2012).
<p>12</p> <p>Risk allocation</p>	<ul style="list-style-type: none"> ■ Public authorities are responsible for identifying risks and preparing risk assessment (Article 35 of Decree 1,467/2012).
<p>13</p> <p>PPP termination</p>	<ul style="list-style-type: none"> ■ The agreements have to provide a mathematical formula to determine the compensation due to the parties in case of early termination (Article 32 of Law 1,508/2012).

<p>13</p> <p>PPP termination</p>	<p>■ Early termination by the public authority occurs when</p> <ul style="list-style-type: none"> • public interest is not served; • the private party dies or becomes physically disabled, if it is a person, or if the company is dissolved, if it is a legal entity; • judicial intervention or bankruptcy of the private party; • the agreement is not being performed as established by the parties (Article 17 of Law 80/1993). <p>.....</p> <p>■ The expiration of the project may be determined when the public party does not perform its obligations, severely affecting the execution of the project. If the public authority does not declare the project ended, it will adopt control and intervention measure to maintain the performance of the agreement. The expiration of the project does not prevent the public authority from taking the project over (Article 18 of Law 80/1993).</p> <p>.....</p> <p>■ Article 31 of Law 1,508 provides that the agreement must address how the reversibility of the assets will occur but article 19 of Law 80/1993 provides that there will not be any compensation.</p> <p>.....</p> <p>■ The project assets must be listed and those that will be returned to the Government when the agreement is over must be identified (Article 31 of Law 1,508/2012).</p>
<p>14</p> <p>Transparency and accountability</p>	<p>■ Transparency is one of the principles applicable to public agreements. The selection of the public party depends on bidding procedures, except as provided in the law. During the bidding process, the interested party must have access to all information and decisions. Public authorities must provide copies of the documents requested by the interested party. The public notice must contain all information necessary, and objective, fair and clear rules about the selection process. (Article 24 of Law 80/1993)</p>
<p>15</p> <p>Other comments</p>	<p>■ All public and private project resources must be managed by an independent fund, organized by the private partner. It has all assets and liabilities related to the project. The public entity may request information it finds necessary at any time. Fund income belongs to the project. (Article 24 of Law 1,508/2012).</p>

ANNEX 5 COSTA RICA



Legislation analyzed:

Law 7,762/98 (*Ley General de Concesión de Obras Públicas con Servicios Públicos*); Decreto 27,098-MOPT (*Reglamento General de Concesión de Obras Públicas con Servicios Públicos - "Reglamento"*); Decreto 31,836-MOPT (*Reglamento de los Proyectos de Iniciativa Privada de Concesión de Obra Pública o de Concesión de Obra Pública con Servicio Público*); Decreto Ejecutivo 39,965 (*Regulations for PPP collaboration contracts*).

Date of analysis:

July 12, 2018.

1

Legal and institutional framework

■ Law 7,762/98 is the PPP Law of Costa Rica.

■ A PPP is the concession of a public work with public service, in which the government entrusts a third party (a public, private or mixed entity), with the design, planning, financing, construction, maintenance, extension or repair of any public property; it also grants its operation, and provision of services in the agreement, for consideration paid by the users of the work or to the beneficiaries of the service or compensations of any kind paid by the granting Administration (Article 1 of Law 7,762).

■ The Ministry of Public Works and Transportation ("MOPT") has authority over infrastructure matters (Article 6 of Law 7,762). The National Board of Concessions is under the MOPT (PPP Unit). The PPP Unit provides fiscal and budgetary treatment to PPP projects, and analyzes and authorizes PPP projects and guidelines.

■ When the object of the concession is within the scope of competence of a body of the Executive Power, the National Council of Concessions, previously demonstrated the legal, technical, environmental, economic and financial feasibility of the project, will be the competent technical entity to act in the stage of the contracting procedure and, when necessary during the execution of the contract (Article 5 of Law 7,762)

■ The National Council of Concessions, in the exercise of its competence, will have the following powers (Article 8 of Law 7,762):

- Ensure the transparency, timeliness and legality of the acts and administrative procedures performed by the Technical Secretariat of the Council.
- Approve or modify the bidding poster of the concessions.

<p>1</p> <p>Legal and institutional framework</p>	<ul style="list-style-type: none"> • Award the concession; • Ensure that the Technical Secretariat exercises the functions of inspection and control of the concessions granted; • Know and approve the report of tasks that the technical secretary must present monthly; • Know the audit reports issued regarding the management and operation of the Concessions Fund; • Authorize the hiring performed by the Technical Secretariat; • Approve the budget of expenses of the Council, which must be submitted to the authorization of the Comptroller General of the Republic; • Request from the Executive Branch the declaration of public interest and the expropriation decree, when necessary; • Authorize the signing of trust agreements necessary for the fulfillment of the purposes of the Council; • Approve the concession contract or its modifications. <hr/> <p>■ Only the Executive Branch and state-owned companies may enter into PPP agreements, including federal or local governments.</p>
<p>2</p> <p>Applicable sectors and activities</p>	<p>■ Any work or service may be subject to a PPP agreement if there is public interest, especially roads, railways, ports, airports and lighthouses (Article 2 of the Law).</p> <hr/> <p>■ Telecommunications, energy and health service projects are not subject to PPP.</p>
<p>3</p> <p>PPP monitoring and regulation</p>	<p>■ The private entity must pay a value for inspection and control to the technical office. This amount goes to the Fund, as do fines and guarantees paid by concessionaries (Article 14 of the Law).</p> <hr/> <p>■ There is a system to track the progress and completion of construction works and that sets the service levels that must be met.</p>

3

PPP monitoring and regulation

■ The bidding notice and the agreement will determine the service levels that will be required during the concession (Article 48).

■ During the term of the contract, the administration shall exercise the supervision of the fulfillment of the contract by the collaborating contractor. The cartel and the contract will provide the scheme of fines and penalties applicable to any breaches of the contractor (Article 11 of Regulations for PPP collaboration contracts # 39965).

■ The technical office and the services regulatory authority (regulated sectors) are responsible for all monitoring and regulation (Article 14 of the Law).

4

Modelling PPP projects

■ The studies must address environmental impact of projects of the public or private sectors (Articles 5 and 20 of the Law).

■ Unsolicited proposals are permitted and regulated (Article 20 of the Law, regulated by Decree 31,836 of the MOPT). Private parties interested in developing a PPP agreement may present (pre) feasibility studies in Spanish to the Government.

■ Reimbursement of studies are defined in the public notice and the private party that presents an unsolicited proposal may participate in the bidding process but will not have any benefit.

■ Article 12 of Regulations for PPP collaboration contracts #39965 establishes the contract requirements in order for it to be duly presented to the administration.

■ A bid bond in the amount of 1% to 5% of the investment is required in order to participate in the bidding process (Article 22 of the *Reglamento*).

■ All projects initiated by a public body must go through preparatory actions that involve:

- general studies;
- preliminary studies; and
- feasibility studies (Article 7 of the *Reglamento*). After the studies are prepared, the project will be forwarded to the regulatory authority of public services so that tariff and periodic adjustment are established. The responsible governmental body will prepare all studies.

5

Procuring a PPP project

■ The Government may have a pre-qualification stage to evaluate the technical and financial availability of the private partner. Tender documents specify prequalification/shortlisting criteria (Articles 7 and 11 of the *Reglamento*).

■ Tender documents detail the procurement procedures and terms (Article 12 of the *Reglamento*).

■ The financial model must be submitted with the proposal (Article 26 of the Law). First, there is an analysis of the technical proposals. Then, the envelopes with the economic proposals of the bidders that have been technically qualified are opened.

■ Proposals are evaluated solely according to the criteria published, which may include multiple variables (technical criteria, quality, prices and others) (Article 28 of the Law).

■ Foreign companies may participate in PPP processes.

■ Detailed criteria to select bidders is regulated.

■ Procuring authorities publish the bidding notice in the Official Gazette and another newspaper of wide circulation (Article 13 of the *Reglamento*).

■ The procuring authority will notify all bidders on the result of the PPP procurement process, including the grounds for the selection (Articles 21 and 24 of the *Reglamento*).

■ The private entity must be a corporation incorporated with the sole purpose of executing the project.

■ The agreement must be approved by the Office of the Republic's Controller General, also responsible for analyzing appeals filed during the procurement process (Article 30 of the Law).

6

PPP incomes

■ PPP income includes user fees, direct payments from authorities and a combination of those two, or other payments provided in the agreement (Article 70 of the *Reglamento*).

<p>6</p> <p>PPP incomes</p>	<ul style="list-style-type: none"> ■ The methods of retribution that may be used in private public partnership contracts, are the following: <ul style="list-style-type: none"> • Payment of considerations by the administration during the term of the contract. • Payment through revenue generated directly by Commercial activities enabled by the contract. • Prices paid by the users of the service (when permitted by the law in each specific case). • Participation in public service fees. (Article 4 of the Regulations for PPP collaboration contracts #39965). <hr/> <ul style="list-style-type: none"> ■ Performance is assessed against established criteria. <hr/> <ul style="list-style-type: none"> ■ The private entity must offer a construction, exploitation and environmental guarantee, whose value will be defined in the bid notice (Article 33).
<p>7</p> <p>Disputes settlement</p>	<ul style="list-style-type: none"> ■ Disputes about the economic and financial balance of the agreement may be submitted to arbitration, but only after the administrative procedure is exhausted (Article 39 of the Law).
<p>8</p> <p>Dealing with changes</p>	<ul style="list-style-type: none"> ■ In case of unilateral changes by the Government, the private entity will be indemnified by means of an extension of the term of the agreement, tariff increase, contributions made by the Government or any other means provided (Article 47 of <i>Reglamento</i>). The dispute will be submitted to arbitration, with the approval of the Office of the Republic's Controller General (Article 48). <hr/> <ul style="list-style-type: none"> ■ The private entity may request the economic and financial rebalance of the agreement when it was not caused by the private entity. <hr/> <ul style="list-style-type: none"> ■ Change in the structure (stockholding) of the private partner and/or assignment of the PPP agreement are regulated. The replacing entity must have the same technical, financial and operational qualifications as the original entity (Article 31 of the Law). <hr/> <ul style="list-style-type: none"> ■ When the administration agrees to amendments affecting the financial balance of the contract, it shall compensate the collaborating contractor (Article 14 of the Regulations for PPP collaboration contracts # 39965)

<div data-bbox="172 689 209 728">9</div> <div data-bbox="162 752 336 1010">Financing and Funding PPP agreements and Warrantees</div>	<ul style="list-style-type: none"> ■ The private party is responsible for financing the agreements, which can be done by capitalization, debt, or other means (Articles 46-47 of the Law). ■ The maximum amount of indebtedness permitted is 80% of the total value of the project (Article 47 of the Law). ■ Private partners may give guarantees based on their incomes from PPP agreements (Article 47 of the Law). ■ The private entity is liable for its creditors. ■ The Board manages the National Fund of Concessions, an instrument to finance projects (Article 13), and has a technical office for specific assignments (Article 9). ■ There may be tax benefits to the private entity (Article 44 of the Reglamento). ■ The government may give a guarantee, with prior authorization from the granting authority and the Office of the Republic's Controller General, for obligations that are directly related to the respective concession (Article 47 of the Law).
<div data-bbox="172 1523 209 1561">10</div> <div data-bbox="162 1574 331 1644">Extraordinary events</div>	<ul style="list-style-type: none"> ■ Force majeure events, material adverse government action and subcontracting are regulated in the PPP agreement (Article 48 of the Law and Article 68 of the <i>Reglamento</i>). ■ The private entity may request an extension of the term of the agreement in case of force majeure events or acts of God (Article 52).
<div data-bbox="172 1803 209 1841">11</div> <div data-bbox="162 1850 317 1995">Public authority's prerogatives</div>	<ul style="list-style-type: none"> ■ Procuring authorities may unilaterally terminate PPP agreements (article 59 of the Law), based on breach of the agreement, and may suspend it in certain situations (article 58).

<p>11</p> <p>Public authority's prerogatives</p>	<p>■ PPP agreements may provide on their revision and new investments (Article 47 of <i>Reglamento</i>). Changes to the agreement must always comply with regulation limits: 25% for new investments during the operation stage of the project. These changes must be approved by the Office of the Republic's Controller General.</p>
<p>12</p> <p>Risk allocation</p>	<p>■ PPP agreements must describe risk allocation in the different steps of the projects and the construction risk is allocated to the private partner (Article 24 of the Law).</p>
<p>13</p> <p>PPP termination</p>	<p>■ Grounds for termination of a PPP contract and its consequences are expressly regulated (Articles 59 and 60 of the Law).</p> <p>.....</p> <p>■ The Regulations for PPP collaboration contracts # 39965 establishes in article 13:</p> <ul style="list-style-type: none"> • Serious non-compliance by the contractor as provided by the respective contract. • The bankruptcy statement of the collaborating contractor. • Mutual agreement between the Administration and the collaborating contractor. • Those expressly indicated in the bid or in the contract. • Those covered by the "Ley para la Contratación Administrativa". <p>.....</p> <p>■ If the agreement is terminated due to the private party's failure to comply with its terms and conditions, the private party must indemnify the government by foreclosure on its performance bond (Article 59 of the Law).</p> <p>.....</p> <p>■ According to article 60 of the Law, upon expiration of the term, the public administration will receive the rights and goods subject to the concession in good condition and operation, free of encumbrances and free of charge.</p> <p>.....</p> <p>■ Article 63 of the Law provides the procedure and basis for compensations due to the agreement termination.</p> <p>.....</p> <p>■ In case of bankruptcy of the private entity, the project can be rebid (article 61 of the Law).</p>

14

Transparency and accountability

■ All documents regarding the bidding process and unsolicited proposals must be made available to the public and published in the Official Gazette (Article 21 of the Law).

■ Clarification questions about the procurement notice are publicly disclosed (Article 25 of the Law).

15

Other comments

■ If one of the partners is a construction company and it wishes to leave the company, it may do so only if: a) its shareholding is smaller than 49% of the capital; b) it gives this participation to any of the other partners; c) the construction stage of the concession has ended and the private entity's administration has received the infrastructure in accordance with the works planned for this stage (Article 31).

ANNEX 6 ECUADOR



ECUADOR

Legislation analyzed:

Ley Organica de Incentivos para Asociaciones Público-Privadas y la Inversion Extranjera (“PPP Law”); *Reglamento de Aplicación del Regimen Excepcional de Delegacion de Servicios Publicos de Transporte* (Decree 810); *Reglamento del Regimen de Colaboración Público-Privada* (Decree 582) and *Reglamento General de Aplicacion de la Ley Organica de Incentivos para Asociaciones Público-Privadas y la Inversion Extranjera* (Decree 1040), *Ley Organica Sistema Nacional Contratacion Publica* (Ley 1 – “Ley Organica”), *Reglamento a La Ley Organica Sistema Nacional Contratacion Publica* (Executive Decree 1700 – “Reglamento”) and *Resolución General para la Presentación y Aprobación de Proyectos Bajo la Modalidad de Asociación Público-Privada* (Resolution nº CIAPP-R-009-Abril-2017)

Date of analysis:

July 4, 2018



Legal and institutional framework

■ *Ley Organica de Incentivos para Asociaciones Público-Privadas y la Inversion Extranjera* is the Ecuatorian PPP law.

■ The framework depends on the PPP modality. The Central Government or the Decentralized Autonomous Governments delegates to a private manager management and execution of a specific public project. The private manager provides total or partial financing for the provision of goods, works or services in exchange for a payment for its investment, risk and work, according to provisions in the agreement for delegated management (Article 8 of PPP Law).

■ The Interinstitutional Committee of Public-Private Partnerships is an executive collegial body of intersectoral nature, responsible for coordinating and articulating policies, guidelines and regulations related to PPPs, approving public projects and applying the incentive system (Article 4 of PPP Law).

■ The Decentralized Autonomous Governments, via the competent collegial body, have authority to simplify the administrative process procedures established by bodies on the same government level (Article 21 of the PPP Law).

■ The National System of Public Procurement (SERCOP) has an intensive, interrelated and fully articulated control between entities with authority to do so. It includes the pre-contractual phase, the performance phase of the agreement and the evaluation thereof (Article 8 Organic Law)

1

Legal and institutional framework

■ It is the Interinstitutional Committee of Public-Private Partnerships responsibility to:

- Define sectors in which the use of the public-private partnership modality for the execution of public projects will be promoted.
- Verify compliance with the provisions of section 3.6 of article 3 of this Law, regarding the use of the national component, technology transfer and recruitment of national human talent, to be incorporated by each project, under the modality of public-private partnership.
- Approve, at the proposal of the delegating entity, the projects that will be developed under the modality of public-private partnership and the incentives regime provided for in this Law.
- Determine the policies and guidelines for the application of the benefits foreseen in this Law.
- Issue general guidelines and technical notes for the application of the public-private partnership modality within the scope of its competences.
- Determine the policies and guidelines for the management of deferred payments established for the execution of a public project under the modality of public-private partnership.
- Arrange the registration of public projects that will be executed under the modality of public-private partnership, in the registry by the Technical Secretariat.
- Form technical teams for the evaluation of public projects that will be executed under the modality of public-private partnership, when the circumstances require it.
- Issue the necessary regulations for its operation and that of the Technical Secretariat.

2

Applicable sectors and activities

■ The agreements of delegated management are executed for public projects to be developed in sectors of general interest. Their object are goods, works or services provided by the Central Government or Decentralized Autonomous Governments, as determined by law or by the Interinstitutional Committee of Public-Private Partnerships, such as infrastructure, urban development, real estate projects, strategic sectors such as oil and gas, mining, electricity and those linked to roads and port infrastructures and airport (Article 13 of PPP Law).

<p>2</p> <p>Applicable sectors and activities</p>	<ul style="list-style-type: none"> Projects to be implemented under PPPs will preferably be entirely managed by the private party, which will manage all stages of project implementation. Exceptionally, the execution stages of a PPP project may be divided and awarded separately, preferably by specialized operators, provided that it is more efficient to do so and it is in compliance with the PPP Law (Article 5 of Decree 1,040).
<p>3</p> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> The agreements must have specific provisions about the functions and duties of the agreement managers and of those who will exercise the supervision or control. (article 56 of <i>Ley Organica</i>). <hr/> <ul style="list-style-type: none"> The agreement supervisor and examiner are responsible for taking measures to ensure the project is carried out in compliance with its clauses, programs, schedules, deadlines and anticipated costs (article 80 of <i>Ley Organica</i>). <hr/> <ul style="list-style-type: none"> The National Service of Public Contracting is entitled to issue regulations related to specific matters. <hr/> <ul style="list-style-type: none"> National System of Public Contracting and monitor the agreement (article 10 of <i>Ley Organica</i>).
<p>4</p> <p>Modelling PPP projects</p>	<ul style="list-style-type: none"> Value for money must be analyzed (Article 3.3 of the PPP Law). <hr/> <ul style="list-style-type: none"> The PPP Inter-Institutional Committee must approve PPP projects, with simplified processes, based on studies carried out by the delegating entity, in accordance with regulations, resolutions, general or specific guidelines, and technical notes issued by the PPP Committee for this purpose. <hr/> <ul style="list-style-type: none"> All PPP projects and PPP agreements must (Article 4 of Decree 1,040): Provide adequate risk allocation; Include performance indicators, service levels or equivalent mechanisms with emphasis on the service quality for users; Provide the form of consideration established for the private manager (fees paid by the recipients, deferred payments made by the public sector, a combination of both or other means established by the PPP Law); Include a total or partial combination of the stages of planning, design, construction, financing, commercialization, operation or maintenance; Provide incentives and benefits approved by the Interinstitutional Committee; and Establish specific regulatory aspects of the sector, which are subject to the guarantee of legal stability.

4

Modelling
PPP
projects

■ In projects initiated by the private sector, in addition to the requirements established in the resolutions issued by the PPP Committee, the following may be established (Article 7 of Decree 1,040):

- Minimum reimbursement amount to be paid to the private proponent that is not awarded the project, which may not be not less than the cost of the studies carried out to structure the project;
- Additional bonus for the qualification of the Bidder's Economic Offer, which implies adding a percentage to the qualification process, depending on the amount of the initial investment on the project;
- The right of the private proponent to improve the offer when other bids have been presented in the public tender; and
- The right of private proponents to request a response from the PPP Committee, if the public delegating entity fails to issue a decision within a certain period as provided in the approval procedure of projects initiated by public or private parties.

■ The private partner may be any private entity organized under Ecuadorian laws. Its capital may be private or contributed by state-owned companies of countries that are part of the international community; it must have a specific purpose and legal personality, and pay taxes arising from the performance of the agreement (Article 12 of Decree 1,040).

■ The procuring authority, in order to comply with its own objectives and needs and those of the National Development Plan, must prepare an Annual Contracting Plan with the corresponding budget, in accordance with the Institution's multi-year planning, associated with the National Development Plan and the Government budgets (Article 22 of *Ley Organica*).

■ The procuring authority may hire a private consultant to prepare to conduct the pre-contractual studies (Article 32 of the *Reglamento of Ley Organica*).

5

Procuring
a PPP
project

■ Before the pre-contractual procedure, depending on the nature of the agreement, the entity must have complete, definitive and updated studies, designs, plans, calculations and technical specifications, duly approved by the corresponding bodies, linked to the Annual Plan of Hiring of the entity (Article 24 of *Ley Organica*).

5

Procuring
a PPP
project

■ Tender documents must be prepared by each procuring authority that can follow the templates issued by SERCOP in ordinary procurement process (Article 27 *Ley Organica*).

