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Public–Private Partnerships in Latin America: Governmental Salvation or Deception?

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With public capital insufficient to satisfy developmental investment needs across virtually all of Latin America, governments have come to realise that the private sector can greatly contribute to the implementation of their development policies. Recent history has shown a number of ways in which the public sector can benefit from opening up its traditional activities to the private sector, and most governments (with the notable exception of Venezuela, Bolivia and, more recently, Ecuador) are inviting private foreign investment.[1] But are they also a way to move large public works projects off the government's balance sheet and reduce the rolls of government workers?

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1 While generally welcoming foreign direct investment, Latin America lags behind other emerging markets such as Eastern Europe and Asia. The Institute of International Finance (IIF) estimates that net FDI in 2005 in Latin America's nine largest economies was $40.9 billion, down 8.5 per cent from 2004, and static in 2006, with a 35 per cent expansion over the three-year period of 2003 to 2005. During the same three-year period, net FDI for emerging markets as a whole jumped 60 per cent. Most of the increase resulted from large privatisations in Eastern Europe, pushing that region's FDI up 563 per cent to US$41.1 billion. The largest volume of FDI is in Asia with over US$61.3 billion in 2006.

Against this backdrop, this article will discuss public–private partnerships, a form of joint public and private endeavour that, in the last ten years, has become increasingly popular throughout the world, and their most common use in the development of critical infrastructure.

The first section starts by tackling an important terminology issue, and attempts to provide a definition for public–private partnerships. The second section describes the advantages of public–private partnerships to their participants as well as to the public in general, which explains their increasing popularity while the third suggests what it will take for public–private partnerships to succeed in Latin America. The challenges that may be encountered in public–private partnerships in Latin America, and the means to avoid or minimise them, are discussed in the next section. Among other things, this section draws on the lessons learned in the past with privatisations. The fifth section briefly discusses the use of public–private partnerships in the natural resource sector in Latin America and the final section presents the authors' conclusion supporting the adoption or preservation throughout Latin America of policies and legal frameworks that, whether within a public–private partnerships framework or not, facilitate the provision of critical services to the people – water, waste water, electricity, gas distribution, hospitals, airports, ports, roads, sports centres, telecommunications and even prisons, schools and the postal service. This can only be done efficiently and fairly by providing the private sector with the assurances it needs with respect to the rule of law and the governance of infrastructure projects and services.

Defining public–private partnerships

If there is point of consensus with respect to public–private partnerships, it is that there is no widely accepted definition of what they are.

Loosely defined, public–private partnerships would include all joint public–private endeavours, ranging from the sale of non-control shares of a state-owned company to simple procurement by the government from private sector contractors, to all private financings of public infrastructure projects, to turnkey and build-operate-transfer (BOT) (and all its multifarious variants: BOO, BOOT, BLT, DBFO, DCMF, LDO, WAA, etc) contracts between the public sector and the private sector.

However, and although definitions still vary enormously, a trend is evolving to include certain principles in the definition of public–private partnerships that, some would assert, make it stand out as a distinct form of joint public–private activity. The principles of efficiency and optimal risk allocation seem to be emerging internationally as essential elements of public–private partnerships.

In the United Kingdom, for example, which pioneered public–private partnerships over ten years ago, and whose Private Finance Initiative model has inspired frameworks for public–private partnerships in several other countries (such as Australia, Canada, Denmark, Finland, Germany, Greece,[2] Japan, the Netherlands, Ireland, Portugal, and Spain), public–private partnerships have been defined as 'a risk-sharing relationship between the public and private sectors based upon shared aspiration to bring about a desired public policy outcome'.[3] The UK Private Finance Initiative projects (public–private partnerships) typically consist of private businesses contracting with the government to provide a service, including any necessary capital assets. Indeed, projects can only proceed if they provide better 'value for money' than public sector investment, based on a technical analysis taking into account more factors than solely the project's financial equation. The UK Government attracts private sector expertise and ensures that individual risks are borne by those best suited and best equipped to mitigate and manage them.

