

Learning in Twenty-First Century Schools

Note 3.

Public-Private Partnerships in School Infrastructure in Latin America

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Public-Private Partnerships in School Infrastructure in Latin America

Overview of public-private partnerships (PPPs)

State budgetary resources allocated to public services, whether essential or not, are not unlimited. Correcting a high deficit in infrastructure of any kind by directly increasing provision and thus burdening public finances, may be too slow an approach to meeting the needs of the country.

Due to budgetary constraints, in some cases imposed by the country's own laws¹ and elsewhere by the financial markets or geopolitical conditions, it is possible that meeting the basic needs of some sectors of the population requires an excessive amount of time. In the case of education, these limitations place a barrier on the population's development, which in turn, restricts the growth and economic development of the country.

The objective of this chapter is to provide the tools needed to support the governments of Latin American countries in assessing potential operations and opportunities that can be carried out as PPPs, a mechanism which facilitates the development of these countries by promoting the participation of the

private sector in the provision and funding for infrastructures, facilities, and educational sector services.

Under the generic term "public-private partnership" (PPP), it is possible to group a large number of relationships between the public sector and the private sector that are targeted toward the provision, financing, and management of infrastructures, equipment, and public services of general public interest. The Organization for Economic Cooperation and Development (OECD), the International Monetary Fund (IMF), and the European Union (EU) define public-private partnerships as follows:²

An agreement between the government and one or more private partners according to which the private partners deliver the service in such a manner that the service objectives of the government are in alignment with the profit objectives of the private partners, and

1. For example, in Costa Rica, the Constitution prohibits budget deficits: "The regular budget of the Republic comprises all probable income and all authorized costs of public agencies during the fiscal year. In no case may the amount of budgeted expenditures exceed likely revenues." (Article 176 of the Constitution of Costa Rica).

2. OECD (Organization for Economic Cooperation and Development). 2008. Public-Private Partnerships: In Pursuit of Risk Sharing and Value for Money. Paris. http://www.oecd-ilibrary.org/governance/public-private-partnerships_9789264046733-en.

IMF (International Monetary Fund). 2004. "Public-Private Partnerships." Prepared by the Fiscal Affairs Department in consultation with other departments, the World Bank, and the Inter-American Development Bank. Washington, DC. <https://www.imf.org/external/np/fad/2004/pifp/eng/031204.pdf>.

European Parliament. 2006. "Public-Private Partnerships: Models and Trends in the European Union." IP/A/IMCO/SC/2005-161. [http://www.europarl.europa.eu/RegData/etudes/note/join/2006/369859/IPOL-IMCO_NT\(2006\)369859_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2006/369859/IPOL-IMCO_NT(2006)369859_EN.pdf).

where the effectiveness of the alignment depends on a sufficient transfer of risk to the private partners. (OECD 2008)

. . . arrangements where the private sector supplies infrastructure assets and services that traditionally have been provided by the government. (IMF 2004)

The transfer to the private sector of investment in projects that have traditionally been executed or financed by the public sector. (European Parliament 2006)

The defining feature of a PPP is the transfer to the private sector of activities under public responsibility that have been traditionally developed directly by the public sector, together with the transfer of risks to the private sector, which seeks effectiveness and efficiency in the outcome. It is also a way of securing from the private sector not only its construction, financial, or management capacities but also its strategic, technical, and innovative expertise while introducing market criteria into the provision of infrastructures, equipment, and public services or those of general interest. For PPPs to be equipped with the necessary legal certainty investors demand, the EU recently developed guidelines that call for their mandatory transposition into the domestic laws of all Member States, the last of which concerns the granting of concession contracts and types of PPPs, which will come into effect on July 1, 2014.

PPPs have reduced deficits related to transportation, health, sports, and social infrastructures in many countries, thus contributing to their growth and economic development. However, in educational matters, they have been used in some countries for some time without coming into general use due to resistance by entrenched interests on the part of teaching professionals as well as cultural rejection by some societies.

Types of collaboration between the public and the private sector in education include a number of objectives. The World Bank has identified a series of standards of cooperation in which the private sector can

provide the public sector with the following actions in relation to education:³

- Educational infrastructure and maintenance;
- Ancillary services (cleaning, catering, maintenance);
- Professional educational services (teaching personnel);
- Corporate services; and
- Educational infrastructure and a range of ancillary services, corporate as well as professional.

Thus the private sector could provide public sector infrastructures in which administrative services would be provided for public education, dealing totally or partially with basic (and non-basic) infrastructure-related services. Among these are maintenance, modernization, refurbishment, laundry services, facilities, labs, and computers. This list could be extended to include more specific academic matters such as the management of enrollment, student and teacher records, and facilities that would allow for multiple uses. PPPs could go even further and include educational services themselves, including educational administrative tasks, according to the regulations of each country. In addition, through the use of appropriate PPP structures, the educational administration or another authorized institution, in collaboration (to a greater or lesser degree) with private interests, could even create management structures that would allow for the use of educational facilities for cultural or community centers, which, being intended for the benefit of citizens within its sphere of influence, would encourage innovative proposals for outreach outside of the school's traditional scope.

This chapter focuses on an analysis of different forms of PPPs and their possible application in the field of education. For this purpose, various types of possible contractual structures were identified internationally, some dealing with public law, others with private and property law, and finally mixed law. The analysis will address the availability of standard

3. Patrinos, Harry A., Felipe Barrera-Osorio, and Juliana Guáqueta. 2009. *The Role and Impact of Public Private Partnerships in Education*. Washington, DC: World Bank.

international data from three Latin American countries—Mexico, Chile, and Costa Rica—and their ability to use these, if necessary, through appropriate policy and management changes being made by the educational administration.

Types of PPPs in education: Latin America

Institutionalization is one of the more relevant aspects of PPPs development. It not only affects the regulatory framework but also all privileges, rights, and duties throughout the collaboration. One of the fundamental differences between public law, property law, and private projects lies in the ownership of the infrastructure. In public projects, it is usually the public sector that holds legal title to the assets, while in the equity and private format, the legal title holder tends to be the private partner, which significantly affects the cost of funding. Moreover, financial ownership is normally held by the private sector for the duration of the partnership.