■ The private manager is selected via a public tender, called by the delegating entity after the Interinstitutional Committee approves the public project. For this purposes, the delegating entity prepares a list of administrative, technical and economic-financial basis, the contractual terms applicable to, as the case may be, the procedure and the relationship between the delegating entity and the delegated manager (Article 12 PPP Law).

■ For public competitions and contracting by short list, the agency, entity or body will form a Technical Commission that carries out the processes provided for each contest, in compliance with the specifications approved for this purpose. If necessary, one or more subcommittees may be created to support the Technical Commission, although none was created so far (Article 42 of the *Ley Organica*).

■ The Interinstitutional Committee of Public-Private Partnerships may approve a simplified procedure for the procurement (Article 2 of Decree 1,040). This procedure is detailed in the Resolution nº CIAPP-R-009.

6

PPP
incomes

■ In consideration of the activities, depending on the type and characteristics of each PPP project, the private manager may receive different types of income (Article 15 of Decree 1,040), such as:

- deferred payments, classified as payments for availability, payments for use, or payments for investment;
- exclusive or combined payments made by the recipients of the service or by the delegating public entity, as the case may be. To benefit the delegating public entity, it may receive income from the private manager, recipients, or others (as provided).

■ If the PPP agreement provides availability payments and/or investment payments to the private fund manager that exceed a fiscal year, the delegating public entity must include in its draft a budget for investment and expenditure for each fiscal year. The allocation must be equivalent to the stipulated payment during the term of the PPP agreement. (Article 15 of Decree 1040)

7

Disputes
settlement

■ If disputes arising from the agreement are submitted to international arbitration, this will be done before a regional Latin American arbitration body. The parties to the agreement may designate the arbitral jurisdictions in the Latin American Region (Article 19 of PPP Law). This clause must be approved by the Attorney General of the State

■ For dispute resolution, the following rules apply (Article 20 of PPP Law):

- When the party that is arguably affected communicates to the other the subject of the dispute, they may resolve the dispute through direct dialogue or mediation.
- If the parties do not settle the dispute through direct dialogues or mediation and after administrative procedures are exhausted, the dispute may be submitted to national or international regional arbitration, as a last resort, in accordance with the management agreement.
- Delegate Tax matters may not be submitted to arbitration nor will any other act deriving directly from the legislative and regulatory power of the Ecuadorian State.

■ The contentious administrative jurisdiction is responsible for the resolution of disputes that arise with respect to delegated management agreements: a. When no regional or national international arbitration has been agreed in the delegated management agreement. b. In the corresponding cases, if after the deadline established for the notification of the interested party with the resolution that exhausts the administrative proceeding, the action has not been exercised before the arbitration jurisdiction agreed in the corresponding delegated management agreement. The parties may agree to arbitration or technical opinions in accordance with terms and stipulations provided in the delegated management agreement to resolve purely factual disputes arising during the execution or liquidation of the respective agreement. (Article 20 of PPP Law).

■ International arbitration will be in law, in the Spanish language and the regulations applicable to the merits of the dispute will be Ecuadorian law (Article 22 of Decree 1040).

8

Dealing
with
changes

■ The public delegating entity and the private manager may modify by common agreement the characteristics of the works and services contracted, in order to increase the levels of service and technical standards established in the PPP agreement, with the limitations established in the regulations issued by the Committee Interinstitutional (Article 8 of Decree 1040).

9

Financing
and
Funding
PPP
agreements
and
Warrantees

■ Incentives apply to public projects executed under PPPs if all of the following requirements are present (Article 16 of the PPP Law):

- Incentives must be totally or partially provided in the bidding documents of the economic basis of the selection process of the private manager;
- Incentives are totally or partially included in the economic financial plan awarded.
- Incentives become a party to the delegated management agreement as of the date this Law goes into effect.
- The public project is registered with the Interinstitutional Committee.
- Incentives appear in the agreement of delegated management for public-private association and are duly approved by the Interinstitutional Committee.

■ Productive financing and national or foreign investment are promoted, regardless of where the legal, national or foreign resources come from, to allow developing, increasing or implementing investments.

■ The PPP agreement may provide for contributions from the State, such as: monetary contributions, subsidies, credits, guarantees to finance the project, deferred payments, guaranteed minimum income, tax exemptions and other financing instruments, among others. They apply according to the type of project. Under no circumstances the PPP agreement may be guaranteed by a minimum project profitability (Article 17 of Decree 1,040)

■ As a collateral to the credits granted to finance PPP projects, pledges may be given in favor of the creditor(s) and guarantors, such as: pledge on minimum guaranteed income or other payments committed by the entity delegating public, pledge on future fluctuation of the price paid by the delegating entity for the services rendered, among others. The private manager (in his relationship with those third parties that will finance the PPP project) has autonomy to give the required guarantees, without prior authorization of the delegating entity, or of any other authority, but in those cases specifically outlined in the Law or in the PPP agreement (Article 14 of Decree 1,040).

■ The delegating public entity must give its authorization to assign, give as guarantee or encumber 20% or more of the shares, stockholding rights or other securities representing capital and/or control of the private manager, and to give guarantees or appropriation in any way of a percentage equal to or greater than 20% of the securities representing the capital of the company or control of the private manager, of whichever nature, require express authorization of. The obligation must be incorporated into the PPP agreement (Article 13 of Decree 1,040).

<p>10</p> <p>Extraordinary events</p>	<p>■ The Contracting Authority may cause unilateral early termination of the agreement in case of Acts of God or force majeure events informed by the Contracting Authority and the private party does not accept termination by mutual agreement (Article 55 <i>Ley Organica</i>).</p> <p>.....</p> <p>■ This does not apply mandatorily for PPPs.</p>
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The Contracting Entity may declare early and unilateral termination of the agreements, in the following cases: (article 94 of <i>Ley Organica</i>).</p> <ul style="list-style-type: none"> • Failure of the contractor; • Bankruptcy or insolvency of the contractor; • If the fine amount exceeds the amount of the guarantee given for compliance with the agreement; • If the works are suspended, by decision of the contractor, for more than 60 days, without force majeure events or acts of God; • If the agreement was executed against express legal prohibition; • In the other cases stipulated in the agreement, according to its nature. <p>.....</p> <p>■ The Contracting Entity may declare early and unilateral termination of the agreement when, in case of unforeseen technical or economic circumstances or acts of God or force majeure events, duly demonstrated, the contractor has not agreed to terminate the agreement by mutual consent. In this case, the guarantee of faithful fulfillment of the agreement will not be executed nor will the contractor be inscribed as unfulfilled.</p> <p>.....</p> <p>■ Before the unilateral termination, the Contracting Entity has to give notice to the contractor, 10 days in advance, of its decision to terminate it unilaterally. (Article 95 of <i>Ley Organica</i>).</p> <p>.....</p> <p>■ These provisions may be used as reference but do not apply mandatorily for PPPs.</p>
<p>12</p> <p>Risk allocation</p>	<p>■ In all PPPs, an identification and assessment of risks and benefits must be made during the term of the project. They will be borne, transferred or shared by the public authority and the private manager, in accordance with the agreement. (Article 3.2 of Decree 1040).</p>

12

Risk allocation

■ In public projects that are executed under the PPP modality, the planning and design risk of the construction, operation and maintenance aspects will be assumed by the private manager when the public project and the commission includes these components. (Article 4.1 of the PPP Law).

13

PPP termination

■ When due to unforeseen circumstances, technical or economic, or causes of force majeure or unforeseeable circumstances, it is not possible or convenient for the interests of the parties, to fully or partially execute the contract, the parties may, by mutual agreement, agree on the termination of all or some of the contractual obligations, in the state in which they are (Article 93 of *Ley Organica*).

■ The contractor party may demand termination of the agreement, if the Contracting Entity (Article 96 of *Ley Organica*):

- Is in breach of contractual obligations for more than 60 days;
- Work has been suspended for more than 60 days, not due to force majeure events or Acts of God;
- Brings legal actions against the consultants for whose fault the object of the agreement cannot be performed (definitive designs are technically unenforceable or defects have not been resolved).

■ The bid notice may include compensation mechanisms for the different causes of early termination of PPP agreements. PPP agreements may also establish partial schemes for valuation and certification of investment advances, based on the physical and/or budgetary progress of the works and services. Likewise, the private manager may assign or constitute guarantees on the certifications or valuations that are issued by the partial advances of the investment (Article 9 of Decree 1,040).

■ **These provisions may be used as reference but do not apply mandatorily for PPPs.**

14

Transparency and accountability

■ The total accumulated value of firm and contingent obligations that may be approved by the PPP Committee, duly updated, may not exceed 5% of the nominal value of the Gross Domestic Product estimated by the Central Bank of Ecuador. The limit may be reviewed by the Interinstitutional Committee, subject to the criteria of the Ministry of Finance. (Article 16 of Decree 1,040).

14

Transpa-
rency and
accoun-
tability

- All tender documents shall be published on the delegating entity portal.

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- The Annual Contract Plan will be published on the website of the Contracting Entity within 15 days of the month of January of each year and will work together with COMPRASPUBLICAS Portal (Article 22 of *Ley Organica*).

ANNEX 7 EL SALVADOR



Legislation analyzed:

Decree No. 379/2013*

Date of analysis:

July 5, 2018.



Legal and institutional framework

■ Decree No. 379/2013 is the PPP Law.

■ A PPP is an agreement between the government and the private sector, under which the private partner is responsible for construction and/or service provisions (Article 1 of Decree 379/2013).

■ Executive bodies, autonomous institutions and municipalities may contract PPPs (Article 2 of Decree 379/2013).

■ There are 3 kinds of PPP:

- the government transfers assets under public domain to the private partner, so the private partner can build, extend, repair or maintain works that provide public services, via a work concession;
- the private partner uses its own assets to provide public services, via a public service concession; and
- exploration or execution of an activity of general interest (Article 4 of Decree No. 379/2013).

■ PROESA's Board of Directors is the body responsible for approving PPP projects, assisting governmental bodies interested in executing a PPP agreement, identifying opportunities and promoting PPP agreements, among other activities (Article 14 of Decree 379/2013).

■ It is PROESA' responsibility to (Article 14 of Decree 379/2013):

- Propose to the President of the Republic, the policies of PPPs

* This analysis also was based on information provided in the World Bank Public Procurement Guide, 2018.

<div data-bbox="167 633 212 674">1</div> <p>Legal and institutional framework</p>	<ul style="list-style-type: none"> • Approve the PPP projects, their bidding rules and their contract projects, and contractual modifications in the terms established in the Law, in the cases in which it corresponds. • Prepare and coordinate with the competent authorities, the plans, policies and rules for the development and proper functioning of PPP in their different modalities. • Ensure the proper development of Public-Private Partnership policies. • Define the origin or inadmissibility of carrying out a new tender, once the term of a contract has expired or the contract has ended for another reason, following a proposal from the State contracting institution. • Report annually to the President of the Republic and the Legislative Assembly on their administrative, financial and technical management, as well as transparency mechanisms and actions implemented in the public private partnership contracts signed. • Execute the other faculties and comply with the other functions or powers assigned by the Law or other Regulations.
<div data-bbox="167 1182 212 1223">2</div> <p>Applicable sectors and activities</p>	<ul style="list-style-type: none"> ■ PPP agreements may be used for infrastructure construction and its associated services, and construction, reparation and improvement of equipment, public services and activities of general interest. PPPs may not be used for health, social security, public safety, justice (in what it refers to custody), prison system, water and education sectors (Article 3 of Decree No. 379/2013).
<div data-bbox="167 1619 212 1659">3</div> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ There are agencies that regulate and inspect specific sectors of the economy (Article 6 of Decree 379/2013). <hr/> <ul style="list-style-type: none"> ■ The Ministry of Finance is responsible for the risk assessment and for evaluating the project's value for money (Article 19 of Decree 379/2013); <hr/> <ul style="list-style-type: none"> ■ The <i>Organismo Fiscalizador de Asocios Público-Privados</i> (OFAPP) is responsible for supervising PPPs, especially their technical aspect (Article 21 of Decree No. 379/2013). It inspects the service level and compliance with the public notice and agreement (Article 22 of Decree No. 379/2013). <hr/> <ul style="list-style-type: none"> ■ During the construction phase, the procuring authority will nominate a project supervisor (Article 60).

<p>3</p> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ OFAPP is responsible for monitoring PPPs, including tariff regime and users' rights (Article 28 of Decree No. 379/2013)
<p>4</p> <p>Modelling PPP projects</p>	<ul style="list-style-type: none"> ■ To initiate a PPP project, the governmental body submits to PROESA the feasibility study of the project, including the financial feasibility, and the evaluation of fiscal and social impact (Article 32 of Decree 379/2013). PROESA then submits the study to the Ministry of Finance, so it can issue its opinion. If the project is approved, the bidding procedure begins. ■ Article 41 provides the bid notice content. ■ The private sector may submit project studies to public authorities (Article 49 of Decree 379/2013). If the authority is interested in the studies, it will request PROESA's council opinion. With its consent, the public body then issues a notice stating its interest in the project's proposal. The announcement is published so others may manifest their interest in the project. If there are no interested parties, the original proponent has 1 year to prepare the feasibility studies. If there are others interested, they will present a guarantee undertaking to submit the pre-feasibility study within 90 days. After the studies are received, the government selects the best one.
<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ The bidding procedure may have a prequalification phase, when those that have experience and financial capacity will be selected. The public notice allows participants to contribute and propose adjustments to the project (Article 35 of Decree 379/2013). ■ The government may hold a procedure called diálogo competitivo (competitive dialogue) with those that had been approved during the prequalification phase (Article 36 of Decree 379/2013). Participants may suggest adjustments to the project documents. This phase will be over when solutions to all of the project's issues have been resolved. When this phase is over, participants will be asked to submit their offers. ■ The bidding procedure is a public one (Article 39 of Decree 379/2013). National and foreign entities may participate. The government and PROESA prepare the public notice, which must be approved by PROESA's council, the Ministry of Finance and OFAPP.

<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ Technical and financial offers will be analyzed for a committee formed by representatives of PROESA, the Ministry of Finance and government authority in charge of the bidding procedure (Article 42 of Decree 379/2013). <hr/> <ul style="list-style-type: none"> ■ Bidding procedures are evaluated based on objective criteria for easy comparison between proposals (Article 43 of Decree 379/2013). These factors are defined in the public notice, but those that are based on a minimum amount of public disbursement and lowest tariffs will prevail. (Article 44 of Decree No. 379/2013). <hr/> <ul style="list-style-type: none"> ■ The committee selects the technical proposals that comply with the public notice. If there is more than one proposal, the committee analyzes the financial proposal.
<p>6</p> <p>PPP incomes</p>	<ul style="list-style-type: none"> ■ PPP agreements may be divided into two groups, according to their financial aspect: <ul style="list-style-type: none"> • self-sustaining agreements: tariffs or prices charged directly from the user cover the costs of the project; and • co-financed agreements: requires public resources (Article 53 of Decree 379/2013).
<p>7</p> <p>Disputes settlement</p>	<ul style="list-style-type: none"> ■ PPP agreements can provide national and international mechanisms for dispute resolution, and must include at least one phase of direct dialogue and one phase with experts (Article 92 of Decree 379/2013). <hr/> <ul style="list-style-type: none"> ■ The parties will initially try a direct agreement in which each one may nominate a specialist to help solve the matter. The specialists will indicate a third individual to compose the “Specialists Table” (Article 93). <hr/> <ul style="list-style-type: none"> ■ PPP agreements cannot provide alternative solutions to the following matters, which must be submitted to ordinary jurisdiction: <ul style="list-style-type: none"> • labor issues; • issues that have already been decided in a court decision; • inspection and penalties applied by monitoring bodies; • the government’s right to terminate the agreement due to public interest or project abandonment (Article 92 of Decree 379/2013).

<div data-bbox="167 353 210 398">7</div> <p>Disputes settlement</p>	<p>■ If the direct dialogue or the dialogue with experts does not succeed, the parties may go to arbitration (Article 93 of Decree No. 379/2013).</p>
<div data-bbox="167 936 210 981">8</div> <p>Dealing with changes</p>	<p>■ The private partner may request compensation in case of a supervening act that affects the financial balance of the agreement (Article 61 of Decree 379/2013).</p> <p>.....</p> <p>■ The government must rebalance the agreement if changes affect negatively the balance of the agreement. The agreement may be rebalanced by:</p> <ul style="list-style-type: none"> • compensation; • voluntary payment from third parties that are interested on the project completion; • review of the incomes; • term extension; • review of the tariffs or other financial element of the agreement (Article 63 of Decree 379/2013). <p>.....</p> <p>■ Governmental bodies and the private partner may agree to amend the agreement to improve services level. The maximum amount of investment that may arise from the amendments is 20% of the total investment amount. The government must rebalance the agreement if the amendments negatively affect the balance of the agreement (Article 64 of Decree 379/2013).</p>
<div data-bbox="167 1608 210 1653">9</div> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ The private party must obtain financing by the most convenient form, including tender offer (Article 30 of Decree 379/2013).</p> <p>.....</p> <p>■ Contingent commitments, provided by article 68, are the potential payment obligations to be borne by the procuring authority and in favor of the private party, corresponding to the guarantees that the former has granted, in order to improve the risk profile of the project and encourage private participation.</p> <p>.....</p> <p>■ There is a fund created to guarantee the obligations arising from financial duties of the Government and related to PPP projects are complied with (Article 66 of Decree 379/2013).</p>

<p>10</p> <p>Extraordinary events</p>	<ul style="list-style-type: none"> ■ The government may temporarily suspend the agreement due to acts of God and force majeure events (Article 69 of Decree 379/2013).
<p>11</p> <p>Public authority's prerogatives</p>	<ul style="list-style-type: none"> ■ Governmental bodies may request the agreement be amended due to public interest (Article 63 of Decree 379/2013). The maximum amount of investment that may result from the amendment is 15% of the total investment amount. <hr/> <ul style="list-style-type: none"> ■ The government may temporarily suspend the agreement for 45 days based on any reason provided in the public notice (Article 69 of Decree 379/2013). The suspension will not generate any responsibility for the procurement authority. <hr/> <ul style="list-style-type: none"> ■ The government may terminate the agreement in case of public interest (Article 71). To do so, it must request the approval of the PROESA Board of Directors, who may grant it after obtaining a favorable opinion from the Ministry of Finance from the fiscal perspective and the OFAPP, on matters within its authority. In all cases the private party will be entitled to compensation and the criteria and procedures to calculate it will be provided by the agreement.
<p>12</p> <p>Risk allocation</p>	<ul style="list-style-type: none"> ■ Agreements must establish which risks are assumed by the government and by the private partner (Article 8 of Decree 379/2013).
<p>13</p> <p>PPP termination</p>	<ul style="list-style-type: none"> ■ PPP agreements may be terminated because: <ul style="list-style-type: none"> • they expired; • project abandonment or breach of contract; • Acts of God and force majeure events; • public interest (early termination); • mutual agreement (Article 70 of Decree 379/2013). <hr/> <ul style="list-style-type: none"> ■ The agreement will provide which assets will be returned by the private party to the government at the end of the term of the agreement (Articles 59 and 74). All technology used by the private party will also be transferred.

14

Transpa-
rency and
accoun-
tability

■ The public notice must include mechanisms to ensure publicity of the acts and allow social control. Every act related to the projects must be public and submitted to auditing (Article 8 of Decree 379/2013).

15

Other
comments

■ The private partner may assign the agreement to a third party when the project is in its execution phase, upon prior approval from the government and OFFAP (Article 30 of Decree 379/2013).

.....
■ The private partner must organize a company that will be responsible for all activities related to the project (Article 46 of Decree 379/2013).

.....
■ PPP agreements must be executed by public deed (Article 55 of Decree 379/2013).

ANNEX 8 GUATEMALA



Legislation analyzed:

Decree 16/2010 (*Ley de Alianzas para el Desarrollo de Infraestructura Económica*) and Acuerdo Gubernativo 360/2011 (*Reglamento de la Ley de Alianzas para el Desarrollo de Infraestructura Económica*).

Date of analysis:

July 13, 2018.



Legal and institutional framework

■ Decree 16/2010 is the PPP Law of Guatemala.

■ A PPP agreement encompasses agreements entered into by authorities with a private party, for up to 30 years, in which the private party is responsible for creating, designing, building and operating infrastructure or its services, including equipment supply, combined with financing (Article 2 of Decree 16).

■ The central government may execute PPP agreements (Article 2 of the Decree). Guatemala is an Unitarian state.

■ National Agency of Alliances for the Development of Economic Infrastructure (ANADIE) is the PPP Unit of Guatemala and the body responsible for the projects. It is composed by the National Board of Alliances for the Development of Economic Infrastructure (CONADIE) together with the Executive Management and the Supervision Board (Article 3 of the Decree).

■ Article 8 of the Law provides ANADIE's responsibilities:

- Prepare and coordinate with the competent authorities the plans, policies and rules for the development and proper functioning of the alliance contracting modality for the development of economic infrastructure governed by this Law, with the State contracting institution.
- Ensure the correct use and execution of alliance contracts for the development of economic infrastructure by state institutions that are interested in hiring through this type of contract.
- Advise, when required, the contracting institution of the State in the implementation of this Law and in all that corresponds to the contracts of alliances for the development of economic infrastructure.

