

PPPs and Supervisory Bodies in Latin America and the Caribbean: Role and Challenges

Vicepresidency for Countries

Michelle Carvalho Metanias Hallack
Patricia Sampaio
Diego Brito Cardoso
Uriel de Almeida Papa
Miguel Donovan
Orlando Palominos Aravena
Patricia Pella Fernandez
Rafael Dickson Morales
Vicente Bagnoli
Airtón Roberto Rehbein
Maria Luisa Olivera

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Discussion Papers

PPP Americas 2021

PPPs and Supervisory Bodies in Latin America and the Caribbean: Role and Challenges

Coordinator

Michelle Carvalho Metanias Hallack

Editor

Patricia Sampaio

Coordinators and collaborators:

Diego Brito Cardoso

Uriel de Almeida Papa

Miguel Donovan

Orlando Palominos Aravena

Patricia Pella Fernandez

Rafael Dickson Morales

Vicente Bagnoli

Airton Roberto Rehbein

Maria Luisa Olivera

Reviewers:

Ancor Suarez

Gracy Zapata

About the Discussion Papers

The Discussion Papers - PPP Americas 2021 are a series of documents produced in preparation for the X Edition of PPP Americas, the main forum for Public-Private Partnerships (PPP) in Latin America and the Caribbean (LAC), organized every two years by the Inter-American Development Bank (IDB).

As part of the PPP Americas 2021 edition, eight groups of experts, professionals, consultants and academics directly involved in the planning, identification, structuring and management of PPP projects in the countries of the region met. Under the coordination of IDB specialists, the groups reviewed the main topics of interest and current affairs in the field of PPPs, in order to exchange experiences, discuss success stories and lessons learned in the ongoing projects in the region.

From an open call made in March 2020, to which more than 200 specialists, professionals and academics from the region applied, around 90 people from across the region were selected to be contributors. They actively participated in discussions on the following topics: reliability of State payments, project selection criteria and drivers of value for money, best practices in contract management, diversification of the capital structure, contract termination rules and their consequences for project viability, planning and prioritization in infrastructure development, fiscal impacts of the projects and the role of control bodies.

Each topic explored in the groups led to a Discussion Document, compiling the reflections shared by the specialists in their joint discussions between June 2020 and April 2021. In addition, in January 2021, each group of specialists shared their insights with the other groups, to encourage the development of a richer and deeper conversation, and to take advantage of synergies between the different areas.

This initiative aims to help consolidate an environment for the exchange of experiences and best practices in PPPs for the region. Its main purpose is to serve as an input for the discussions that will take place at PPP Americas 2021—where solutions will be proposed in all directions.

Gastón Astesiano
Chief of IDB PPP Team

Carolina Lembo
IDB PPP Specialist

Ana Beatriz A. Araújo
IDB Consultant for PPP Americas

PPPs and Supervisory Bodies in Latin America and the Caribbean: Role and Challenges

This report presents an overview of how PPP supervisory systems operate in Latin America and the Caribbean, based on supervisory practices. The different definitions of supervisory bodies and the control heterogeneity in LAC are discussed. We show the importance and challenges of supervision at different stages of PPPs and the complexity of "multi-institutionality", with its checks and balances, and sometimes costly overlaps. The report also comments on the supervisory changes in the more general context of the opportunities that new technologies bring, and the more specific context of the role, along with the supervisors' learning process in the context of the Covid-19 pandemic. In the concluding remarks, we discuss a set of findings on the current state of PPP monitoring in LAC and share our suggestions.

Contents

1	Key Definitions: PPP and Supervisory Bodies	15
1.1	Public-Private Partnerships	15
1.2	Supervisory Bodies	16
2	Characterization of PPP Supervisory Bodies in LAC, Their Main Roles and Supervision Stages	22
2.1	External Audit Authorities/Auditors Course	22
2.2	Internal Supervision of Public Authorities	27
2.2.1	Public Contracting Authority	27
2.2.2	Regulatory Agencies	28
2.2.3	Internal comptrollers	30
2.2.4	Offices for the Defense of Competition	31
2.3	The Public Prosecutor's Office and the Judicial Branch	33
2.3.1	Arbitral Tribunals	35
3	The PPPs Phases and Decisions Related to Supervision	37
3.1	Supervisory Phases: <i>ex ante</i> , <i>ex post</i> and during the process	37
3.2	The Content of the Supervision and Types of Decisions	41
3.2.1	The Contents of Supervising Decisions	41
3.2.2	Types of Supervisory Decisions	41
4	Interaction Between Supervisory Bodies and Supervised Entities	44
4.1	General Issues	44
4.2	Overlapping Roles Between the Manager and the Supervisory Body	45
5	Transformations of Supervisory Bodies	50
5.1	More dialogue	50
5.2	Concern with the length of the supervisory stages of PPP projects	50
5.3	Digitization and Artificial Intelligence	53
6	The Role of Supervisory Bodies in Relation to the Covid-19 Pandemic	55
6.1	Priority	55
6.2	Necessity of proof on contractual imbalances	55
6.3	The role of regulatory agencies and auditor courts	56
6.4	Digital tools to facilitate information exchange	56
7	Concluding Remarks: <i>Trade-off</i> and Best Practices	57
8	References	62

Index of boxes, figures and tables

Boxes

BOX 1 – Step by Step procurement of some PPPs in Chile

BOX 2 – Uruguay: the supervisory practice

BOX 3 – Bodies with an impact on the supervisory practice: the case of the Dominican Republic

BOX 4 – PPPs and the Federal Court of Auditors (Brazil)

BOX 5 – Government and public service participation in the supervision of PPPs in Mexico

BOX 6 – The involvement of regulatory agencies in the supervision of PPPs in the Dominican Republic

BOX 7 – The supervision of PPPs by the defense of competition authorities: the Brazilian case

BOX 8 – Judicial supervision in Peru: timing and content of the supervision bodies' decisions

BOX 9 – FCA project supervision phases - Brazil

BOX 10 – Forms of supervision of the FCA - Brazil

BOX 11 – Failures in supervision duties in the Dominican Republic

BOX 12 – Overlapping of supervision duties: the case of the public market of the city of Porto Alegre, Brazil

Figures

Figure 1 – ISSAI – Best practices in auditing PPPs

Figure 2 – Supervisory Phases: *ex ante*, *ex post* and during the process

Figure 3 – Process of a PPP project in Uruguay

Figure 3 – Overview of supervision prior to the PPP: Titicaca Wastewater Treatment Plant – Puno

Figure 4 - Airport concession structuring timeframes, including the *ex ante* supervision stage – Brazil

Figure 5 – Road concession structuring timeframes, including the *ex ante* supervision stage – Brazil

Tables

Table 1 – Role of Auditing Courts by PPP projects phases

Table 2 – Role of regulatory agencies at a national level

Table 3 – Presence of internal comptrollers and their roles

Table 4 - Role of the Judicial Branch

Acronyms

LAC – Latin America and the Caribbean

APC – Contracting Public Authority

PPP – Public-Private Partnership

CADE – Administrative Council for Economic Defense

CGR - Comptroller General of the Republic of Peru

SAI - Supreme Audit Institution

INTOSAI – International Organization of Supreme Audit Institutions

MPW - Ministry of Public Works

MP - Public Prosecutor's Office

OALCEF - Latin American and Caribbean Organization of Supreme Audit Institutions

OPP – Office of Planning and Budget

PPI (IPP) – Programa de Parcerias de Investimento (Investment Partnerships Program)

PPP – Public-Private Partnership or Public-Private Participation

SEAE (SCAC) – Secretaria de Advocacia da Concorrência da Concorrência e da Competitividade (Secretariat of Competition Advocacy and Competitiveness)

CCS – Computer Communications System

TCA – Contentious-Administrative Tribunal

TCE-RS – Court of Auditors of the State of Rio Grande do Sul

TCR – Court of Auditors of the Republic

TCU (FCA) – Tribunal de Contas da União do Brasil (Federal Court of Accounts)

EU – European Union

Introduction

This report discusses the role and challenges of the supervising of Public-Private Partnerships (PPPs) in Latin America and the Caribbean (LAC). One of the benefits of using PPPs is that they can provide "demonstration effects" and help to reduce corruption, therefore increasing transparency and the quality of public services ([PPP Guide, 2021](#)). For these purposes, an effective supervisory system is needed. And for a supervision to be effective, it is essential to have in place a well-constructed and well-operated institutional structure.

Supervision is not a solution in itself, but it can be a very effective and transformative tool for ensuring high quality public services for the population at affordable prices. Supervisory bodies can contribute to project improvements and avoid unnecessary increases in budgets in the planning or implementation phases. Moreover, they can play a very important role in the fight against corruption and other perverse practices in public procurement and bidding, such as the creation of cartels. As Transparency International has mentioned about public procurement in the context of the Covid-19 pandemic, "the cost of corruption in Latin America is human lives".¹

The problem associated with corruption has many dimensions; among them it contributes to the low quality of projects because it does not encourage a careful review of proposals. This implies the payment of excess prices and unnecessary budget increases. As a result, there are fewer hospitals, schools, water, and sewage networks available to the public. This slows socio-economic development and condemns individuals to avoidable early deaths. The IDB estimated the annual cost of corruption in LAC at USD 200 billion.² Therefore, an effective supervisory system PPPs is essential when aiming for economic efficiency and the provision of high-quality public services to society.

However, distortions in the supervisory exercise can generate the opposite effect of what is expected. It may delay or increase project costs, and even become a barrier to investment. Therefore, finding a balance in terms of supervision is essential. But it is also an enormous challenge in view of the complexity of the supervisory relationships during the different stages of the "project cycle" or "infrastructure development cycle", and the diversity of institutions involved.

Therefore, an efficient supervision is a core component of an institutional structure since it allows countries to access the benefits of PPPs. It also avoids the costs and potential damage that this organizational form can generate when providing public services.

At an European level, an audit carried out by the European Court of Auditors has concluded that *"although PPPs have the potential to deliver policies more quickly and ensure quality maintenance standards throughout their lifetime, the EU-funded PPPs that were examined during the audit were*

¹ <https://www.transparency.org/en/news/corruption-could-cost-lives-in-latin-americas-response-to-the-coronavirus>. Accessed in February, 2021.

² Information published on 2019 and available at <https://www.larepublica.co/globoeconomia/america-latina-pierde-us220000-millones-por-la-corrupcion-de-sus-gobiernos-bid-2837566> Access in February, 2021.

not always managed effectively. and did not always represent value for money. The potential benefits of the audited PPPs were often not achieved because, similarly to traditionally tendered projects, they suffered from delays, cost increases and an under-utilization of project outputs, generating EUR 1.5 billion of inefficient and ineffective spending, of which EUR 400 million was EU funds". The report also concluded that there is still a lack of legal and institutional frameworks that can adequately oversee PPPs in some countries (European Court of Auditors, 2018).

The challenges of organizing supervisory bodies are not an issue specific to PPPs, but more of a general challenge for public services. PPPs are mechanisms that can facilitate control if they are framed within an efficient institutional structure of supervisory bodies.

Considering the importance of supervisory PPPs, this report presents the results of a discussion of the issue in Latin America and the Caribbean, based particularly on the experiences of six countries in the region: Brazil, Chile, Mexico, Peru, Dominican Republic, and Uruguay. The aim is analyzing the supervision of PPPs during the different phases of the process: from the planning phase to the end of contractual performance.

Analyzing the role of a supervision is challenging because the definitions of supervision and supervisory bodies are heterogeneous and depend on the institutional framework under consideration. There is no common list of supervisory institutions, and their roles vary from country to country, as will be discussed below. Therefore, in order to think comparatively among LAC countries, and in a way that is consistent with reality, it is important to consider broader definitions based on supervisory practices.

Moreover, the discussion of supervision is not separate from many of the discussions and challenges of implementing social, infrastructure and innovation projects more broadly, regardless of their form and place of procurement. Even when the contract is solely for performing a project or providing a service, there are also risks of delays and cost overruns and failures as a result of multiple factors. However, this discussion focuses on PPPs, and does not analyze administrative contracts that do not characterize PPP projects.

Nor are the problems distinguished in supervisory PPPs unique to LAC. Bent Flyvbjerg (2007; 2014), analyzing the experience of 104 countries on six continents between 1927 and 2013, from a database with more than two thousand large energy and transport projects. It shows that about 80% were characterized by cost overruns (with an average of + 43% cost overruns) and 40% presented deficits in relation to the estimated benefits (average of – 17%). The researcher presents a set of causes for these failures, which include, among others, imperfect forecasts, optimism in the planning phase, underestimation of costs and political interference.

According to Flyvbjerg (2007; 2014), large infrastructure projects, whether executed as public works, common concessions or PPPs, are marked by uncertainty and risks due to the long-term duration and the complex interfaces involved. Also, because of the existence of very specific

assets, which can lead to opportunistic behavior, both by public authorities and private stakeholders.

In Brazil, the Instituto de Pesquisa Econômica Aplicada (Ipea, 2018) and the National Confederation of Industry (CNI, 2018) point to other problems that affect the spending effectiveness related to infrastructure projects. These include the limited capacity of the State to plan, formulate, select and prepare budgets. It is also claimed that investment decision-making processes are marked by little transparency and a reduced civil society participation.

Furthermore, according to Monteverde and Pereyra (2019), "the mere existence of cost overruns in projects has become a stigma for projects and for the teams that carry them out. But the phenomenon is extremely complex and needs to be understood in depth in order to be managed properly. Moreover, this direct and simple interpretation can lead to blockages in the investment system due to inaction when it comes to making a decision when higher project costs occur"³.

Specifically, in relation to PPP projects, frequent criticisms include, among others: (i) lack of comprehensive and long-term planning, and lack of a rigorous value-for-money analysis, (ii) short term project portfolios, (iii) high vulnerability of public entities to political cycles and the negative impact of these on corruption, (iv) errors in investment and engineering studies, (v) inadequate risk allocation, (vi) delays in the granting of State permits and licenses (such as environmental licenses), (vii) delay in the delivery of properties or land, (viii) poor selection of the private investor due to flaws in the competitive or bidding process (inexperienced investors, lack of financing capacity), (ix) lack of the public partner's fiscal capacity to sustain the project's considerations and risks; (x) lack of permanent monitoring of the projects' performance⁴. Avoiding such problems is a key factor to justify the need for supervisory PPPs.

The World Bank highlights four core elements for healthy PPPs (World Bank, 2020)⁵: (1) good project formulation and design, quality engineering and an adequate evaluation system, which avoids putting projects out for bids if they are not "mature" enough yet; (2) competition and transparency in bidding as the main objectives of private investment systems; (3) regulation of private initiatives aligned with international best practices; and (4) contractual execution as another phase of the infrastructure cycle, paying equal attention to this phase in the awarding of projects. As part of the supervision, these objectives must be addressed daily.

