

The Public-Private Partnership as a New Tool for Infrastructure Development in Argentina

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By Santiago Carregal, Lorena Schiariti & Enrique Veramendi

The Federal Executive Branch (known by the Spanish acronym, PEN) of the Argentine government recently submitted to the Argentine Congress a bill seeking approval of a new Public-Private Partnership (PPP) framework. This regime is seen as a new legal tool to help address the country's existing infrastructure deficit and make banks and multilateral lending agencies more interested in financing public works. Congress is expected to discuss this initiative in the coming weeks and, if approved, the new legal framework for PPPs may be applied to several infrastructure projects throughout Argentina. PPPs and their strategic importance

The lack of investment in Argentina's infrastructure is so deep and the need for capital, technology, management, and resources to overcome this deficit is so massive that neither the public nor private sector alone can provide a solution. The Argentine government is, accordingly, seeking ways to provide the infrastructure required for the country's needs. In the United States, the need for infrastructure repair and improvement is also deep and massive. State governments have used the PPP model to encourage private investment in infrastructure as an alternative to the standard model of public procurement. It has been argued that models involving an enhanced role for the private sector, with a single private sector organization taking responsibility for most aspects of service provisions for a given project, could yield an improved allocation of risk and allow for accelerated project completion while maintaining public accountability for essential aspects of service provision. Both the U.S. and Argentine governments were well aware of PPPs' use in the U.K. during the early seventies. Until then, the classic conception of public contracting, with the private sector providing a service directly to the public sector on a bid basis, prevailed. With the advent of PPPs, the model shifted to a sharing of responsibility and risk. The greatest advantage for the public sector is that the works are financed by the private sector. The works are paid for over time by the state through a periodical fee in consideration for the service provided by the private party as long as the service meets pre-established standards. This not only defers the budgetary impact of the project's cost, but also promotes intergenerational solidarity in its financing. PPPs are an alternative to the classic public

works contracting system in Argentina in which the state usually designs, finances, operates and pays, while the private party only builds. The framework submitted by the PEN also implies a shift in the traditional paradigm on public contracts, as it excludes or limits the public law prerogatives of the administration (including, the power to unilaterally modify the contract; to terminate it for reasons of public interest; to force the private contractor to continue with the performance of the contract despite the state's lack of compliance as to its own obligations; and the limitation of state liability). In Argentina, two regulations were previously enacted to govern PPPs, neither of which was ultimately used: Decree No. 1299/2000 and Decree No. 967/2005. The first was an excellent framework but because of the vagaries of timing as to both the international economy and Argentine politics, it was never used. The second resulted in a deficient regulation despite having been issued in an excellent international context with an abundance of capital available for emerging markets and historically favorable trade terms for Argentina. Main provisions of the Executive Branch's PPP bill

The bill submitted by the PEN represents a substantial improvement over the current PPP framework established by Decree No. 967/2005. The new framework includes many elements that were included in Decree No. 1299/00. For instance, it allows contracts to be assigned, thereby permitting structured financing for projects. The bill is relatively short and allows for its provisions to be implemented through its subsequent regulations. It also allows the project to be governed by the terms of the solicitation of bids and the ultimate concession agreement. The bill also defines PPPs broadly. They can include contracts for construction, supply, maintenance, management and/or operation of projects and thus, are not limited to infrastructure projects. The bill's main provisions follow:

Alternative regime. PPPs constitute an alternative regime for public works contracting depending on what the public authority deems the most efficient way to accomplish a public project. Traditional methods of accomplishing public projects are not precluded.

Regulatory framework. The legal framework will be completed through the implementing regulations as well as the bidding terms and the provisions of the contract. Neither the Public Works Law No. 13,064, nor the Concession of Public Works Law No. 17,520, nor the Public Procurement Decree No. 1023/01 will be applicable to projects governed by the PPP regime.

Flexibility in legal structure. The entity undertaking a project may be an existing company or a special purpose vehicle (SPV) formed solely for the purpose of undertaking the project. The PEN may have an ownership interest in the SPV. Corporations (including SPVs) created under the PPP framework can be publicly offered under the Capital Markets Law No. 26,831, a potentially important tool in seeking a wider financing net.