<p>2</p> <p>Applicable sectors and activities</p>	<ul style="list-style-type: none"> ■ PPP agreements are available for the following sectors: highways, roads, ports, airports, energy (generation, transmission and trading) and railway, and the services related to them (Article 2 of the Decree).
<p>3</p> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ CONADIE must present a yearly report to the Congress detailing all PPP projects. This report must also contain the mechanisms and actions regarding the transparency of the projects. (Article 13, k). ■ ANADIE maintains a public registry of all PPP agreements on its website, accessible by anyone. (Article 30 of the Decree). ■ Private parties in PPP agreements must present their audited balance sheets, upon request, to be published on ANADIE's website (Article 33). ■ CONADIE verify service level indicators are complied with (Article 29 of the <i>Reglamento</i>). ■ The Supervision Board monitors the agreement and sees that its terms and conditions are complied with (Articles 46 and 222 of the <i>Reglamento</i>). ■ There will be an inspector for each agreement. The inspector may apply fines in case of infractions. (Article 78 of the Decree and 224-227 of the <i>Reglamento</i>). ■ The Supervision Board includes mechanisms of self-regulation for the private party in the agreement (Article 221 of the <i>Reglamento</i>).
<p>4</p> <p>Modelling PPP projects</p>	<ul style="list-style-type: none"> ■ All PPP projects must be submitted by the procuring authority to CONADIE. After the approval, CONADIE will determine technical feasibility studies be prepared for the project, including: <ul style="list-style-type: none"> • A pre-investment study, which will include market, technical, and environmental impact, risk analysis, legal, organizational, economic and financial analysis; • Estimated budgetary and financial impact for the periods of the fiscal year during which the agreement will be performed; and

4

Modelling PPP projects

- Social and environmental impact of the project for the development of economic infrastructure. (Articles 35-37 of the Decree).

■ All PPP projects and PPP agreements that arise from them must contain the essential elements (Article 44 of the Decree). The content must be approved by ANADIE and the procuring authority.

5

Procuring a PPP project

■ The bidding notice must be published twice in the Official Gazette and another two newspapers of great circulation, twice in an international publication specialized in government procurement and on ANADIE's and GUATECOMPRAS' website. (Article 45 of the Decree).

■ Tender documents detail the procurement procedures (Article 44).

■ Tender documents specify prequalification/shortlisting criteria in case of complex projects (Article 60 of the Decree).

■ Financial models must be submitted with the proposal. Proposals are evaluated solely in accordance with published criteria, which may include many variables. (Article 47 of the Decree).

■ Detailed qualifications are regulated to select bidders. (Article 53 of the Decree).

■ Tender documents must be published at least 60 days before the final date for submission of proposals (Article 46 of the Decree).

■ Foreign companies may participate in PPP processes (Article 42 of the Decree).

■ According to Art. 62 of the Public Procurement Law (Ley de Contrataciones del Estado), the role of the Congress of the Republic of Guatemala is to approve the draft PPP Contract ahead of its execution by the parties (contracting authority and awarded contractor) and the Director of ANADIE. The responsibility of reviewing the bidding process is of the Review Committee appointed by CONADIE. CONADIE is also the responsible party to review the proceedings of such Committee and the awarding of the contract.

GUATEMALA

5 Procuring a PPP project	<ul style="list-style-type: none"> ■ The private partner must obtain the relevant licenses (Article 65 of the Decree). <hr/> <ul style="list-style-type: none"> ■ After executing the agreement, the private partner must pay the Private Equity Fund managed by ANADIE a contribution equivalent to 1% of the project's value (Article 34 of the Decree).
6 PPP incomes	<ul style="list-style-type: none"> ■ The private party will be paid by the Government and by tariff of the service (Article 34 of the Decree).
7 Disputes settlement	<ul style="list-style-type: none"> ■ Arbitration may be used to resolve disputes by an ad-hoc commission. This must be provided in the agreements. (Article 94 of the Decree). <hr/> <ul style="list-style-type: none"> ■ There may be a local conciliation and arbitration or an international arbitration, if the parties waive the local one (Article 95 of the Decree). <hr/> <ul style="list-style-type: none"> ■ Articles 96-104 of the Decree detail the procedure and the composition of the ad-hoc commission.
8 Dealing with changes	<ul style="list-style-type: none"> ■ PPP agreements may be extended in case of delays caused by the State (Article 34 of the Decree).
9 Financing and Funding PPP agreements and Warrantees	<ul style="list-style-type: none"> ■ Financing is the private party's responsibility (Article 34 of the Decree). <hr/> <ul style="list-style-type: none"> ■ Private partners may constitute guarantees based on their incomes from PPP agreements (Article 65 of the Decree). <hr/> <ul style="list-style-type: none"> ■ Lenders' step-in rights are provided in article 65 of the Decree. They have to be regulated in the PPP agreement. ANADIE must authorize the replacement of private partner, even if it happens due to step-in rights. <hr/> <ul style="list-style-type: none"> ■ The public party may provide guarantees that will be established in the bidding documents (Article 44 of the Decree).

<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ The Ministry of Public Finance shall include in the general budget of income and expenditure of the State the corresponding total disbursements for guarantees of income or minimum traffic to the private participant, in the corresponding fiscal year. In the event that the availability of disbursement during the execution of the budget is exhausted, the Ministry of Public Finance will make the corresponding budget forecasts in subsequent fiscal years, according to the conditions of capacity of indebtedness and fiscal sustainability of the State (Article 72 of the Decree).</p>
<p>10</p> <p>Extraordinary events</p>	<p>■ The agreement may be terminated in case of force majeure events (Article 73 of the Decree).</p>
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The inspector of the agreement may impose fines and other penalties to the private party (Articles 78 and 90 of the Decree).</p>
<p>12</p> <p>Risk allocation</p>	<p>■ PPP agreements must describe risk allocation (Article 4, e, of the Decree).</p>
<p>13</p> <p>PPP termination</p>	<p>■ PPP agreements may:</p> <ul style="list-style-type: none"> • expire; be terminated • when the project is abandoned or when the agreement is not complied with; • Acts of God and force majeure events; • because of other reasons provided by the agreement. <p>.....</p> <p>■ If the agreement is terminated by the private party, the agreement must determine the procedure for the private party to indemnify the government (Articles 65 and 74).</p> <p>.....</p> <p>■ When the agreement is terminated, a 3-person committee will be appointed to decide on how the assets and technology will be transferred (Article 75 of the Decree).</p>

14

Transparency and accountability

■ All consultations and clarifications must be published online on the GUATECOMPRAS portal (Article 61 of the Decree).

■ The selection of the private party depends on bidding procedures, except as otherwise provided by law. During the bidding process, the interested party must have access to all information and decisions. Public authorities must provide copies of the documents requested by the interested parties. The public notice must contain all information necessary, and objective, fair and clear rules about the bidding process. All documents and acts must be published on ANADIE's or GUATECOMPRAS' website (Article 46 of the Decree).

15

Other comments

■ Every 3 years the private party must hire a consultant that prepares new risk studies to review insurances values (Article 180 of the *Reglamento*).

■ The private party must invest 1% of the total value of the agreement in corporate social responsibility projects (Article 34, b, of the Decree).

ANNEX 9 HONDURAS



Legislation analyzed:

Decree 143/2010 (Ley de Promoción de la Alianza Público-Privada), Acuerdo Ejecutivo 02073/2010 (Reglamento General de la Ley de Promoción de la Alianza Público-Privada) and Decree 58/2010 (Ley Especial para la Simplificación de los Procedimientos de Inversión en Infraestructura Pública). Decree 24-2012 Interpretation of the PPP Law, Decree 73-2010 General regulation to the PPP Law and Decree 51-2011 Law for the Promotion and Protection of Investment.

Date of analysis:

August 17, 2018.



Legal and institutional framework

■ Decree 143/2010 is the applicable law for PPP.

■ The Commission for the Promotion of Public-Private Partnerships (COALIANZA) is the government body that manages and promotes public-private partnership projects (PPPs) and processes (APPs) (Article 1 of the PPP Law).

■ The Commission for the Promotion of Public Private Partnerships (COALIANZA) is a decentralized entity linked to the Presidency of the Republic. It has legal status and its own assets. (PPP Unit) (Article 11 of the Law). It is the COALIANZA function to:

- exclusively manage the contracting processes that allow public private participation in the implementation, development and management of public works and services of public interest for the State, both at the national and the local levels;
- coordinate with the State Secretariats, autonomous institutions, Regional Development Councils, municipalities, entities or deconcentrated bodies, and other State dependencies, the management of all the authorizations, permits, licenses and other requirements to make the execution of projects feasible, technically, operationally and financially;
- coordinate with other internal Public Administration internal bodies, the necessary actions to select, among public investment projects, those that qualify from the prioritized areas;
- collaborate with the municipalities in the evaluation of the projects submitted to programming to be incorporated into the National Public Investments System;
- follow-up the projects, works or services provided through Public-Private Partnership (PPP) models, in coordination with the regulating entities;



Legal and institutional framework

- advise and collaborate with Local Governments and other State entities, in private investment promotion matters, prior to the submission of projects for their feasibility analysis;
- ensure that Public-Private Partnerships (PPPs) are in harmony with the Objectives and Goals of the Country Vision and the Nation Plan;
- guarantee the implementation of activities included in the relations that originate the Partnerships;
- approve the necessary internal regulations for a better functioning of the Commission;
- propose to the Executive Branch the necessary regulation projects;
- approve the Budget and Annual Operations Plan;
- authorize the contracting of audits, having to know and approve the reports generated by such audits;
- know and declare itself on the reports requested or submitted by the Executive Secretariat;
- approve the appointment, contracting and termination of the Commission's staff;
- set the appropriate guidelines and criteria for the Executive Secretariat;
- adopt, within the sphere of its attributions, all the measures it deems relevant to meet its objectives and solve all issues that are not to be expressly solved by the Executive Secretariat.

■ Public-Private Partnerships are schemes for the public and private sectors to cooperate or join efforts to incorporate their skills, experience, knowledge, equipment, innovation and technology (Article 1 of the Reglamento).



Applicable sectors and activities

■ There are several different PPP models, whose objective is the creation, development, improvement, expansion, operation, maintenance or reduction of costs with public works and/or public services.

■ When the only scope of an investment project is the provision of labor force, supply and installation of equipment or the execution of public works, it may not be done via a public-private partnership. (Article 1 of the Reglamento).

3

PPP monitoring and regulation

■ Article 76 provides that the Congress is responsible for the selection process and appointment of the 3 members of the Superintendent of Public-Private Partnerships.

■ Article 83 provides that if the Superintendent finds breach of duty by the officers, the agency that initiated an administrative procedure involved may apply to present their defense. Sent the resolution to determine the failure of the agent, the Superintendent shall make the application of the penalties established in the respective agreement, license or contract.

■ The Superintendent shall keep a register of sanctions imposed by the Honduran Republic, with the objective of having control, conducting statistics, and informing the public, as well as for detecting cases of recidivism.

■ The Superintendent is required to submit to the Congress a report on the activities undertaken during the year, no later than January 31 of the year following the projects implementation (Article 85 of the Reglamento).

■ Article 80 of the Reglamento provides that the Superintendent may issue regulations and rules governing the procedures for the application of appropriate sanctions for violation of laws, regulatory or contractual, ensuring the principle of due process. These may be issued exclusively within its authority.

4

Modelling PPP projects

■ Article 8 of the PPP Law provides the basic matters the agreement address.

■ The Public-Private Partnerships (PPP) may be originated from public and private entities. In the public sector, State Secretariats, autonomous entities, the municipalities, associations of municipalities, Regional Development Councils and COALIANZA may initiate the actions (Article 17 of the PPP Law).

■ Article 18 of the PPP Law provides that the feasibility assessment must be done before projects are incorporated into the National Public Investment System under public-private participation models. The studies must include cost-benefit analysis and feasible financing schemes to assure the implementation of the project, works and/or services that may be delegated. These analyses are conducted by COALIANZA.

4

Modelling PPP projects

■ Public-Private Partnership initiatives originating from the public sector must be accompanied by preliminary feasibility tests, which include a cost-benefit analysis and possible financing schemes. They also have to be included in or compatible with national and local priorities, as appropriate (Article 4 of the Reglamento).

■ COALIANZA determines which public projects can be executed under PPP schemes, among those that are part of the planned National Public Investment System. (Article 18 of the PPP Law).

■ Article 5 of the Reglamento provides that the cost-benefit analysis serves to determine whether the contribution of the State means a higher net benefit for society, for the alternative use of the resources provided by it.

5

Procuring a PP project

■ Article 6 of the PPP Law provides the procedures available for PPP projects:

- National or international public tender; 2. National or international public contest; and 3. Any other procedure that ensures competition. The Specification Sheet determines the requirements the participants will offer, the types and amounts of guarantees demanded from the interested parties, the technical, economic and material evaluation criterion or criteria for the provision of the services, the materials, equipment and services the government offers, their respective budgets and conditions for provision of services. The works have to be implemented within the shortest time possible.

■ Article 12 of the Reglamento provides that a public contest will be conducted in cases in which COALIANZA does not have the required analysis for the work, service or project to be executed and/or exploited. In this case, COALIANZA evaluates the projects submitted by the interested parties, which must be within the parameters and minimum criteria set by COALIANZA and which is in contest's specification sheet.

■ Article 20 establishes that the proposal submitted in a public tender or public contest must be in the form, amount and conditions provided in the Specification Sheet.

■ Prior to the submission of proposals, the selection process includes a pre-qualification stage, which will be developed based on legal, technical, economic and/or financial criteria to be established in the Specification Sheet (Article 20).

5

Procuring
a PP
project

■ Article 36 of the Reglamento provides that, in case of unsolicited proposals, the project cannot commit public funds to finance the private entities nor grant guarantees of endorsement for this purpose. The State may only assume contingent commitments that represent minimal or no chance of claiming the use of public resources and as the project involves purposes of public interest and is developed to benefit the State. Private enterprises shall not include investment projects that match or are similar to those that match totally or partially the projects previously approved by COALIANZA, by state initiative or other private enterprise. Reimbursement is provided by article 49.

■ Evaluation criteria are provided by article 40 of the Reglamento.

■ During the evaluation stage of a private enterprise and before the qualification of public interest, one or more third parties may submit private enterprises concerning the same investment project, COALIANZA will continue the process with the first private enterprise presented. In case it is admitted and qualified of public interest it shall abide to the corresponding procedure of evaluation, selection and awarding and the following private enterprises submitted will be rejected. (Article 42 of the Reglamento).

■ COALIANZA will publish the qualification of interest on its website and in two newspapers of wide circulation; these costs will be assumed by the proponent. After the declaration of public interest has been published, interested parties may submit their expressions of interest regarding the implementation of the investment project within the time specified in the publication. If no third parties are interested in the execution of the investment project, COALIANZA will award the project to the participant according to what the Commissioners' choice (Article 44 of the Reglamento).

■ In the occurrence of one or more interested parties in the corresponding investment project, the selection procedure shall be carried out according to the provisions established in the specification sheet and shall be approved by COALIANZA and in the applicable rules (Article 48).

6

PPP
incomes

■ Article 7 of the PPP Law provides Public Administration Contribution.

■ Private companies, with previous authorization granted by the Superintendent of public-private partnerships, may give as a guarantee the income earned by the operation of the public-private partnership to creditors that qualify as such and as provided in the respective partnership contract for private investment. The purpose of these guarantees is to finance the design, construction, maintenance and/or operation of projects and/or services subject to a public-private partnership. Credits in favor of private parties resulting from a public-private partnership will be subject of securitization (Article 33).

<p>7</p> <p>Dispute settlement</p>	<p>■ Claims about the Public-Private Partnerships, initiated by individuals, as well as the PPP awarding, and the associations of this type that are approved, including the challenges to the awarding processes are obligatorily subject to the Arbitration Procedure and will abide by the rules that for this effect are established in the Terms and Conditions (Article 35 of the PPP Law).</p>
<p>8</p> <p>Dealing with changes</p>	<p>■ Legislation do not address, but the Law for the Promotion and Protection of Investments in the article 44 establishes the functions of the National Investment Council and within it states to work in coordination with the Ministry of Foreign Affairs and in close relationship and harmony with Honduran diplomatic representations around the world, to provide them with updated information relative to changes in legislation or government policy that may stimulate or affect investment, as well as potential attractive areas for investment.</p>
<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ Article 30 of the Reglamento provides that individuals that provide public services through public-private partnership schemes may give payments received for the services as guarantee. They may transfer their position as providers of specific services to third parties, upon authorization of the Superintendent for Public-Private Partnerships.</p> <p>.....</p> <p>■ PPPs are exempt from paying any type of taxes, duties or formalities to have the property registered in its name and/or for the formalization of all contractual relations required to carry out the projects. (Article 33 of the Reglamento).</p> <p>.....</p> <p>■ In the same way, the credits in favor of the private party resulting from a public-private partnership will be the subject of securitization (Article 33 of the Reglamento).</p> <p>.....</p> <p>■ State and Municipalities may assume firm commitments, if they are in certain and known amounts, and their contributions in the Public-Private Partnership model can be made as:</p> <ul style="list-style-type: none"> • Cash contributions; • Technical studies; • Subscription of shares or purchase of other securities traded in the financial market; • Granting certain public assets (concessions without transfer of ownership), including assets that have expropriated due to a public use cause;

<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<ul style="list-style-type: none"> • Granting permits or licenses to conduct authorized activities as Public-Private Partnership (PPP); • Granting temporary rights to government property (in case of Municipalities); • Providing services that correspond to the State; and • Other forms of contributions authorized by law and that are strictly in accordance with the purposes, principles and objectives of this Law. <p>.....</p> <p>■ The State and the Municipalities may not use public funds to finance private investors nor will they grant endorsements for this purpose. However, the agreement can provide there will be contributions made by the State and Municipalities if it serves the public interest and benefits the State, the Municipalities or the users.</p>
<p>10</p> <p>Extraordinary events</p>	<p>■ Without prejudice to provisions applicable to each concrete case, Public-Private Partnership contracts will include provisions about risk allocation between contracting parties, such as financial, commercial, operational and extraordinary risks that may be attributed to unforeseen causes or events (Article 8 of the Law).</p> <p>.....</p> <p>■ The parties must agree about the distribution of inherent risks and costs between them agreed according to what is best for the specific needs of the PPP (Article 9 of the Law).</p>
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ Article 87 of the Reglamento provides that in case of breach of contract, the Superintendence may impose fines and penalties, in accordance with the regulations or the agreement. It must be approved by the Superintendent no later than 60 days after the appointment of superintendents. In addition to the penalty to the offender, there may be other sanctions given to legal representatives or the persons in the legal entities' boards, according to their participation and responsibility for the offenses committed.</p> <p>.....</p> <p>■ Article 88 of the Reglamento establishes that the Superintendent may inform the government entity that an event that causes the temporary suspension of a PPP agreement. For the services not to be interrupted, the Superintendent may temporarily hire services, until a new public-private partnership agreement is executed. These service agreements may in no case be longer than one year.</p>

<p>12</p> <p>Risk allocation</p>	<p>■ Article 9 of the PPP Law provides that the parties have to agree on how to distribute inherent risks and costs according to what is best for the specific needs of the PPP, which could be, among others, financial, commercial, operations risks and extraordinary risks attributable to unforeseen causes.</p> <p>.....</p> <p>■ In any case, risk allocation has to be clearly defined and the government's liability in PPP should always be limited according to its contributions to the partnership.</p>
<p>13</p> <p>PPP termination</p>	<p>■ Article 8 provides that, without prejudice to what may be provided in each concrete case, PPP agreements must include provisions that establish causes to assumptions and extinction causes.</p>
<p>14</p> <p>Transparency and accountability</p>	<p>■ The owners of Public-Private Partnerships must publish their financial statements every three months and their annual report within the first quarter of the following year on their website. (Article 2 of the Reglamento).</p> <p>.....</p> <p>■ All documents that are part of the files prepared for the Public-Private Partnership and that are owned or held by the State, retain their confidentiality until the subscription of respective Contract of Public-Private Partnership. (Article 92 of the Reglamento).</p> <p>.....</p> <p>■ Once signed the PPP contract, any natural or legal person may request and receive the information referred, without giving reason or cause to substantiate the request. COALIANZA must provide the information requested within a maximum period of 15 days of the respective application. (Article 93 Reglamento).</p>
<p>15</p> <p>Other comments</p>	<p>■ The Commission for the Promotion of Public-Private Partnerships (COALIANZA) may charge up to 2% of the value of each authorized project to the company to which the project was awarded as a service provision fee (Article 29 of the PPP Law).</p> <p>.....</p> <p>■ COALIANZA may hire a corporate trustee to manage the trust referred to in Article 29 of the Law. The trust assets are the income from the fee charged for services provided to COALIANZA, and the contribution of the regulation corresponding to the Superintendence of Public-Private Partnership. (Article 96 of the Reglamento).</p> <p>.....</p> <p>■ The PPP Law, also foresees that in the basic content of a PPP Contract there must be a Fiscal stability and a convertibility rights clause. (Article 8 of The Law).</p>

ANNEX 10 JAMAICA





Legislation analyzed:

Government of Jamaica's Policy and Institutional Framework for the Implementation of Public-Private Partnerships (September 18, 2012)

Date of analysis:

June 12, 2018.

1

Legal and institutional framework

■ The Policy and Institutional Framework for the implementation of a PPP Program for the Government of Jamaica is the legislation applicable to PPPs.