Public law PPPs

By means of public works contracts, the private sector finances and builds an infrastructure, which along with its associated services, is available to the public sector so that this use falls within the provision of educational services. In exchange, it receives payments from the public sector, subject to the condition of the infrastructure provided and the quality of the provision

of associated services defined by a set of default parameters that specify the form of payment (availability payment).

The granting agency holds the legal ownership of the educational facility even though the economic ownership resides with the concession holder. In other words, the investment is included not in the public accounts but in those of the concessionaire, leaving the former unaffected in terms of both the deficit and public debt. With this type of PPP, the transfer of risk to the private sector is sufficient since the investment has no effect on the public finances and only current availability payments are made annually by the contracting agency.

Due to space restrictions, not all of the diagrams originally in this section are included in this chapter. Instead, each section includes all necessary explanations.

Public services management concessions. This is a concession to manage public services of general interest that may or may not include the implementation of public works. The private sector provides the infrastructure as well as educational services. In this case, the compensation may be linked to both the quality of the infrastructure and associated services (availability payment) as well as educational demand for the facility (demand payment), or a combination of both. The computation of the investment and other payments made through this contractual structure

FIGURE 1.
Varieties of legal regime

Public projects	Private projects	Mixed-law projects
<ul style="list-style-type: none"> • Granting of public works contracts • Granting of public works with public service contracts • Institutional PPPs (mixed-economy partnerships) • PPPs with competitive dialogue 	<ul style="list-style-type: none"> • Concession for private use of public property • Operating leases • Leasing 	<ul style="list-style-type: none"> • Ordinary public works contracts funded with grants for private use in the public domain.

in the public finances is identical to the case above, with only current expenses appearing in the public accounts but not the investment itself, whose economic ownership remains with the private sector.

Institutional PPP contracts. These seek to introduce public participation in the private portion of the partnership by creating mixed-economy corporations. In this case, the developer, which provides the infrastructure, is a mixed public-private corporation which is awarded the contract. The selection of the private partner must be made in accordance to the contract award criteria, which apply in public sector procurement, establishing in the contract specifications both the basis for the contractual relationship between the public and private partners as it is defined in the consortium agreement as well as the contractual relationship that governs the mixed-economy company and the public entity that acts as the contracting authority. One of the advantages of this form of partnership is the introduction of the public sector into the management of the contract. Together, the public and private sectors contribute the best of their capacities and can aim at innovation in public education services.

Public-private partnership contracts. These are awarded through competitive dialogue and are specially prescribed in cases in which the government agency knows the needs to be met but does not know the most appropriate way to proceed. This can often be the case in the education sector. Under these circumstances, the private partner willing to meet the needs of the public sector is invited to initiate a dialogue through which both sides define the scope of the technical, legal, economic, and financial terms of the contract and the form of the partnership between the parties. Following the dialogue, the applicants deliver their bid, and the contract is awarded to the highest ranked bidder.

Implementation arrangements. Through these arrangements, it is possible to use private education facilities to provide public education. The private partner receives payments for services from the

government and in return undertakes to implement and develop the education program in accordance with the education administration's criteria.

In light of the public law contracts analyzed above, it should be noted that the assignment of responsibilities for public activities to the private sector allows the latter to grow in size and strength, which enables it to perform increasingly complex tasks both at the national and the international level. As a result, enterprises in some countries such as Spain have taken increasingly greater responsibility for providing public services and have become leaders in the field of PPPs internationally.

Property and private law PPPs

The concession for the private use of public property is a form of PPP in which the private partner is granted the right to the private use of the public property for a period of time, which being intended for public use by the population in areas affected by the concession, becomes the exclusive use of the public property by the concessionaire in exchange for which the public party receives a corresponding payment. The infrastructure the private sector eventually builds on the public property is privately owned. The private partner can be forced to tear it down at the end of the concession or to deliver it to the public entity that granted the concession. It should be noted that this formula of non-contractual PPPs should be guided by the principles of openness, transparency, and non-discrimination as established under public law

Public authorities can also use typical private law contracts for the attainment of their objectives, always in accordance with the principles of openness, transparency, and non-discrimination as established under public law:

- Through an operating lease, the private sector makes infrastructure available for the public sector to lease. The owner is the private partner, and the public pays the corresponding payment for its use.

Sometimes, the leased property is sold at public auction by the government agency to the private partner. The term of the lease must be shorter than the amortization period of the property so that the private sector takes on the corresponding risk. This relationship should not be understood as a payment by installments, and so, ultimately, the investment does not appear in the public accounts;

- In the event that the contractual deadline is equal to or greater than that required for financial amortization of the investment, this requires a financial lease, that is, an equivalent to a hire-purchase that would require the entire cost of the investment entirely to be entered into the public accounts according to national accounting standards.

In both arrangements, whether through operating or financial leases, the public sector may make the land on which the construction of infrastructure will take place available to the private partner through the assignment of surface rights so as to allow the private party to build upon it while not having ownership of the land.

At the end of the period during which the surface rights were assigned, the surface right's holder may be forced to tear down the structure unless the public sector party having assigned the right has contractually stipulated otherwise.

All three countries listed above (Mexico, Chile, and Costa Rica) have used trusts with relative frequency, which has enabled them to overcome the traditional difficulty of dealing with incomplete regulatory frameworks. As is common knowledge, a trust is a contract by which certain goods are intended for a specific lawful purpose, entrusting the implementation of that purpose to a fiduciary institution. The affected assets in the trust do not incur the commercial risk of the grantor (who transfers the ownership of property) or of the trustee (the owner of the trust property at the expiration of the contract) since the assets of the trust

cannot be claimed by the creditors or affected by the bankruptcy of either party.

Mixed-law PPPs

The potential of PPPs is reinforced by the possibility of combinations of property and private and public law. For example, the requirements the private partner must meet in order to obtain private use of the public property could be replaced by building an infrastructure as per public procurement regulations.