Flexibility in guarantee structures. The bill allows the assignment of receivables and contractual rights. It also allows insurance or other guarantees (whether from local or foreign entities) to be used. It provides for the ability to create trusts with a financial entity as trustee as a way to secure funding lent to the SPV and to assure the payment of loan funding from a segregated source. Trusts must have a specified minimum liquidity during the term of the PPP contract. Also, they must hold certain assets specified by law and may issue securities thus allowing an assured flow of funds for loan repayment. One issue Congress must still address is that the Civil and Commercial Code requires that assignments of credits where the consideration is wholly or partially backed by fees or rates to be paid by users, must be formally notified to the users, in order for the assignment to be

enforceable against third parties. This requirement should be eliminated in PPP contracts as it has previously represented an obstacle for financing projects such as toll roads or gas distribution networks where such notification was —and remains— unworkable because of the large number of users. We suggest replacing this mechanism with a publication of the assignment in the Official Gazette and, if necessary, in a newspaper in the project's jurisdiction. **Flexibility in the contractor's remuneration.** Financing long-term projects in Argentine pesos, a currency exposed to inflation, is impossible unless the regime allows for price redetermination mechanisms. For this reason, the bill expressly excludes the prohibition of indexation set forth by Convertibility Law 23,928. Moreover, the parties may agree that the consideration be payable in foreign currency. The consideration structure provides the possibility of assigning funds resulting from credit operations or taxes; the creation of surface rights and/or use of any other contributions made by the state. Finally, the contractor has the right that the original economic balance of the contract be preserved. Hence, changes to the initial cost-benefit structure of the project imposed by the government within the limits permitted by law, must be compensated accordingly. **Step-in rights.** Loan agreements entered by the contractor may include step-in rights, meaning that, should the borrowers default, the PPP contract will be assigned to the creditor or to eligible third parties, subject to the procedures to be established in the contract. **Possibility of appointing independent technical auditors.** The parties to the contract may appoint independent technical auditors who will effectively control and monitor the execution of projects in order to determine whether the consideration paid to the party in charge of the project has accrued. The contract may specify that if the administration does not agree with the auditors' determination, this will not preclude the payment of the consideration, which will remain in a trust until the dispute is solved. **Competitive dialogue.** This concept, often used in the United States, is novel in Argentina. It is a way to arrive at solutions for a contract's content when the PEN knows what it wants to achieve but is unsure what methods would be the most effective to reach its goals. By having a dialogue with the possible contracting parties, the PEN can determine which solutions are best, and formulate the final request for proposal accordingly. **Quantification of damages in case of breach by the parties.** Under the new law, the parties' liability for breach of contract will be as set forth in the Argentine Civil and Commercial Code but also governed by the provisions of the bidding terms and the resulting concession contract. The damages calculation may include the possibility of lost profits damages if included in the concession contract. **Compensation for early termination.** The contract will set the scope of compensation in cases of termination for reasons of public interest, as well as its determination and method of payment. All such compensation must be paid prior to the takeover of assets. Rules limiting the state's liability are inapplicable. **Dispute resolution. Arbitration.** Technical or any other kinds of disputes arising out of PPP contracts may be submitted to technical panels or arbitral tribunals. This is becoming more commonly used in U.S. PPP contracts. Under the new law, review of the merits of the arbitral award by the local courts is prohibited. Arbitration may take place outside of Argentina. Final Comments This new regime seeks, essentially, to allow a balanced and predictable collaboration between the public and private sectors, allocating project risk in a reasonable and efficient way between the parties. Once approved by the Argentine Congress, it will represent a positive change by limiting the

ability of government to override agreed contractual relations. Assuming regulations consistent with the intent of the new law, it will then be possible for Argentina to capitalize on the worldwide trend toward using public private partnerships and move forward with the construction of needed infrastructure to benefit its citizens. *Santiago Carregal, Lorena Schiariti & Enrique Veramendi are members of the Argentinian law firm Marval, O'Farrell & Mairal.*

Authored By



Andrew J. Markus

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