■ The Policy defines a PPP as “a long-term procurement contract between the public and private sectors, in which the proficiency of each party is focused in designing, financing, building and operating an infrastructure project or providing a service, through the appropriate sharing of resources, risks and rewards.” (Article 1.0.2)

■ Two broad institutional structures: strategic and operational (Article 4.0.1)

- *Strategic Oversight.* Two (2) committees will have strategic oversight of the PPP Program:

A The Cabinet;

B Privatization Committee of Cabinet, supported by recommendations from a Strategy Committee.

- *Operational Management.* Two operating units were created specifically to manage the PPP Program. These entities are:

A the Privatization Agency and PPP Unit of the Development Bank of Jamaica;

B the Ministry of Finance and Planning PPP Node.

■ The Cabinet is the principal policy instrument, responsible for the general direction and control of the Government (Section 69(2) of the Jamaican Constitution on executive authority). Therefore, the Cabinet is the authority responsible for policy matters in the PPP Policy.

2

Applicable sectors and activities

■ PPPs may take a wide variety of forms, and are used for both existing assets and services (Brownfield), and new projects (Greenfield) (Article 1.0.2).

<p>2</p> <p>Applicable sectors and activities</p>	<ul style="list-style-type: none"> ■ PPPs apply to public infrastructure/assets or service provided for public benefit where the output has the element of facilities/services being provided by the Government as a sovereign to its people. Two key concepts are elaborated below: • ‘Public Services’ are services the Government is required to provide to its citizens (towards meeting the socio-economic objectives) or where the Government has traditionally provided the services to its citizens. • ‘Public Asset’ is that asset that is inextricably linked to public services. For example, public roads are linked to public transportation. They may be assets to be used or be part of assets that are used to provide public services.
<p>3</p> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ The Ministry/Agency, in consultation with the PPP Unit, establishes the Contract Management Team and the process and tools to manage the agreement. <hr/> <ul style="list-style-type: none"> ■ The Contract Management Team monitors PPP delivery and risk, manages changes, and signs the contract (Article 6.0.1)
<p>4</p> <p>Modelling PPP projects</p>	<ul style="list-style-type: none"> ■ The first stage of a PPP project is the project identification. Subject Ministries/Agencies will be asked to identify and scope potential projects and submit them to the PPP Unit for screening (Article 6.0.1). <hr/> <ul style="list-style-type: none"> ■ Unsolicited proposals (under regulation item 9) must contain a complete Business Case. <hr/> <ul style="list-style-type: none"> ■ If the project is in the PPP List developed by the Federal Government, the PPP unit will move the project up the priority list and then will develop and procure the project under the standard PPP process (Article 9.0.3.1) <hr/> <ul style="list-style-type: none"> ■ If the project is not in the PPP List (Article 9.0.3.2), the PPP unit will consider if it meets the PPP criteria: a. viability, b. achievement of value for money, c. marketability, d. fiscally responsible (article 7). <hr/> <ul style="list-style-type: none"> ■ If the proposal does not meet the criteria, the PPP Unit will reject it. However, ideas in the unsolicited proposal may be incorporated into the design of other projects, if it seems likely they will promote value for money. (Article 9.0.3.2).

<p>4</p> <p>Modelling PPP projects</p>	<ul style="list-style-type: none"> ■ If the proposal meets the criteria, the PPP Unit may recommend to the Strategy Committee that the project be developed by the Proponent utilizing the Swiss Challenge procurement system (Article 9.0.3.3). <hr/> <ul style="list-style-type: none"> ■ The Privatization Committee of Cabinet must approve the list of candidate projects (the PPP List) or a project's addition to the PPP List (reviewed by the Strategy Team) (Article 6.0.2). <hr/> <ul style="list-style-type: none"> ■ The Privatization Committee of Cabinet must approve moving forward to the Transaction stage to procure the proposed PPP (reviewed by the Enterprise Team) (Article 6.0.2). Also, there will be a Gateway Review made by the PPP Unit, the DBJ Board, the Enterprise Team or Cabinet (Article 6.0.3).
<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ The transaction stage is when bidders are requested for the project, pre-qualified, and then invited to bid (Article 6.0.1). The Project Team drafts the PPP Agreements, qualifies bidders, drafts the Request for Proposals (RfP), consults with bidders, issues the RfP, evaluates bids and recommends award. The Enterprise Team guides the Project Team in completing these tasks and reviews the bid evaluation before submitting the results to the Cabinet for final approval. This stage continues past bid evaluation to include negotiation (if needed), contract signature, and financial close. <hr/> <ul style="list-style-type: none"> ■ The Privatization Committee of Cabinet must approve the parameters of the final deal (reviewed by the Enterprise Team) before the contract is executed in the Transaction Stage (Article 6.0.2).
<p>6</p> <p>PPP incomes</p>	<ul style="list-style-type: none"> ■ Each agreement has its income rules. <hr/> <ul style="list-style-type: none"> ■ The private sector may receive payment for the services from the Government, from the users or a combination of both. Where an existing Government asset or service is utilized, the Government will negotiate appropriate compensation from the private sector for the use of the asset (Article 1.0.2). <hr/> <ul style="list-style-type: none"> ■ Government payments are conditional on the private party providing the specified outputs at the agreed quality, quantity, and timeframe. If performance requirements are not met, service payments to the private sector party may be abated (Article 2.0). <hr/> <ul style="list-style-type: none"> ■ It is possible for both parties to constitute guarantees (Article 3.0.3).

<p>7</p> <p>Disputes settlement</p>	<p>■ Regulation does not have provisions on domestic arbitration, international arbitration, and investor-state dispute settlement (ISDS). Dispute resolution mechanisms will be established in the PPP agreement (Article 8.0).</p>
<p>8</p> <p>Dealing with changes</p>	<p>■ The agreement may be renegotiation by the parties (Article 8.0.1), according to the procedure detailed in the PPP agreement.</p> <p>.....</p> <p>■ Change in the contract environment is inevitable, given the long-term and complex nature of PPP contracts. The contract should include mechanisms to adjust to such changes. These contract mechanisms typically include adjustment provisions, dispute resolution, and force majeure and termination provisions (article 8.0).</p> <p>.....</p> <p>■ If the time comes to use one of these contractual mechanisms, the Contract Manager must ensure that the review/negotiation team has the appropriate skills. This will generally involve engaging legal counsel, seeking help from the PPP Unit, and keeping the Ministry of Finance and Planning PPP Node involved (Article 8.0).</p>
<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ According to article 11.0, the GoJ's PPP program may be funded from the following sources, which will be identified by the PPP Unit in conjunction with the Ministry of Finance:</p> <ul style="list-style-type: none"> • Low-cost debt financing to GoJ; • Grant financing from multilateral institutions; • Infrastructure Funds; • Bond floats on the local or international capital markets; • A Nominal Tax to be withheld (up to 2%) from proceeds of each PPP transaction.
<p>10</p> <p>Extraordinary events</p>	<p>■ Force majeure events, materially adverse government action and subcontracting are regulated only by contract (article 8.0).</p>

<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The Contract Management Team may manage amendments to the agreement (with advice from the PPP Unit) and enforce the contract when necessary (with advice from the PPP Unit and legal counsel) (Article 4.0.2.5).</p>
<p>12</p> <p>Risk allocation</p>	<p>■ Risk retained by the Government in owning and operating infrastructure typically carries substantial unvalued cost. Allocating some of the risk to a private party which can better manage it may reduce the project's overall cost to government (Article 2.1)</p> <p>.....</p> <p>■ The PPP Node will be responsible for monitoring fiscal risks (Article 4.0.2.4).</p>
<p>13</p> <p>PPP termination</p>	<p>■ Grounds for termination of a PPP agreement and its consequences are expressly regulated in each contract (Article 8.0).</p>
<p>14</p> <p>Transparency and accountability</p>	<p>■ The Access to Information Act, 2002, and Access to Information Regulation, 2003, apply to all PPP projects, and requests for information will be dealt with in accordance with this Act and its regulations. In addition, the PPP Unit will adopt the following practices on disclosure:</p> <ul style="list-style-type: none"> • The PPP List will be published after it is approved by Cabinet, and whenever it is updated. • A summary of information on each PPP project will be published before the tender process begins (prior to issuing a Request for Qualifications or Request for Expressions of Interest). • Requests for Proposals (RfPs) will be published when they are issued to potential bidders. • PPP contracts will be published after they become effective. • The Contract Manager will make performance data publicly available, following an agreed-upon schedule and format.

ANNEX 11 MEXICO





Legislation analyzed:

Political Constitution of the Mexican United States (*Constitución Política de los Estados Unidos Mexicanos*), PPP Law (*Ley de Asociaciones Público Privadas*) and Reglamento (*Reglamento de la Ley de Asociaciones Público Privadas*), Applicable Rules for the Public-Private Partnership Scheme (*Lineamientos para un esquema de asociación público privada*), Federal Budget and Tax Responsibility Code (*Ley Federal de Presupuesto y Responsabilidad Hacendaria*), General Law of National Assets (*Ley General de Bienes Nacionales*).

Date of analysis:

August 17, 2018. Updated on: February 20, 2019.



Legal and institutional framework

■ Federal Private-Public Partnerships (PPP) are regulated by the *Ley de Asociaciones Público Privadas* (PPP Law) and the *Reglamento de la Ley de Asociaciones Público Privadas* (Reglamento), under the Constitutional rulings and principles set forth in Articles 25 and 134 of the Political Constitution of the Mexican United States.

■ The PPP Law was published and made enforceable in 2012.

■ Even though there is a Federal Law (the PPP Law), 30 of the 32 Mexican States (except Tlaxcala and Zacatecas) have local PPP Laws.

■ The Applicable Rules for the Public-Private Partnership Scheme provide the rules to be followed in order to incorporate and operate a PPP project.

■ The General Law of National Assets will rule the treatment of the assets provided to and by the PPP (Article 97 of the PPP Law).

■ PPP projects are those are made according to schemes that establish a long-term contractual relationship between the public and the private sector for the provision of services to the public sector, wholesalers, intermediaries or the end user and in which infrastructure is totally or partially used by the private sector to increase social welfare and investment levels in the country (Article 2 of the PPP Law).

<p>1</p> <p>Legal and institutional framework</p>	<ul style="list-style-type: none"> ■ There may also be PPP projects that are carried out under the terms of the PPP Law, under partnership schemes to develop projects in productive investment, applied research and/or technological innovation (Article 3 of the PPP Law). <hr/> <ul style="list-style-type: none"> ■ The federal government and federal public trusts that are not considered parastatal entities, autonomous federal public legal entities, and the states, municipalities and public entities who partake in the Federal Budget may enter into PPP projects (Article 4 of the PPP Law).
<p>2</p> <p>Applicable sectors and activities</p>	<ul style="list-style-type: none"> ■ There is no specific legal provision about the applicable sectors, but from the definitions of PPP, we can infer that it applies to any physical facilities, systems and equipment required for the adequate provision of public services and the services themselves (Article 2 of the PPP Law), and also, to productive investment projects, applied research and technological innovation (Article 3 of the PPP Law). <hr/> <ul style="list-style-type: none"> ■ Only corporations and legal entities may enter into PPPs (Article 91 of the PPP Law).
<p>3</p> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ The Secretariat of the Comptroller supervises the preparation, beginning and adjudication of public-private associations' projects and other acts regulated by the Law, except for the technical aspects of the PPP projects. Some projects, due to their extremely technical nature, may not be subject to supervision by the Secretariat of Public Function. The supervision of the provision of the services, if appropriate, the execution of the works and the compliance with and development of the PPP Project, will rely on the public entity that entered into the Agreement, as well as any other ruling authority on the matter. (Article 125 of the PPP Law). <hr/> <ul style="list-style-type: none"> ■ If the private company fails to comply with the obligations of the PPP agreement it will result in penalties provided in the agreement, which may include reductions in the consideration paid to the developer (Article 129 of the PPP Law), as well as possible disqualification to participate in future PPP projects or public services (Article 130 of the PPP Law). <hr/> <ul style="list-style-type: none"> ■ The Government Agencies and Federal Entities must keep a file with specific documentation for each project in which they participate. (Article 126 of the <i>Reglamento</i>). These files must be kept by the Government Agency for the duration of the Agreement, and for an additional 12 year term (Article 127 of the PPP Law).

3

PPP
monitoring
and
regulation

■ There is no provision of who is the competent body to regulate the agreement. The terms and conditions of these agreements are ruled under the principle of Civil Law contained in Article 6 of the Mexican Federal Civil Code, which states that the parties are free to agree on the terms and conditions as long as they don't contradict enforceable laws, or affect public order or third party rights. Nevertheless, the Secretariat of Public Function may prosecute matters related to PPPs in accordance to the attributions granted by Article 125 of the PPP Law (Articles 125 and 126 of the PPP Law).

4

Modelling
PPP
projects

■ Several Analyses should be provided in order to model a PPP Project:

- **Value for money:** A detailed analysis should be provided in which the appliers prove that the project will provide significant advantages by being executed as a PPP rather than solely by the public sector (Article 14, section VII of the PPP Law and Article 28 of the *Reglamento*).

- **Economic and Financial Viability:** Economic and financial viability shall consider reasonable economic and financial assumptions; the income and expenditure flows of the project during its term, as well as an adequate distribution of risks between the public sector and the private sector during the stages of preparation, construction and operation of the project. From this analysis, it will be necessary to determine if the project is economically or financially viable (Article 14-VIII of the Law and 28 of the *Reglamento*).

- **Environmental Analysis:** In the preliminary studies to prepare public-private partnership projects, agencies and entities will take into consideration the analysis of the authorities on compliance with environmental protection provisions, preservation and conservation of the ecological balance at the federal, state and municipal levels, and the effects on the environment that may be caused by the execution of works, supported by the evaluation of environmental impact (Article 15 of the PPP Law).

■ In order to receive federal funds, the PPP project must be registered before the Mexican tax authorities ("Cartera de Inversión") in accordance to Article 34, Section III of the Federal Budget and Tax Responsibility Code and Section II of the Applicable Rules for the Public-Private Partnership Scheme. (Article 21 of the PPP Law and article 11-II of the *Reglamento*).

■ The dependencies or Federal entities shall publish in the Official Gazette of the Federation and on its website an announcement through which they determine the proposals for the applicable (Article 43 of the *Reglamento*).

4

Modelling
PPP
projects

■ If a private party submits a proposal for a PPP which has not been published by the Government Agencies or Federal Entities, such private party is eligible for a reward for the time and material spent on making the proposal. The public party who receives the proposal will call for a public tender in order to find the best provider possible. If the private party who suggested the project does not win such tender, he will be entitled to a prize, which will be established on the basis and which may not exceed the equivalent of ten percent in relation to the criteria indicated to award the contract (Article 31 of the PPP Law).

■ The participation of a support agent in a procurement procedure consists of advising, preparing projects and proposals, and providing logistical, technical or any other kind of support that will help the Federal Dependency or Entity to carry out any act of the contracting procedure. The services of the Agent may include conducting financial, legal, technical workshops and any other activity that allows the best dissemination of the project, and coordinating the public sessions to receive and open proposals (Article 57 of the *Reglamento*).

■ PPP Agreements should include the formalities and requirements set forth in Article 92 of the PPP Law and 107 of the *Reglamento*.

5

Procuring
a PPP
project

■ The notice is published online on the agency's or the entity' website, in the Official Gazette of the Federation, in CompraNet, in a newspaper of national circulation and in a newspaper published in the federal entity where the project will be developed. (Article 44 of the PPP Law).

■ None of the conditions in the notice, in its tender documents and annexes, nor in the proposals of the participants, may be negotiated (Article 46 of the PPP Law), except for those cases in which the project would be improved, its efficiency would be enhanced, the ecological impact is reduced or the economical profit is improved (Articles 117 to 120 of the PPP Law).

■ The competition process has one or more stages for consultation and clarification, in which the grantor answers, in writing, questions submitted by participants (Article 50 of the PPP Law).

■ To facilitate the competition, prior to the presentation and opening of the proposals, the grantor may register the participants, and make preliminary revisions to the documentation other than the amount of the economic offer (Article 49 of the PPP Law).

5

Procuring
a PPP
project

■ The technical and economic offers will be presented simultaneously, but in separate files (Article 75 of the *Reglamento*).

■ The proposal should be submitted by a legal representative with enough power of attorney to bind the private company accordingly (Article 76 of the PPP Law).

■ Technical offers are evaluated first. Economic offers are only opened after the technical offers have been evaluated (Article 81 of the *Reglamento*).

■ In the evaluation of the proposals, the grantor will verify whether they comply with the requirements indicated in the tender, and sufficient elements to develop the project. Only the criteria established in the basis themselves should be considered, provided they are clear detailed and allow an objective evaluation that does not favor any participant (Article 52 of the PPP Law).

■ Three main criteria will be taken into consideration in the evaluation process:

- points and percentages,
- cost-benefit criteria or
- any other criteria may be used, provided they are clear, quantifiable and allow an objective and impartial comparison of the proposals (Article 77 of the *Reglamento*).

■ Government Agencies and Federal entities may avoid public tender and invite at least 3 competitors or award the project directly in certain specific scenarios, like military projects, lack of specialized competitors in the market, or special circumstances that will unavoidably increase the costs of the project. (Article 64 of the PPP Law).

■ The Government Agency or Federal Entity is entitled (but not obliged) to ask for remuneration for:

- the public real estate provided to the project,
- reimbursement of remnants, and
- supervision services (Article 100 of the PPP Law).

6

PPP
incomes

■ When the developer is required to provide guarantees, their amount, in total, must not exceed: 15% of the total value of the works during the construction of the infrastructure in question; and 10% of the annual compensation for the services provided (Article 99 of the PPP Law).

■ The income will depend on the type of PPP chosen (Articles 92-VII y 94-I of the Law).

■ Infrastructure works may include facilities for carrying out complementary activities, commercial or otherwise, that are convenient for the final users, as well as compatible and susceptible to differentiation from the main service (Art 109 of the Law).

7

Disputes
settlement

■ In disputes about technical or economic issues, the parties in the PPP agreement must try to resolve them in good faith by mutual agreement. If the parties do not reach an agreement within the agreed upon period, they must submit the dispute to a committee with 3 experts in the matter in question. Each party appoints a member and the third by the latter. The committee will analyze technical or economic issues, but will have no knowledge about legal issues. (Art 134 of the PPP Law).

■ If a public-private partnership agreement foresees it, the parties may request for conciliation process before the Ministry of the Comptroller for a request for conciliation which will resolve the matters in accordance to the applicable laws. (Article 138 of the PPP Law).

■ The parties in a public-private partnership agreement may agree to have a strict law binding arbitration procedure, to resolve disputes that arise from the contract itself. The arbitration must be in Spanish and under Mexican Law, and the ruling will be binding to all the parties (Article 139 of the PPP Law).

■ Disputes about the interpretation or application of the agreement's conditions concluded on the basis of the Law are submitted to the federal courts. This will be the case if there is no arbitration clause, alternative dispute resolution method, or if these are not applicable (Article 146 of the *Reglamento*).

■ Disputes concerning the legal validity of any administrative authorization or similar action, in this respect will be resolved by the federal courts.

8

Dealing with changes

■ During the original term of the public-private partnership project, amendments may only be made when they intend to:

- Improve the characteristics of the infrastructure, which may include additional works;
- Increase services or their level of performance;
- Address issues related to environmental protection, as well as the preservation and conservation of natural resources;
- Adjust the scope of the projects due to unforeseen supervening causes when preparing and awarding the project; or
- Restore the economic balance of the project (Article 117 of the Law).

■ Changes do not imply risk allocations from one party to the other, differently from those agreed in the original contract (Article 117 of the Law).

■ In case the changes require additional compensation or imply diminishing of the obligations assumed by the developer, the following conditions must be met among others:

- During the first 2 years immediately after the project is awarded, the total value of the modifications may not exceed 20% of the agreed upon infrastructure cost, and consideration for services provided during the first year cannot be changed;
- When, after the first 2 years after the project has been awarded, the previously authorized amendments or the ones to be authorized, exceed the 20% of the infrastructure cost agreed by the parties, as well as the consideration for services rendered during the first year, must be expressly approved in writing by the head of the dependency or contracting entity. (Article 118).

■ In order to restore the economic balance of the project, the developer has the right to have the agreement reviewed if the prices increase or the profit reduced substantially, because of an administrative, legislative or jurisdictional action of a competent authority. In light of the above, variations are substantial when they are long lasting and put the financial viability of the project at risk.

8

Dealing with changes

- The agreement may only be reviewed and, where appropriate, amended if the action of the authority:
 - Takes place after the date of presentation of the economic positions in the contest;
 - Could not have been foreseen when the project was prepared and awarded; and
 - Represents a change to the provisions applicable to the development of the project (Article 119 of the Law).

9

Financing and Funding PPP agreements and Warrantees

- The budget assigned to PPP Projects will be published once a year, and will never surpass 1% of the Federal Expenditures Budget (Article 24 of the PPP Law and Article 32 of the *Reglamento*).
-
- The participation of Federal agencies and entities in public-private partnership projects may be conducted through:
 - Federal budget;
 - Resources from the National Infrastructure Fund or other federal non-budgetary public resources, or
 - Contributions other than cash, including granting necessary authorizations. (Article 3 of the *Reglamento*).
-
- The PPP agreements must provide among others the terms and conditions the following:
 - Financial adjustments if, during the term of the agreement, the developer receives better financing conditions. The benefits that these financial adjustments generate should be calculated and distributed according to what is established in the agreement, considering the specific conditions of the project and the financing. The participation of the Federal Dependency or Entity in said benefits may not be smaller than fifty 50% thereof, and
 - Any other additional project net income, which must be used to pay the Developer's consideration, with the consequent reduction of the amounts that the Federal Dependency or Entity owes to said Developer or the fees paid by users (Article 107 of the *Reglamento*).