In Ireland, public–private partnerships are a method of procuring public services and infrastructure by combining the best of the public and private sectors with an emphasis on value for money and delivering quality public services.[4] Similarly, 'public–private partnerships' is the term used in Western Australia to describe the procurement of public infrastructure and ancillary services through a joint arrangement between the public and private sectors causing public–private partnerships to be more of a process rather than a readily defined object.[5]

In Brazil, the Private Partnership Law defines it as a type of concession contract, expanding beyond the tradition 'sponsored' concession to an 'administrative' concession in which the government is directly or indirectly the user of the services provided and is solely responsible for paying for the services.[6]

An EU Green Paper on public–private partnerships provides the following definition:

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2 Nomos (3389/2005) Simprakseis dimosious kai idiotikou tomea (public private partnerships), Ephemeris tes Kyverniseos tes Hellenikis Demokratias (IKED) (2005), A232.

3 Patrick Boeuf, 'Public-Private Partnerships for Transport Infrastructure Projects.' Transport Infrastructure Development for a Wider Europe Seminar, Paris, 27-28 November 2003. Section 2 – Financing of the Infrastructure, at 3.

4 Irish Government Public-Private Partnership, at www.ppp.gov.ie/splash.php.

5 Department of Treasury and Finance. Government of Western Australia. 'Partnerships for Growth, Policies and Guidelines for Public-Private Partnerships in Western Australia.' December 2002.

6 Article 2 of Brazilian Law 11,079 (2004).

> 'PPPs describe a form of cooperation between the public authorities and economic operators. The primary aims of this cooperation are to fund, construct, renovate or operate an infrastructure or the provision of a service. PPPs are present in sectors such as transport, public health, education, national security, waste management, and water and energy distribution.'[7]

As public–private partnership frameworks are put in place around the world, definitions seem to converge with the principles of efficiency and optimal risk allocation at the core.

Based on the analysis of various definitions adopted or suggested for public–private partnerships, and the essential elements that seem to permeate most if not all of such definitions, the following definition is proposed in an attempt to clarify and properly characterise this particular form of public–private structure.

> Public–private partnerships can be defined as the outsourcing, in whole or in part, of infrastructure projects and social services that would traditionally be undertaken by the government, but that the government chooses to deliver in partnership with the private sector with the resulting benefits of increased investment capacity, increased efficiency, and optimal risk allocation.

In infrastructure, public–private partnerships usually take the form of concessions and BOT contracts, or a variant. These are contracts in which the principal risks and responsibilities of a project are transferred to the private sector, unlike in traditional public works or governmental service contracts.[8]

An analysis of the characteristic elements of public–private partnerships follows.

Outsourcing

Although there is no presumption that the private sector is always more efficient than the public sector in delivering traditional public services, the private sector can often design, build, operate, finance and manage public assets and services in a more cost-effective manner than the public sector. Recognising that, governments should develop and set forth a systematic method to assess the appropriateness of having the private sector deliver a public service.

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7 http://europa.eu.int/scadplus/leg/en/lvb/122012.htm.

8 Patrick Boeuf, 'Public-Private Partnerships for Transport Infrastructure Projects.' Transport Infrastructure Development for a Wider Europe Seminar, Paris, 27-28 November 2003. Section 2 – Financing of the Infrastructure.

Partial or total

Classic examples of public–private partnerships are instances of outsourcing entire projects or delivery of services by the government to the private sector. It is not unusual, for example, for the public sector to contract out to the private sector the construction of an entire infrastructure asset such as a power plant. Nevertheless, an efficiency analysis may determine that there is only value to be gained from using public–private partnerships in certain parts of a project.

Infrastructure projects and social services

International experience shows public–private partnerships have been employed successfully in sectors in which they would most likely be best employed in Latin America: the infrastructure and the social services sectors. Infrastructure development needs are somewhat similar throughout Latin America, and include telecommunications, energy, transport (roads, ports, airports), utilities, basic sanitation, sports stadiums and waste and water. Social infrastructure or social services include hospitals, medical equipment, schools, universities, social housing, prisons and public security.

But public–private partnerships can be used not only for capital investments in new assets. They can also be used to bring private sector skills into the management of capital expenditures (eg flood and sea defence projects in the United Kingdom),[9] or to equip government agencies with state-of-the-art information technology capabilities, and to modernise working practices at the same time.