Both criticisms and suggestions for increasing the quality of PPPs are not only intended for supervisory institutions. However, the practice of supervising is very important when it comes to avoiding many of these problems, and it can contribute more to the solutions. To increase the chances of success of an infrastructure policy or project, it is necessary to adopt supervisory

³ Reflections on Costs. Hugo Monteverde, Andrés Pereyra. p. cm. — (IDB Monograph; 665)

⁴ Shortcomings and opportunities for improvement in PPP projects in LAC cities are studied in Vasallo, 2018. A comparison between the degrees of capacity to develop PPP projects in LAC can be found in The Economist, 2017 (Translation by the authors)

⁵ Policy Note on Attracting Private Investment to Infrastructure in Peru 2020. The World Bank.
<https://openknowledge.worldbank.org/handle/10986/34159>

methods that are integrated into management. Internal and external supervision of the public service that guarantees compliance with laws and efficiency in public management is also necessary. Therefore, there are different supervision levels. When everyone works together, the result is more resilient public policies and projects.

The experience of more than 25 years managing PPPs in the region has taught us that it is not enough to have exhaustive and detailed regulations. Equal or greater emphasis must be given to their implementation. Throughout this report and along these lines, we will see that LAC countries continue to face great challenges.

Therefore, the existence of effective mechanisms for PPPs' supervision that address these criticisms, or try to prevent their materialization, is essential for the development of PPPs. They contribute to the improvement of the living conditions of the region's citizens. Therefore, analyzing successful forms of PPP supervision, as well as possible flaws in their operation, is very useful for improving the use of these mechanisms.

This report is the result of a collective research effort among experts and practitioners in the region on supervisory systems for PPPs in their respective countries. Therefore, this article presents how PPP projects are overseen in LAC and the main challenges of their implementation. It seeks to contribute to promoting improvements.

This effort was carried out through seven virtual workshops between experts, in which they presented their countries' experiences and perspectives on the supervision of PPPs. Moreover, participants provided relevant information, as well as examples of success and opportunities for improvement in the region. Based on a qualitative analysis and with this methodological design, it was possible to address problems and failures, observe a set of good practices and, finally, present progress recommendations and suggestions for supervisory systems for PPPs in LAC.

In order to present an overview of the performance of supervisory bodies in LAC on the selected countries, this report has been divided into eight sections, including this introduction. Section 2 presents the definitions of PPP and supervision used in the discussion. The different types of supervision bodies that exist in the countries that are part of the research are also presented, as well as brief contextual cases, given the number of bodies that can be called upon when planning up until the contractual execution of a PPP. Section 3 then discusses the moments of action of the supervisory bodies - *ex ante*, concomitant/concurrent or *ex post*, and their purpose. Also, whether they only affect the award procedure or whether they also include the review of substantive aspects of the projects. Section 4 presents the challenges that need to be overcome in order to achieve an efficient supervisory system for PPPs in LAC countries. Section 5 opens the discussion on the recent transformations observed in the practice of supervisory bodies. Section 6 highlights the effects of the Covid-19 pandemic on PPP contracts. Finally, section 7 presents a summary of the group's main findings and the *trade-offs* needed to move forward on the issue of supervising PPPs. Also, recommendations are made at the end. These recommendations seek to strengthen the countries'



capacity to attract private investors with bankable, sustainable and resilient projects that translate into quality public services and infrastructure.

1 Key Definitions: PPP and Supervisory Bodies

When beginning an analysis of how PPPs are supervised in LAC, some semantic and conceptual agreements are necessary because there is no precise list of what or who the supervisory bodies are. The analysis carried out has made it possible to verify that the LAC countries' experiences with PPPs are very different, as are the structures of their supervisory bodies and their capabilities.

There are situations in which the legal frameworks are the same for PPPs and concessions without public contributions. At the end of the day, all of them are cases of procurement and partnership between the public power and private initiative to enable the adequate delivery of services to the population. As for the supervisory bodies, they act *either ex ante or ex post*. Their participation is mandatory in some countries. In others, it is merely optional. No consolidated best practices have been found in terms of governance of institutions that play a role in supervising LAC countries.

Therefore, we have adopted a broader view of the phenomena in this report, based on the practices of experts and the reality of how PPP projects are structured in LAC. This was done at the cost of using a less precise definition from the theoretical point of view, but one that is perhaps more reliable for the complex reality of the issue.

1.1 Public-Private Partnerships

The first point of focus is to agree on what Public-Private Partnerships (PPPs) are for the purposes of this research. Especially because there are substantive legislative differences in relation to the subject in some countries in the region. For example, between "common concessions" and "public-private partnerships". This is the case in Brazil, which divides PPPs into at least three different legal species: (i) common concessions, which are contracts in which the consideration to the private party is given through the payment of tariffs paid by the users; (ii) PPPs as sponsored concessions, in which the consideration is given from the tariffs paid by the users and, jointly, by direct contributions or subsidies from the State; and (iii) administrative PPPs, for which the service provider receives the consideration only from State's contributions or subsidies. This is so because they are used in cases where it is not possible to charge user fees (e.g. PPPs for public schools, public hospitals or prisons). Under Brazilian law, according to Law 11.079/2004, only sponsored and administrative concessions are labeled as PPPs. However, it was verified that the research's intention was also aimed at what Brazilian legislation calls "common concessions". These cases are important because they are contracts signed between public

authorities and private investors for the provision of infrastructure or social services for the community. They usually require the execution of works so that they can be provided.

Therefore, in consideration of distinctions such as the one mentioned above, the term "PPP" is used with broad sense here. This will include not only cases with economic considerations from the public sector, but also concessions in which the private agent does not have direct contributions from the government. The focal point of PPPs is that they are long-term contracts, and they aim to distribute risks between the public authority and the private counterpart. This is done in order to assign them to the party that is in the best position to manage them (preventing risks and solving them when they occur). Although it is not the reality in all cases, the private party typically assumes the risks of financing, the construction, operation and maintenance. On the other hand, the public party assumes the political risk, the exchange risk, the risk of force majeure, etc. Through PPPs, projects are developed for the provision of public services, with or without tariffs (social services), public sector services (such as the management of prisons and other public buildings/activities), as well as applied research or technological innovation.

It is also considered that PPPs involve the delegation to private stakeholders of the provision of public services, under bidding procedures, whether preceded by public works or not. Public works contracts that do not include maintenance and exploration of assets are not considered PPPs for the purposes of this report. Administrative contracts for the provision of services common to the public sector, such as cleaning, security and gardening services, are not PPPs either.

1.2 Supervisory Bodies

Another issue on which prior agreement had to be reached was that of what would be considered to be a supervisory body. In other words, what do supervisory bodies actually do during the analysis of a PPP project?

This may be a matter of debate, given the absence of a precise definition of what is involved in "supervising" a PPP. Do we understand supervision to be the State control exercised exclusively by the Supreme Audit Institutions⁶? Are the bodies that manage PPP contracts included, such as sectoral regulatory agencies in the countries that have them? Would the Judicial Branch be a supervisory body since it can cancel procurement processes and contracts in certain situations? Should only external supervisory bodies, such as the Court of Auditors, be officially considered to be regulators? Or do internal comptrollers also have a relevant supervisory duty because they supervise public service activity, for example, in the area of regulatory compliance and the fight against corruption?

⁶ "Supreme Audit Institutions (SAIs), as the principal public sector audit institutions that focus on the accountability and transparency of public funds. They are uniquely positioned to contribute to the development and maintenance of stronger and more effective accountability mechanisms between governments and their citizens". (OECD, available at https://www.oecd.org/dac/effectiveness/Buenas_Pr%C3%A1cticas_para_el_Apoyo_a_Entidades_Fiscalizadoras_Superiores-%20for%20web.pdf).

It was decided to adopt a broad understanding of "supervision" based on several supervisory practices. As a result, a number of institutions are seen to interact in the PPP supervisory process. This interaction may even involve conflicting decisions in specific cases. For example, in favor of or against the modeling of a project, or on what legal formalities are necessary for them to be validly contracted and executed.

Indeed, supervision is considered to involve the power to review aspects of the PPP project or to prevent it from being implemented. Or to propose changes in the different stages of its structuring and procurement. For example, the following stages of the projects to be supervised can be verified: (i) supervision of public revenue and expenditure processes intended for PPPs; (ii) supervision of bidding processes; (iii) supervision of the signing and execution of PPP contracts.⁷

Supervision includes, but is not limited to, the review and approval of the project implementation mechanism (*value for money*), the supervision of the selection procedure of the private partner that will develop the project, the allocation of risks in the contract, the construction or operation of the project, the modifications that the contract may undergo during its execution, and even the dissolution and reversal of assets.

On that basis, and for the purposes of this report, both internal bodies and external bodies of the executive branch structure have been considered to be supervisory bodies but limited to State bodies. Thus, in addition to (i) SAls, "supervision bodies" also include: (ii) public authority bodies, such as the public contracting authority, regulatory agencies, internal control and competition authorities; and (iii) the Judicial Branch and the Public Prosecutor's Office. Courts, auditors and comptrollers will merit more detailed consideration of their powers and scope because of their significant role in the control of PPPs. This will be presented throughout this report.

Moreover, it is noted that there are other bodies of the executive branch that may also influence the operation of PPPs, such as, inter alia, ministries or secretariats of finance, bodies for the promotion and protection of free competition, supervisory authorities (which varies in each country). In Uruguay for example, the ministries have a more relevant role than the Court of Auditors (CAR) in terms of supervising PPPs. The opinions of the CAR are not binding for this type of project. As another example, Box 1 illustrates Chile's procurement process.

⁷ We have not found data that would allow us to perform an analysis of the supervision and compare the experiences of LAC PPPs based on each of these stages. Which is why such classification by stages will not be used in this report.

- **BOX 01** – *Different Stages of the Procurement Process for Some PPP Projects in Chile*

The process of granting a concession in Chile and the intervention of different State supervisory bodies corresponds to:

1. Sectoral Ministry (e.g. Ministry of Health for hospital concessions): has the authority over the property to be concessioned and gives a mandate to the Ministry of Public Works to carry out the PPP procedure.
2. Ministry of Public Works: prepares the bidding conditions and conducts the bidding process and subsequent awarding. During the term of the concession contract, it is responsible for its administration and supervision.
3. Ministry of Finance: approves the inclusion of projects in the investment portfolio, allocating the necessary public resources for the development of a given project. It is also responsible, among other duties, for approving the pre-qualification and bidding conditions, signing the supreme decree awarding the concession, and approving contract modifications that have a financial impact and signing the corresponding supreme decree.
4. Ministry of Social Development (MSD): responsible for the social evaluation of the project.
5. Chile's environmental evaluation service (SEA): responsible for the Environmental Impact Study that, according to the applicable regulations, is required for the development of the PPP. Subsequently, the environmental supervision of the project corresponds to the Superintendency of the Environment.
6. Office of the Comptroller General of the Republic: external supervision body that oversees the legality and legitimacy of the acts of the different State bodies as well as the use of State assets. In particular, among other duties, it is responsible for: approving the terms of reference of the studies necessary for the concession process, approving the pre-qualification and bidding conditions and their clarifying circulars, approving modifications to the concession contract, approving the mandate agreements signed between the MPW and other sectoral ministries approving contracts for government audit, and controlling the exercise of the public duties of the bodies and officials involved in the bidding process.

In the previous example, at first glance it seems that only the Comptroller General of the Republic would be a supervisory body for the legality of the different acts involved in this process. But it should be noted that there are different levels of approval, at different governmental levels, until a PPP is implemented. At each stage, each body evaluates or reviews the project in accordance with the powers granted to it by law.

Box 2 illustrates the practice of supervision in Uruguay, the agencies involved and the different roles involved in the PPP process. In Uruguay, the Granting Authority, the Public Contracting Authority (APC), is the one who structures, tenders and signs the PPP contract⁸.

- **BOX 2 – Uruguay: the practice of supervision⁹**

Bodies with supervisory competences:

- PPP Unit of the Ministry of Economy and Finance:
 - Follow-up of economic, financial, tax and accounting aspects.
 - Risk identification.
 - Recommend external audits.
 - Liaise with the financial sector.
- Office of Planning and Budget (OPB): socio-economic assessment.
- Federal Court of Accounts: non-binding pronouncements and interventions (except for prior consultations with the court).
- National Secretariat for Combating Money Laundering and Financing of Terrorism.

Depending on the stage in the PPP process, these entities have different roles. In the structuring stage, the OPB approves the socio-economic assessment studies (pre-feasibility) and the bidding conditions (including the draft contract). On the other hand, the PPP Unit of the MEF approves the Evaluation Document (budget feasibility + financial model + value for money), as well as the bid contracting conditions (including the draft contract).

During the bidding process, the PPP Unit and the OPB must approve all modifications that the APC makes to the bidding documents. Once the winning bid is selected, the PPP Unit must verify that it is consistent with the previous studies and that the VPD has been obtained. In this instance, the Auditors Court will have to rule on the awarding of the contract and the legality of the process.

Subsequent to the award of the contract, the PPP Unit must approve the terms of the financial structuring to be accredited by the successful bidder (as well as any subsequent modifications that these may undergo).

Once the contract is signed, the APC monitors the proper performance of the project and informs the PPP Unit of any alterations or non-compliance with the contract. In the case of contract modifications or renegotiations, a prior favorable report from the OPB and the PPP Unit will be required, as well as

⁸ For example, the Ministry of Transport and Public Works, or the Ministry of the Interior.

⁹ Compilation of Regulations Text of Law 18.786 Regulatory decrees N.º 17/012 of January 26, 2012, 280/012 of August 24, 2012, 251/015 of September 14, 2015. https://www.gub.uy/ministerio-economia-finanzas/sites/ministerio-economia-finanzas/files/documentos/publicaciones/compilado_normativa_ppp.pdf

the intervention of the Auditors Court. The PPP Unit may also request any information it deems relevant, as well as recommend audits.

The Uruguayan case illustrates the coordination of different oversight roles, including internal oversight of the executive branch, for example, exercised by the National Secretariat for the Fight against Money Laundering and Financing of Terrorism or the Ministry of Economy and Finance. And external oversight by the Court of Auditors, which has no binding power and only makes recommendations.

In some countries, such as Brazil, Uruguay and Chile, the Public Prosecutor's Office and the Judicial Branch act as exceptional bodies, exercising certain supervisory duties. This is so because although they are not regularly involved in the supervision of PPPs, they have the power to demand (the Public Prosecutor's Office) or adopt decisions (the Judicial Branch) with respect to possible violations of legal regulations in the award processes upon prior request of the interested parties (for example, complaints about the direction of the bids to favor the private interest of some companies). Or during the performance of the contract (as, for example, in cases of complaints of renegotiations outside the cases defined in the law and in the contract). In this order, the concept of supervision includes especially those cases in which a body of the Judicial Branch may suspend or cancel PPP award processes. It may even do so when the respective contracts have already been awarded or entered into.