<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ The rights of the developer derived from the public-private partnership agreement and, if applicable, the respective authorizations for the development of the project, may only be transferred to third parties, given as a guarantee or affected in any way, with prior authorization from the agency or contracting federal entity (Article 112 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ The developer is responsible for providing the resources for the execution of the works and the provision of the services. The Government's provision of resources may be added in the terms and conditions of the PPP Agreement (Article 96 of the Law).</p>
<p>10</p> <p>Extraordinary events</p>	<p>■ The public-private partnership agreement must provide the allocation of risks by fortuitous event or force majeure and of any other nature. The agencies and entities cannot guarantee any payment to developers for risks other than those established in the agreement or established by mechanisms different from those indicated by this law and its regulations (Article 92 of the PPP Law).</p>
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The contracting entity may demand an early termination in order to secure public interest, or when the goods or services originally contracted are no longer needed and if the State would be damaged or affected by the completion of the Project. The parties may agree to include other causes for early termination in the PPP Agreement if applicable (Article 123 of the <i>Reglamento</i>). In case of early termination, private companies are entitled to the reimbursement of measurable and demonstrable expenditures (Article 124 of the <i>Reglamento</i>).</p>
<p>12</p> <p>Risk allocation</p>	<p>■ The requirements of the competition must provide for the risk allocation (Article 45 of the Law). This analysis should be included in the PPP Agreement (Article 95 of the PPP Law).</p> <p>.....</p> <p>■ Unless otherwise agreed in the PPP agreement, all of the operational and service risks of the project (except those set forth in Article 119 of the PPP Law), will be assumed by the developer (Article 108 of the PPP Law).</p> <p>.....</p> <p>■ The Government Agency will request the private company to hire insurance policies at its own cost in order to reduce the risks. (Article 100 of the PPP Law).</p> <p>.....</p> <p>■ The feasibility analysis of the PPP project will determine the adequate risk allocation between the public and the private sector during the preparation, construction and operation phases of the project (Article 28 of the <i>Reglamento</i>).</p>

13

PPP
termination

■ By general rule, PPP Agreements shall not have a duration of more than 40 years (Article 98 of the PPP Law).

■ Notwithstanding any other contractual issue, the following are grounds for termination of PPP agreements:

- Cancellation, abandonment or delay in the execution of the work, in the cases provided in the agreement;
- Failure to provide the services, in accordance to the terms provided in the agreement, or suspension of services for more than 7 consecutive calendar days without justified cause;
- Revocation of authorizations required for the provision of services (Article 122 of the Law).

■ Upon termination of the agreement, public real estate property and rights that were incorporated into the infrastructure or were essential to provide the service will be reassigned to the contracting agency or entity. (Article 123 of the Law).

14

Transpa-
rency
and
accoun-
tability

■ All of the information provided for PPP projects shall be published online in the Tax Authority Budget Transparency Portal (*Portal de Transparencia Presupuestaria de la Secretaría de Hacienda y Crédito Público*), except the information that is not allowed to share to the general public by ministry of law (Article 14 of the PPP Law).

■ The Ministry of the Comptroller will provide free information on federal PPP projects and unsolicited proposals in the government electronic public information system CompraNet (Article 11 of the Law).

■ To analyze and, where appropriate, authorize PPP projects that require budgetary resources or changes to the scope of previously authorized projects that require such resources, the Finance Secretariat sends information to the competent commission thereof for authorization (Article 36 of the *Reglamento*).

■ In addition to the elements in article 44 of the Law, the call must include:

- The webpages on which the call and other information about the contest will be available, and
- The cost and form of payment of the the bidding process. (Article 66 of the *Reglamento*).

ANNEX 12 NICARAGUA





Legislation analyzed:

Law 935/2016 (Ley de Asociación Público Privada) and Decree 05/2017 (Reglamento de la Ley de Asociación Público Privada).

Date of analysis:

August 16, 2018.

1

Legal and institutional framework

■ Law 935/2016 is the PPP Law of Nicaragua.

■ PPPs involves planning, financing, construction, development, use and enjoyment, operation, maintenance, modernization, expansion and improvement of new public infrastructure facilities and associated equipment, as well as the rehabilitation, modernization, exploitation and maintenance of existing public infrastructure facilities and the provision of public services by the private party that provides resources with State assets (Article 3 of the Law).

■ DGIP (*Dirección General de Inversiones Públicas del Ministerio de Hacienda y Crédito Público*) is the PPP Unit (Articles 6 and 7 of the Law) and is responsible for preparing and coordinating the plans, policies and standards for the development and proper functioning of the PPP projects, ensure its compliance and correct use and advise any State institution that so requires in its implementation. The DGIP will have the power, in coordination with the Public Sector Institutions, to identify and propose possible projects to be developed under the modality of contracting in Public Private Partnerships, as well as to execute the actions aimed at the development of the Project.

■ PPPs may be procured by the Executive and Legislative Powers, including public foundations, agencies, state-owned companies and other entities directly or indirectly controlled by the Union, States, Federal District or Municipalities (Article 4 of the Law).

2

Applicable sectors and activities

■ There is no legal provision about the applicable sectors, but from the definition of PPP, one can infer that it applies to any facility, system and equipment required to adequately provide public services, and to the services themselves (Article 3 of the Law).

3

PPP monitoring and regulation

■ There will be an auditor for each agreement selected by public tender. The auditor may propose fines and prior authorization of the Ministry of Finance the DGIP will apply them (Articles 58 and 64 of the *Reglamento*). The auditor is the DGIP representative to monitor the agreement (Article 32 of the Law and 61 of the *Reglamento*).

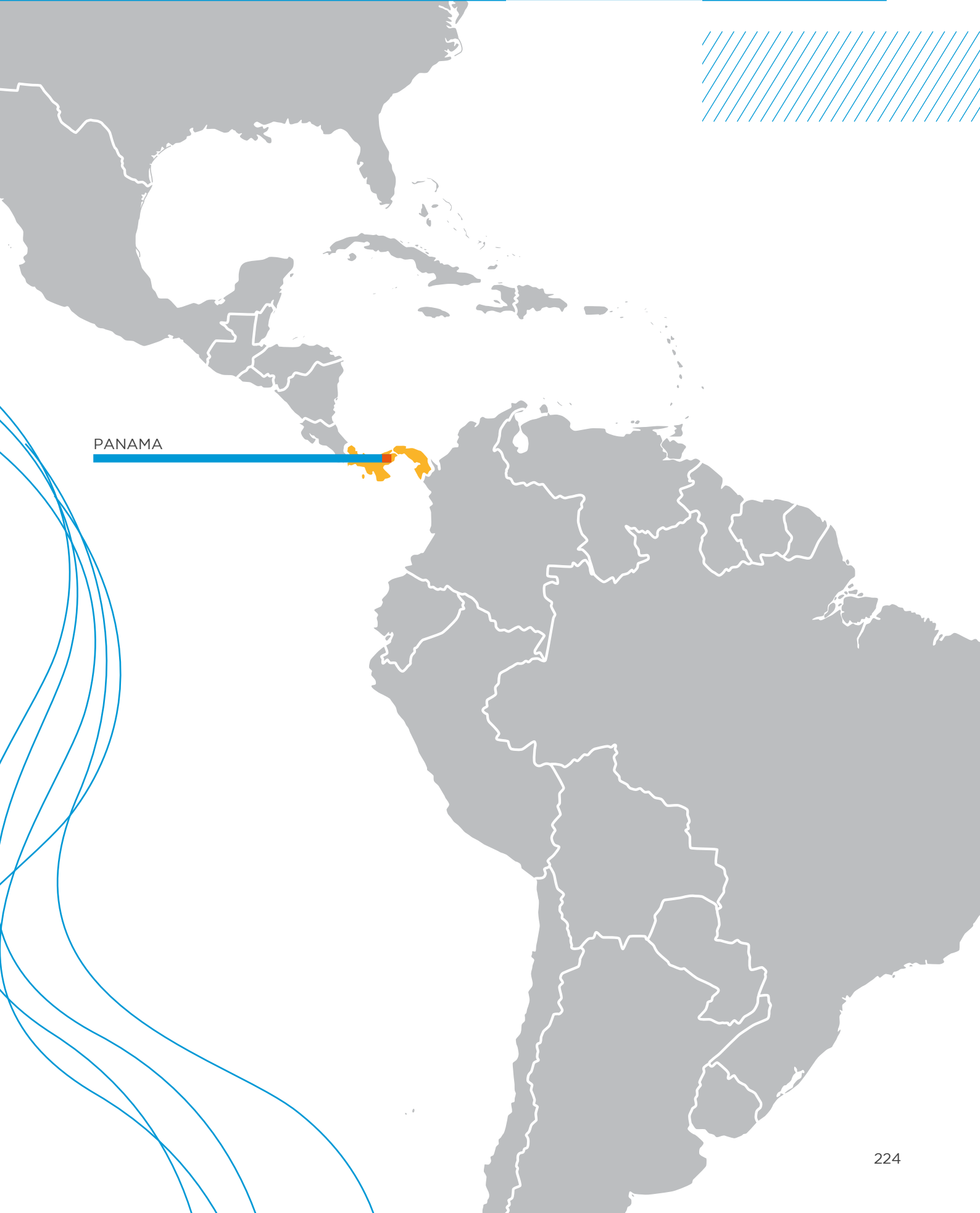
<p>3</p> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ The Ministry of Finance and Public Credit oversees compliance with the terms and conditions of the PPP agreement during the works and operation phases (Article 32 of the Law). <hr/> <ul style="list-style-type: none"> ■ Article 3 of the Reglamento provides that the DGIP is responsible for monitoring and regulating the projects.
<p>4</p> <p>Modelling PPP projects</p>	<ul style="list-style-type: none"> ■ Value for money must be analyzed (Article 4 of the Law). <hr/> <ul style="list-style-type: none"> ■ DGIP is responsible for analyzing the convenience of the project and its sustainability, based on the studies carried out by the Contracting Institution (Articles 5 and 6 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ In projects initiated by the private sector, the DGIP and the Contracting Institution must verify the national interest in the project (Article 8 of the <i>Reglamento</i>).
<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ Tender documents are prepared by the Contracting Institution (Article 24 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ The bidding process are public and international and national or foreign individuals or legal entities may participate (Article 17 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ The private manager is selected via a public tender, called by the delegating entity after DGIP issues a resolution approving the project. For this purpose, the delegating entity prepares the tender documents that must be consistent with the feasibility studies (Article 22 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ The technical and economic offers must be delivered simultaneously, in 2 separate envelopes, until the date and time indicated in the call notice, not less than 120 days from publication (Articles 30 and 31 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ The Technical Committee will evaluate the proposals, according to the criteria in article 37 and the ones defined in the tender documents and will select the winning bidder (Articles 36 and 37 of the <i>Reglamento</i>).

<p>5</p> <p>Procuring a PPP project</p>	<p>■ DGIP publishes an invitation to present studies that will be published online and in the Official Gazette, with the information about the projects that will be presented by the private sector, the evaluation criteria and reimbursement conditions. If there is more than one project with the same object, they will choose the one that is most convenient for the Government. After the presentation of the projects, DGIP and the Contracting Institution will evaluate the projects and publish the results. (Article 9 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ After the results are published, the private party must submit a guarantee that it is going to present the final proposal, which will be reviewed by the DGIP and the Contracting Institution. After that, then the project will be placed in a bidding process (Article 34 of the <i>Reglamento</i>).</p>
<p>6</p> <p>PPP incomes</p>	<p>■ The private party will be reimbursed for its investment, by charging user fees, by receiving periodic payments made by the government and that must be expressly provided in the agreement, or a combination of both. It may have, in case it is allowed, a profitability inherent to the Project, a certain contribution in money or participation in the benefits arising from the execution of the agreement in favor of the government. Compensation payments from the government may be certain or contingent (Article 11 of the Law).</p>
<p>7</p> <p>Disputes settlement</p>	<p>■ The PPP agreement provides an alternative mechanism to resolve disputes arising from the agreement and any other document that is a part of the PPP agreement. The alternative dispute resolution mechanism includes mediation first, and if the mediation is unsuccessful, then arbitration (Article 31 of the Law).</p>
<p>8</p> <p>Dealing with changes</p>	<p>■ The parties may agree to one or several changes to the characteristics of the works and/or services contracted in order to increase service levels and/or technical standards established in the Bid Terms and Conditions, or for other reasons of public interest, duly justified. It may not exceed twenty-five percent (25%) of the original agreement's budget for the work or service. (Article 55 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ Any amendment by mutual agreement not considered substantial must be previously approved by the Ministry of Finance and Public Credit, which will assess the socio-economic profitability and fiscal sustainability of the project, based on the modification requested. The government Contracting Institution must compensate the private party for these changes in the agreement (Article 55 of the <i>Reglamento</i>).</p>

<p>8</p> <p>Dealing with changes</p>	<p>■ The private party may request compensation for unforeseen acts of the public authority that substantially increase the cost to execute the agreement or that substantially reduces the amount provided in the initial calculation of the benefits of its execution. However, said act of authority strictly complies with the following requirements:</p> <ul style="list-style-type: none"> • The act occurs after the agreement had been executed and could not be provided in the Bid Terms and Conditions. • It is an administrative measure, a legislative or regulatory change, with specific effects on the sector of the PPP Project, after the agreement had been executed, and significantly alters the economic regime of the agreement. <p>.....</p> <p>■ If the supervening act occurs after the project is awarded, but before the execution of the agreement, the private party is entitled to withdrawing its offer, and the guarantee given will not be foreclosed on. (Article 27 of the Law).</p>
<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ Financing is the private party's responsibility (Article 52 of the <i>Reglamento</i>). The private party may do it as it deems appropriate, including by a securities public offering. Upon consent of the Contracting entity, it may also issue securities derived from the securitization of payments, income or rights of the private party related to the agreement, pledge those values, income or rights.</p>
<p>10</p> <p>Extraordinary events</p>	<p>■ The agreement may be terminated in case of force majeure events (Article 21 of the Law). The agreement will provide the termination mechanism.</p>
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The auditor may propose fines and prior authorization of the Ministry of Finance the DGIP will apply them (Article 32 of the Law).</p> <p>.....</p> <p>■ If there is serious breach of contract or abandonment of the Project, declared by the DGIP, at the request of the Contracting Institution and the Project Auditor, they must appoint an intervening party, who will have authority to ensure compliance with the PPP agreement for an efficient, effective and uninterrupted service provision (Article 29 of the Law).</p>

<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The Contracting Institution may unilaterally amend the agreement, in the minimum amount of 25% of the agreement's value, as long as the private party is compensated so that the economic balance of the agreement is maintained (Article 54 of the <i>Reglamento</i>).</p>
<p>12</p> <p>Risk allocation</p>	<p>■ PPP agreements must describe risk allocation (Article 4 of the Law).</p>
<p>13</p> <p>PPP termination</p>	<p>■ Tender documents and the agreement will provide causes for agreement termination (Article 21 of the Law and Article 24 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ Article 26 of the Law provides that it must be specified in the PPP agreement the assets that would remain property of the private entity and those that will be transferred to the Government.</p>
<p>14</p> <p>Transparency and accountability</p>	<p>■ PPP public notices, prequalification, draft agreements and any amendments to them must be available online (Articles 4 and 18 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ One of the guidelines of PPP procurement is transparency on procedures and decisions (Article 4 of Law and article 4 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ All projects must be approved by a law as well as any amendment to the agreement (Article 23 of the Law).</p>

ANNEX 13 PANAMA



PANAMA

Legislation analyzed:

Law No. 22/2006 and Law No. 5/1988

Date of analysis:

August 14, 2018.

1

Legal and institutional framework

■ There is only one piece of regulation about PPPs, which provides for their use in the road sector. It establishes the administrative concession system for the execution of public work of public interest, applicable to construction, improvement, maintenance, and exploration of roads or other works that the *Consejo de Gabinete* classifies as of public interest (Law No. 5/1988).

■ In the administrative concession system, a legal entity undertakes, at its own risk, to execute public works in exchange for tariffs or rights (Article 2, Law No. 5/1988).

■ The private entities may be legal entities or state-owned companies (Article 4, Law No. 5/1988).

■ Law No. 22/2006 provides guidelines for public agreements and the bidding process, and also applies to “concessions and other agreements not regulated by special law” (Article 1 of Law).

■ Law No. 22/2006 applies to the Central Government, autonomous and semi-autonomous entities, and state-owned companies (Article 1 of Law).

■ Law No. 22/2006 applies secondarily to municipalities, community boards, local boards and *caja de seguro social* (Article 1 of Law).

■ Panama does not have with a specialized body responsible for PPP projects.

2

Applicable sectors and activities

■ The legislation does not provide any restriction on which sectors on PPP may be used.

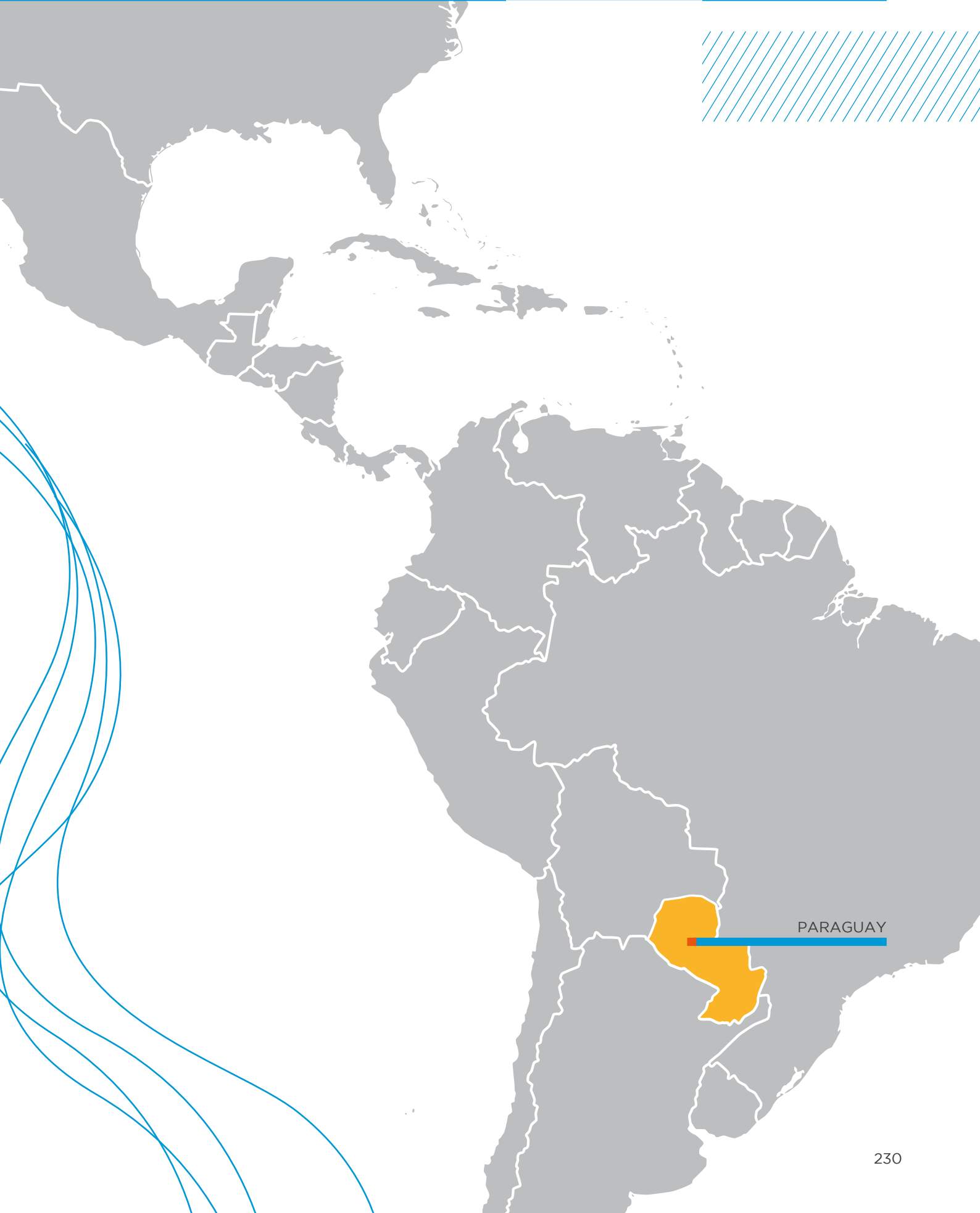
<p>3</p> <p>PPP monitoring and regulation</p>	<ul style="list-style-type: none"> ■ Law No. 22/2006 creates the <i>Dirección General de Contrataciones Públicas</i>, the body that regulates, monitors and assists bidding processes (Article 8 of Law). ■ The <i>Dirección General de Contrataciones</i> is monitored by <i>Contraloría General de la República</i> and by Executive Power's policies (Article 8 of Law No. 22/2006). ■ PPP agreements go into effect upon authorization of the <i>Contraloría General de la República</i>, which is also responsible for monitoring public agreements (Article 65 of Law No. 22/2006). ■ The public entity may impose fines to the private party for delay in compliance of the agreement (Article 96 of Law No. 22/2006). ■ The National Economic Council is the responsible for supervising all financial matters involving the Government as provided by article 131 of Law No. 22/2006.
<p>4</p> <p>Modelling PPP projects</p>	<ul style="list-style-type: none"> ■ The <i>Dirección General de Contrataciones Públicas</i> must draft general conditions that will serve as basis for all selection procedures (Article 25).
<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ Legislation provides the items that must be in the bid notice (Article 24). ■ Two companies may, in a consortium, submit a proposal, if the public authority considers it to be beneficial for the project (Article 5, Law No. 5/1988). ■ The bid notice must be published in the Public Purchase Electronic System (PanamaCompra). ■ When the object of the project is complex, the public entity must publish the bid notice in advance for the proposals to be prepared.