These mixed formulas may be circumscribed in private law, as we saw with the assignment of surface rights. Other cases of this type have been implemented with great success in some countries. In the United States, for example, a private partner acquired surface rights on land owned by the City of Washington, D.C., on which it built a block of rental units. With the income from these rents, it financed the construction of a school, also in the area.

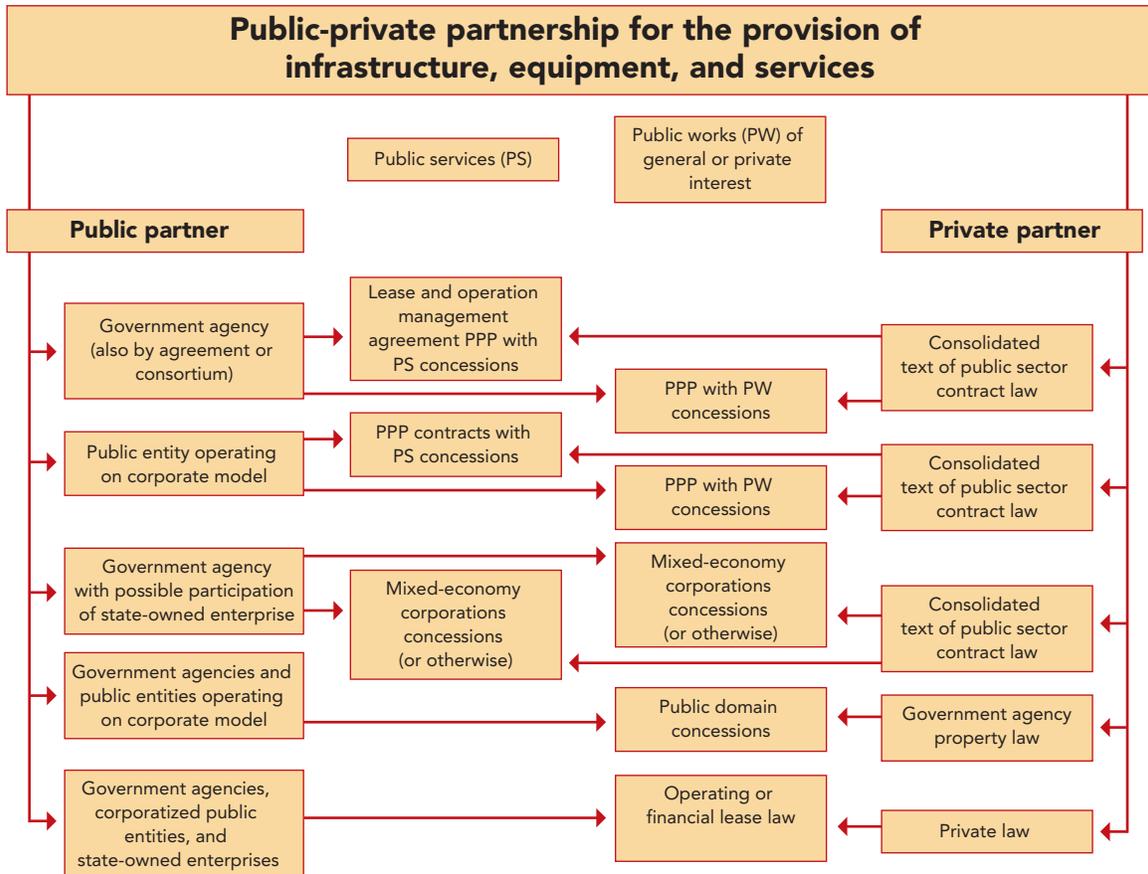
Figure 2 summarizes the various alternatives available to public entities for the provision and financing of infrastructures, equipment, and public or general interest services, whether directly or indirectly, with the collaboration of the private sector.

Availability of standard data in Latin America

Although the regulatory frameworks of the Latin American countries under study have different scopes, they generally allow for the use of standard international legal frameworks, with the exception of public contract law, which uses the competitive dialogue format, which is more typical of European law. It should be remembered that this European legal framework aims mostly to replace the negotiated procedure in contract bidding with PPP contracts, which has often been done with unsatisfactory results in countries such as the United Kingdom.

As shown above, the public-private partnership contract with competitive dialogue, for example,

FIGURE 2.
Diagram of public-private partnerships



within the Spanish regulatory framework, offers great potential to government agencies for resolving issues of great complexity, as can be the case for infrastructure and services in education. For government agencies, particularly complex problems can find acceptable solutions through collaboration with the private sector, using its technical, economic, and financial capabilities and its ability to undertake actions and to innovate. In particular, the regulatory framework of Uruguay already recognizes this contractual arrangement, and it would be desirable for it to spread to Latin America and the Caribbean to address particularly complex public projects.

In the absence of familiarity and previous experience in the field of PPPs in education, these

contractual arrangements will require a quality regulatory framework to work properly, incorporating a detailed procedures manual specifying guidelines for the use of these contracts. Obviously, a regulatory framework with a well-designed procedures manual could also be a suitable alternative. In any case, the members of the technical teams responsible for these projects must have adequate training, and acquire the skills required for selecting some of these contractual arrangements and for solving their particular difficulties.

The following paragraphs consider whether Latin American legislation allows for the development of PPP projects using all of the existing standard frameworks described in the previous section.

Mexico. In general, beyond the limitations regulatory frameworks may impose on the development of this type of arrangement, possible corporatism among educators may be a handicap when it comes to launching this type of contract since, when faced with such opposition, the risk may be high for politicians.

Regulatory environment. Generally speaking, the applicable laws are as follows:

- The political constitution of the country;
- Public-Private Partnerships Law (PPPL);
- General Law on National Assets; and
- General Law on Education.

The Private-Public Partnerships Law alludes to the National Constitution, particularly Articles 25 and 134. These articles determine the need for the participation of the private sector in the development of the country, allowing for the creation of PPPs for this purpose. These partnerships must be granted in light of the principles of equality, transparency, and non-discrimination.

The publication of the Public-Private Partnerships Law overrides the provisions contained in the following laws:

- Law on Public Works and Related Services; and
- Law on Procurement, Leases, and Services by the Public Sector.