Departure from traditional government delivery of services

Public–private partnerships are a way to both boost private sector investment in public infrastructure and foster the modernisation of the public sector. All levels of government – federal/national, regional, provincial/state and local/municipal – can avail themselves of public–private partnerships.

Increased investment capacity

By relying on private financing to fund part of the cost of priority infrastructure projects, the public sector frees up funds to invest in other

9 Adrian Montague, 'Public Private Partnerships in the UK – Lessons for International Projects.' Presented at the 7th Annual Conference for Public-Private Partnerships, 23 November 1999, www.pppcouncil.ca/pdf/montague/pdf.

projects, thereby enhancing its investment capacity. This, in turn, will increase additional private sector investment, fostering a virtuous cycle and thus boosting the economy of developing countries.

Increased efficiency

The key element of public–private partnerships, without which they are not advantageous to the public sector, is efficiency. Efficiency should determine whether public–private partnerships are warranted for the procurement or delivery of traditionally public services. Public–private partnerships will only be warranted if they can deliver value for money and quality.

The private sector can bring to infrastructure projects its rigour and expertise in the design, implementation and operation of a project, benefiting society as a whole. It also brings technology skills and resources that increase work efficiency.

In addition, the private sector must follow strict specifications and standards. Failure to meet such specifications and standards should entail penalties to the private partner. In a typical public–private partnership, just as with a successful project financing,[10] the risk of construction cost overruns owing to bad management of the job should be borne by the private sector. This serves as a strong incentive for the private partner to perform well during the life of the contract.

If the private sector can provide, and demonstrate that it can provide, an infrastructure service, or an improved service or outcome, for the same or a lower cost than the government would, then use of a public–private partnership is indicated.

Optimal risk allocation

A fundamental characteristic of risk allocation in public–private partnerships, as with project financings, is that each individual risk is identified and allocated to the parties best suited to manage and mitigate that risk.

Project finance

While public–private partnerships can be financed on a corporate balance sheet basis, much more frequently, project finance is used. This financing mechanism relieves the government of paying the substantial capital cost of

10 Scott L Hoffman, *The Business and Law of International Project Finance* (2nd edn, 2001), p 38.

providing infrastructure. The government's financial obligation is merely contractual over a period of years.

Off balance sheet

Concerns are often raised about public–private partnerships mortgaging the future of the country because they are often off balance sheet and therefore outside the normal governmental analysis and evaluation of the value of expenditure. They obligate the government to make long-term contractual payments, without the usual financial scrutiny provided to the government budget. From the private parties' perspective, some assurance is required that the contract payments will be reliably paid over the term of the contract despite having bypassed the government budgetary process. Since government projects are well known for cost overruns, the profit motive of the private sector can moderate cost overruns owing to bad planning and execution by the government.

Avoid governmental labour

Governments can use public–private partnerships to avoid the high cost and often inefficiency of the use of governmental employees.

Focus on customer demand

Public–private partnerships can more easily take into account the larger public good of the user's needs and wants than can governments, which are often influenced more by political reasons for building infrastructure projects and providing services, ie so-called 'pork-barrel' projects.

Advantages of public–private partnerships

Against the backdrop of a still recovering international economic scene, Latin American economies may be faced with the challenge of having to compete with each other and with other developing countries elsewhere in the world for private international financing. Public–private partnerships can be instrumental in enhancing an otherwise marginally profitable project's attractiveness to private investors. A project with a high quotient of public good, but low quotient of profitability, can be undertaken via a public–private partnership in which the government agrees to pay an amount by contract that equates to the proper combination of private profit and public good.

Efficient and sustainable risk-sharing entails significant advantages.

The identification and unbundling of risks associated with infrastructure projects and services, which is characteristic of public–private partnerships, allows for a more accurate assessment of those risks, and thus better risk management by the party undertaking it.

Better risk allocation provided by public–private partnerships improves value for money. As the private partner undertakes risks, public–private partnerships promote private investment in capital assets, management, operation and maintenance of infrastructure projects. In addition, payment incentives encourage construction performance improvements, as payments to the private partner are often conditioned on the completion of the project. Construction delays also tend to diminish because payment mechanisms usually condition the beginning of payments on when the asset is operational.