<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ If the value of the agreement exceeds 175 thousand balboas, the public entity and those interested in the project meet for proposals to be submitted. The interested parties execute a document by which they agree with all the conditions of the project and with the terms of the bid notice (Article 33). <hr/> <ul style="list-style-type: none"> ■ The proposal must be submitted in Spanish to the PanamaCompra system. (Article 37). <hr/> <ul style="list-style-type: none"> ■ Proposals are evaluated solely in accordance with published criteria, which may include many variables (Article 38). <hr/> <ul style="list-style-type: none"> ■ Depending on the value and complexity of the project, the <i>Consejo de Gabinete</i> may install a pre-qualification process (Article 45). <hr/> <ul style="list-style-type: none"> ■ The evaluation committee analyzes the proposals according to the criteria provided in the bid notice (Article 48). <hr/> <ul style="list-style-type: none"> ■ The head of the public entity awards the project object of the bidding procedure (Article 49).
<p>6</p> <p>PPP incomes</p>	<ul style="list-style-type: none"> ■ The Ministry of Economy and Finance must authorize the execution of an agreement that involves disbursement of resources for longer than a fiscal period (Article 23). <hr/> <ul style="list-style-type: none"> ■ Each type of agreement has a different payment provision that will be stipulated in the agreement (Article 70). Article 73 provides that the public entity may pay a bonus in case of early contract compliance. <hr/> <ul style="list-style-type: none"> ■ Law 5/88 establishes in article 9 that the agreement may provide the detailed methodology used to monitor the recovery of the private party investments. In order to do so, the methodology must establish periodic calculations.
<p>7</p> <p>Disputes settlement</p>	<ul style="list-style-type: none"> ■ Article 104 of Law No. 22/2006 provides the creation of a Public Contracting Tribunal that will be located in Panama City for the bidding procedure discussions. <hr/> <ul style="list-style-type: none"> ■ The legislation does not provide any other dispute resolution mechanism.

<p>8</p> <p>Dealing with changes</p>	<ul style="list-style-type: none"> ■ Long-term agreements can include clauses to maintain its balance. If an extraordinary or unforeseeable situation takes place, the agreement may be amended so the balance may be reestablished (Article 20). <hr/> <ul style="list-style-type: none"> ■ The public entity may change agreement terms regarding public interest. The total value of the agreement may be reviewed if it does not exceed 25% of the initial value (Article 68). <hr/> <ul style="list-style-type: none"> ■ The public entity may provide clauses of price adjustment for cost variation (Article 71).
<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<ul style="list-style-type: none"> ■ The Government may make the following contributions in favor of the private party: payments for infrastructure availability, freights that reduce the cost of tolls, rights on real estate of the State and any other mechanism that make the concession financially viable (Article 2 of Law 5/88). <hr/> <ul style="list-style-type: none"> ■ The Government may agree with the private party for the construction and exploitation of new areas for commercial or housing in order to guarantee the financing of the project (Article 2A of Law 5/88). <hr/> <ul style="list-style-type: none"> ■ The private party may mortgage the concession or the rights and obligations arising from the agreement to the financial entities of the project as a guarantee, provided authorization of the Government (Article 24A of Law 5/88).
<p>10</p> <p>Extraordinary events</p>	<ul style="list-style-type: none"> ■ Delays caused by force majeure events might extend the agreement's term (Article 72). <hr/> <ul style="list-style-type: none"> ■ Article 16 of Law 5/88 provides that the agreement may be terminated in case of Extraordinary events.
<p>11</p> <p>Public authority's prerogatives</p>	<ul style="list-style-type: none"> ■ The public entity must impose termination clauses and the possibility to unilaterally amend the terms of the agreement (Article 63).

<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The public entity may cause early termination of the agreement when there are circumstances of public interest. In this case, the private party will be compensated.</p> <p>.....</p> <p>■ The <i>Consejo de Gabinete</i> must agree with the early termination of agreements whose value exceeds 3 million balboas.</p>
<p>12</p> <p>Risk allocation</p>	<p>■ According to article 2 of Law 5/88, the agreement must provide the risk allocation.</p>
<p>13</p> <p>PPP termination</p>	<p>■ PPP agreements may be terminated:</p> <ul style="list-style-type: none"> • if the private party breaches the contract; • because of bankruptcy or dissolution of the private party; • in case of transfer of the agreement or the goods involved in the project without authorization. When because of breach of contract by the private party, it must compensate the government. (Article 16 of Law 5/88).
<p>14</p> <p>Transparency and accountability</p>	<p>■ All agreements, regardless of their value, must be published on the <i>Pana-maCompra</i> system (Article 65)</p>

ANNEX 14 PARAGUAY



Legislation analyzed:

Law 5,102 (PPP Law), Decree 1,350 (*Reglamento*), Law 1,618 (Concession Rules) and Law 2,051/03 (Bidding Process General Rules)

Date of analysis:

August 14, 2018



Legal and institutional framework

■ PPPs are regulated by Law 5,102, which provides guidelines for the agreements and their bidding process.

■ PPPs are secondarily regulated by Law 2,051 (Bidding Process General Rules).

■ PPPs projects are those where the procuring authority jointly with a private company participate in a long-term relationship distributing obligations, risk and benefits between them. The main purpose of PPPs projects is to make investments in public infrastructure and the provision of compelling services to them, as well as in the production of goods and/or services provided by agencies, entities, public companies and companies of which the government is part (Article 3 of PPP Law).

■ The specialized body responsible for PPPs is the PPP Projects Unit (Unidad de Proyectos de Participación Público-Privada) linked to the Technical Secretary of Planning – STP (Article 7 of PPP Law), as provided by article 9 of the PPP Law.

■ It is the PPP Unit responsibility to:

- promote and coordinate with the authorities and competent public agencies, the plans, policies and norms for the development and good functioning of the PPPs;
- coordinate and promote the projects and advise on the structuring, selection, adjudication, signing and execution of contracts;
- identify opportunities and promote mechanisms for the provision of public services or activities of general interest among the contracting authorities;
- promote projects among potential investors and financiers and in the community in general;

1

Legal and institutional framework

- elaborate general specifications of tender documents and advise the Public Administration in the preparation of the particular documents and in the selection processes of the bidders;
- elaborate the Project's Public Registry;
- publish all information regarding the projects, the agreements and its execution; and
- maintain a wide public information policy.

2

Applicable sectors and activities

■ PPP agreements may not be executed if their total amount is smaller than 12,500 minimum wages, equivalent approximately to USD 4 Million (Article 2 of Law No. 11,079/2004).

■ The following sectors may be the object of a PPP project:

- Waterways, dredging, signaling and maintenance of the navigability of the Paraguay River and other navigable rivers;
- International airports;
- Construction, rehabilitation and maintenance of national routes and highways;
- Construction, extension and operation of the railway line service;
- Construction and maintenance of national and international bridges;
- Provision of potable water and sanitation services and treatment of effluents;
- Generation, transmission, distribution and commercialization of electric power;
- The road infrastructure of the capital of the Republic and its metropolitan area;
- Social infrastructure; hospitals, health centers, educational centers;
- Penitentiaries;
- Improvement, equipment and urban development in which the Contracting Administrations participate;
- Aqueducts, pipelines, alcohol pipelines, gas pipelines;
- Production of goods and provision of services that are specific to the purpose of the companies and societies in which the State is a party;
- Production and marketing of cement;

<p>2</p> <p>Applicable sectors and activities</p>	<ul style="list-style-type: none"> • Production, refinement and commercialization of hydrocarbons, fuels and lubricants; and • Telecommunications services. (Article 52 of the PPP Law).
<p>3</p> <p>PPP monitoring and regulation</p>	<p>■ The PPP Unit and the Treasury are responsible for monitoring the project (Articles 9 and 10 of PPP Law). The PPP Unit and the contracting authority monitor the activities of the private party (Article 75 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ The Treasury must hire an independent audit every 4 years to evaluate the project (Article 10).</p> <p>.....</p> <p>■ The contracting authority appoints a project supervisor for the construction and operation phases (Articles 81, 82 and 90 of the <i>Reglamento</i>). After receiving advice of this supervisor, the contracting authority may apply sanctions to the private party in case of breach of contract or infraction (Article 93 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ The General Controller of the Republic and the Public Company Council and other authorities may also monitor the projects (Article 120 of the <i>Reglamento</i>).</p>
<p>4</p> <p>Modelling PPP projects</p>	<p>■ Authorities may model projects in different ways:</p> <ul style="list-style-type: none"> • independently, using their own technical body; or • by gathering contributions from the private sector (Article 16 of the PPP Law). <p>.....</p> <p>■ The private party that is interested in starting a PPP project must present the studies for the project (Article 49 of PPP Law and articles 39 and 135 of the <i>Reglamento</i>). After authorities accept the proposal of the company, they may decide for a prequalification (obliged in the cases provided by article 39 of the <i>Reglamento</i>). An invitation to present studies is published, and any interested party may also present their studies to model the project in order to enhance the one presented. Either way, interested companies must comply with the requirements in an invitation to present studies. It is common that interested companies are required to present an authorization in which they attest to their qualification and experience, and demonstrate their working schedule to present their studies. The private companies will be reimbursed of the costs of the studies if theirs are selected by the authorities and if the project not awarded to them. In case of a successful bidding process, where the proponent is awarded, he shall be responsible for paying for the studies.</p>

4

Modelling PPP projects

■ Irrespectively of how a project is modelled, the definition of the technical studies has a common scope, essential to structure a concession project or PPP. This scope covers:

- engineering and operational technical studies;
- environmental studies;
- economic studies and business model;
- risk assessment and its definition.

■ For a PPP project to be published, it must cover at least a Value for Money analysis, the estimated fiscal impact, the social impact and the environmental studies of the project (Article 32 of *Reglamento*).

■ The grantor, the PPP Unit and the Treasury may work together in the modelling in order to shorten deadlines and make their functions more effective (Article 34 of the *Reglamento*).

5

Procuring a PPP project

■ Foreign companies may participate in PPP bidding processes (Article 45 the *Reglamento*).

■ There may be a prequalification stage (Article 21 of the Law).

■ The judgment may be preceded by a qualification stage of technical proposals. The bidders that do not reach the minimum score will be disqualified, and will not participate in the following stages (Article 51 of the *Reglamento*).

■ There are several judgement criteria that may be used to evaluate the proposals but they must be clear and established before the presentation of the proposals (in the tender documents) (Articles 23 and 24 of the Law).

■ The examination of technical proposals, for purposes of qualification or judgment, will be made by a motivated act, based on requirements, parameters and outcome indicators pertinent to the object, defined with clarity and objectivity in the public notice (Article 55 of the *Reglamento*).

<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ The participants must present a bid bond in order to participate in the bidding process (Article 53 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ Prior to the execution of any PPP agreement, a special purpose entity must be organized to manage the project (Article 27 of the Law).
<p>6</p> <p>PPP incomes</p>	<ul style="list-style-type: none"> ■ In public-private partnership contracts, the government may make payments with resources obtained from public revenues, project financing guarantees, minimum income guarantees, tax exemptions, contributions for the capitalization of special purpose entities, loans, among others (Article 28 of the PPP Law). <hr/> <ul style="list-style-type: none"> ■ Payment to the private party will be provided in each agreement according to the type and characteristics of the public-private participation project. There may be different types of compensation, such as granting collection rights to users, public contributions or other sources of income. The compensation mechanisms may be related to availability and levels of service. (Article 28 of the PPP Law).
<p>7</p> <p>Disputes settlement</p>	<ul style="list-style-type: none"> ■ There are “levels” for dispute resolution. The first level is the conciliation, the second is mediation by the technical panel; and the third is arbitration. (Article 103 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ The procedures for all “levels” are established in articles following article 103. <hr/> <ul style="list-style-type: none"> ■ Arbitration may be institutional or “ad hoc” and must happen in the city of Asunción, except in case of relevant factors (Article 110 of the <i>Reglamento</i>). <hr/> <ul style="list-style-type: none"> ■ If there is a foreign party, the arbitration will be considered an international arbitration. <hr/> <ul style="list-style-type: none"> ■ In case there is no agreement in the arbitration or if it is consider invalid, the dispute will be submitted to the Judiciary (in the city of Asunción) (Article 111 of the <i>Reglamento</i>).

<p>8</p> <p>Dealing with changes</p>	<ul style="list-style-type: none"> Public agreements may be unilaterally amended by the Government whenever the project or its specifications are modified, for better technical adequacy to its objectives, limited to 15% of the initial value of the agreement and before 2/3 of the agreement term (Article 94 of the Reglamento). <hr/> <ul style="list-style-type: none"> PPP agreements may be amended by mutual agreement limited to 30% of the initial value of the agreement. (Article 95 of the Reglamento). <hr/> <ul style="list-style-type: none"> Any change made by the Government must be calculated and compensated, whether made unilaterally or by mutual agreement.
<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<ul style="list-style-type: none"> The private party may finance the development of PPP projects, by using the modalities, instruments and financial transactions recognized and regularly used in national or international financial markets. It may establish, for the benefit of its creditors and to ensure obligations that are directly related to the development of its PPP agreement, a special guarantee consisting of a pledge or security trust constitution with respect to the rights arising from the PPP contract, including the future flow of funds generated by the project, and the shares representing the share package of the company that acts as a private participant. (Article 38 of the PPP Law). <hr/> <ul style="list-style-type: none"> The PPP Law also created a guarantee and liquidity trust fund to comply with the obligations derived from the quantifiable firm and contingent commitments to which the Public Administration could be obligated and the costs that correspond to it for the resolution of controversies, through the subscription of participation in PPP agreements (Article 11 of the PPP Law).
<p>10</p> <p>Extraordinary events</p>	<ul style="list-style-type: none"> Risks in Extraordinary events are generally shared. Extraordinary risks are managed by the Government by maintaining the economic-financial balance of public contracting. This mechanism ensures the economic and financial conditions upon which the parties have relied when entering into the agreement will be maintained until its expiration (Article 6 of the Reglamento). <hr/> <ul style="list-style-type: none"> PPP agreements may be amended to reestablish the relationship initially agreed upon by the parties with respect to the obligations of the contractor and award by the government. This may be done by changing the remuneration for the works, services or supply. The goal is to maintain the agreement's initial financial and economic balance:

<p>10</p> <p>Extraordinary events</p>	<ul style="list-style-type: none"> • if unforeseen or foreseeable events occur and whose consequences cannot be estimated; • if the consequences cause delay or prevent full performance of the terms of the agreement or; • in case of force majeure event or acts of God that may result in financial losses or liability for economic damages not established in the agreement (Article 96 of the <i>Reglamento</i>).
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The Government may unilaterally amend the agreements so they better suit public interest purposes, respecting the contractor's rights (Article 94 of the <i>Reglamento</i>).</p> <p>.....</p> <p>■ The Government may unilaterally terminate agreements in several cases. For example, when the private partner is not complying with the agreement (Articles 100 and 101 of the <i>Reglamento</i>).</p>
<p>12</p> <p>Risk allocation</p>	<p>■ Risks in PPPs must be objectively allocated in the agreement, including those related to acts of God, force majeure events, government acts that affect the agreement, and extraordinary economic risk (Articles 5 and 6 of PPP Law).</p>
<p>13</p> <p>PPP termination</p>	<p>■ Early termination cases (Article 100 and 101 of the <i>Reglamento</i>):</p> <ul style="list-style-type: none"> • Serious breach attributable to the private participant; • Non-satisfaction of the public needs that motivated the PPP project. • The need to invest more than 30% of the initial value of the agreement, provided that this extra cost will not cover the economics and social benefits. <p>.....</p> <p>■ Upon termination of the agreement, the private party must transfer all reversible assets (used to carry out the contracted activities) to the Government and depending on the case a compensation may be due (Article 99 of the <i>Reglamento</i>).</p>

14

Transparency and accountability

■ PPP public notices, prequalification, draft agreements and any amendments to them must be available online (Article 15 of PPP Law). Article 27 of the *Reglamento* establishes the deadline for disclosure of that information.

.....

■ The PPP Public Registry, all managing reports and audit reports must be available online (Article 119 of the *Reglamento*).

.....

■ The PPP Unit must prepare an annual report about the management of PPP agreements, including the goals achieved (Article 118 of the *Reglamento*).

.....

■ One of PPP procurement guidelines.

ANNEX 15 PERU



PERU

Legislation analyzed:

Legislative Decree 1362 (PPP Law) and Supreme Decree 240-2018-EF (PPP Law Regulation).

Date of analysis:

June 15, 2018. Reviewed in February 19, 2019.



Legal and institutional framework

■ Legislative Decree 1362 is regulated by Supreme Decree 240-2018-EF. They are the basis of the PPP legal framework.

■ Legislative Decree 1362 establishes PPPs as a device of participation in private investment and Supreme Decree 240-2018-EF provides regulation, and more detailed information.

■ PPP constitutes a mechanism of participation of private investment, through long-term contracts in which the State participates, through a public entity and one or more private investors. Through PPPs, public infrastructure projects, public services, services linked to public infrastructure and public services, applied research and/or technological innovation are developed. Also, in PPP risks and resources are distributed, preferably private in the case of resources (Article 20 of the PPP Law).

■ The Ministry of Economics and Finance states the promotion of private investments policy (Article 5.3 of the PPP Law).

■ Agencia de Promoción de la Inversión Privada - PROINVERSION is the body in the Peruvian national government that promotes private investment (Article 12 of Legislative Decree 1362).

■ It is possible to have PPPs for national regional and local projects.

■ The design, conduction and conclusion of the processes is in charge of the Promoter Organizations of Private Investment - OPIP (article 8.1 of the Legislative Decree 1362).

■ In the case of the National Government, PROINVERSION and the Ministries have the status of OPIP, through their Committees for the Promotion of Private Investment (Article 8.2 of the Legislative Decree 1362).



Legal and institutional framework

■ In the case of the Regional and Local Governments, they have the status of OPIP, also through their respective Committees for the Promotion of Private Investment. The highest body among these committees is the Regional Council or Municipal Council (article 8.3 of Legislative Decree 1362).

■ PROINVERSION is responsible for PPP projects:

- of national competence originated by a state initiative that are multisectoral;
- of national competence originated by a state initiative that has a Total Investment Cost greater than forty thousand (40,000) UIT; and, in the case of Public Private Partnership projects that do not contain an investment component, that have a Total Project Cost greater than forty thousand (40,000) UIT;
- of national competence and originated by self-financed private initiative;
- projects under public entity competence enabled by express law and originated by self-financed private initiative;
- projects regarding any level of government and projects under public entity competence enabled by express law originated by co-financed private initiative;
- developed through the competitive dialogue mechanism;
- by express legal provision they are assigned to PROINVERSION; and
- assigned to PROINVERSION by the public entity that holds the project (articles 13 and 15 of Supreme Decree 240-2018-EF).

■ The projects of competence of the Ministries are those de competencia nacional that are not mentioned above (Article 14 of Supreme Decree 240-2018-EF).

■ It is possible to have more than one Investment Promotion Committee in a Ministry or Regional Government or Local Government. In the case of Ministries, this is possible if they are responsible for two or more sectors. In the case of the Regional Governments and Local Governments, this is possible according to the matters, complexity of projects and economies of scale in the entity (Article 17 of Supreme Decree 240-2018-EF).

2

Applicable
sectors and
activities

■ PPPs may include public infrastructure in general, including road networks, multimodal networks, railways, airports, ports, logistics platforms, leisure and culture urban infrastructure, prison infrastructure, irrigation, health and education; public services, such as telecommunications, energy and lighting, water and sanitation and others of social interest, related to health and the environment, such as waste treatment and processing and education; services related to infrastructure and public services that State must provide, such as tariffs and tolls collection systems and citizen service centers – MAC; and the development of applied investigation projects and technological innovation (Article 29.3 of Supreme Decree 240-2018-EF).

■ Exceptions: It cannot be considered as PPP if a project is solely related to:

- provision of labor,
- equipment supply and installation,
- construction or execution of public works, and
- exploitation or maintenance of assets owned by the State (Article 29.8 of the Supreme Decree 240-2018-EF).

3

PPP
monitoring
and
regulation

■ All provisions to ensure timely and efficient supervision must be in the PPP agreement.

■ The agreement must establish obligations for the investor to allow the exercise of supervisory activities, and obligations for the private supervisor primarily related to the supervision of service levels (Article 118 of the PPP Law regulations).

■ The public entities in charge of the projects are responsible for managing and administering the PPP contracts. In addition, public entities that are responsible for managing PPP projects whose total cumulative investment cost exceeds three hundred thousand (300,000) UIT, can implement one or more specialized bodies for the implementation of the projects under their competence (Article 18.1 of the Supreme Decree 240-2018-EF).

■ The supervision of projects in regulated sectors is subject to the provisions of the Framework Law of Regulatory Bodies for Private Investment in Public Services (Law 27,332).

4

Modelling
PPP
projects

■ PPPs are classified as: co-financed or self-financed.

■ A PPP may be initiated by the public or the private sector.