It is also necessary to differentiate whether the supervision is exercised only in terms of legality. Meaning, in terms of verifying possible violations of legal or constitutional regulations regarding public procurement processes or contractual performance. Or whether the supervisory bodies may also question the merit of the administrative decision. For example, regarding the choice of design for the project structuring, or require its adaptation to the modeling that best captures value for money for the project that a manager wishes to tender according to the supervisory body's opinion. In some countries, there are cases in which the audit courts supervise the purpose of the projects in terms of risk allocation, quality indicators, value of tariffs, etc. Judicial control, on the other hand, is usually related legality. But there are cases, such as Brazil's, in which the principles of efficiency and economy are contemplated by the Federal Constitution (and are, therefore, legal regulations). Thus, at least in theory, it becomes more difficult to draw the boundaries between the supervision of the legality and the content of the PPP project.

Another interesting illustration of diversity is the case of the Dominican Republic, in which there are multiple supervisory bodies (see Box 3).

- **BOX 3** – *Bodies that have an impact on the supervision practice: The Dominican Republic case*

In the Dominican Republic, the following bodies that have an impact on the practice of supervising PPPs.

Chamber of Accounts: exercises external supervision. It basically analyzes the fiscal control of public resources, as well as administrative processes. In the case of PPPs, it analyzes compliance with the legality of the contractor selection process. And during the performance of the contract, it may conduct audits to determine compliance with contractual conditions. It can also supervise some material aspects. Basically, it is limited to determining whether or not the contract was in compliance with the law, without further material issues. The audit reports of the Chamber of Accounts can establish alleged administrative, civil and criminal liability, which would enable other bodies such as the Public Prosecutor's Office to take legal action.

National Comptroller's Office: exercises internal supervision, analyzes and authorizes payment orders for all contracts, including PPPs that require the expenditure of public funds after verifying compliance with legal and administrative procedures.

PPP regulatory body -- the General Directorate of PPPs: the General Directorate of PPPs is the autonomous and decentralized entity of the State that promotes, regulates and supervises Public-Private Partnerships. In the exercise of its duties, it shall promote and regulate public-private partnerships in an orderly, efficient and transparent manner. IT must ensure compliance with Law 47-20 on Public-Private Partnerships and supervise public and private stakeholders involved in such projects.

Pro-Competence and the General Directorate of Public Procurement: the General Directorate of Public Procurement intervenes by issuing technical opinions regarding the design and structuring of the competitive processes carried out by the General Directorate of PPPs for PPP projects.

Other sectoral regulatory bodies: regulatory bodies, such as, in the case of, inter alia, telecommunications, energy, mining, public transport, may have an impact on some aspects of PPP projects, but they do not have a supervisory operation of their own.

In the case of Dominican Republic, there is no supervision of the decision to carry out a project under the PPP modality beyond jurisdictional supervision in order solve the identified problem.

The case of the Dominican Republic is interesting to analyze, due to the different levels of oversight. A PPP desired by a public manager is subject to conventional supervision, such as that of the Chamber or Federal Court of Accounts. But also, to the supervision of the National Comptroller's Office, which has the power to approve all payments of PPP contracts. In other countries, it is customary to leave to the contracting entity as an act of contract management. Thus, in the Dominican case, the time of payment is closer to a level of supervision than to the management of the contract. Moreover, as will be discussed below, there are also the roles of the regulatory bodies, specifically for PPP projects, with the recent creation of the Directorate General of PPPs, and the antitrust authorities with the power, in some cases block the signing of certain contracts (for example, by supervising the concentration of companies).

2 Characterization of PPP Supervisory Bodies in LAC, Their Main Roles and Supervision Stages

Based on the broad and heterogeneous definition discussed above, of what PPP supervisory bodies are, this section presents the different kinds that exist, and the stages in which they operate from the planning stage of a project to the end of the contract. There will also be a discussion of whether they act *ex officio* or whether they need to be prompted by allegations of project failures. As could be noted, the bodies vary substantially among the countries investigated. This shows that the Latin American experience is rich and that the countries are at different levels of maturity in terms of PPP control.

The study even shows that there are cases of different realities within the same country, especially in those using the federal system. In Brazil, for example, different supervisory bodies interact at different levels (federal, state or municipal) with different scopes and responsibilities depending on the project, i.e. regulatory agencies, courts of auditors and the Judicial Branch. Municipal or State projects with contributions from the federal government are also supervised by the Federal Court of Accounts (*Tribunal de Contas da União -- TCU*).

The following sections will discuss the role of the following types of supervisory bodies: (3.1) the auditors courts, which are independent of the executive branch and are more associated with the strict and theoretical definition of supervision; (3.2) the internal bodies of the public sector, which have different branches and may be the most relevant for some countries, as in the case of Uruguay; (3.3) as well as the Public Ministry, which can receive and address complaints, and the Judicial Branch, which can decide on the fate of the PPPs. These are not the day-to-day supervisory bodies, but they perform important actions at the request of one party.

2.1 External Audit Authorities/Auditors Course

Supreme Audit Institutions (SAIs), also known as auditor courts, or Comptroller's Offices (external to the public service), play a very important role when it comes external supervision, whether of the public service in general or specifically when it comes to PPPs. They are usually independent bodies of the executive branch. Their contribution is based on observing the public managers' regulatory compliance. And in the case of PPPs, they prevent and avoid damage to public assets that may arise from these projects. Depending on the country, they act prior, concomitant or *ex post* to the definition, structuring or awarding of projects and contracts.



The SAI ecosystem at a regional level is integrated in the Latin American and Caribbean Organization of Supreme Audit Institutions (OALCEFS), which is a group made up of 23 Supreme Audit Institutions (Peru, Chile, Brazil, Colombia, Costa Rica, Mexico, Dominican Republic, Uruguay, among others). In turn, the OALCEFS belongs to the *International Organization of Supreme Audit Institutions* (INTOSAI). By promoting the exchange of experiences among accounts/auditors courts, both bodies strengthen their institutions in their countries, and promote international guidelines on relevant issues.

Its performance on PPP and private participation issues is no different. INTOSAI's working group on auditing projects with private participation has produced guidelines (ISSAI) and other official documents since the 2000s. The most relevant ISSAIs on PPPs, currently under revision, are ISSAI 5220 ¹⁰"Guidelines on Good Practices for Public/Private Finance and Concession Audits" and ISSAI 5240 ¹¹"Guidelines on Good Practices for PPP Risk Audits". Both provide frameworks for SAIs in auditing PPPs.

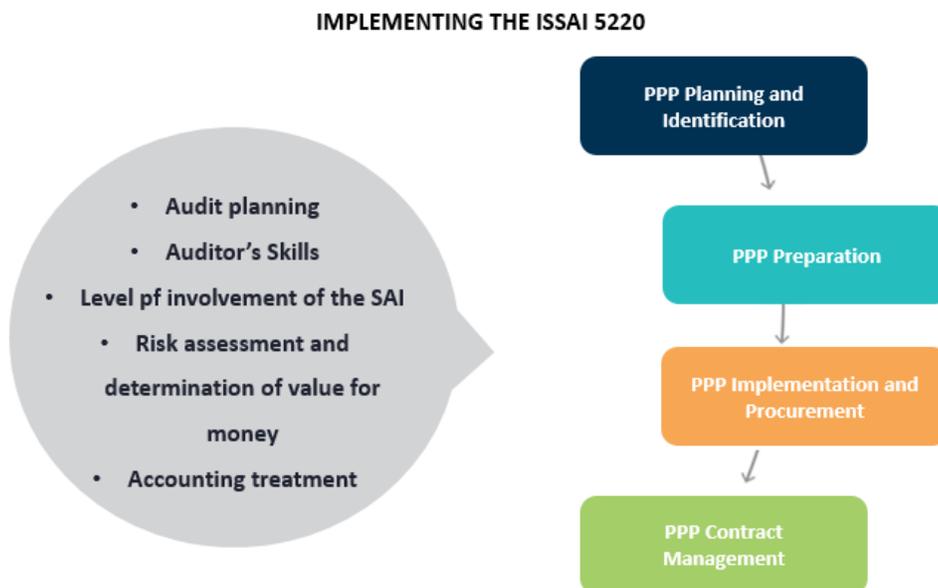
The ISSAIs are used by SAIs throughout the project cycle, as shown in Figure 1.

¹⁰ Good Practice Guidelines for Auditing Public/Private Finance and Concessions, accessed in Spanish <https://www.issai.org/?s=ISSAI+5220>.

¹¹ Good Practice Guidelines for Auditing Public/Private Finance and Concessions, accessed in Spanish <https://www.issai.org/?s=ISSAI+5240> .

- **FIGURE 1 – ISSAI: Best Practices for the Auditing of PPPs**

FIGURE A4 – 3
ISSAI 5220 Best Practice for auditing PPPs



Source: The World Bank, 2020. Policy Note on attracting private investment to infrastructure in Peru 2020:

In fact, the idea of supervising is often directly associated with SAIs/courts of auditors and their audits. The role and focus of these institutions, however, may vary in different countries, ranging from cases where they are limited to purely financial supervisions. Also examples of accounts/auditor's courts involved in issues such as regulatory quality and money laundering prevention. In some cases, the competence of these bodies is restricted to supervising compliance with the financial clauses of the investments and payments under each contract, but with no supervising authority over the administrative decisions on project structuring (tariff model and payment structure, service levels, performance indicators, etc.). In other cases, we have observed the powers are much broader. In some countries, invitations to biddings have to be audited in advance by the SAI, as is the case in Brazil at federal level, and in Chile.

Moreover, in some cases, accounts/auditors' courts have the power to impose sanctions on public and private stakeholders who do not respect the laws on public procurement, administrative transparency and anti-corruption. In other regions, such as the Dominican Republic and Uruguay, SAIs are advisory bodies without sanctioning powers, as shown in the table below. The table also shows that accounts/auditors courts tend to play a central active role in the auditing and implementation of PPP projects.

- **Table 01: Role of the Courts of Accounts/Auditors During Each Phase of a PPP Project**

Country	Power to review the project	Power to audit the execution of the project	Power to sanction public or private stakeholders in case of deviation
Brazil ¹²	Yes ¹³	Yes ¹⁴	Yes ¹⁵
Chile ¹⁶	No (in terms of the content of the project, only the regulatory compliance)	Not directly	Yes, public agents
Mexico ¹⁷	Yes	Yes	Yes
Peru	Yes ¹⁸	Yes	Yes, only public stakeholders are sanctioned
Dominican Republic ¹⁹	No	Yes ²⁰	No
Uruguay ²¹	Yes	Not directly	No

Source: Authors' own contribution

To illustrate the role of courts of auditors in PPPs, the case of Brazil will be used (Box 4). We show the importance of the Federal Court of Auditors (TCU) in the different phases of the project.

¹² At federal level - role of the Federal Court of Accounts.

¹³ Art. 18, VIII, Law 9.491/1997.

¹⁴ Art. 71, Federal Constitution. At federal level, art. 41, Law 8.443/1992; art. 14, § 5º, Law 11.079/2004; Law 13.334/2016, among others.

¹⁵ At federal level, art. 5, 57 and 58, Law 8.443/1992

¹⁶ Through the Office of the Comptroller General of the Republic Law 10.336:

<https://www.bcn.cl/leychile/navegar?idNorma=18995>

¹⁷ At federal level through multiple bodies, such as the Federal Superior Audit Office, the Inter-Ministerial Commission on Public Expenditure, Financing and Disincorporation and the Ministry of Civil Service. At a subnational level, the States have Secretariats of the Comptroller's Offices that supervise these activities.

¹⁸ There are mandates from the Comptroller General's Office of the Republic, see regulations at

https://www.contraloria.gob.pe/wps/wcm/connect/CGRNew/as_contraloria/as_portal/Conoce_la_contraloria/Normatividad/NormasControl/

¹⁹ Law N.º 10-04 of the Chamber of Accounts of the Dominican Republic.

²⁰ Art. 10 of Ley N.º 10-04 of the Chamber of Accounts of the Dominican Republic.

²¹ Law N.º 18.786 of 07/19/2011 Public Private Partnership -- Art. 23 and 47.

<https://www.impo.com.uy/bases/leyes/18786-2011/8>

- **BOX 4. PPPs and the Federal Court of Auditors (Brazil)**

The role of the Federal Court of Auditors in Brazil is quite broad, and includes not only financial and accounting audits, but also audits on the consistency of projects, quality indicators, as well as the legality of the rules that define who can participate in bids.

Supervision of PPPs is often concomitant at federal level. Law 9491/1997, which regulates the National Destabilization Program, empowers the manager of the National Destabilization Fund to prepare the documentation of debilitation projects for the appraisal of the Court of Auditors of the Union.

In 2016, Law 13.334 created the investment partnership program (*Programa de Parcerias de Investimentos*, in Portuguese) and has determined that projects qualified as PPPs are treated as undertakings of strategic interest. Also, that they have national priority before all public stakeholders in the administrative and supervisory departments of the Union, the States, the federal district and the municipalities. This law also requires that bodies with authority over the projects act in coordination with the supervisory bodies and authorities in order to increase the transparency of administrative actions, and efficiency in the receipt and consideration of contributions and recommendations.

In relation to the extension of its power of review, in its Regulatory Instruction 81/2018, the TCU determines that in order to be able to plan supervisory actions, the bodies responsible for the destabilization processes should send the Court an extract of the desired destabilization plan. It must include the description of the object, the forecast of the value of the investments, their relevance, location and bidding schedule, and it must be sent at least 150 days before the foreseen date for the publication of the call for bids. The technical and economic-financial studies that support the PPP bidding must be sent 90 days prior to the date foreseen for the publication of the invitation to contract, so that they may be examined by the TCU together with the legal documents for the bidding.

The TCU oversight evaluates the central characteristics of the project, which includes not only the impacts on the budget and public finances, but also the research carried out and the characteristics of the projects, the demand forecasts, the possibilities of alternative solutions or associated projects, the methodology for verifying the economic and financial balance of the contract, and the documentation related to the manifestations of the competent environmental body and the risk matrix, among others.

If the PPP requires public contributions, the TCU requires evidence of the guarantees to be provided by the public authority and an assessment containing an exhaustive description of all the elements that make up the risk-sharing matrix of the undertaking. IT must explain the allocation of each risk mapped for each of the parties involved in the contract to be signed.

2.2 Internal Supervision of Public Authorities

This section will present the bodies belonging to public authorities that usually supervise PPPs. These may be the public contracting authority itself, the regulatory agencies, the internal comptrollers and the competition authorities.

An interesting example of the participation of public authority supervisory bodies is Mexico, where they are involved from very early stages of the process.