Another important advantage of public–private partnerships over traditional public procurement and financing is the optimisation of the life cycle costs through innovation and adapted design, as the private sector typically bears the design risk.[11]

Moreover, the governance principles and standards provided by the government for public–private partnerships such as transparency and accountability advance market discipline, which is in the public interest.

In addition, public–private partnership projects can often be made off balance sheet by the government.[12] This may be a distinct advantage to governments over traditional forms of infrastructure financing to the extent the government as a consequence can secure capital investments that might not otherwise fit into the government's capital budget.

With respect to labour costs, the private sector is often more efficient than the public sector in certain aspects. In the public sector the selection and hiring processes are long and arguably less efficient than in the private sector. In addition, civil servants' tenure represents an additional cost for government, which lacks flexibility to hire temporary employees and pay market-based compensation. The private sector, on the other hand, has the comparative advantage of an efficient selection and hiring process, and often employment at will, in addition to the requisite flexibility to hire temporary employees and pay market-based compensation.

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11 Patrick Boeuf, 'Public-Private Partnerships for Transport Infrastructure Projects.' Transport Infrastructure Development for a Wider Europe Seminar, Paris, 27-28 November 2003. Section 2 – Financing of the Infrastructure, at 1.

12 The assets in public private partnerships are classified as non-governmental assets, thus off balance sheet, under the criteria applied by the Statistical Office of the European Community (Eurostat).

Finally, the existence of a legal framework governing public–private partnerships has the advantage of increasing clarity and certainty to the process of partnering between the public and private sectors, and to all contractual negotiations that are part of the process.[13] This legislation can provide transparency, encouragement to lenders; necessary guarantees, a reliable dispute resolution mechanism in arbitration and exclude sensitive sectors.

How to undertake public–private partnerships successfully across Latin America

Many public–private partnership programmes are thought to have been implemented successfully in Latin America. Chile is an example. Chile's public–private partnership programme has been used to develop a vast number of projects and sectors, including highways, airports, prisons and irrigation. In addition, Mexico has used public–private partnership arrangements to develop transport and energy projects.[14]

When considering enhancing the role of the private sector in the delivery of infrastructure services in Latin America, governments should take into account the lessons learned from prior experience with public–private partnerships internationally, and with joint public–private endeavours domestically. Governments should follow what experience has shown to be the best practices in public–private partnerships.

Public–private partnership policy frameworks should be embodied in the law. As mentioned above, a legal framework strengthens private sector interest and confidence in public–private partnerships. A critical element to successful public–private partnerships is reliable enforcement of the government's payment obligations and fair provisions for payment to the private sector if the government increases the risk or the obligations of the private sector. The law must clearly state the scope of authority of the public authority to aware the concessions and enter into agreements for the implementation of privately financed infrastructure projects.[15] Clarity and certainty add significant value to and reduce the cost of public–private projects.

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13 See 'UNCITRAL Legislative Guide on Privately Finance Infrastructure Projects' UNCITRAL (2001).

14 International Monetary Fund. Fiscal Affairs Department. 'Public-Private Partnerships.' www.imf.org.

15 See n 13 above, at xii.

In addition to putting the legal frameworks in place, Latin American governments should build confidence and experience by selecting strong pilot projects. Focusing on pilot projects allows the public sector to pay close attention to all aspects of public–private partnerships, including any possible flaws, and is likely to result in a job better done. Starting with pilot projects allows for thorough real-time analysis of issues, and the mitigation or adoption of remedies to any such issues.

In the procurement of public–private partnerships, governments should provide thorough and detailed project information and project documentation to the private sector so as to ensure the bankability of the project. Private investors are less likely to be interested in projects if they are not able to secure sources of financing for the project, and that will only be possible if complete documentation and detailed and accurate data are available regarding the project. 'The public sector must work out what it wants before it can expect a sensible bid from the private sector.'[16]