■ Self-sustaining projects are those financed by fees paid by users, or by prices, tolls or other similar types of investment recovery. They do not require the use of public resources. Co-financed projects require co-financing, financial guarantees or guarantees given not financial institutions that have a significant probability of demanding the use of public resources. (article 30 of Supreme Decree 240-2018-EF).

■ PPP projects, regardless of their classification in co-financed or self-financed, are developed in five phases:

- planning and programming;
- formulation;
- structuring;
- transaction; and,
- contractual execution (article 30 of the Legislative Decree 1362)

■ In the planning and programming phase, the projects and commitments corresponding to the projects are planned. The planning phase is reflected in the Multi-annual Investment Report on PPP. The Multi-Annual Investment Report on PPP is the project pipeline made by each Ministry, Regional or Local Government that identifies potential PPP projects (Article 6.1 of the Legislative Decree 1362). This report has a validity of 3 years.

■ In the formulation phase, the Project is designed and evaluated. In this phase, the Evaluation Report is prepared, containing the necessary information to define if it is convenient to develop the project, structure the Project and detect significant contingencies, as well as define the management competencies of the public entity.

■ The Ministry of Economy and Finance issues an opinion on the evaluation report and with its favorable opinion, the Private Investment Promotion Body incorporates the Project into the promotion process.

■ When the preparation of the Evaluation Report is entrusted to PROINVERSIÓN, it must be sent to the public entity that holds the project for approval. If after 30 business days the entity does not issue an opinion, then the authorization is considered granted (article 45 of Supreme Decree 240-2018-EF).

4

Modelling
PPP
projects

■ In the structuring phase, the Project is designed as PPP, including its economic and financial structuring, compensation mechanisms, risk allocation and contract design. During this phase, the OPIP calls the public entity that holds the Project, the regulatory body and the Ministry of Economy and Finance to coordinate meetings to receive, comments, suggestions and general assessments on the design of the contract and its correct execution. In this phase, the initial version of the contract is drawn up. In the case of Private Initiatives in this phase, the Declaration of Interest is issued, containing a summary of the Project, the prequalification requirements of the selection process, the competition factor, the initial version of the contract and the technical information of the Project. This Declaration of Interest must be published in the institutional website of the OPIP and in the Official Gazette.

■ With the transaction phase, the Project is open to the Market.

■ Competitive PPP procurement procedure for unsolicited proposals. If there are no other interested parties by the deadline (article 47 of Legislative Decree 1362), direct award is possible.

■ The procurement authority may hire a private party as a consultant to prepare the studies that will result in the tender documents (article 33 of the Supreme Decree 240-2018-EF).

■ Vetting procedure and/or pre-feasibility analysis of unsolicited proposals.

■ Comparative assessment (value for money analysis) is mandatory (article 4.2 of Legislative Decree 1362).

■ The PPP projects by state initiative are referred to the provision of services related to public infrastructure and/or public services required by the Government, applied research and/or technological innovation, as well as PPP projects which do not hold an investment component, are subject to the simplified procedure (Article 43 of the Legislative Decree 1362).

■ The final version of the Public Private Partnership agreement requires a favorable opinion of the public entity that holds the project under its competence framework, a non-binding opinion of the appropriate regulatory body, a favorable opinion of the Ministry of Economy and Finance, and a non-binding report of the General Comptrollership of the Republic, prior to its awarding and signing (article 41 of Legislative Decree 1362 and Article 55 of Supreme Decree 240-2018-EF).

4

Modelling
PPP
projects

- The draft agreement may be changed as a result of comments and queries received during the Transaction phase (Article 54 of Supreme Decree 240-2018-EF).

- The bidding notice must be published on the institutional website of the entity that holds the project and in the Official Gazette “El Peruano” for 2 consecutive days, indicating the link to the tender documents. The amount and form of payment of the participation fee and the selection criteria applicable to the selection process must be in the bid notice (article 54 of the Supreme Decree 240-2018-EF).

- Proposals are presented in a sealed envelope by a person authorized by the bidder. The reception of technical and/or economic proposals and the granting of the award (Buena pro) are made in public. A Public Notary certifies the submitted documentation and attests to said act (article 56 of the Supreme Decree).

5

Procuring
a PPP
project

- The contract is awarded to the best submitted offer, according to the pre-established evaluation system. The Special Committee, for reasons of public interest, may reject all submitted proposals. There is no obligation to pay any compensation to the bidders (article 58 of the Supreme Decree 240-2018-EF).

- There is a simplified process with special rules that apply to PPP initiated by the government. The total cost of the project must be smaller than fifteen thousand (15,000) UIT. Likewise, said simplified process applies to projects related to the provision of services related to public infrastructure and / or public services required by the Government, applied research and / or technological innovation, whose total investment cost does not exceed 50,000 UIT, as well as to those PPPs that do not contain an investment component, whose total cost of the Project does not exceed 50,000 UIT (Article 60 of the Supreme Decree 240-2018-EF)

- Foreign companies may participate in PPP bidding processes.

6

PPP
incomes

■ Income varies depending on whether the PPP co-financed or self-financed. If co-financed, income depends on public funds (Article 12 of the Supreme Decree).

■ The PPP agreement may establish rights in favor of the allowed creditors of the investor, whose rights and obligations are governed by private law (article 113.1 of the Supreme Decree 240-2018-EF).

■ The private partner must give a guarantee to ensure proper execution of the project and compliance with the respective obligations (article 117 of the Supreme Decree 240-2018-EF).

7

Dispute
settlement

■ There may be a mediator who must be a neutral third party called “Friendly Composer” to resolve the controversies. Only disputes that may be submitted to arbitration may be resolved by a Friendly Complaint procedure. This can happen at any time of the Direct Treatment stage or at a similar stage (articles 119 and 120 of the Supreme Decree 240-2018-EF).

■ If the investments in the agreement exceed 80,000 (eighty thousand) UIT, a Dispute Resolution Board can solve the dispute. Furthermore, this board may be settled at the beginning of the performance of the agreement in order to solve enquiries and give recommendations if the parties require it (article 130 of the Supreme Decree 240-2018-EF).

■ Arbitration is possible for disputes on matters of free disposal of the parties. The agreement must expressly provide it is a dispute settlement mechanism (Article 132 of the Supreme Decree 240-2018-EF).

■ Arbitration may not be used as a dispute resolution mechanism if the claim regards administrative decisions issued by regulatory bodies or other entities (Article 133.1 of the Supreme Decree 240-2018-EF).

■ Technical issues may be submitted to arbitration in equity (arbitrators are not legal professionals). Non-technical issues must be submitted to regular arbitration or in equity if this is convenient (article 132.1 of the Supreme Decree 240-2018-EF).

8

Dealing
with
changes

■ The parties may agree to modify the PPP agreement, maintaining the financial balance and the competitive conditions of the bidding process. Risk allocation and the project nature may not be altered if possible. The value for money must be sustained in favor of the Public Administration (Article 134 of the Supreme Decree 240-2018-EF).

■ Amendments and renegotiation of the agreement. The government, in agreement with the investor, may amend the PPP agreement maintaining its financial balance and the competitive conditions of the bidding process, in accordance with the conditions and requirements established by the Regulation. Within 10 working days as of receipt of the amendment request, the Ministry, Regional Government or Local Government summons the public entities to issue an opinion on the proposed amendment. They review the case, and may also invite the investor. The body responsible for the regulation of the sector must issue a non-binding opinion and the Ministry of Economy and Finance must issue a favorable opinion in case they are involved in matters of competence of the latter (Article 55 of the Law).

■ The participation of the General Comptrollership of the Republic is also obligatory, in case the amendments alter the co-financing status or the guarantees of the contract (article 55 of the Legislative Decree 1362 and article 138 of the Supreme Decree 240-2018-EF).

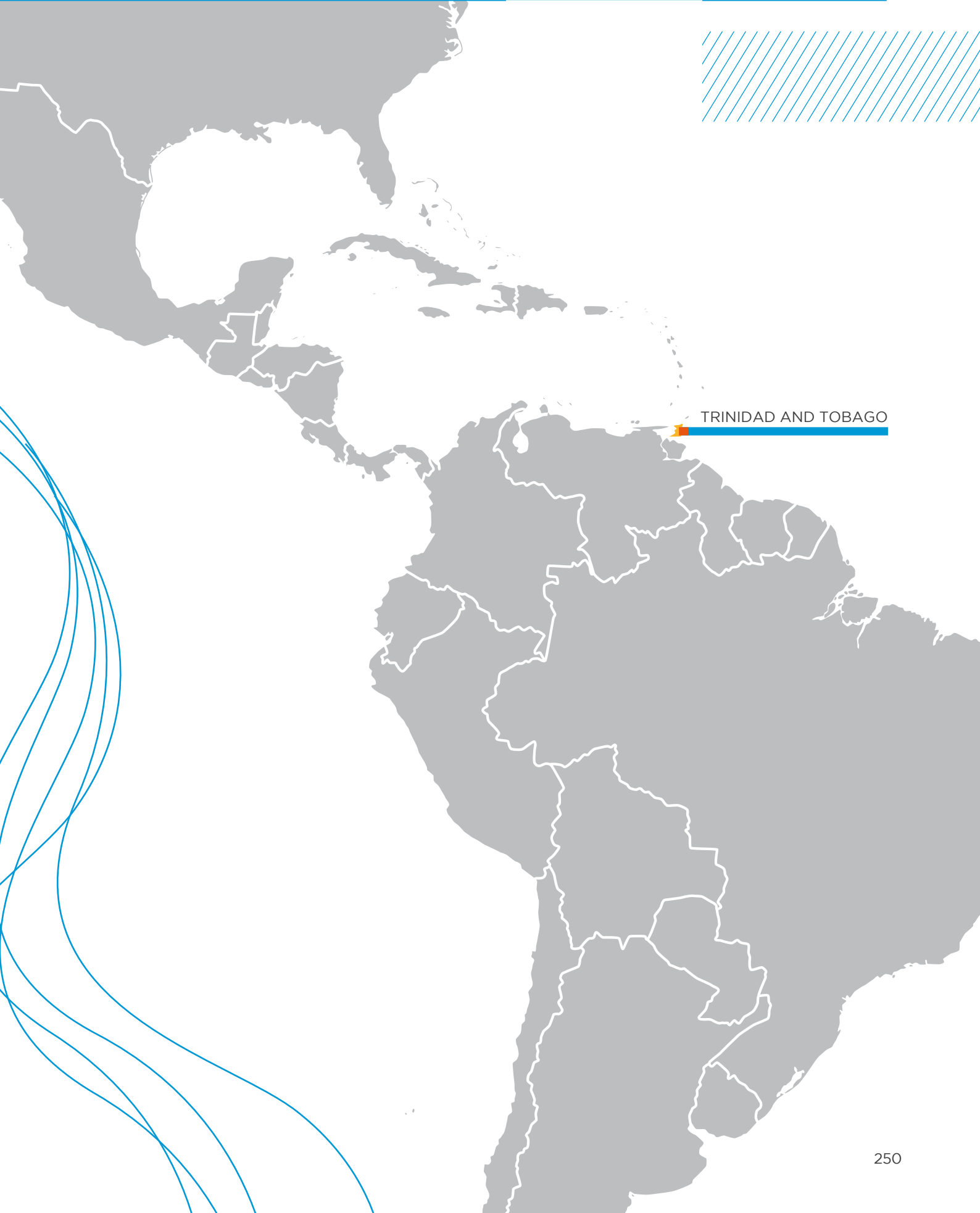
■ There is 3-year standstill period during which there may be no amendments to agreements, except for correction of material errors, for supervening events to the award of the “Buena Pro” which generate essential modifications of the execution of the project, for the accuracy of operational aspects that prevent the execution of the contract and for the restoration of the economic-financial balance (article 135 of Supreme Decree 240-2018-EF).

■ If the modification of the PPP agreement involves investments greater than the 15% of the project’s total value, the public entity that holds the project evaluates the possibility and convenience to perform a new bidding process as an alternative to negotiate a modification agreement (article 137.2 of the Supreme Decree 240-2018-EF).

<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ If the project is co-financed, the government and the private party, both fund the project (article 30 of the Supreme Decree 240-2018-EF).</p> <p>.....</p> <p>■ The PPP agreement may establish rights to creditors of the investor; these rights and obligations are under private law (article 113.1 of the Supreme Decree 240-2018-EF).</p> <p>.....</p> <p>■ The investor's collection rights derived from PPP agreements may be transferred without prior authorization from the Government, unless otherwise provided in the agreement (article 113.2 of the Supreme Decree 240-2018-EF).</p>
<p>10</p> <p>Extraordinary events</p>	<p>■ When deadlines are missed because of action or omission of the Government or force majeure events, the term of the PPP agreement is extended according to the provision in the agreement (Article 38.3 of the Supreme Decree 240-2018-EF).</p>
<p>11</p> <p>Public authority's prerogatives</p>	<p>■ The PPP agreement may be suspended for:</p> <ul style="list-style-type: none"> • In case of war, civil war or force majeure events that prevent public infrastructure works or the provision of the service. • When public infrastructure or its elements are partially destroyed so that it is impossible to use it for a certain time, under the provisions of the agreement. During the suspension period, the term of the agreement is interrupted (Article 111 of the Supreme Decree 240-2018-EF).
<p>12</p> <p>Risk allocation</p>	<p>■ Adequate risk allocation: risks are allocated to those with the greatest capacity to manage it at a lower cost, considering the public interest and the project profile (article 4.2 of the Supreme Decree 1362).</p>
<p>13</p> <p>PPP termination</p>	<p>■ Grounds for termination of a PPP agreements and its consequences are provided in Article 63 of the Supreme Decree 240-2018-EF.</p>

<p>13</p> <p>PPP termination</p>	<ul style="list-style-type: none"> ■ The PPP agreement is terminated by: <ul style="list-style-type: none"> • Expiration of the agreement; • Serious breach of the investor or the government, as provided in the agreement; • Agreement of the parties; • Resolution of the State for reasons of public interest such as the total destruction of public infrastructure; and • Other reasons provided in the agreement. <p>.....</p> <ul style="list-style-type: none"> ■ Article 53 of Legislative Decree 1362 provides the assets regulation.
<p>14</p> <p>Transparency and accountability</p>	<ul style="list-style-type: none"> ■ All information to support decisions made during the evaluation, development, implementation and rendering of accounts stages must be disclosed to the public, under the Law of Transparency and Access to Public Information (article 4.1 of the Legislative Decree 1362). <p>.....</p> <ul style="list-style-type: none"> ■ The Board of Directors of PROINVERSION, through an agreement published in the Official Gazette “El Peruano”, must approve all acts about the modality for the promotion process of private investment modality and its amendments and the Plan for the Promotion of Private Investment and its amendments, in the case of the projects which are subject under PROINVERSION’S competence. (Article 18 of the Legislative Decree 1362). <p>.....</p> <ul style="list-style-type: none"> ■ Interested third parties may access to the tender documents and they can also make comments and suggestions to the initial version of the contract. They may request meetings and access to the project’s public documentation available related to the project, to the unsolicited proposal and its modifications. The Private Investment Promotion Body must evaluate each enquiry and respond to it through a written communication (article 91 of the Supreme Decree 240-2018-EF) <p>.....</p> <ul style="list-style-type: none"> ■ Specific information may be kept confidential (articles 70.2 and 139 of the Supreme Decree 240-2018-EF and First final complementary provision of the Legislative Decree 1362)
<p>15</p> <p>Other comments</p>	<ul style="list-style-type: none"> ■ Article 39 of Supreme Decree 240-2018-EF establishes the obligation of an anti-corruption clause in all agreements.

ANNEX 16 TRINIDAD AND TOBAGO



TRINIDAD AND TOBAGO

Legislation analyzed:

Act No. 1/2015 (Public Procurement and Disposal of Public Property Act, 2015) and the Government of the Republic of Trinidad and Tobago PPP Policy Draft (GORTT PPP Policy, May 2012)

Date of analysis:

August 20, 2018.

1

Legal and institutional framework

■ There is no specific PPP law but a general act (Public Procurement and Disposal of Public Property Act, 2015) and a draft PPP policy.

■ PPPs are arrangements between a public body and a private party under which:

- the private party undertakes to perform a public activity or provide a service on behalf of the public body;
- the private party receives a benefit for performing the activity or providing the service; and
- the private party is generally liable for the risks arising from the performance of the activity or the provision of services depending on the terms of the arrangement. This may involve financing, designing, building, operating, and maintaining the infrastructure asset and associated service, or some of these functions.

■ The Government entity may be a Ministry, a State Enterprise, a Board, or any other Government contracting authority (Policy)

■ The Office of Procurement Regulation (the “Office”) is the responsible body for PPPs and it is under the Ministry of Finance, Investments Division (Part II – 9 of the Act)

2

Applicable sectors and activities

■ Public assets or services may be a new infrastructure project, or may involve existing infrastructure assets and services. PPPs may be used in various sectors and for several services, as long as the public sector is interested in having the services provided.

3

PPP monitoring and regulation

■ The Office audits and reviews the system for procurement and disposal of public assets to ensure compliance. The Procurement Review Board may review decisions made by the Office (Act No.5 of 2016)

3

PPP monitoring and regulation

■ The Agreement Regulator submits yearly reports to the Speaker of the House of Representatives, the President of the Senate and the Minister. It includes:

- the total value of contracts as awarded by public bodies;
- the number of agreements awarded and not executed;
- a summary of transactions, for each public body, specifying in respect of public procurement;
- a summary of transactions in respect of each public body concerning the disposal of public assets.

■ A procuring entity must submit a report of all contracts awarded during the quarter to the Office no later than 3 weeks after the end of each quarter.

■ Penalties may also be imposed for failure to meet contractually-specified standards.

■ If performance requirements are not met, service payments to the private sector party may be abated or financial penalties applied.

The Government agency is responsible for ensuring the quality of services provided, by carefully managing the PPP agreement.

■ Management in the PPP is focused on service delivery, free from competing objectives or constraints typical in the public sector.

■ When the PPP transaction reaches financial close, a Contract Management Team will be appointed by the responsible Ministry or Government agency, to manage the PPP contract for its duration. The Contract Management Team may refer to the PPP Ministerial Committee to provide guidance as needed to manage change over the contract lifetime.

4

Modelling PPP projects

■ The Office prepares, updates and issues model handbooks, incorporating standardized bid documents, procedural forms and relevant documents to be used in public procurement and the use of public property.

4

Modelling
PPP
projects

■ A procuring entity has to, no later than 6 weeks after the National Budget is approved, publish on its website or in any electronic format, information regarding all planned procurement activities for the following 12 months.

■ PPP projects are to be implemented so that they achieve value for money, by capitalizing on the value. The fiscal impact of PPP projects must be well understood, affordable, and the level of fiscal risk must be acceptable. PPPs have to be transparently identified, developed, procured, and managed. The environmental and social impacts of PPP projects must be carefully assessed and managed appropriately.

■ To ensure the objectives of the PPP program and the potential benefits of using PPPs are achieved, the Government ensures all PPP projects meet the following four criteria:

- feasibility and economic viability of the project;
- commercial viability;
- value for money;
- fiscal responsibility.

■ A PPP Execution Team will be established for each project selected for development as a PPP project, reporting to the PPP Ministerial Committee. The PPP Execution Team will be responsible for developing a Business Case for the project, and for implementing the PPP Transaction, with the support of experienced advisors. Each PPP Execution Team will be led by the responsible Ministry or Government agency, and will include representatives of the Ministry of Finance PPP Unit, and other relevant Government entities.

■ The Business Case contains the detailed appraisal that informs Cabinet's decision to implement a PPP. Before being submitted to Cabinet, the Business Case of each proposed PPP must be reviewed in detail by the Ministry of Finance, and other relevant Government entities as needed. The results of these reviews will be included in the Cabinet submission. The PPP Unit will be responsible for coordinating the review process.