- **Box 5:** *The participation of government and public authorities in the supervision of PPPs in Mexico*

To supervise and monitor the proper legal development of a PPP at federal level, the Mexican government requires supervision authorities to participate from very early stages. The participation of the Investment Unit of the Ministry of Finance and Public Credit (SHCP) and the Inter-Ministerial Commission on Public Expenditure, Financing and Disincorporation (CIGFD) are highlighted.

Government units interested in executing PPP projects work hand in hand with the Investment Unit, which provides advice and support in the development of the project. Among its duties, the aforementioned administrative unit guarantees that the projects are carried out under the principles of transparency and supervises the PPP projects in their different stages.

The CIGFD is a body that coordinates inter-institutional actions to address issues related to federal public spending. Among other functions, it oversees the allocation and prioritization of investment programs and projects, including budget authorization for PPP projects requiring federal resources. It is composed of representatives of the various ministries, including the Ministry of the Civil Service.

2.2.1 Public Contracting Authority

There is often interaction between supervision/management of contracts and the supervision. Whoever supervises and has the power to penalize operators for poor contractual performance, decree an intervention or even initiate/request early termination of the contract, certainly has a supervisory role of the PPP.

Some countries have independent regulatory agencies, i.e. entities with their own legal personality, not subordinate to direct administration, with decision-making and administrative autonomy. In jurisdictions or levels of government that have set up regulatory agencies as part of the administrative reforms of the 1990s (David Levi-Faur & Jacint Jordana, 2006), this separation between the public contracting authority and the administrative body supervisory PPPs can be observed. But in many cases, the roles of contracting and supervision still overlap.

In this context, the role of public authority bodies in PPP projects is analyzed. First of all, it is necessary to consider the figure of the public contracting authority, since it is common among public authorities that the contracting body is also the one that continuously supervises the performance of the PPP. The public counterpart is always present as a contractor in PPP projects,

but in some cases, it has a dual role and also assumes the supervisory function. In such situations, the public contracting authority supervises PPP contracts and often even has the power to intervene in PPPs and apply sanctions. For example, this is the case in PPP projects in Uruguay.

In fact, in cases where an independent entity is not present, it is usual for a responsible ministry or secretariat, which may or may not be responsible for the project, to also be in charge of its supervision/auditing. In Chile for example, if the grantor is the Ministry of Health, the Ministry of Public Works (MPW) through its concession structure, is the supervisor. The reason for this is that the MPW leads the PPP bidding through an agreement-mandate signed with the sectoral ministry. But only the MPW has the competencies and agencies, or directorates empowered to carry out the supervision of the project.

In the case of Peru, for national projects (e.g. health, education, prisons, solid waste), or in the case of sub-national projects that do not have a regulatory body per se, the PPP holder is responsible for hiring the project supervisor: the latter has a direct relationship and reports directly to the former.

In any case, it is necessary to clarify that this supervisory role is not to be confused with the fact that different ministries, secretariats, and bodies of the executive branch in general may take part in the process of structuring the PPP model (therefore, in the decision-making on its contractual model, risk matrix, tariff schemes, quality and performance indicators).

The fact that different ministries make suggestions or may require additional clauses or provisions from the originating body is not a supervisory activity on itself. For example, the fact that the body in charge of engineering requires modifications in the project, or that the environmental body demands that certain compensations or environmental protection measures be included in the draft of the PPP bid contract, does not turn it into a supervisory body of the PPP. But their intervention may change some characteristics of the project originally conceived by the body interested in structuring the PPP.

There are cases in which other bodies of the executive branch play a role in blocking, reviewing or not approving projects, although they are not typically supervisory bodies. For example, when the Ministries of Finance do not release the money necessary for the payment of the public counterpart, or when the Ministry of the Environment decides not to grant the necessary licenses. Although they are not supervisory bodies, they play relevant roles when it is considered that they can prevent a PPP project from being implemented.

2.2.2 Regulatory Agencies

Regulatory agencies are usually the typical supervisory bodies, and therefore the first supervisory bodies for the implementation of PPP contracts. They usually have the power to impose warnings, fines and, in some cases, to prohibit the continuation of a project or contract.

However, they do not always participate in the stages of project prioritization, project design and the bidding model. But these stages are usually left to the public contracting authority, represented by the respective ministries or secretariats (at sub-national level in federal countries, where there are States and municipalities).

- **BOX 6** – *The involvement of the regulator in the supervision of PPPs in the Dominican Republic*

In the case of the Dominican Republic, when it comes to PPP projects, the General Directorate of Public-Private Partnerships participates in the project stage, from the evaluation phase of what to do to selection of the agent and project completion. It is the central unit for all PPPs, which also has regulatory duties. Its main duty is to promote and regulate PPPs. It does not grant power. It was created under Law No. 47-20 on PPPs.

The main supervisory duties of the aforementioned Directorate include the following:

- to oversee compliance, supervision and monitoring of the normal execution of public-private partnership contracts;
- to conduct the phases of the procedures for submission, the declaration of public interest and the process for selecting private initiatives and bids;
- to evaluate and decide on the relevance of the initiative in terms of the National Planning and Public Investment System, national development policies and strategies, and the priorities established by the government;
- to issue the verdict on whether the contracting authority should award the contract.

The PPP General Directorate is responsible for reviewing the project goals and their fulfillment, together with the contracting entity. Firstly, it controls and reviews the selection process. Its decisions may be appealed before the administrative jurisdiction. It also oversees and manages the operation of PPP projects. At this stage, it interacts directly and can exercise some supervision over risk sharing, service levels, and other contractual provisions, together with the contracting entity.

Source: Authors' own contribution

The role of regulatory agencies may vary even within the same country because there may be cases of specific sectors that do not have regulatory agencies, while others do. The table below presents a summary of the powers of the regulatory agencies in the different countries in question. In the case of countries with multiple government levels (national and sub-national), the reality of central/national government (or the federal government) has been addressed.

• **Table 02: Role of regulatory agencies at national level**

Country	Has one or more separate administrative entities with power over PPPs	Power to conceive or revise the project prior to bidding	Power to oversee the execution of the project	Power to sanction private agents
Brazil ²²	Yes	In proper form, yes ²³	Yes	Yes
Chile	Yes	Yes	Yes	Yes
Mexico	Yes	Yes	Yes	Yes
Peru ²⁴	Yes	Yes	Yes	Yes
Dominican Republic ²⁵	Yes	Yes	Yes	Yes
Uruguay ²⁶	No	No	No	No

Source: Authors' own contribution

2.2.3 Internal comptrollers

In many countries, the different bodies of the executive branch are accountable to an internal comptroller's office. Although it is not an independent body of the head of the executive branch, it is separate from those exercising the roles of granting power in PPPs. And it usually has the functions of transparency, anti-corruption oversight and ensuring the proper use of public resources. They also usually verify that procurement and the corresponding payments have complied with the legal regulations in force.

• **Table 3: Internal comptrollers and their roles**

²² In Brazil, there is a general law with the attributions of the regulatory agencies (Law 13.848/2019), in addition to specific laws that create each regulatory agency and discipline their roles (such as Law 9.427/1996, which created the first federal level regulatory agency, the National Electric Energy Agency (Aneel). The powers of each regulatory body may vary according to specific laws.

²³ Projects do not always go through the regulatory agency, although this is the case in some sectors and levels of government. In the case of PPPs, the way the project is structured is defined by the granting authority, which may delegate the bidding procedure to Aneel. The National Land Transport Agency (ANTT), has the right to propose grant plans to the Ministry of Transport, in cases of concession or authorization, instructed by specific technical and economic feasibility studies for the exploration of infrastructure and the provision of land transportation services (Law 10.233/2001).

²⁴ There is no single website that brings together all regulatory agencies for public services in the country, but, we list a few of them below: OSIPTEL-Telecommunications, OSITRAN-Transport, SUNASS-Water and Sanitation and OSINERGMIN-Energy

²⁵ In the Dominican Republic, Law No.° 47-20, creates the General Directorate of PPPs, which is an autonomous and decentralized entity of the State, which has legal personality, its own assets, and administrative, jurisdictional, financial and technical autonomy, and is attached to the Ministry of the Presidency.

The fifth paragraph of Article 5 off Law N.° 47-20 establishes that its duties include promoting and regulating PPPs in an orderly, efficient and transparent manner. It also stipulates that it shall mitigate project risks through regulation and supervision of public and private stakeholders involved in such projects.

²⁶ Law N.° 18.786 of 07/19/2011 Public-Private Partnership.

<https://www.impo.com.uy/bases/leyes/18786-2011/8>

Country	It has an internal comptroller with supervisory power in PPPs	Power to conceive or revise the project prior to bidding	Power to oversee the execution of the project	Power to sanction public or private stakeholders in case of deviation
Brazil ²⁷	Yes ²⁸	No	Not directly	Yes
Chile	Yes (with the same precision with respect to the scope in Table 1)	Not directly	Not directly	Yes ²⁹ .
Mexico	Yes	Yes	Yes	Yes
Peru	No ³⁰	N/A	N/A	N/A
Dominican Republic ³¹	Yes	No	Yes, with limitations	No
Uruguay ³²	Yes	No	Not directly	No

Source: Authors' own contribution

Significant heterogeneity can be observed in the analyzed countries analyzed. In the case of the Dominican Republic, the Comptroller's Office exercises internal supervision. It does so by analyzing and authorizing payment orders for all contracts, including PPPs that require the expenditure of public funds, after verifying their compliance with legal and administrative procedures. Basically, its intervention is limited to the control aspects of the disbursement of funds to the contractor. Audits on PPP projects can also be performed.

2.2.4 Offices for the Defense of Competition

In the event that an economic agent buys other assets or PPP projects, or in order to review subcontracting processes, the roles of competition authorities often include powers to review proposed business mergers. There is also the supervision of complaints of anti-competitive conduct (e.g. posters in public tenders), as well as an advisory role, which may include opinions on bid invitations (e.g. not allowing entry barriers).

The participation of competition authorities in public PPP procurements has the potential to reduce the risk of opportunistic bids, the concentration of economic power and, consequently, may favor the obtaining of more advantageous conditions for public authorities (and, consequently, for users and society). Moreover, the greater the number of bidders in a competitive

²⁷ With respect to the federal body, the Office of the Comptroller General of the Union (CGU). States and municipalities also generally have internal supervisory and transparency bodies.

²⁸ At federal level, the attributions of the Office of the Comptroller General of the Union (CGU) are defined in Law 10.683/2003.

²⁹ In the case of the Ministry of Public Works, its internal Public Prosecutor's Office initiates sanctioning procedures but the actual sanction is imposed by the Minister.

³⁰ There are mandates from the Comptroller General's Office of the Republic, see regulations at https://www.contraloria.gob.pe/wps/wcm/connect/CGRNew/as_contraloria/as_portal/Conoce_la_contraloria/Normatividad/NormasControl/

³¹ Law N.º 10-07 which institutes the National System of Internal Control and the Office of the Comptroller General of the Republic, establishes its powers and competencies.

³² Law N.º 18.786 of 07/19/2011 Public-Private Partnership. <https://www.impo.com.uy/bases/leyes/18786-2011/8>

process, the better the proposals are expected to be and therefore, the better the outcome of the award. If the process of choosing the contractor is adequate (not flawed by cartels and without unnecessary barriers to entry), it is to be expected that the public contracting authority or the regulatory body will be in a better position to support the development of the projects.

The competition authorities may also issue advisory opinions, which are non-binding, seeking to promote the execution of competitive tenders among the granting sectoral bodies without unnecessary limitations that may threaten competition or optimal results for the authorities. The same role can be played by these bodies in cases where the concession holder must carry out a work or services that require the participation of third parties, or the implementation of a competitive outsourcing process. In such cases, the competition authority may issue guidelines or oversee the new outsourcing bidding process, in some countries, like Chile.

- **BOX 7** – The supervision of PPPs by the competition authorities –
The Brazilian Case

In Brazil, the Competition Defense System is formed by a secretariat of the Ministry of Economy (SEAE) and by the Administrative Council for Economic Defense of Competition (CADE, in Portuguese). The Secretariat of Competition Advocacy and Competitiveness (*Secretaria de Advocacia da Concorrência da Concorrência e Competitividade - SEAE*) has a consultative role. It may issue opinions on the structure of privatization and PPP projects, and CADE is the administrative awarding body, which decides on acts of concentration and complaints of anti-competitive conduct.

Cases of cartelization in public procurement, including PPPs, are analyzed by the Council. It may impose sanctions on companies that engage in anti-competitive conduct in PPP bidding and contracting.

Consortia formed to participate in PPP bids are exempt from concentration supervision in Brazil.³³ However, if there are changes in the corporate composition of the private partner, and if the economic groups involved meet the annual revenue requirements set out in the legislation during the life of the PPP contract, the competition authority must evaluate the concentration resulting from the intended transaction. And it may approve it, reject it or impose restrictions for its approval.

Moreover, it is interesting to mention that CADE signed a technical cooperation agreement with TCU in 2018, with the aim of exchanging intelligence and technology in the fight against cartels in tenders.³⁴

In the Dominican Republic, the competition authority has a non-binding advisory role to other sectors and regulatory bodies, such as the General Directorate of Public-Private Partnerships. And, in certain cases, it may review State legal acts contrary to free competition through a public report to the respective authority. It also has a competition law role. Its functionality, intervention and influence in public procurement is currently being discussed. It is not and does not have the functions of a control body as such.

³³ Law 12.529/2011 (Brazilian Antitrust Law). See art. 90, sole part.

³⁴ <http://www.cade.gov.br/noticias/cade-e-tcu-celebram-acordo-de-cooperacao>. Accessed on Dec 1, 2020.

2.3 The Public Prosecutor's Office and the Judicial Branch

The Public Prosecutor's Office and the Judicial Branch, depending on the country,³⁵ may have relevant roles in the control of PPPs. They may act to prevent the bidding or execution of certain projects that are presented as illegal or unconstitutional, as well as to prosecute processes after the pronouncement of the SAIs.

However, it should be clarified that they are not bodies for day-to-day monitoring of PPPs or for direct supervision, and only act in specific cases. The Judicial Branch must be motivated by an agent who is interested in control, or by an entity whose purpose is to defend the public interest. For example, associations, foundations, or the Public Prosecutor's Office.

Although the Public Prosecutor's Office is not a supervising body because it has no powers to review or overturn decisions on the bid, or execution of PPP contracts, it often has broad powers to investigate crimes and the ability to propose legal actions that may result in the blocking of PPP projects that are being managed or executed. The Public Prosecutor's Office acts, either when it receives complaints, or ex officio, in cases where there are suspicions of structuring problems, or errors in the calculation of the maintenance of the economic and financial balance, or corruption.

Although the Judicial Branch cannot replace the executive branch in its role of structuring PPP projects, there are constitutional principles such as economy, efficiency and competitiveness in some countries that give the Judicial Branch ample tools to supervise not only the formal legality of PPPs, but also their economic aspects. That is the case in Brazil.