The Public-Private Partnerships Law governs contracts between the public and the private sectors, which must meet the following requirements:

- Use an infrastructure provided totally or partially by the private sector;
- Be long-lasting; and
- Have as their objective the provision of services to the public sector or the end user.

In accordance with the provisions of the Public-Private Partnerships Law, the provisions will apply to those sectors whose specific legislative framework provides for the participation of the private sector.

However, they may not be used in cases in which the applicable provisions specify that the private sector cannot be involved. In the case of education, not only is there no such prohibition, but this application is expressly authorized by the General Law on Education, Article 9.

Additionally, Article 28 of the law confers a social interest to the investments made by individuals in educational projects. The requirement set forth in the Public-Private Partnerships Law for there to be specific legislation providing for private sector participation is then fulfilled, and therefore the Law is fully implemented. However, the above is not applicable to higher and university education, which are not governed by the provisions of the General Law on Education. To analyze the applicability of the Law on PPPs to these institutions, we would need to analyze the laws that govern them.

Among the various assets regulated by the General Law on National Assets, for the purposes of this study, the following should be highlighted (Article 3 of the General Law on National Assets): (i) assets in common use, and (ii) movable and immovable State property.

Chile. Legislation on concessions in Chile has undergone numerous amendments since its inception and been fine-tuned to reach its current form.

The Civil Code of Chile defines national assets as those belonging to the nation and establishes two fundamental types: (i) national assets for public use or public goods; and (ii) State property or public sector assets, these not being affected by common use.

Costa Rica. The applicable law is as follows: (i) The political constitution of Costa Rica; (ii) General Law on the Concession of Public Works with Public Services, Law 7762 and its amendment, Law 8643; (iii) Regulation of the General Law on the Concession of Public Works with Public Services; (iv) Educational legislation, including: (a) Organic Law of the Ministry of Public Education, (b) the Education Code (Law 181), and (c) the Basic Law on Education (Law 2160); (v) the

Civil Code; and (vi) the General Law on Urban and Suburban Leases.

We should note that the various forms of PPPs may face corporatist rejection by teachers, making it difficult to make policy decisions on their use in Costa Rica.

The trust format is commonly used in Costa Rica, which even includes a draft law for

“... authorizing the Executive Branch to establish, finance, and extend public credit under a lease contract for the long-term financing of construction projects and equipment for the Ministry of Public Education’s national educational infrastructure.”

Stages in the PPP cycle

In PPPs governed by public law, there are several key aspects a regulatory framework must meet if it is to make the entire process successful, from conception or planning to conclusion, taking into account the different phases in the development of these projects. This study is organized in three different sections, which relate to the natural and temporal evolution of these projects:

- Preparation of projects and calls for bids: This analyzes how regulatory frameworks assess the feasibility of PPP projects, the institutional framework that takes part in its design and coordination among its components, the transparency of administrative processes, and the regulation or non-regulation of initiatives put forth by individuals. In emerging countries, advertising, transparency, and non-discrimination in the bidding process acquire potentially greater importance if these projects are to attract international players.
- Construction and operation of projects, with special attention to:
 - Risk-sharing: Regulatory frameworks must allow for an appropriate allocation of risks according to the management capacity of the public and private parties;

- The risks derived from the *ius variandi* (decisions by the owner of the project), *factum principis* (the executive powers), cases of *force majeure* (such as nature and social conflicts), and requests for infrastructure use are usually not transferred, at least not completely, to the private sector. If such circumstances emerge during the construction and operation phases of the project, the regulatory entity should have planned how to face them in each case;
- Rewards and sanctions: Regulatory frameworks should allow for the granting of rewards when private partner management exceeds certain standards as well as for sanctions when the opposite occurs. Economic sanctions should be subject to limits, which when exceeded, should enable seizures as a way of restoring the quality and continuity of the service provided to citizens.

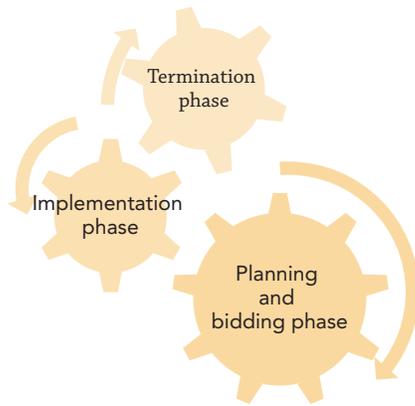
- Conflict resolution and termination of contracts: Approaches to conflict resolution and termination of contracts and their consequences for the various actors involved in a PPP are of particular relevance to their legal certainty and therefore require special attention.

In the absence of a specific regulatory framework, this requires procedures manuals for PPPs.

Planning and preparation

During the initial planning and preparation of projects, it is necessary to conduct feasibility studies that show that the project can be implemented through a PPP. Although the aspects that must be analyzed are many and varied, the related technical, environmental, legal, economic, and financial aspects as well as publicly available information are key. An analysis of the impact of the project on the public finances is also necessary, and those responsible for the public accounts should have decision-making authority over the launch of the project.

FIGURE 3.
Phases in the PPP process



The following outline summarizes concisely how to compute public investment in the national accounts, whether carried out by the public or the private sector.

All of these aspects require specific and comprehensive expertise in the relevant areas. However, not all public bodies with the power to award such contracts have staff specifically trained to identify, carry out, or supervise such projects. The more developed the regulatory frameworks, the easier it will be for regulatory overseers and responsible entities to prepare and consider bids for the projects. However, it is appropriate as well as a guarantee of success to have an integrated supervisory agency responsible for the proper management of all tasks in this phase.

Regulatory frameworks should allow the private sector to submit proposals for developing specific projects. The degree of collaboration thus reaches its peak, and the private sector can help with tasks typically attributable to the public sector, providing technical, financial, strategic, and innovative capabilities based on market criteria.