5

Procuring
a PPP
project

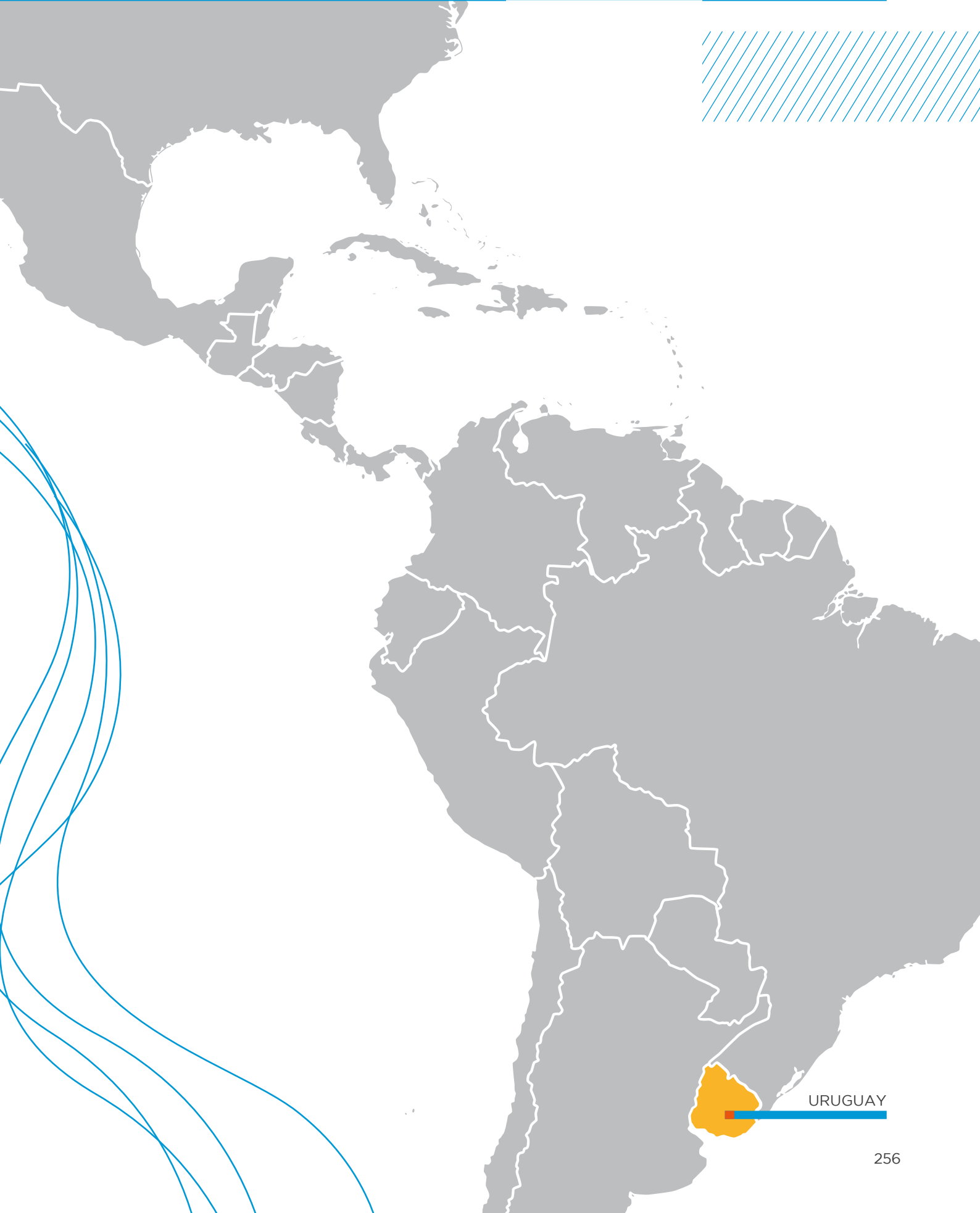
■ The procuring entity evaluates the qualifications of suppliers or contractors in accordance with the qualification criteria specified and procedures provided in the pre-qualification or pre-selection documents, if any, and in the solicitation documents.

<p>5</p> <p>Procuring a PPP project</p>	<p>■ After the standstill period or, if there is none, promptly after the successful submission of the proposal, a procuring entity sends the notice of acceptance of the successful submission to the supplier or contractor, unless the Office orders otherwise.</p> <p>.....</p> <p>■ A supplier or contractor may apply to the Office for review of a decision or an action taken by a procuring entity in the procurement proceedings.</p>
<p>6</p> <p>PPP incomes</p>	<p>■ The private party may be paid either by receiving:</p> <ul style="list-style-type: none"> • compensation from a public fund; • the amounts collected as charges or fees from the service users; or • a combination both. <p>.....</p> <p>■ The remuneration of the private party depends on outputs delivered, such as the availability of the asset and the provision of services to clearly-defined performance standards. Payment to the private party for assets and services provided may be made by users, by the government, or by a combination of the two.</p>
<p>7</p> <p>Dispute settlement</p>	<p>■ Not informed</p>
<p>8</p> <p>Dealing with changes</p>	<p>■ Not informed</p>
<p>9</p> <p>Financing and Funding PPP agreements and Warrantees</p>	<p>■ PPPs can mobilize additional financing and financing sources for infrastructure. PPPs provide alternative financing sources for infrastructure investments. Charging users for services can also bring in more revenue to fund infrastructure, and may sometimes be done better or more easily with private operation than by the public sector. PPPs can improve the predictability and transparency of infrastructure costs and financing. The cost of a PPP includes the cost of providing an infrastructure asset and services over a significant period, including any upgrade requirements. This provides budget predictability over the life of the asset, and reduces the risk of inadequate maintenance financing over time.</p>

TRINIDAD AND TOBAGO

10 Extraordi- nary events	<input type="checkbox"/> Not informed
11 Public authority's preroga- tives	<input type="checkbox"/> Not informed
12 Risk allocation	<input type="checkbox"/> Risks are clearly allocated to the public and private parties, and in a way that achieves value for money, by ensuring each party bears those risks they are best suited to manage.
13 PPP termination	<input type="checkbox"/> Not informed
14 Transpa- rency and accoun- tability	<input type="checkbox"/> Accountability, integrity, transparency and value for money are the principles that guide PPPs; <input type="checkbox"/> The names of all members of the Board since its first composition have to be published in the Gazette and at least one newspaper in daily circulation in Trinidad and Tobago. <input type="checkbox"/> A PPP must be approved by the Cabinet at two key stages: Business Case (approval to implement the PPP transaction), and Transaction (approval to execute the PPP agreement).

ANNEX 17 URUGUAY



URUGUAY

Legislation analyzed:

Law 18,786, and Decrees 17/2012, 280/2012 and 251/2015*

Date of analysis:

June 6, 2018.



Legal and institutional framework

■ Law 18,786 is the Uruguayan PPP Law.

■ A PPP agreement are those executed by authorities and a private party, for a term up to 35 years, and in which the private party is responsible for designing, building and operating (DBO) infrastructure or its services, and also for financing the project (Article 2 of Law 18,786).

■ All public authorities may enter into PPP agreements, including local governments, the parliament, judicial and administrative courts, state-owned companies and other governmental entities that provide public utilities services (Article 3 of Law 18,786).

■ Uruguay's PPP Unit reports directly to the Ministry of Finance. The PPP Unit provides fiscal and budgetary treatment to PPP projects, and analyzes and authorizes PPP projects and guidelines prepared by Corporación Nacional para el Desarrollo - CND. It also oversees fiscal and budgetary aspects of the execution of PPP agreements (Article 13 of Law 18,786).

■ It is the responsibility of the PPP Unit, according to Article 9 of the Law to:

- Develop and promote the execution of Public-Private Participation projects through the application of the best technical criteria and adherence to the principles and guidelines contained in this law.
- Elaborate the technical guidelines applicable to Public-Private Participation projects through the preparation of recommended best practice guides, standardization of procedures and preparation of manuals, models and instruments that contribute to the design and execution of the referred projects in a more effective manner and efficient. The diffusion of the same will require the approval of the Ministry of Economy and Finance, previous report of the Office of Planning and Budget.

* This analysis was also based on information provided in the World Bank Public Procurement Guide, 2018.

<div data-bbox="165 562 209 602">1</div> <div data-bbox="159 607 330 716">Legal and institutional framework</div>	<ul style="list-style-type: none"> • Advise on the identification, conception, design, study, structuring, promotion, selection and contracting of PPP projects, under the terms and conditions agreed by agreement with the Public Administrations contracting. • Contribute to the strengthening of the capacities of the Public Administrations contracting in the design and implementation of PPPs • Advise the Executive Power to identify and prioritize projects that may be executed through the PPP system. • Facilitate the Public Administrations contracting the inter-institutional coordination of their activities related to Public-Private Participation projects. • Create or acquire commercial companies of any nature as well as financial instruments, when this is deemed necessary for the best development of PPP projects.
<div data-bbox="165 1160 209 1200">2</div> <div data-bbox="159 1205 330 1314">Applicable sectors and activities</div>	<ul style="list-style-type: none"> ■ PPP agreements are available for the following sectors: roads, railways, ports, airports, energy, waste disposal and treatment, prisons, health centers, schools, social housing, sport centers, urban infrastructure, and protecting historical heritages (such as Colonia del Sacramento) (Article 3 of Law 18,786). <hr/> <ul style="list-style-type: none"> ■ PPP agreements do not apply to: <ul style="list-style-type: none"> • teaching services in schools, • sanitization services in health centers, • and security, sanitization and resocialization services in prisons (Article 3 of Law 1,786).
<div data-bbox="165 1682 209 1722">3</div> <div data-bbox="159 1731 330 1868">PPP monitoring and regulation</div>	<ul style="list-style-type: none"> ■ The procuring authority oversees the PPP execution (Article 7 of Law 18,786). <hr/> <ul style="list-style-type: none"> ■ Each procuring authority establishes a PPP management team, which advises and oversees the entire project, from tender to completion. Not all team members need be public servants, and they must present a statement under oath about their suitability (Article 8 of Law 18,786). <hr/> <ul style="list-style-type: none"> ■ Private parties in PPP agreements must periodically present their audited balance sheets (Article 17 of Law 18,786).

3

PPP monitoring and regulation

■ The procuring authority oversees the PPP execution (Article 7 of Law 18,786).

■ Each procuring authority establishes a PPP management team, which advises and oversees the entire project, from tender to completion. Not all team members need be public servants, and they must present a statement under oath about their suitability (Article 8 of Law 18,786).

■ Private parties in PPP agreements must periodically present their audited balance sheets (Article 17 of Law 18,786).

■ Every 6 months, procuring authorities must submit - for the PPP Unit's analysis - information about the execution of the agreement. Information about the amendment, renegotiation and unilateral modification of the PPP agreement must be submitted to the PPP Unit.

■ Performance is assessed against established criteria. Private partner provides periodic information. Procurement authority gathers information.

■ There is a system to track progress and completion of the construction works.

■ All public authorities in PPP agreements must submit a budgetary report on each individual PPP agreement to the Ministry of Finance every year (Article 87 of Decree 17/2012).

■ Regulatory agencies may also monitor and regulate PPPs under their authority.

4

Modelling PPP projects

■ The Ministry of Finance, through the PPP Unit, must create a PPP national register with information about all PPP agreements in Uruguay's PPP pipeline (Article 14 of Law 18,786).

■ Uruguay's "Corporación Nacional para el Desarrollo - CND" functions as a PPP fostering entity, which provides training to other authorities, prepares best practices guides and drafts PPP agreements and bidding notices (Article 9 of Law 18,786). Prior to their publishing, the Ministry of Finance must approve guidelines and drafts, which must have been analyzed by the Office of Planning. CND also advises local authorities in the modeling of PPP projects and facilitates institutional dialogue, and advises them on the bidding procedure itself. Authorities may contract with CND without a public procurement process.

4

Modelling
PPP
projects

■ The CND may develop a PPP project itself, upon authorization by the authority in charge, if the project does not exceed 850 million specific monetary units, and CND awards the project to a private party within 36 months as of the start of the operation (Article 9 of Law 18,786).

■ Authorities have a fixed period to present feasibility studies to justify the PPP project to the Ministry of Finance. Studies also must be delivered to the Office of Planning (Article 15 of Decree 17/2012). Article 16 provides that such studies include value for money, technical, legal, financial and economic/social impacts studies. The Ministry of Finance will publish its analysis of the studies.

■ Procuring authorities must submit the bidding notice for approval of the Ministry of Finance and the Office of Planning (Article 18 of Law 18,786).

■ Companies or entities in the same economic group that advises the procuring authorities during the modeling of the PPP project may not participate in the tender (Article 88 of Decree 17/2012).

■ Unsolicited proposals are under the terms of article 35 of Law 18,786. Private parties that are interested in developing a PPP agreement may present (pre) feasibility studies to CND. CND may request adjustments to the studies be made within 15 days. The decision on whether to move the PPP project forward belongs to the procuring authority that may use CND analysis as reference (CND opinion is not binding).

■ A bid bond is required to present an unsolicited proposal (article 43 of Decree 17/2012).

■ According to article 37 of Law 18,786, the private party that presents an unsolicited proposal may be reimbursed and may benefit from a preference margin of 10% regarding its bid in the tender.

■ Comparative assessment (value for money analysis) is mandatory (article 2 of Law 18,786).

■ Detailed procedure for PPPs' prioritization consistent with public investment prioritization is not regulated.

5

Procuring
a PPP
project

■ Procuring authorities may adopt any type of bidding process to grant a PPP agreement (Article 19 of Law 18,786).

■ Procuring authorities may adopt a competitive dialogue mechanism in the bidding procedure (Article 20 of Law 18,786). In this case, the procuring authority regulates the terms of the competitive dialogue in the bidding notice, including the advantages to private parties that participate in the procedure.

■ Procurement authorities may require bid bonds, which may be presented in local or foreign currency (article 25, Decree 17/2012), due to the conditions regulated in the bidding notice.

■ Detailed selection criteria is provided in the legislation to select the bidders.

■ Foreign companies may participate in PPP processes.

■ Procuring authorities publish the bidding notice online at least 90 days prior to submission of the bids (Article 21 of Decree 17/2012). Procuring authorities may also publish the bidding notice in newspapers and other media, for greater transparency of the bidding process.

■ There are various procurement procedures for PPPs, such as open procedure (single-stage tendering), restricted procedure (competitive procedure with prequalification stage), competitive dialogue and/or multi-stage tendering.

■ Tender documents detail the procurement procedures.

■ Tender documents specify prequalification/shortlisting criteria.

■ Financial model submitted with proposal.

■ According to article 22 of Law 18,786, proposals are evaluated solely in accordance with published criteria, which may include multiple variables (technical criteria, quality, prices, period to complete works and others).

■ Procuring authority will notify all bidders on the results of the PPP procurement process, including the grounds for the selection (Article 31 of Decree 17/2012). Both procuring authority and the PPP Unit analyze the proposals.

<p>5</p> <p>Procuring a PPP project</p>	<ul style="list-style-type: none"> ■ Standstill period provided in article 24 of Law 18,786. Bidders may also submit their comments regarding the winning bid in other stages of the bidding procedure. <hr/> <ul style="list-style-type: none"> ■ Restricted negotiations with the selected bidder. <hr/> <ul style="list-style-type: none"> ■ All bidding procedures will be reviewed by accounting courts after the proposals are evaluated and the procuring authority publishes the results of the bids (Article 23 of Law 18,786). The accounting courts have 30 days to analyze the procuring process; if they do not issue an opinion within 30 days, the process is considered approved. <hr/> <ul style="list-style-type: none"> ■ Interested private party may challenge all procuring acts by authorities during the bidding process (Article 31 of Law 18,786). The challenges normally do not suspend the process, but authorities may suspend the bidding process if requested and it judges it necessary.
<p>6</p> <p>PPP incomes</p>	<ul style="list-style-type: none"> ■ PPP incomes include user fees, direct payments from authorities and a combination of those two (Article 5 of Law 18,786). <hr/> <ul style="list-style-type: none"> ■ Performance assessment against established criteria. Abatement of payments for non-performance. <hr/> <ul style="list-style-type: none"> ■ Foreign companies may repatriate income. <hr/> <ul style="list-style-type: none"> ■ Article 29 of Decree 12/2012 and article 25 of Law 18,786 provide that procuring authorities must request performance bonds, which may be presented in local or foreign currency (article 37, Decree 17/2012).
<p>7</p> <p>Dispute settlement</p>	<ul style="list-style-type: none"> ■ There is regulation on domestic arbitration, international arbitration, and investor-state dispute settlement (ISDS). Article 54 of Law 18,786 provides that disputes about PPP agreements must be submitted to arbitration.

3

Dealing
with
changes

■ PPP agreements must have provisions to maintain their economic and financial balance (Article 17 of Law 18,786) and must regulate conditions for them to be amended/renegotiated.

■ Authorities have the prerogative to unilaterally amend PPP agreements, as long as it is regulated in the PPP agreement, and upon authorization of the Ministry of Finance and the Office of Planning (accounting court is also notified prior to the amendment) (Article 47 of Law 18,786). Even though the regulation provides that each PPP agreement may regulate the limits of the amendments (particularly on the scope of the agreement) and that authorities may unilaterally amend an agreement, there is a 20% CAPEX limit and a 20% OPEX limit. In such cases, the private partner receives economic compensation.

■ PPP agreements may regulate their revision (Article 48). In all cases, changes in the agreement must comply with regulation limits: 50% for new investments during the operation stage of the project and 30% for new investments during the works stage. The Ministry of Finance and the Office of Planning will render a prior analysis of the revision of the agreement.

■ Cases that allow PPP agreements be renegotiated (Article 49) include:

- costs changes by public authorities if it affects the agreement's economic and financial balance and impacts the agreement itself (not a policy on other situations);
- force majeure events, acts of God (Article 73 of Decree 17/2012 provides it is mandatory to describe them in the agreement); and
- in any case provided in the PPP agreement. If the parties do not reach an agreement to renegotiate the PPP, they may sue for damages in courts. The Ministry of Finance and the Office of Planning must render a prior analysis of the revision of the agreement.

■ The PPP agreement must provide a standstill period in which no renegotiation or modification may take place after its execution (Article 74 of Decree 17/2012).

■ Change in the structure (stakeholder composition) of the private partner and/or assignment of the PPP agreement is regulated. Same legal qualification required to replace entity.

■ A new public bidding may address new investments during the final 5-year period of the PPP agreement (Article 53). If the private partner in charge of the services is not the winner, the agreement is terminated and authorities pay damages to the private partner for early termination of the agreement.

9

Financing and Funding PPP agreements and Warrantees

■ Financing is the private party's responsibility and it may be used as a criterion to award the PPP contract.

■ The private partner must provide information about financing the PPP project (Article 34 of Decree 12/2012). The Ministry of Finance must authorize the financing arrangement proposed, which also includes amendment and re-negotiation of financing agreements.

■ Private partners may give guarantees based on their incomes from PPP agreements (Article 55 of Law 18,786).

■ Lenders' step-in rights are provided in article 80 of Decree 17/2012. They have to be regulated in the PPP agreement. Procuring authorities must authorize the replacement of the private partner, even if it happens due to step-in rights.

■ The private partner must give guarantees based on assets and incomes from PPP agreements. Financing entities may foreclose on the guarantees through the procuring authority, which will launch a tender that may replace the private partner to pay the debts (Articles 58-60 of Law 18,786).

■ Articles 59 and 62 provide the PPPs' fiscal and budgetary treatment, according to each agreement's provisions on risk sharing, and some limitations for public authorities to enter into PPP agreements (a total limit and an annual limit for new projects).

■ According to the specific characteristics of each project and for the purpose of making them viable, the contract may provide for contributions from the Public Administration, such as monetary contributions, granting of grants, credits, guarantees for the financing of the project, guarantees of obtaining minimum income and tax exemptions, among others. Of these contributions, those that require it must have the decree of the corresponding Executive Power (Article 6 of Law 18,786)

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Extraordinary events

■ Force majeure events, material adverse government action and subcontracting are regulated in the PPP agreement (Articles 49 and 50 of Law 18,786).

<p>11</p> <p>Public authority's prerogatives</p>	<p>■ Authorities may unilaterally amend the PPP agreement, if it is regulated in the PPP agreement and the Ministry of Finance and the Office of Planning authorize it (the accounting court also receives notice prior to the amendment) (Article 47 of Law 18,786). Even though the regulation provides that each PPP agreement may regulate the quantities that authorities may unilaterally modify an agreement, legislation provides a 20% CAPEX limit and 20% OPEX limit. In these cases, the private partner receives an economic compensation.</p> <hr/> <p>■ Procuring authorities may unilaterally terminate the PPP agreements, based on public interests (Article 51 of Law 18,786).</p> <hr/> <p>■ Public authorities may temporarily assume the agreement if the private partner abandons the services or breaches the PPP agreement (Article 52 of Law 18,786) for no longer than 24 months. Procuring authorities may summon the second bidder to assume the PPP agreement, have a new tender, or terminate the agreement.</p>
<p>12</p> <p>Risk allocation</p>	<p>■ PPP agreements must describe risk allocation, with special attention to costs and demand (Article 17 of Law 18,786).</p>
<p>13</p> <p>PPP termination</p>	<p>■ Grounds for termination of a PPP contract and its consequences are expressly regulated (Article 51 of Law 18,786). Agreements may be terminated because:</p> <ul style="list-style-type: none"> • they expired; • of project abandonment or breach of contract; • Acts of God and force majeure events; • public interest (early termination); • mutual agreement; • bankruptcy; • other provisions of the agreement. <hr/> <p>■ If the agreement is terminated due to the private party's failure to comply with its terms and conditions, it must indemnify the public authorities by making a claim under its performance bond (Article 44 of Law 18,786).</p>

14

Transparency and accountability

■ The statements of the PPP management team must be publicly delivered to a transparency and ethics committee (Article 2 of Decree 17/2012).

■ Procuring authorities must publish the bidding notice online. Procuring authorities may also publish the bidding notice in newspapers and other media for the transparency of the bidding process (Article 21 of Decree 17/2012).

■ A competitive dialogue procedure will be published online and procuring authorities may publish its basis in newspapers and/or other media for transparency of the bidding process (Article 56 of Decree 17/2012). Procuring authorities must publish the competitive dialogue basis 30-45 days prior to the submission of the proposals to participate in such procedure. All governmental studies exchanged between the parties during the competitive dialogue must be disclosed to other private parties. Nevertheless, the studies presented by private parties during the procedure are confidential to other bidders.

■ Assessment and studies in the project are not made available to the public.

■ Public procurement notice of the PPP issued by the procuring authority is available online, including a draft of the PPP agreement.

■ Clarification questions about the procurement notice are publicly disclosed.

■ Publication of award notice is made available online.

■ The agreement is made available online.

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Other comments

■ PPP agreements must adhere to some guidelines, including environmental ones (Article 4 of Law 18,786).

■ All bidding procedures leading to a PPP agreement require information regarding the corporate structure of the bidder and its financing source for disclosure of information to prevent terrorist acts and money laundering (Article 22 of Decree 17/2012). Procuring authorities must consult Uruguay's Central Bank prior to entering into a PPP agreement to address these concerns.