³⁵ In some countries, such as Chile, the Public Prosecutor's Office only has a criminal prosecution role. In other cases, such as in Brazil, in addition to their criminal function, they can also propose public civil actions for reparation of damages, including for lack of administrative transparency in cases of violation of public assets, illicit enrichment of public managers, and even for violation of the principles of public authorities, such as honesty and fairness.

• **Table 4: Role of the Judicial Branch**

Country	Power to suspend/end biddings in case of illegal activity	Power to suspend/terminate administrative contracts in case of illegal activity	Extension of Supervision: Only for matters of formal/procedural illegalities (1) or, it also supervises the content of projects, bidding invitations or contractual clauses (2)
Brazil	Yes	Yes	2 ³⁶
Chile	Yes	Yes	1
Mexico	Yes	Yes	1
Peru	No	No	No
Dominican Republic	Yes ³⁷	Yes ³⁸	2
Uruguay ³⁹	No ⁴⁰	No	No

Source: Authors' own contribution

To illustrate the interaction between auditor courts and the judicial branch, Box 8 discusses the case of Peru.

³⁶ According to the Brazilian Federal Constitution, any injury or threat to law can be decided by the Judicial Branch (art. 5º, XXXV). According to article 37, the principles of public administration are legality, impersonality, morality, publicity and efficiency. Moreover, art. 70 mentions economy as one of the dimensions of the supervision of public accounts. Therefore, as they are legal regulations, these principles can be invoked to support judicial decisions related to PPPs. Thus, it is possible for the Judicial Branch to decree the nullity of a PPP contract because if it is inefficient or uneconomical in its view.

³⁷ At an administrative level, it is possible that the suspension of the competitive or selection procedure may be ordered. This may also take place by means of a precautionary measure dictated by the dispute jurisdiction.

³⁸ In the Dominican Republic, the competent jurisdiction would be the dispute tribunal, which would hear cases on disputes regarding acts, including contracts, actions and the administrative authorities contrary to the law as a result of relations between the State authorities and private individuals.

³⁹ Law N.º 18.786 of 07/19/2011 Public-Private Partnership. <https://www.impo.com.uy/bases/leyes/18786-2011/8>

⁴⁰ In Uruguay, this role can be assigned to the Dispute Tribunal (TCA). The Contentious-Administrative Tribunal will hear applications for the annulment of final administrative acts, carried out by the administrative authorities in the exercise of its duties, and which are contrary to a rule of law or concern a misuse of power. For example, it can declare a final award as null and void.

- **BOX 8. Judicial Supervision in Peru: Timing and content of the supervisory bodies' decisions**

Compliance audit reports (ex-post control) issued by the Office of the Comptroller General of the Republic of Peru (CGR Peru)⁴¹ frequently identify alleged administrative, civil and criminal liabilities of public officials.

Although the decision of the CGR Peru cannot be reviewed by other State bodies, the Judicial Branch can do so through its jurisdictional bodies, along with the Public Prosecutor's Office, which is in charge of evaluating the results of the audits and, if necessary, initiating the respective civil and criminal proceedings. It is also important to mention that there is usually an interaction between officials of the aforementioned entities and CGR officials. Mainly because the audited material -- PPP contracts -- is complex and highly technical, so they might hold meetings in which the CGR presents a summary of the audit and answers queries.

Moreover, it should be taken into account that, in serious cases of misconduct in the bidding processes or in the performance of PPP contracts, in several LAC countries the Judicial Branch is usually empowered not only to determine the reparation of damages to the State, but also to condemn the persons involved for lack of administrative transparency and even criminal wrongdoing. LAC countries are improving their laws to prevent and penalize corrupt practices and anticompetitive conduct in public procurement.

2.3.1 Arbitral Tribunals

Once again, it is important to emphasize that the interpretation of supervisory bodies in this document is understood broadly based on the perception of specialists with concrete experience in the Latin American and Caribbean region. Arbitration bodies do not fall within the canonical definitions of supervisory bodies. We include them in this paper because they are perceived as an important institution in the institutional structure to supervise failures and protect or maximize the value of PPPs.

In their legislation, some countries provide for contractual disputes in PPP cases to be able to be submitted to arbitration panels. This is usually perceived as an attractive factor for private investments, because it guarantees faster and more technical decisions and, therefore, more legal certainty.

In Brazil, it is possible to submit disputes between the public service and the private stakeholder to arbitration in matters of available economic rights. Brazilian concession and PPP laws

⁴¹ For further reference, consult the web portal of the Office of the Comptroller General of the Republic, refer to section 6.1. "Compliance Audit", highlighting the directive on compliance auditing and the resolution approving the compliance audit manual.
Accessed via https://www.contraloria.gob.pe/wps/wcm/connect/CGRNew/as_contraloria/as_portal/Conoce_la_contraloria/Normatividad/NormasControl/

expressly provide for the possibility of arbitration as a means to resolve a dispute.⁴² The economic-financial balance of the concession, compensation calculations in the event of dissolution or transfer of contracts, as well as non-compliance with contractual regulations, for example, are recognized as available economic rights.⁴³

In the Uruguayan case, "disputes arising from the application, interpretation, execution, performance and termination of contracts" can be submitted to arbitration⁴⁴.

In the Dominican case, dispute resolution mechanisms are established in the contract, allowing for alternative dispute resolution mechanisms such as renegotiation, conciliation, mediation and arbitration, which are not exhaustive⁴⁵.

In the case of Chile, a dispute resolution mechanism for public works concessions is specially regulated in the respective law (<https://www.bcn.cl/leychile/navegar?idNorma=16121>), which currently includes the possibility for concession holders to choose between submitting their disputes to the Court of Appeals of Santiago or to an Arbitration Commission, which is appointed for each public works concession (art. 36 and 36 a). Based on experience, no concession holder has ever brought an action before the Court of Appeals, which demonstrates the importance of arbitration courts in the supervision of PPPs. It is important to consider that for concessions which bids were submitted after 2010, the law includes a previous step for those disputes if they are of technical or economic nature. In such case, they need to submit the conflict to a non-binding recommendation of the Technical Panel of Public Works Concessions (www.panelconcesiones.cl). For concessions offered prior to that date, and before resorting to an Arbitration Commission, the dispute had to be submitted to a Conciliation Commission to try to reach an agreement between the parties.

In Peru, it is mandatory for the parties of a PPP contract to submit their disputes to arbitration, according to the specific regulation of each contract⁴⁶.

Therefore, in specific cases of allegations of breach of contract in a contract's execution phase, it is possible to interpret that arbitration panels act as *ex post* supervisory bodies because their activity is similar to that carried out by the Judicial Branch.

⁴² Law 11.079/2004, art. 11, III; Law 8.987/1995, art. 23-A.

⁴³ These cases are referenced in Law 13.448/2017, which provides for extensions and re-bidding of concession contracts in the road, railway and airport sectors (Law 13.448/2017)

⁴⁴ Law No. 18.786 Public-Private Partnership Law. Art. 54 (Dispute settlement).

⁴⁵ Art. 76 of Law No. 47-20, on Public-Private Partnerships .

⁴⁶ Article 56 of the PPP Framework Law (Legislative Decree 1362) and articles 119 to 133 of the regulations of the Framework Law (Supreme Decree 240-2018-EF)

3 The PPPs Phases and Decisions Related to Supervision

In addition to the different possible systems to supervise PPP projects, which may include the Executive Branch, the SAs, the Public Prosecutor's Office and the Judicial Branch, it is important to highlight the times at which the supervisory activities are carried out because the timing has a direct influence on their effectiveness.

Depending on when they are carried out, supervisory activities can be classified as *ex ante*, concomitant or concurrent, and *ex post*. The different supervisory bodies tend to act or be called upon at different times and for different types of decisions. This tendency may vary according to the country to which they refer.

3.1 Supervisory Phases: *ex ante*, *ex post* and during the process

The implementation cycle of new infrastructure begins with the public policy formulation stages. Based on the guidelines and goals defined by public infrastructure policies, projects are selected, planned, evaluated and implemented. In some countries, such as Brazil, even at this early stage of the cycle, the external supervisory body (TCU) has a role already.

In the case of PPPs, the private stakeholder will depend on the activity's profitable operation to recover the investment they have made. The investor is expected to demand clarity in the rules before agreeing to commit.

Such clarity is also essential for the granting authority that will bid the PPP project. The regularity, consistency and accuracy of the data, and the calculations and assumptions used are critical to ensuring that this asset is bid at a fair price, both for the government and for the stakeholders.

Therefore, the manager must adopt practices to ensure that the assessment of the technical, economic and environmental feasibility of projects is strong enough. Moreover, in many cases it is desirable to incorporate risk and shareholder management before handing over the implementation to the private shareholder.

Although a large part of the risk is assigned to the private stakeholder in PPPs, strong studies are needed to ensure the effectiveness of the adopted solution. It is now common to devote initial efforts to formulate a more efficient risk allocation at the time of the project's design. And the reason is clear: whatever its selection criteria is used, the formulation of the economic proposal by the parties interested in the PPP places a value on each of the risks that may affect the provision of the contracted service. Any doubt about liability in relation to a particular risk means that the individual must regard it as their own.

Given the complexity of these arrangements, an external supervision can be profitable in this process. The so-called "concomitant supervision" contributes to preventing the occurrence of non-conformities or failures that might generate an unfair value for the asset for tender bid. Or even occurrences that may compromise the execution of the contract or its inspection in the future.

In some countries, for example, ministries of finance or auditor courts may be involved in *ex ante* or concomitant supervision when they determine modifications to projects prior to their bidding. This is the case of Brazil in relation to the TCU, which evaluates projects as they are developed at a Ministry level. Another example of *ex ante* supervision is the Uruguayan case, in which the Ministry of Economy and Finance can request modifications to the project prior to its bidding process in order to ensure an adequate distribution of risks.

Once the planning, selection, study and bidding stages of the project have been completed, the contract will be executed in order to build and develop the project. In the case of a PPP, the execution of the contract will be long, and it may last many years. It is subjected to the most diverse uncertainties and complex renegotiations. At this point, there is also room for external supervision, with the sole aim of contributing to the effectiveness and success of the execution of the contract.

- **Figure 2:** Supervisory Phases: *ex ante*, *ex post* and during the process



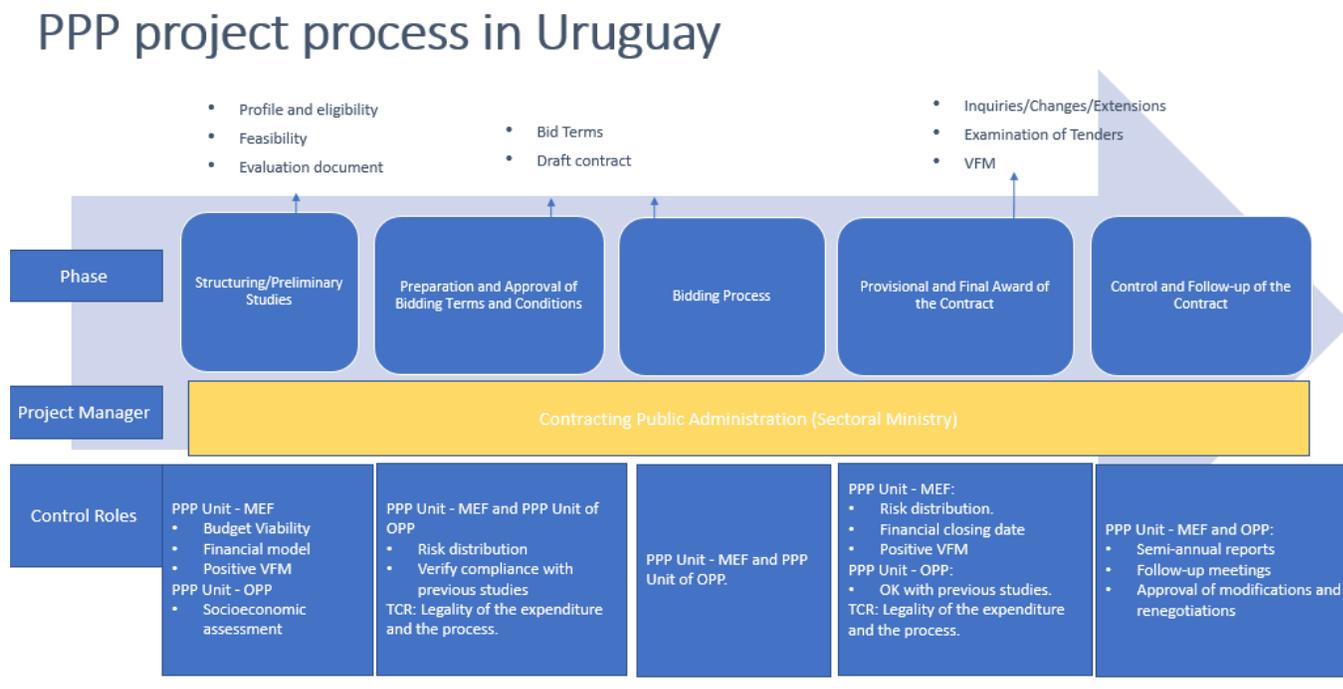
Source: Elaborated by the authors.

At the time of execution of the contract, the supervisory approach seeks to examine, for example, the performance, efficiency and effectiveness of the regulatory or supervisory body. Therefore, the supervision seeks to contribute in correcting deviations, increasing efficiency and effectiveness, or preventing failures in the inspection of the contract by auditing aspects of the performance of these entities. Its ultimate aim is to look after the adequate provision of the service granted.

In other words, the effective and successful implementation of a project or the adequate provision of the service in a concession contract depends on the proper fulfillment of a long and strong planning and implementation cycle. For each stage or moment in this cycle, a different approach by the supervisory body is possible.

Below, Figure 3 shows the process that a PPP project goes through in Uruguay, as well as the supervisory interventions involved.

- **Figure 3:** Illustration of a Public-Private Partnership Project process in Uruguay⁴⁷.



Moreover, the Judicial Branch's is always *ex post* to an administrative act that produces effects, although it can also block the PPP procurement process before it is carried out. For example, as when it issues a blocking order of a bid on the grounds of favoritism towards one or more bidders.

Figure 4 below presents a case of *ex ante* supervision of the SAI in Peru, in the case of the Titicaca-Puno PPP.