Bidding and awards

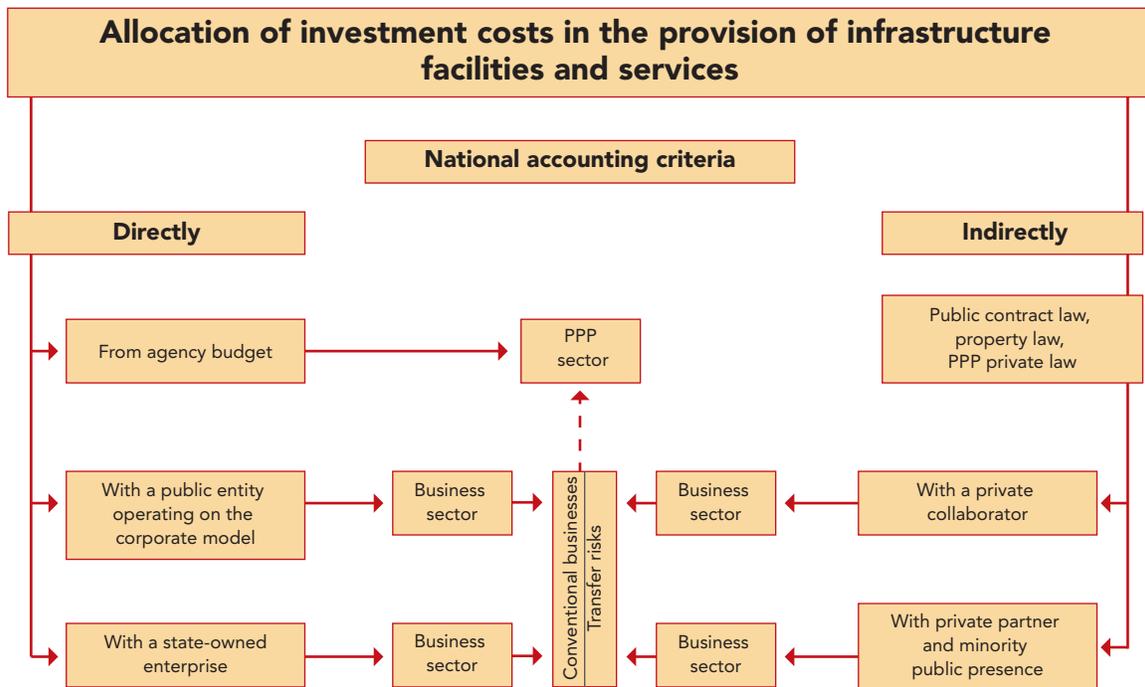
The Regulatory Framework

As mentioned above, the bidding process must respect the principles of openness, transparency, and non-discrimination, which are essential to allowing the free competition of private stakeholders aiming to win the competitive bidding process. Additionally, bids need to be evaluated along objective criteria as a guarantee of the impartiality of the awarding agency. Otherwise, bidders will not use the resources in the preparation of bids if the contents are not decisive to winning the competition, which can cause problems in the implementation phase. It is necessary to be able to challenge contract awards in the courts. Finally, to protect the public interest and promote the quality of services to be provided by the private partner, regulatory frameworks should include prohibitions on the public sector from contracting with enterprises marginalized for being found in breach of contract in other public contracts.

In **Mexico**, preparation and bidding is generally conducted as follows:

- A feasibility study is carried out, the content of which should be appropriate and well-defined;
- Economic planning agencies are involved and have the capacity for deciding to launch a project;
- The framework allows for challenges to award processes;
- In the bidding for projects presented through individual initiatives, the award of projects can derive from bias in the scoring, which can adversely affect more competitive offers and is clearly inappropriate;
- As mentioned above, while the law appears to efficiently coordinate all of the public agents involved, the creation of a specialized agency that would support them in the preparation of projects, bidding, and award processes is always desirable; and

FIGURE 4.
Allocation of investment expenses in PPPs



- There is no registry of bidders. It would therefore be desirable to create such a register in order to streamline the bidding and award process and make it more cost effective.

In **Chile**, concessions fall under the responsibilities of the Ministry of Public Works.

- The Chilean regulatory framework does not define precisely the content of the feasibility study, which would be highly advisable;
- Although a National Council for Concessions is in place and is tasked with screening all projects, the decision to open them to bidding does not fall to this institution but to the ministry responsible for the project;
- The various ministries may, if they wish, request that the Ministry of Public Works carry out all the necessary tasks throughout the different phases of

the contract. In this regard, the Ministry of Public Works functions as an agent of the PPP;

- A request from the Ministry of Finance to develop PPP contracts is mandatory and binding;
- The preparation of the agreement between the Ministry of Public Works and the contracting public authorities involves various issues, including bidders' requests for clarification during the bidding phase and the possibility of modifying certain technical aspects of the infrastructure to be built in the event that pre-qualification with an iterative process of consultation exists, in order to promote technical improvements, which are attributed to the Ministry of Public Works, with the direct involvement of the relevant ministries;
- In all cases, agreements can specify the role to be played by the agency responsible for the project;

- It is recommended that the advertising of competitive bidding be improved;
- Awarding criteria must be objective but can be excessively rigid, which may not be suitable;
- The law allows for individuals to submit their proposals, and the procedure governing these cases is clearly defined in the Regulations under the Law on Concessions. However, the award goes to the bid deemed superior to the other bids, which, depending on the case, could lead to awarding bids that are not the most competitive;
- Awards cannot be challenged, a provision that should be modified;
- As is the case in Mexico, Chile could create a system for classifying bidders, which would streamline the award process.

Although **Costa Rica** undertakes the drafting of feasibility studies, it does not require them to have specific content.

- Although a National Concession Council (NCC) is in place, which must intervene in cases where the contract is opened for bidding by the Executive Branch of the government, the decision to initiate the process of bidding following the feasibility studies is taken by the public official in charge of studying the feasibility of such a project;
- If the contracting entity does not fall within the scope of the Executive Branch, the NCC is not required to participate in the development of the project;
- There should be coordination and supervision of all activities aimed at analyzing the feasibility of a project, which may be led by the NCC if it has sufficient capacity, in order to avoid duplication, inefficiencies, or failures;
- It is recommended that agencies responsible for economic planning become involved in making decisions about which projects are to be bid upon and which are not;

- Once it has been decided to open a contract for bidding, a request for proposals must be drafted and approved by a two-thirds majority vote of the NCC, in the case where the contract is being opened for bidding by the Executive Branch; there is no such control over other cases;
- For those projects where the NCC intervenes, the drafting of the contract specifications is the responsibility of the technical secretariat of the NCC. To this end, the NCC should collaborate with the administrative entity responsible for the project;
- Objectivity in the contract award process depends on the evaluation criteria set out in the request for proposals; and
- The presentation of project proposals by individuals is regulated, and provides for privileges for certain bidders when bids are evaluated. However, this may divert from more competitive options.