The United Kingdom has recognised the importance of standardising public–private partnership contracts, and has adopted contract templates, providing guidance on the key issues that arise in public–private partnerships in order to promote the achievement of commercially balanced contracts.[17] Guidance is provided for various sectors, including infrastructure. The contract is at the heart of the public–private partnership relationship.[18] Typical clauses of public–private partnership contracts include: the service or project description and requirements; penalties for non-performance and delayed performance; warranties; maintenance requirements; performance monitoring; price and payment mechanisms; duration, extension and termination of the project agreement; assignability of the concession; tax treatment; transfers of controlling interest in the project company; waivers of sovereign immunity; change in law; and dispute resolution.[19] Certainty with respect to the terms of public–private partnership contracts allows for accurate risk assessment by the bidders:

– *Optimise risk transfer.* Excessive risk transfer to the private sector is not advisable as it may entail excessive risk premium to bidders and disincentives to private sector participation in public–private partnerships.

16 Adrian Montague, 'Public private partnerships in the UK – Lessons for International Projects.' Presented at the 7th Annual Conference for Public-Private Partnerships, 23 November 1999, www.pppcouncil.ca/pdf/montague/pdf, at 3.

17 HM Treasury, UK Government, 'Standardization of PFI Contracts Version 3'.

18 Stephen Harris, 'Public Private Partnership: Delivering Better Infrastructure Services.' Inter-American Development Bank.

19 See n 13 above.

– *Achieve efficiency through value for money*. The fundamental advantage of public–private partnerships is that public–private partnerships make better use of government money.

European experience with transport infrastructure projects has shown that the assessment of private partners' performance in public–private partnerships should take account of the learning curve of each sector. The application of experience with public–private partnerships is not necessarily immediate within a sector. On the contrary, the learning curve may vary from sector to sector. For that reason, it is important for both the public and the private sectors to make efforts to learn lessons from their experience in the early stages of a public–private partnerships programme or policy.

If a new legal framework is put in place to govern public–private partnerships, governments should provide for clear processes of procurement, management, evaluation and assessment of public–private partnerships' results. The first phase of public–private partnerships' processes should be the assessment of procurement options (which are country-specific). Thereafter, a list of sectors of the economy that are eligible for public–private partnerships is advisable. The public–private partnerships may then be developed, following planning by the government. Service requirement specifications and standards should be established prior to implementation. The phases of operation and maintenance then follow. An additional post-implementation phase should include assessment of achieved results. Information about public–private partnerships that have been completed and are operational should be disseminated to the private sector and to other entities, agencies and branches of the government.

With respect to the nature of their financing, the vast majority of public–private partnerships are structured as project finance deals in Europe, where the number of public–private partnerships increased significantly in the late nineties and boomed after 2000, and where they are now widely used in infrastructure. However, project financing is but a technique for financing public–private partnership projects that relies on project revenues, with no or limited recourse to project sponsors, to pay the loan amounts incurred to fund the development of the infrastructure asset. Similarly, public–private partnerships may be financed using other financing techniques, including, for example, corporate finance.

Another issue that touches the core of optimal risk sharing in public–private partnerships is whether public–private partnership frameworks allow for, or encourage, the public sector to grant guarantees to the private sector in public–private partnerships. Government guarantees limit the financial risk undertaken by the private sector, and great attention should be given to the outcome of the public–private partnerships in terms of efficiency, and

life cycle costs for the government. However, the Brazilian prohibition on the government providing a guarantee to any party that has not won a public bidding process has resulted in the law establishing a guarantee fund in order to overcome the concerns of the private sector as to the reliability of future contract payments by the federal government. The funding comes from the federal government, independent agencies and public foundations. The contract is at the heart of the public–private partnership relationship.[20]

In Latin America, Brazilian Congress implemented its law including a guarantee fund to be provided to the private sector and its lenders in public–private partnerships. However, to the extent government guarantees unbalance the allocation of risks and impair value for money, these arrangements should not be undertaken.