⁴⁷ Compilation of Regulations Text of Law 18.786 Regulatory decrees N.º 17/012 of January 26, 2012, 280/012 of August 24, 2012, 251/015 of September 14, 2015. https://www.gub.uy/ministerio-economia-finanzas/sites/ministerio-economia-finanzas/files/documentos/publicaciones/compilado_normativa_ppp.pdf

- **Figure 4: Illustration of supervision prior to the PPP: Titicaca Wastewater Treatment Plant -- Puno⁴⁸**

SISTEMA DE TRATAMIENTO DE LAS AGUAS RESIDUALES DE LA CUENCA DEL LAGO TITICACA	
Objetivos del Proyecto	i) Diseño, Financiamiento, Construcción, Ampliación, Rehabilitación, Operación y Mantenimiento de: Colectores principales, Cámaras de bombeo, Líneas de impulsión, Sistemas de tratamiento de aguas residuales y Disposición final ii) Soporte Técnico a los prestadores de servicio para el Control de los Valores Máximos Admisibles (VMA) en las descargas de desagües al sistema de alcantarillado sanitario provenientes de conexiones no residenciales. 1 millón 175 mil beneficiados con la limpieza de la cuenca del Lago Titicaca, distribuidos en 10 localidades de la provincia de Puno en Perú
Modalidad	Iniciativa Privada Cofinanciada (100%)
Monto Referencial	USD 236 000,000.00 (sin IGV)
Plazo	25 años
Informe Previo de la CGR	Se emitieron 17 recomendaciones: i) 11 (69%) fueron acogidas (vinculadas a suspensión de plazo para el cumplimiento de obligaciones, supervisión de diseño y obras, expediente técnico, penalidades, requisitos ambientales, etc.) ii) 2 (13%) fueron acogidas parcialmente (vinculadas a la prórroga y suspensión del plazo de la concesión y el perjuicio económico financiero). iii) 4 (18%) no fueron acogidas (entre ellas, la cláusula PRC).

Source: Comptroller's Office - Peru
https://www.contraloria.gob.pe/wps/wcm/connect/cgrnew/as_contraloria/as_portal

The table shows that the participation of the Peruvian SAI resulted in 11 recommendations resulting in changes to the project, and an additional two that were partially accepted.

- **BOX 9 – FCA Project Supervisory Phases - Brazil**

The TCU inspection can be prior, concomitant or subsequent to the acts of the administrative managers.

As a general rule, PPP contracts to be signed between the Union and the private party involve very high values and very long terms. All of this in addition to being linked to public policies and services that have a high impact on society. The aim of the supervision exercised by the TCU prior to the publication of the bid, and concomitant to the development of the project by the respective ministry, is to provide the market with greater legal certainty and allow errors to be corrected before the launch of the public notice, with a lower cost for the regulatory process and for society. The correction of any errors after the launch of the bid invitation or the signing of the contract may be too costly.

After the concession of the public service, the performance of the TCU continues to supervise the execution of the concession contracts through audits in the regulatory agencies (*ex post* and indirect supervision of the contracts, since the contract is already signed, and the addenda can be signed without prior approval of the TCU). This does not replace the constitutional and legal role of regulatory agencies, which must regulate the market.

⁴⁸ The full report was published on its institutional website. To access the document https://s3.amazonaws.com/spic-informes-publicados/informes/2019/03/2019CPRC92000004_ADJUNTO.pdf.

To access the summary sheet listing the risks

https://apps8.contraloria.gob.pe/SPIC/srvDownload/ViewPDF?CRES_CODIGO=2019CPRC92000004&FILETYPE=RE.

Information on the conclusion of the contract: <https://peruconstruye.net/2019/10/30/ptar-titicaca-estado-peruano-y-consorcio-mexicano-suscriben-contrato-de-proyecto-ptar-titicaca/>

The regulator's action is not reduced by the TCU's action because it is not up to this supervisory body to choose calculation methodologies or set tariff values. But the TCU points out any possible illegality or inconsistency in the managers' decision-making and may determine the correction of the error.

3.2 The Content of the Supervision and Types of Decisions

The issues and areas involved in supervising PPP projects are diverse and variable, as are the decisions that need to be made in the process. That being said, the supervision is heterogeneous in its content, form and application.

3.2.1 The Contents of Supervising Decisions

The issues can range from merely formal controls, to financial, budgetary and merit controls which question whether the project's structuring can achieve the desirable public or social policy objectives. Also, if it guarantees the value for money ratio that justifies the choice of the PPP modality. Thus, the following types of supervision can be listed:

- **Formality/procedure supervision:** seeks to verify whether the legally required formalities have been observed in terms of processes, documentation, bidding, signing of the contract, advertising in official media, presentation of reports on compliance with the stages of the contract, etc.
- **Financial supervision:** focuses on compliance with the stages of investments and capital contributions (private and public). The purpose is to observe whether payments have been made in accordance with the contractual provisions. Also, whether tariff adjustments and economic-financial rebalancing, as well as modifications to the contract, were carried out in accordance with the law and the contract.
- **Substantive supervision:** this is the supervision over administrative decisions on the structuring of the project (on the choice of the PPP model, the tariff model, performance indicators, risk distribution, etc). In principle, this is only possible within the hierarchical structure of the administration, from the technical bodies to the higher political body that makes the final decision to bid the PPP project. Here, the Judicial Branch cannot review these types of administrative decisions, but rather only supervises their conformity with the constitution and the law.

3.2.2 Types of Supervisory Decisions

The type of supervision that a supervisory body can perform also varies. It is very important to refer to the nature of the supervisory bodies' decisions, i.e. whether they are binding or not, before the matter that is being audited/supervised.

There are bodies that can confer on modifications to PPP projects (in structuring or in implementation). Others can only issue recommendations to the responsible public bodies. Others can personally

penalize managers who fail to comply with their decisions on projects, and others can report on their compliance, etc.

For each type of supervision, the instruments in charge of each supervision body also vary: recommendations, pronouncements, favorable reports, determinations, warnings, fines, suspension of projects may be issued, among others.

It is worth mentioning another type of instrument that is often used by the audit courts and the Judicial Branch, which are preliminary or precautionary measures. These are control measures, and they can result in the suspension of the bid or the execution of the contract (Pascoal, 2009), as is the case in Brazil. However, such measures are not binding in other cases, as in Peru, where they are understood to be recommendations.

- **BOX 10** – *Forms of FCA Supervision- Brazil*

In the exercise of its **corrective function**, the TCU is responsible for determining who is responsible for taking action to remedy the irregularities found or recommending the implementation of improvements when opportunities for performance improvement are identified.

In 2020, the TCU passed TCU Resolution 315/2020, which presents the following possibilities for action:

Determination: this is a deliberation of a compulsory nature that imposes on the recipient the adoption within a fixed period of time of specific and immediate measures with the aim of preventing, remedying an irregularity, eliminating its effects or refraining from executing irregular acts;

Science: this is a deliberation of declaratory nature, and it informs the recipient of the occurrence of an irregularity. For supervisory purposes, and when the circumstances do not require concrete and immediate measures, this will be sufficient to prevent similar situations from occurring in the future;

Recommendation: this is a collaborative deliberation that presents the recipient with opportunities for improvement, with the purpose of contributing to the improvement of management or government programs and actions.

In the **recommendations**, in particular, there is greater freedom for the TCU to point out different possibilities and different possible discretionary solutions for the manager. Through its recommendations, the supervisory body assumes a consultant role, and can provide the regulator with a range of possible options. When proposing recommendations, the TCU often specifies the recommended action for performance improvement to be carried out.

The recommendation's characteristic feature is its lack of binding force. The recommendation includes measures that the courts cannot impose, as it is necessary to safeguard the discretion reserved for the government. The courts identify the problem, but it is up to government to establish concrete measures for the efficient achievement of that purpose (maximizing the outcome, engaging the minimum use of physical, human, economic and environmental resources, etc.).

Unlike recommendations, TCU **determinations** are not subject to management's judgment of appropriateness because they are coercive.



The determination has a corrective purpose and confers certainty in the characterization of the situation as irregular or illegal and, therefore, imposes the adoption of concrete measures that can correct or interrupt the irregularities/illegalities on the manager. In a preventive situation where the risk of irregularity is imminent, it may be necessary to impose the adoption of concrete and immediate measures to inhibit it.

4 Interaction Between Supervisory Bodies and Supervised Entities

This section presents the key points in the interaction between management and supervisory bodies. Considering the findings on the subject, this section is divided into two parts. The first part presents general considerations, and the second presents a specific analysis of the risk of role overlap issue.

4.1 General Issues

The interaction between the public contracting authority and the supervisory bodies does not always take place within the framework of a harmonious process. Sometimes there is resistance on the part of the contracting authority to the review to be carried out by the supervisory bodies on decisions made during the initial phases of PPPs, such as the planning and structuring phases.

Other issues that often arise include the fact that the exchange of information between managers and supervisory bodies, or between different oversight bodies, is not always quick. Sometimes, this exchange of information only takes place by means of formal letters or requests, without concrete results for the improvement of the projects.

Therefore, institutional culture plays a relevant role in this area. In some cases, there is a lack of coordination between supervisory bodies and management. Although coordinated action can be more efficient and promote trust between the different stakeholders in the system. In Peru for example, the Office of the Comptroller General of the Republic does not give an opinion on the bidding conditions (as it does in Chile), but rather on the final version of the PPP contract, when two or more years of structuring the project may have elapsed already. Moreover, the opinion of the Peruvian Comptroller's Office is not binding, except in specific cases such as with compliance audits.

One possibility would be for managers to meet periodically with the comptrollers, which would not only reduce the asymmetry of information, but could also create empathy among the teams as they become more acquainted and strive to improve the projects in their early stages.

However, in many cases this is more good practice rather than policy, which could be less personal and more institutionalized. In the case of Uruguay, an important difference has been noted in terms of project structuring deadlines because working groups have been formed with regular meetings between the institutions participating in the process, beyond the formal links⁴⁹. A better result is achieved if the supervisory bodies are involved from the early stages of the process, therefore

⁴⁹ In the Uruguayan PPP Project Registry, the progress of project structuring and development over time has been documented. <https://www.gub.uy/ministerio-economia-finanzas/iniciativas-publicas>

avoiding conflicts that may arise if their participation is limited to formal instances, which usually occur when the project is already at an advanced stage.

Cases have also been observed where attempts are made to replicate projects from one place to another, especially at sub-national level. These attempts have been carried out without considering the different requirements of the communities in which they will be implemented. Thus, when they reach the supervisory body, they usually require multiple modifications because they have been the result of a copy-paste process with no deeper analysis of the reality in which they will be developed.

Moreover, the press can play a very significant role. One strategy that can be adopted is for the supervisory body that is against a project decides to put negative news in the media. Nowadays, it must also be considered that there can be tensions that go beyond the sphere of traditional media institutions and are amplified by social networks, with clashes between groups for and against a project. And these are not necessarily based on technical issues.

Management may also feel threatened by supervisory bodies, as they may suffer consequences if any supervisory body considers that the project was not well formulated or that contractual changes have not been well negotiated or executed. Some control bodies, such as the TCU in Brazil, can impose sanctions on public administrators who carry out inefficient PPPs, or that have structural problems and have not been previously submitted for supervision. Or that deviate from the requirements made by the supervisory bodies.

4.2 Overlapping Roles Between the Manager and the Supervisory Body

It is common to observe criticism against supervisory bodies (such as accounts/auditors courts and, in extreme cases, the Public Prosecutor's Office or the Judicial Branch), for meddling too much in the subject matter of the projects, almost becoming second-level managers.⁵⁰ There is a risk that many interactions in the supervisory process will lead to delays in the bidding process until managers and supervisory bodies agree on the details. And, along the way, the political momentum for the development of a project can be lost.

Moreover, it is important not to sign contracts for projects that are not very resilient.

Thus, the overlapping of duties is a matter that deserves attention. It would be ideal for roles of the supervisory bodies to be complementary and collaborative, and for all of them to function adequately. But in some cases, overlapping roles can be important and functional for countries with a history of non-compliance with rules or contracts, as well as frequent allegations of corruption.

⁵⁰ Criticism of the role of the Brazilian Court of Accounts in the review of PPP projects can be found in Dutra, 2020 and Ribeiro and Jordão, 2020.

For example, there are 32 audit courts in Brazil. In addition to the federal audit courts, the States and some municipalities each have their own external supervisory body. In most cases, these sub-national bodies do not interact with the PPP managing body until the bid invitation is published. Meaning they act only *ex post*, unlike the Federal Court of Accounts, which receives the drafts of the bid invitations at federal level for supervision prior to their publication. Ministries usually wait for TCU approval of the draft before publishing it.

Although such *ex ante* supervision may delay the launch of the bid, it tends to reduce issues in the subsequent stages of the bid until the contract is signed. Such order also tends to give more legal certainty to management because, if the TCU's demands are met, there is no expectation that there will be a subsequent challenge/review of the manager's decisions. Moreover, before the bid invitation is published, the manager is not subject to sanctions which may be applied should authorization be granted for the issuance of a bid invitation. Or even the signing of a contract that can later be identified as illegal, uneconomic or inefficient by the Audit Court.

Another key point is the risk of different positions being adopted by different State bodies on the same project. This tends to delay the launch of projects and create legal uncertainty. It should be noted that the Audit Court may end up acting as a second-level managers, making suggestions for changes in the economic-financial model or in contractual clauses which, although not formally binding, become real demands because managers fear being sanctioned. For example, there are occasions at the structuring stage on which there are different views between the ministry or another body that will exercise the function of granting power, the comptrollers' offices and the audit courts regarding technical aspects of the PPP.⁵¹

Moreover, the rules over governance and interaction between managers and supervision bodies are not always clear. And as a result, the roles of the planner, the person performing the project and the supervisor, overlap.

Indeed, the supervisory body may be tempted to substitute its own administrative decisions for those of the granting authority. In the case of Mexico, duties sometimes overlap, and there is confusion between the supervisory body and the granting authority in terms of the duties assigned to each one of them according to legal regulations. The truth is that supervision tends to be more reactive: when an event of non-compliance with the PPP is observed, the supervisory body states that it was never been called upon to comment on the project.

It is possible to argue that the prior review of PPP projects by the audit courts does not threaten the autonomy of the managers. But rather it helps to reduce the risk of mistakes being made and

⁵¹ In a study on the review of public lighting (PL) PPPs of municipalities in the State of São Paulo by the São Paulo State Court of Accounts (TCE-SP), Brazil, Ayrton Rehbein noted that all projects were suspended or declared null and void by the TCE-SP in its *ex ante* overview process: "The study included 10 municipalities that were scrutinized prior to PL PPP bidding invitations by TCE-SP from 2017, with the exception of the capital São Paulo, and the bidding was suspended in six projects and cancelled in four" (Rehbein, 2020, translated from Portuguese).

is therefore an adequate provision for obtaining better projects once they have been scrutinized by the supervisory body.

Moreover, supervisory bodies may defend themselves against the allegation of them interfering with the projects' merit by arguing that the need for review (determination of changes) by the supervisory body on a project submitted for supervision is often inversely proportional to the quality and maturity of the documents that are submitted by the managing body. When good projects are presented, less intervention by the supervisory body is needed.