Just as in Mexico and Chile, we recommended the setting up of a system of pre-qualification of companies that can certify their solvency and stimulate the selection process.

Risk sharing

Following the awarding of contracts, the private sector builds and finances the infrastructure and delivers the contracted services. The successful development of these contracts depends on an efficient distribution of transferred risk. The party that is better prepared to manage this risk is the one that should take the risk. Regulatory frameworks must be flexible so as to ensure proper allocation in each case, and the specifications must allow for linkages with the various projects.

Special consideration should be given to funding risks, which should be adequately regulated along with all other risks so as to make projects amenable to financing. In this sense, it is advantageous to introduce provisions for announcements and interventions ("step-in right" clauses) in regulatory frameworks or in the specifications.

Moreover, given that these contracts are developed in the context of a country where the public party must keep legislating and regulating other areas and issues, decisions must be made on what actions need to be taken when public sector measures (*factum principis*, or the powers of the Executive) impact the economic aspects of the contract. Although this concrete dimension can come via a law or specifications, it must include the risk that these measures may affect the economic aspects of the contract and should not appear in the balance sheet of the private partner.

Country risk

In the distribution of commercial risks, assigning them in each case to the party better able to handle them generates added value for the PPP. The position is different as regards non-commercial risks, which are not managed by the private sector. These risks must be balanced by the public sector or suitably mitigated if they are partially transferred to the private sector. In emerging countries, multilateral banking favors the mitigation of these risks. In any case, according to the 2012 Infrascopes,⁴ country risks should not be a serious problem for investors participating in PPP projects in Mexico, Chile, or Costa Rica.

Contract amendments

Thanks to public legal ownership and because PPPs are long-term contracts, the public party can amend contracts through *ius variandi* (decisions of the owner of the project) to conform to everyday reality, invoking the general interest. Obviously, since these amendments affect the economics of the contract, the injured party should be able to demand rebalancing of its accounts by the other party.

However, the scope of these amendments should be specified since they may hide the fact that partners may wish to improve contractual conditions or flout

the principles of openness, transparency, and non-discrimination.

Sanctions and rewards

Along with possible modifications to construction or operating conditions, ordinary operating conditions also deserve to be considered. Thus, the list of sanctions in case of non-compliance must be clearly established. The goal should be to promote the quality of the service provided. Since experience shows that the private sector includes in its economic model the application of sanctions, these may not be effective, and a combined system of sanctions and rewards may be most appropriate for this purpose. On the other hand, if penalties are excessively high, the private partner may deal with an economic stranglehold that makes it difficult to finance the project or prevent it from fulfilling its obligations. Seizure of the contract, that is, temporary management by the public sector is a second category of sanctions that offers a solution to this problem and ensures continuity of service under any circumstances. Termination of the contract always remains a last resort when the provision of services by the private sector truly fails to satisfy the needs of citizens.

In Mexico, assumptions of *factum principis* are regulated, even in the case of court judgments. However, economic balance must be restored only in cases where the damage to the private partner is substantial, and prevents the development of the project.

- Amendments to the contract are possible within a limit of 20% of the costs of investment during the first two years, as validated by a committee of experts. This committee helps ensure transparency. Amendments beyond two (2) years of the signing of the contract are not subject to limits;
- The regulation of the system of sanctions and rewards must be made via specifications. Seizure of the contract is possible for a maximum of three years;

4. Infrascopes. 2012. "Evaluating the environment for public-private partnerships in Latin America and the Caribbean." Multilateral Investment Fund, Inter-American Development Bank.

- The institutional organization is required to alert the Secretariat for Finance and Public Credit to changes that may occur in the projects but does not grant it decision-making powers;
- Amendments to contracts are not studied from a legal or environmental perspective.

For its part, Chile generally stipulates that changes in standards or general laws may not involve compensation to the concessionaire:

- Changes leading to compensation must produce a substantial and long-lasting imbalance in the economy of the concession;
- The regulatory framework also establishes the criteria that must be followed in amending contracts. The guarantees required by law are considered sufficient to ensure transparency in all cases. However, it would be desirable for the law to allow for downward rebalancing;
- From an institutional point of view, the Directorate General of Public Works acts as a specialized agency for concessions, providing the expertise required for the management of processes by other governments, departments, and public agencies. This is done in accordance with the respective partnership agreements between the Ministry of Public Works and the ministries responsible for the projects. Roles to be played in the possible amendment of contracts are therefore highly relevant; and
- Sanctions and rewards for operating results are possible, although seizure of the concession should also be possible.

In Costa Rica, both the *factum principis* and unpredictable risks are regulated, and give the concessionaire the right to re-establish the balance, regardless of whether the injury is substantial or not:

- Limits to amendments are sufficient to ensure transparency;

- However, the intervention of the agencies responsible for public accounts is not allowed;
- Nor does the law require the study of the legal or environmental consequences arising from such amendments;
- The NCC cannot intervene in projects that are not the Government's; and
- Seizure is not allowed, and sanctions can be imposed only on the basis of delays, not deficiencies in quality. It would be desirable to amend the law to regulate these aspects via specifications.

Project financing

With regard to the financing of projects, it is desirable that the regulatory framework allow certain actions aiming to promote the use of PPPs. Thus, some projects may not be profitable by themselves and may require the public sector to cooperate by supporting a portion of the investment. To this end, partial grants should be allowed in order to prevent the exclusion of certain projects that offer interesting positive outcomes. It follows that the manner of granting these and the particular purpose for which they are intended can affect the distribution of risks and therefore require careful study.