In short, the scope of the supervision bodies' powers and, above all, the limits of that power are not always clear. Finally, there are also cases in which the supervisory bodies do not have the technical expertise to review projects. And even if they do, political power can influence such supervision.

The example of the Dominican Republic regarding the lack of experience of the supervisory bodies is presented below.

- **BOX 11** – *Failures in the Supervisory Functions in the Dominican Republic*

In the case of Dominican Republic, there is no effective supervision carried out by the oversight bodies. The Comptroller's Office deals with the formalities of releasing the payment or not.

The Directorate General of PPPs, as the regulatory agency, supervises some aspects of the PPPs such as the feasibility of the project.

There are problems with the coordination of project planning. The contracting entities have their own vision of infrastructure opportunities. Conflicts are experienced with the municipalities as regards where the project will be located, and with the general directorate of public procurement and contracting. At this stage, centralizing and coordinating a project is considered.

The General Directorate of PPP is a newly created entity by virtue of Law 47-20. Its implementing regulations, and its interaction with other entities, agencies and regulatory bodies have no practical experience. Therefore, conflicts and overlaps have been analyzed from the perspective prior to its creation.

The following example illustrates the risks of supervisory overlaps. In the city of Porto Alegre, Brazil, a case has arisen in which the investor has been left with no power of action in the face of the different views of the state's audit court, the Public Prosecutor's Office and the Judicial Branch on a project.

- **BOX 12** -- *Overlapping of Supervisory Functions: the case of the public market of the city of Porto Alegre, Brazil*

This is the concession for the use of public space in the city's public market, a property with historical and cultural relevance.

The first overlapping of understandings has focused on whether the project needed legislative authorization to be delegated to the private initiative because it was launched by the municipality without prior vote from the local assembly. The Court of Auditors of the State of Rio Grande do Sul (TCE-RS) understood that the legislative approval was required by law. Therefore, the Court imposed an administrative injunction suspending the bidding of the PPP project⁵².

At the same time, the Public Prosecutor's Office filed a lawsuit seeking the nullity of the bidding process. The discussion behind the controversy is based on whether the concession in question would be a *public service concession* or a *concession for the use of a public asset*.

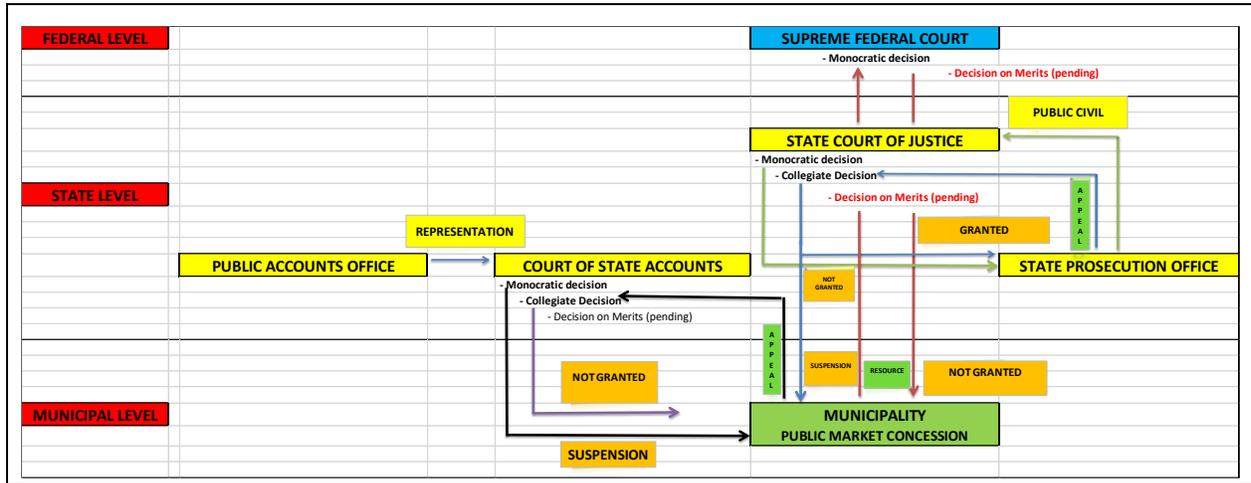
The first instance judge considered that the legal authorization was not necessary and suspended the administrative injunction of the TCE-RS, but the Public Prosecutor's Office filed an appeal and the Court of Justice reversed it. The municipality appealed to the Federal Supreme Court, but the President of the Court upheld the decision to suspend the bidding process.⁵³

The case illustrates at least two relevant points on the issue of supervision of PPPs: one is the fact that, in some countries, auditor courts are considered to have a role in addition to financial and budgetary control of the projects. They also control other aspects related to the legality and constitutionality of the proposals.

The second is the illustration of how the presence/overlapping of multiple external controllers, in this case, the Auditor, the Public Prosecutor's Office and the Judicial Branch can lead to opposing decisions. And without going into the merits of the case, this creates a scenario of legal uncertainty for investors when it comes to the legality of a PPP project. In the case of the public market, two investors came to present proposals to the municipality before the bidding process was suspended.

⁵² Information available at <https://g1.globo.com/rs/rio-grande-do-sul/noticia/2020/08/18/tce-rs-mantem-suspensao-de-concessao-do-mercado-publico-de-porto-alegre.ghtml>. Accessed on December 10, 2020.

⁵³ <https://g1.globo.com/rs/rio-grande-do-sul/noticia/2020/10/13/luiz-fux-mantem-suspensao-processo-de-concessao-do-mercado-publico-de-porto-alegre.ghtml>



5 Transformations of Supervisory Bodies

This section presents examples of audit developments that supervisory bodies are adopting to increase the capacity to prevent and remedy defects and errors in PPP projects in a timely manner.

5.1 More dialogue

Even with different levels of implementation, there is a growing awareness of the need to prevent PPP projects from not being carried out or being paralyzed due to disputes between managers and supervising bodies.

We must move towards the search for consensual mechanisms of information exchange and building a consensus capable of bringing more predictability to investors and users who need the services. In this respect, as will be seen in the next section, the urgency and the absence of precedents caused by the Covid-19 pandemic opened a relevant space for a more collaborative posture, dialogue and consensus building dynamic between different levels of managers and supervising bodies. Emphasis should not be placed on punishing managers who make mistakes in PPP projects. But rather on acting preventively to avoid making mistakes, bearing in mind that many decisions need to be made quickly and in uncertain scenarios.

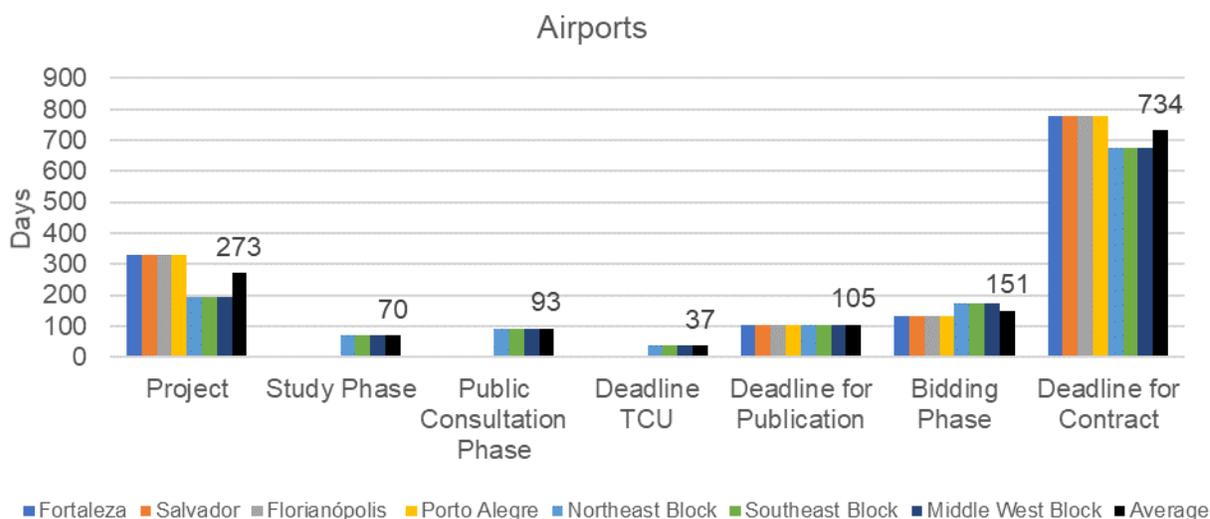
5.2 Concern with the length of the supervisory stages of PPP projects

Depending on the nature of the project, the duration of the supervisory processes can vary greatly. This may be correlated to the complexity of the sector and the lack of previous experience of the supervisory bodies.

The two graphs below illustrate that structuring infrastructure projects is a complex task that requires several stages and long lead times. The court of auditors may have a relevant time slot in that process, but it usually varies a lot. The graphs show the main stages of structuring a federal PPP in Brazil. It starts with the deadlines for assessments, public consultation, supervision t by the TCU as regards publication of the bid invitation, carrying out the bidding process and signing the contract.

In Brazil, data from the Investment Partnerships Program (*Programa de Parcerias de Investimentos - PPI*) shows that, from the contracting of the studies on which the project is based, to the contracting of the PPP, federal airport concession projects take, on average, 732 days⁵⁴. In the case of airport concessions, the average time spent with TCU is 93 days.

- **Figure 5:** Airport concession structuring timeframes, including the *ex ante* control stage -- Brazil

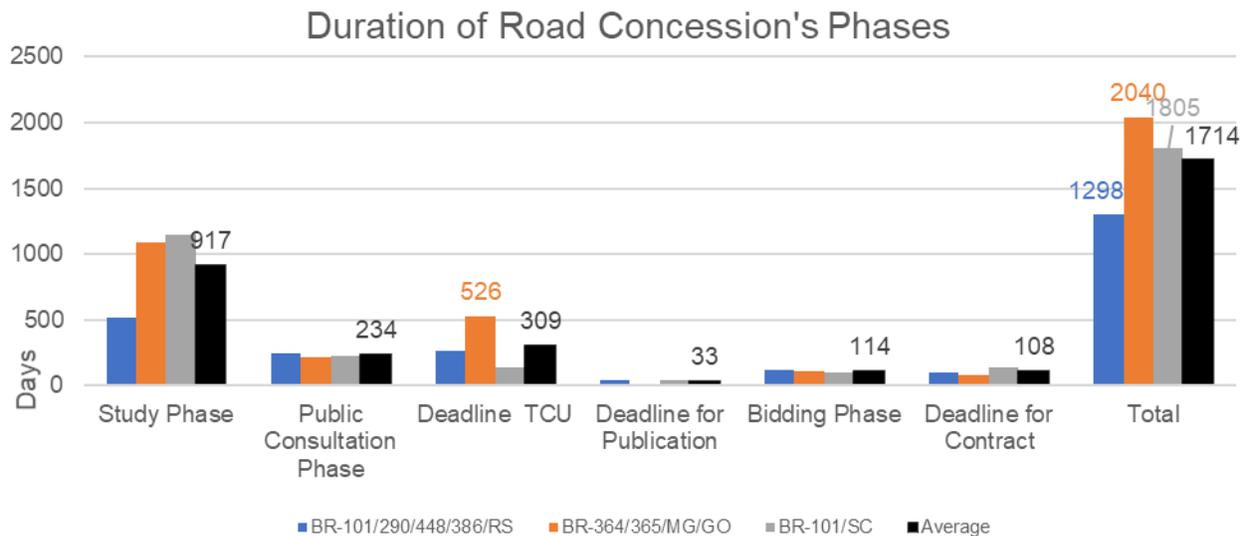


Source: Authors' own creation, PPI data.

The supervisory stage deadlines are longer for roads and railways. The figures below illustrate that road project review/supervisory periods take, 309 days, or more than 10 months, on average.

⁵⁴ PPI data, not yet published as a whole, but searchable by project, at <https://www.ppi.gov.br/projetos1#/s/Em%20andamento/u//e//m//r/> Accessed on December 12, 2020.

- **Figure 6: Road concession structuring timeframes, including the *ex ante* control stage -- Brazil**



Source: Authors' own creation, PPI data.

The different timescales are associated with the complexity of the projects, previous experience with the sector and the quality of the organizational/institutional structure of the sectors, as well as the quality of the individual projects. Better structured and more experienced sectors tend to take less time. Moreover, time-consuming control processes may result both from the limited capacity of the supervisory body to analyze the project and from a lack of staff or financial resources.

Sometimes, supervision bodies claim that low quality projects lead to the delay of their reviews. Moreover, the deadlines for the supervision of the internal phases of project structuring that precede the publication of the bid invitation (such as the hiring of consultants and discussions of the model to be used for the desired infrastructure), are not always regulated. It is important to consider that supervisory bodies must have regulated deadlines for the exercise of their powers, including in the internal phase of PPP structuring. In most cases, deadlines for their analysis in the external phase of the bidding (after the publication of the invitation to bid) already exist.

It has been reported that sometimes projects are delayed in the structuring bodies, rather than by the supervisory bodies. In Uruguay, deadlines have been shortened by law to respond to the delay. But it turns out that the time for analysis by the Court of Auditors (TCR) has not changed, because the problem was not identified in this body⁵⁵.

⁵⁵ Law 18.786 Public-Private Partnership Law and its regulatory decrees 17/012, 280/012 and 215/015.

Currently, the supervisory bodies are more attentive to the importance of the duration of their supervision activity, so that PPP projects are not delayed and there is little hesitation in recognizing rights of economic and financial rebalancing of contracts during their execution. Especially because they are often necessary to ensure the continuity of the projects.

5.3 Digitization and Artificial Intelligence

The activity of supervisory bodies is also being positively impacted by the advance of technology.

Some PPPs stages benefit from technology, such as the digital signature of contracts and the use of blockchain for land registries, which facilitates the work of the supervisory body. The digitization of processes and the automation of procedures reduce costs and provide more guarantees for the integrity of information. Some auditor courts have begun to work with artificial intelligence to promote better control of contracts and use, for example, input price comparison tools when auditing project budgets.

Therefore, some oversight bodies are working with algorithms and artificial intelligence to better control bids and administrative contracts in general. That is the case with the Brazilian competition authority with the Brain Project, which uses big data for the detection and elimination of cartels (Macedo, 2018). Such measures have great potential to help oversee the implementation of administrative contracts.

In the case of Chile, the incorporation by the supervisory body of Electronic Work Books has been observed. It facilitates the exchange of communications between the private party and the supervisory entities that intervene directly and daily in the project. This therefore allows the communication of instructions or requirements in a more expeditious manner.

Moreover, in recent bidding conditions for public works concessions (mainly hospital concessions) in Chile, the so-called "Computer Communications System" (CCS) has been incorporated. IT is performance evaluation system that allows users to communicate disputes due to interruptions or deficits of the concessioned services. As a computerized communications and alert system, the CCS is used for two different functions: (i) to request work orders by authorized users, or requirements that correspond to the vast majority of system records; and (ii) to record and communicate incidents in the event of interruptions or shortfalls in concessioned services, in accordance with previously defined service level standards. In this way, the CCS is essential for the supervision of the level of service provided by the supervisory authority. It is the official and valid way of recording these incidents and, in the event of non-compliance, it allows discounts to be recorded in the notes for the provision of services. In this way, it eventually serves as a precedent for the imposition of fines.⁵⁶

⁵⁶<https://documentos.bancomundial.org/es/publication/documents-reports/documentdetail/305651603954008662/main-report>. Accessed on December 15, 2020.

In the case of Uruguay, computer systems have been implemented for the follow-up and supervision of social infrastructure PPP contracts. In the case of educational projects, there is a "User Service Center". It allows the supervision and management of the Service Events reported in each of the Centers, which indicate both to the contractor and to the public sector supervision about the failures and inconveniences that have arisen. Each center has a liaison figure in charge of reporting in the system. The system allows for the traceability of service events and their solutions, as well as assigning different profiles according to the role of each stakeholder in the process⁵⁷.

However, the Penitentiary project has a technological platform to support the centralized communication, registration and control system. This facilitates a fluid relationship between the awarding authority, the contractor and the contract inspector, so that the operation of the services can be coordinated and overseen. This system records any information relating to the services included in the contract.⁵⁸

⁵⁷ First Educational Infrastructure Project Contract
https://www.mef.gub.uy/innovaportal/file/28335/1/contrato_firmado_ppp_e1_anep_web.pdf

⁵⁸ Penitentiary Precinct Contract - PPP Project - UPPL No. 1.
<https://www.gub.uy/ministerio-economia-finanzas/sites/ministerio-economia-finanzas/files/inline-files/contratofirmado.pdf>

6 The Role of Supervisory Bodies in Relation to the Covid-19 Pandemic

The magnitude of the effects of the economic crisis resulting from the pandemic makes it necessary for PPP supervisory bodies, such as regulatory agencies and auditor courts, to take a position on the need for the economic and financial rebalancing of contracts. Many infrastructure sectors have suffered a drastic decline in demand and delays in bill payments by users. In Chile, for example, it has been reported that during the third quarter of 2020, transactions accounted for on urban highways saw a decrease of 34.1% compared to the same period in 2019. Airport data has taken an even bigger hit for international passengers: during the third quarter of 2020, the number of travelers dropped from 2.8 million in the third quarter of 2019 to 70,600. A substantial drop has also been observed in domestic passengers, which decreased from 3.5 million to 528,400 (General Directorate of Concessions, 2020).

Moreover, the rebalancing of opportunistic requests must be taken care of, and should not be based on situations generated by Covid-19. In this regard, the following measures have been verified by the supervisory bodies, specifically in relation to the pandemic.

6.1 Priority

Given the potential magnitude of the need to rebalance many infrastructure sectors, it is necessary to prioritize the claims of concession holders. Especially those contracts related to public services offered to the population, such as transportation, electricity and health services. The Brazilian TCU has created a specific program called the Coopera Program, which will be discussed below.⁵⁹

6.2 Necessity of proof on contractual imbalances

Applicants applying for contract modifications need to be able to prove that the fall in demand, increased costs, and other adverse effects are a direct result of the pandemic, and not situations that would have occurred regardless of Covid-19.

Attention should be paid to situations of force majeure or other legal or contractual reasons capable of generating changes in PPP contracts. It is necessary to consider the occurrence of information asymmetry between investors, the public service, and supervisory bodies, in order to demand that contractual review decisions are based on evidence.

⁵⁹ <https://portal.tcu.gov.br/coopera/>.

6.3 The role of regulatory agencies and auditor courts

The first stakeholder to receive economic-financial rebalancing approaches is usually the regulatory agency (or public counterparts, when there is no sectoral agency in place).

In turn and depending on the country, Auditor Courts may have binding or non-binding review powers for decisions made by regulators if they consider that decisions were made without regard to cost-effectiveness or to the detriment of the public interest.

It is very important that there is a more collaborative vision between managers and supervisory bodies to ensure quick responses with legal certainty. Also to prevent the institutional environment from deteriorating as a result of a delay in providing quick responses to concession holders. In some countries, there are attempts at a more agile, weighted action, with less bureaucracy, to provide support to rather than sanctioning first instance supervisory bodies (such as agencies).

Creative solutions must be sought and supervisory bodies must act in harmony with those purposes. An example of this is the Coopera platform of the Auditors Court of Brazil. This is an internet portal where information from the Special Plan to Support Actions to Combat Covid-19 is gathered. The Court supports 27 actions that are developed in 8 ministries, in addition to the signing of cooperation agreements with other State bodies for cooperation and exchange of technical information. The aim is to provide managers with greater legal certainty in making procurement decisions during the pandemic and to increase the transparency of public spending. If the program is successful, there may be enough scope to implement similar mechanisms for supervising PPPs at federal level, and subsequently a mechanism for technical cooperation with State and municipal supervisory bodies, and with the other LAC countries.⁶⁰

6.4 Digital tools to facilitate information exchange

With the pandemic, communications between different levels of government authorities became less formal and bureaucratic. With social distancing regulations, it was perceived that technology can bring people closer together and enhance efficiency.

Because people do not need to travel to meetings, many more problems can be solved and decisions can be made more frequently, in terms of bureaucratic rituals, through virtual meetings than was acceptable during the pre-pandemic era.

⁶⁰ More information at <https://portal.tcu.gov.br/coopera/>. Accessed on November 2, 2020.

7 Concluding Remarks: *Trade-off and Best Practices*

Time and cost variables are critical: control overruns or delays in getting final approval can discourage investors. Moreover, *ex post* changes or poorly established contracts can generate very long-term costs for society, as well as costs with lawsuits. And too much supervision can have adverse effects on the possibility of innovation.

A balance must be reached between the need to supervise projects and the need to maintain the manager's discretion, with the aim of improving and innovating PPPs. A complex issue would be the possibility or willingness to take out civil liability insurance (a type of D&O insurance) to protect the public administrator who makes decisions as a contracting party of the PPPs. This would be done in order to face cases of subsequent personal condemnation by the supervisory bodies. This is a delicate issue because although it can be a positive factor in attracting senior executives to take up management positions in the public service, it can also become a factor that makes them less careful in their decisions. And this can have a profound impact on the use of public resources.

Aiming for efficient supervisions involves increasing the efficiency of the process, and not necessarily decreasing supervision. It is a commendable measure to clarify the roles of each supervisory body and to avoid too many overlapping duties. But how can this process be more efficient? There are still some highly debated issues, but there are already some important *trade-offs*, and some consensus has already been achieved in this matter. Therefore, we can progress to the implementation stage for each country.

As previously discussed, the institutional and functional heterogeneity among the supervision bodies of the different countries did not allow us to reach a set of best practices that fits for all. However, in the construction of successful PPP supervisory models, some key points can be highlighted for the success of the supervision. **A supervision is considered successful if it can perceive errors and failures early on and correct them in a timely manner. This prevents the supervision time from becoming an unnecessary obstacle and a hindrance to contracting the PPPs.**

In that sense, the following are key points for a successful supervision of PPPs:

- (i) **Clear definition of roles - it is important that each supervisory body has a clearly defined area of action.** Countries should review their legal frameworks and try to clarify points that are unclear or that may suggest the overlapping of supervisory roles, or between supervisory and management roles, and define boundaries clearly. Ideally, it should be clear in one or more documents which bodies and authorities are

responsible for supervising the multiple phases of the PPP -- structuring, contracting and performance -- and the extent of their respective power. We can group the main roles as following:

- a. *Revise projects.* Auditor courts control the value for money. It should have the power to review projects in matters involving public expenditures (budgets, public contributions to the project, etc.). It also holds the power to sanction public and private agents in cases of serious misconduct. Mere reporting or advisory roles are insufficient in these respects. It is worth to mention that auditor Courts are essential to the process of monitoring PPPs. Therefore, it may be ideal for them to have the power to make decisions on whether issues such as budgets, payments and other issues with financial economic impact should be reviewed or dismissed in countries where they are still very limited or act solely as advisors.
- b. *Supervise the performance of the contract.* The regulatory agencies or the public contracting authority must have the technical and managerial power and capacity to supervise the performance of the contract. They also need to have a set of legal and contractual tools that allow them to review, together with the private party, any problems that may arise during the performance of the contract that are not the responsibility of the contracted party. The risk matrix should be clear in the contracts, and supervisory bodies should have the power to administratively resolve disputes and apply sanctions for contractual non-compliance with speed and respect for the due legal process.
- c. *Increase the credibility of PPPs.* Auditor courts and the internal bodies of the public service must supervise the budget and avoid wasting public resources. The internal comptroller should focus on fighting corruption, money laundering and other serious allegations that may diminish the credibility of PPPs as a mechanism for increasing infrastructure and public services in LAC.
- d. *Guarantee the conformity of PPP with competition criterium.* Competition authorities must ensure that PPP projects do not include unnecessary barriers to competitive bidding (prior consultative stage). They must ensure that mergers and acquisitions do not create or reinforce the market power of economic agents acting in the different relevant markets where PPPs are developed. And they must eliminate cartels and other forms of abuse of dominant position.
- e. *Take legal actions.* The Public Prosecutor's Office should investigate the legality of PPP contracting, as well as the performance of the contracts, and pursue the applicable legal actions in cases of deviation. The Judicial Branch should apply PPP legislation, anti-corruption and anti-money laundering laws (including criminal law) upon request, as well as rules to combat lack of administrative transparency and related offences;

- g. *Resolve contractual breaches.* The judicial branch and arbitration panels must resolve contractual breaches that have not been remedied in the administrative sphere. Arbitration should be a prestigious dispute resolution procedure because of its ability to bring together experts in the field and to offer quick solutions.
- (ii) **Capacity building and institutional strengthening.**
- a. For an adequate performance, of each of roles mentioned above **capacity building** is key. The training of public agents that function as PPP supervising bodies should be preserved, including the implementation of innovative resources in the processes of reviewing projects and supervising their execution, such as the use of technology.
 - b. It is important to **allocate the necessary budget** to guarantee the supervision roles and activities. The necessary resources should be earmarked in the public budget for well-structured supervisory bodies with the necessary technical capabilities. It is important to generate effective supervision capacity in the supervisory bodies. And, moreover, for them to take into account the political sensitivity involved in PPP projects. If all executive decisions require supervision, and control points other offices might have supervised already are studied in depth, managers may be discouraged from using the PPP mechanism for projects that are essential to society, and the investor's interest may subside.
 - c. The use of *new information technologies and digitalization* can substantially increase the efficiency of processes.
- (iii) **Timely intervention.** It is good practice to involve supervisory bodies at an early stage of the contracting process to avoid delays or stoppages when the project is already at an advanced stage. For example, to avoid this when the bidding invitation has been published already, or when works are interrupted by the enforcement of administrative (auditor court) or judicial injunctions.
- (iv) **Checks and balances.** The checks and balances of the different institutions and departments must be guaranteed. But it is important that contradictory decisions be avoided as much as possible. Coordination between supervisory bodies is very important. When there is more than one supervisory body with authority over a PPP, it is important to consider the possibility of working together in real time. Or to seek other forms of coordination so that all the competent bodies can express their views and, perhaps, reach a consensus before the bidding process is launched;
- (v) **Coordination between agencies.** The signing of cooperation agreements between auditor courts and specialized government bodies, such as competition authorities, is ideal and may increase the quality of projects. Institutionalizing the mechanisms for information exchange between the project management body and the supervisory bodies can bring more legal certainty for moving forward with PPP projects. But it is

also important to leave a degree of informality to allow for exchanges as and when required, without there being many stages in a bureaucratic review process.

- (vi) **Adequate legislation and responsibility allocation.** Legislation should clearly provide for the personal liability of managers and private stakeholders to punish cases of willful or gross negligence in cases of misconduct or misguided decisions in PPP projects, in the civil, administrative and, in extreme cases, criminal fields. The threat of conviction needs to be credible to prevent deviations of conduct in PPP processes;

For serious cases involving sanctions against public stakeholders or concession holders and private individuals, it is important that the administrative and judicial processes are swift. But they must be carried out without neglecting the due legal process and must be well instructed with the necessary evidence and technical reports. It is important that the supervisory body adopts an exempt position and, preferably, that the roles of investigation and prosecution of the accusations are separated internally.

There are other issues, questions and trade-offs raised in this document which is not clear the best way forward. Future research, harmonized data collection and country-specific considerations should be taken into account. Such as, for example, on the extent and limits of the role of auditor courts, as well as on sectoral and specific issues. On one hand, these bodies have an important role to play in view of their independence from managers and their technical expertise. On the other hand, giving supervisory powers to auditor courts for PPP projects for fundamental substantive decisions that require sectoral expertise, such as how to assess the project's value for money, which tends to be ineffective unless specialized units are created. Such action is often inefficient because of problems with overlapping competencies, lack of technical capacity and delayed response. In any case, the auditor courts must analyze all payments and public budget implications that a PPP project may have.

There are also important *trade-offs* regarding the degree of freedom for the managers to contract projects more quickly. This often generates greater risks of suffering delays during the execution of contracts due to the decisions of the supervisory bodies. Supervisory bodies must be as prepared as possible for the concomitant review of projects up until the bid is held. This prevents delays in their implementation, lowers *ex post* costs (and tends to increase efficiency). But it is time consuming and enhances the risk of losing the support associated with political cycles.

It should be considered that if projects take a long time to be structured because of multiple *ex ante* or concomitant supervision, the political time for contracting may be lost because the adoption of PPPs depends to a large extent on having rulers who are in favor of this type of contracting. However, there are multiple supervisions over public contracting in LAC, and they can be valued as a mechanism, not only to increase the quality of projects, but also to fight corruption. When PPP projects are defined as a priority, the review periods are usually shorter until they are implemented. It makes a difference if a project has an authority that is directly



interested in its implementation. Also, it helps if the highest levels of the administrative bureaucracy are directly involved in its structuring.

Finally, it is essential to learn from the challenges and be able to adapt while maintaining the credibility of the oversight process, as this year's response to the Covid-19 crisis has demonstrated. The recent response experiences to the contracting needs of public managers and the discussions on the economic-financial rebalancing of PPP contracts due to Covid-19 tend to favor more frequent and cooperative information exchanges between managers and supervisory bodies. The urgency of responses and the magnitude of the impact suggest that stakeholders need to change their positions and become more active and less bureaucratic: "fewer offices and more meetings" can translate into an idea of more direct dialogue, less intervention and more consensus that can be implemented as a result of the impact of Covid-19 on public procurement in general. This can hopefully positively influence the supervisory environment of PPPs and remain after the pandemic has ended.

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