In addition, PPPs sometimes experience hardships that can jeopardize their viability in the short term. Provided they are only temporary and not related to the possibility that the project may not be feasible using these formulas, these difficulties can be resolved by making sure that the public entity responsible be allowed to grant participating loans to the private partner provided it has sufficient resources and subject to such conditions that will allow for the continuity of the project.

Construction financing of infrastructures requires the existence of financing mechanisms that make it possible. The more mechanisms exist, the more competition there is and the lower the cost of servicing the debt.

Some of these mechanisms, which are referred to in the international procurement standards, rely on funding with guarantees by the company that is part of the PPP, as is the case with mortgages and the securitization of collection rights. These options must be made possible through administrative authorization provided that funding is intended for the actual infrastructure itself and the deadline for the debt is less than the period of partnership set out in the contract.

Lastly, the issuance by the private partner of bonds or securities contributing to the financing of projects is another form of financing. The term of these instruments, which must be subject to the control of the public entity responsible for these products, cannot exceed the contractual term, and the framework must take into account the treatment the securities thus issued would receive in case of early termination of the contract.

One relevant aspect pertaining mainly to emerging countries that may carry a high is the regulation of the situation of the private partner in case the public partner fails to comply with its contractual obligations. Although administrative law rarely makes exceptions for unfulfilled contracts, it creates safeguards that limit the responsibility of the collaborating private party in the fulfillment of the contract and that should be set out in case the public sector fails to comply.

The recovery of the contract, that is, the withdrawal of the contract despite the good management of the private partner, should also be contemplated. It is possible that after the contract has been awarded, certain circumstances make the project no longer in the public interest. In these cases, cancellation of the contract should be possible since the ultimate goal is to serve the public interest. In such cases, the rights of the private partner (i.e., substantial damage and loss of profits) should be assessed and dealt with.

Conflict resolution mechanisms have special importance in situations where country risk is decisive. In this regard, the resolution of disputes through alternative means such as the local courts acquires great

importance. Thus, processes prior to procedural escalation to the courts may mitigate or resolve—even partially—any disputes. The introduction of international institutional arbitration as a substitute for the use of ordinary courts located outside of the contracting country is clearly a major requirement of international investors and is therefore highly desirable. Naturally, the decisions must be executable, and given this perspective, countries must be signatories to the New York and Washington conventions.

In Mexico, there are no exceptions to the performance of the contract by a private partner in case of non-performance by the public partner:

- The recovery of a contract is not possible; and
- As regards the resolution of disputes, a committee of experts is in place to resolve such disputes equitably and is available to all parties wishing to resort to arbitration as a mechanism for conflict resolution, which should be regulated by means of the corresponding arbitration agreement, and determine the venue, venue type, etc.

Chile allows for an exception over unfulfilled contracts via specification. Nevertheless, legal regulations would be advisable;

- Contract recovery is regulated in the construction phase and can be modified in the operational phase via specifications; and
- Conflicts can be resolved by a technical panel. When such conflict involves the interpretation of a contract, a previously established arbitration commission or the courts may step in. International arbitration is not possible.

In Costa Rica, we also recommended the introduction of the exception for unfulfilled contracts;

- Prohibitions are also recommended, which ensure that companies that terminated contracts are ineligible for hire by the government, at least for a certain period;

- Contract recovery is regulated; and
- Resolution of disputes can be via arbitration, whose characteristics (type and venue) are defined in the relevant arbitration agreement.

Conclusions and recommendations

Having the use of PPPs in the provision of infrastructures, equipment, and services through the public administrative authorities is perceived in many countries as genuine structural reform. PPPs can deliver projects capable of generating revenue and be self-sustaining with the help of the private sector, which invests, funds, maintains, operates, and provides services over a given period in exchange for a fee and at its own risk. Thus, fiscal resources can be used for projects of greater social content that are not self-financing. For government agencies, having such projects on the market requires thoroughly prepared technical units and sound technical, legal, economic, financial, and tax advice. However, administrative policy makers must understand the scope of these types of contracts, which go far beyond the ordinary procurement of public works and services. In this instance, it is fitting to have agencies that specialize in these contractual arrangements, normally located in the Ministry of Finance and providing support to the various ministerial departments and government agencies.

The PPP system uses public, private, and mixed-use contractual and non-contractual legal frameworks that are not always clearly or sufficiently well regulated and that offer minimum guarantees and legal certainty to investors. In emerging countries, the international private sector tends to assess country risk before making investment bets.

Once the PPP structure is selected, the first step is to establish the regulatory framework needed to prepare projects for bidding as well as the procedures for awarding contracts. An essential document in the pre-contractual phase is the feasibility study for the project on a PPP basis and, for the contractual phase, including contract design, the distribution of risks, how to

request and evaluate bids, and how to ensure compliance with the principles of openness, transparency, and non-discrimination in contracting. These extensive regulations are fundamental and usually include a manual of operating procedures. Less essential are relevant guidelines and standardized manuals, which are always available from multilateral banks.

In this context, a clear roadmap showing how to apply PPPs to the education sector is required in order to detect the strengths and weaknesses of each country in terms of their organization and operation, the regulatory framework, and the preparedness of its public and private stakeholders to address income-generating projects of this kind. Obviously, the experience of each country in other sectors, such as transportation or healthcare, play both in favor of extending this format to education but also against it given the possible social repercussions to the participation of the private sector in public services, particularly one as sensitive as education. In this respect, it will be necessary to assess whether the corporatist interests of teachers are defended through a concerted social response, as happened in healthcare and education in other countries.

The following bulleted items consist of a summary of the main recommendations:

- Mexico, Chile, and Costa Rica have regulatory frameworks designed to use different types of PPPs in the provision of infrastructures, equipment, and services in education. This regulation covers private and public law, even if there is room for improvement, for which we offer recommendations for action. In particular, we recommend the introduction in the regulatory framework of the three countries competitive dialogue aimed to facilitate the implementation of especially complex projects in education;
- Mexico, Chile, and Costa Rica included in their regulatory frameworks the preparation of projects for bidding and the bidding process itself, even if,

as was pointed out, we recommend improvements in certain aspects of this regulation;

- Both Mexico and Chile have broad and sound experience of the PPP system, although less so in applying it to education. Costa Rica also has experience in other areas of education, although according to the testimonies collected, it appears less satisfactory. In Chile and Costa Rica, the private sector participates in the provision of education through school vouchers or via an arrangement, normally with faith-based organizations or nonprofit foundations, which use their own facilities, for which they receive a payment from the educational administration, including teachers' salaries;
- In Chile, there are a number of concessional experiences in professional training, including the implementation by the municipalities of Las Condes, Vitacura, and La Pintana, of concessions in their educational institutions. In Costa Rica, there is currently a project to build and manage educational centers using a lease under a public trust. In Mexico, the concession system has been used to build and equip university facilities, including the University of San Luis Potosí. However, there are no outstanding experiences in non-university education. There is a long way to go in Mexico, and a governmental institution, the National Institute for Educational Physical Infrastructure (NIEFED), was set up and can be very useful to implementing early experiences;
- As was mentioned, PPP experiences in education in Mexico, Chile, and Costa Rica are limited with regards to the provision of new public educational infrastructures, though less so regarding the use of the school infrastructures and teaching staff of private nonprofit entities. Generally, it is perceived that the degree of satisfaction achieved by education authorities when the private sector has participated (or participates) is reasonably positive, although not so positive so as to make a firm commitment;
- The lack of experience of government agencies responsible for projects is felt by investors to be a major weakness for the country in question, leading them to assume the risk of participating in poorly prepared and badly designed projects bid for within regulatory frameworks that call for improvements. It is therefore essential that good training be provided to members of the technical units responsible for projects in education and, if possible, staff these units with people with knowledge of private sector projects, as is done in other countries. Given that the desirable knowledge of public officials should cover institutional contracts as well as technical, legal, economic, and financial aspects, it may be a good idea to create, as mentioned above, a unit specialized in PPPs to deal with part of this knowledge and to advise the technical units, as is the case in many countries;
- The creation of a specialized unit for PPPs in the Treasury allows for the control of the effects of the project on the public finances. PPPs are not only the responsibility of the ministry to which the technical unit responsible for the project belongs, but obviously also concern the Treasury, which has to deal with possible effects of contracts on the public finances. It is recommended that these projects be entered into only if they have previously been approved by the Ministry of Finance of the country in question;
- The ambition of many emerging countries to develop comprehensive PPP programs financed by development banks may constitute a serious risk for the country if the officials involved in projects are not well prepared. It is recommended that the training of public sector officials be certified through an Expert Diploma in PPP, if the funding is to come from multilateral banks;
- Mexico, Chile, and Costa Rica expect social repercussions from the participation of the private sector in education. As mentioned above, it is likely that such repercussions will be encouraged by

BOX 1.**Roadmap for the development of educational PPPs**

1. Identify projects that need to be addressed and incorporate them into a developed action plan;
2. Conduct feasibility studies of projects and corresponding funding sources, and identify those that can be realized through a PPP;
3. Decide on the institutional and contractual typology to be used (hierarchical position and type of PPP), keeping in mind the magnitude of the investments required, and avoid small PPP projects;
4. Identify the locations where schools should be built and how the land may be acquired;
5. Prepare the school pre-projects or projects;
6. Garner political support for projects, with the aim of reaching a political and social consensus. Provide an implementation strategy for projects that exceed the strength of the teachers unions' interests or opportunistic demagoguery. Study (among others) the strategies used for schools in Bogotá (starting with schools in which teachers have little interest) and hospitals in Madrid (referring to the debate in the Assembly of the Autonomous Community of Madrid), and enlist prominent academic experts as participants;
7. Train officials in understanding and managing PPPs, using sound academic programs based on case studies;
8. Prepare the request for proposals with the desired content, passing on to investors only the risks they are able to manage effectively and efficiently, and identify quality parameters that are to be monitored and the sanctions and rewards to be used;
9. Seek funding from development banks;
10. Present the projects to economic and financial national and international officials, and inform them of the possible involvement of multilateral banks;
11. Put projects out to tender, relying if possible on the support of a specialized administrative unit (as in Chile and Costa Rica), and establish criteria for the evaluation of bids so that candidates cannot win if they bid for projects without the proper aim of public service;
12. Prepare the program supervision team for educational administration and the monitoring of tasks assigned to the private partner; and
13. Looking toward the future, propose regulatory changes needed to improve the regulatory framework for PPPs.

teachers' union interests or by political opportunism. The preparation of countermeasures is therefore recommended, as is done in other countries, which will help defeat this opposition with the help of a previously designed strategy;

- PPPs that are well thought out and properly designed can introduce important economic efficiencies into the provision, financing, and management of

education projects, with the potential to positively affect the provision of public education. It is recommended that actions go from less to more, as seen in other countries, starting with simple pilot projects, and by better preparing the responsible government units in each case. To mitigate the social repercussions of PPPs, we recommend that the first pilot projects be undertaken in areas

where teachers do not show particular interest, as was done in Colombia;

- Although the emerging country risk presented by Mexico, Chile, and Costa Rica is limited, especially in the first two cases, it is recommended that educational projects on a PPP basis always secure funding from development banks. This is because international financiers and investors will take country risk into account and limit the profitability of their bids;
- We did not detect reticence in national and international investors or financial institutions to engage any of the three countries or to doubt demand or availability. The risk of non-payment for availability by the educational administration does not appear to cause concern among investors or financiers. Additionally, it is a risk that is relatively easy to mitigate when development banks play a

part in the financing since they can offer loans to the government, which would then be extended to the private partners in the event of non-payment;

- The knowledge of local private partners is often adequate since they participated in PPP projects in areas other than education, especially in Mexico and Chile. Mexico already uses an Attendance Diploma for government and private sector professionals in collaboration with the National Chamber of Consultants and the University of Anahuac South, and a master's degree in infrastructure management, facilities, and services from the Polytechnic University of Madrid. The Monterrey Institute of Technology also teaches courses in PPP online. Chile also developed courses in PPP in various professional and university centers. Perhaps the more limited development of the PPP market in Costa Rica is due to a lack of training for public and private sector professionals.



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