The United Kingdom, for example, avoids the limitation of private sector financial risk by the granting of government guarantees, but has recently proposed a public–private partnership scheme whereby the government provides financing to the private party or consortium partnering with the government. Under the proposed UK scheme, the government provides cash advances to the public partnership project pursuant to a loan agreement entered into with the private sector for repayment after project completion. Payment is fully and unconditionally guaranteed by a third party or multiple third parties, thus limiting public sector exposure.[21]

Another aspect of public–private partnerships that has to be taken into account to maximise their success is the disconnect between public sector and the private sector investment objectives. The private sector is bottom-line oriented and will generally pursue the maximisation of revenues, while the public sector is generally oriented by the public interest. The government will therefore set fees and tariffs that may be charged to the public by the private sector based on its sense of the public good. Experience has shown that this issue can be addressed by putting in place an appropriate public–private partnership framework and effective contractual arrangements that clearly state the relationship between these opposing interests, and limits the private sector partners' imposition of fees and tariffs on the public based on a sustainable model. It is the job of practitioners representing the private sector to negotiate the terms and conditions of public–private partnership contracts that will maximise private partners' returns within the applicable legal framework. For the government, the achievement of value for money should guide any such negotiations. The public sector will pursue the mitigation and minimisation of the socio-economic risk, and the private

20 Article 8 of Brazilian Public Private Partnership Law (Lei Federal No 11,079) (2004).
21 HM Treasury, UK Government, 'Credit Guarantee Finance Technical Note'.

sector will pursue the mitigation and minimisation of the financial risk. Whether the financial risk will be allocated to the public, to the public sector, or to the private sector, will depend on the existing legal framework and the negotiation of public–private partnership contracts.

Pitfalls of public–private partnerships and how to avoid them in Latin America

As mentioned above, public–private partnerships are a form of outsourcing of public sector services. As such, public–private partnerships necessarily entail the replacement of civil servants with a private sector workforce, employed directly by the government's private sector partners. Labour issues may inevitably arise in Latin America, as they did in the United Kingdom. As in the United Kingdom, labour rights and trade union issues are particularly sensitive in Latin America. There will be additional sensitivity if civil servants are required to brief or train private sector employees who will be taking the new public–private partnership jobs. Additional issues arise if the public sector employees transfer to the private sector as part of public–private partnerships. It is thus desirable that any policy and legal framework for public–private partnerships that is put in place in Latin America addresses these issues. Early involvement of labour and trade unions is advisable to minimise the ability of labour unions to sabotage or derail public–private partnerships.

Successful public–private partnerships must reduce or eliminate corruption, waste, mismanagement and indifference to the environment. One of the lessons learned from the privatisations that were in vogue in the past decade or two is the need to avoid 'selling the Crown Jewels at a discount to a friend'. Privatisation scandals that have occurred, particularly in the Former Soviet Union and with some of the former Communist governments in Eastern and Central Europe, demonstrate the importance of transparency and accountability when the government offers the private sector an opportunity. The tainting effect that can occur when there is no legal framework for privatisations was seen in the early Polish privatisations, which allowed the so-called 'nomenklatura' or former party officials, to buy government assets for a fraction of their actual value. This was contrasted by the legal framework for privatisation passed by the Hungarians and later by the Poles, which placed fair values on the assets and reduced corruption in the privatisation process.

Among the lessons learned from the privatisation experience around the world and in Latin America, in addition to the need for a legal framework, is the value in building political coalitions and engaging in bipartisan efforts.

This causes the programme to be more sustainable when the political winds change.

While there are lessons learned from the privatisations experience that can help the public–private partnership process, there is a clear distinction between public–private partnerships and privatisation: public–private partnerships are a method of procurement and as such they focus more on output than on input requirements and standards, while privatisation is an irreversible change in the way the service is provided with no risk sharing.

Public–private partnerships enable the delivery of infrastructure and ancillary services without privatisation, from which they differ in that[22]:

(1) government-owned assets are not irrevocably sold off to the private sector, and new assets that may be initially funded by the private sector under a BOT or a similar arrangement are eventually transferred to public ownership;
(2) core public services continue to be provided by the public sector;
(3) public and private sectors share service delivery risks and obligations;
(4) the government sets service delivery standards;
(5) the private sector is paid according to its performance in reaching agreed service standards;
(6) the government as a partner will always play a key role in ensuring that the use of assets and service delivery remains in the best interests of the public; and
(7) where profit-sharing arrangements are in place, the public may have access to windfalls that could be generated under public–private partnership.

In addition to the lessons learned from the experience of privatisation, the history of the electric generating sector's use of power purchase agreements (PPAs) with governmental off takers provides us with experience of what can go wrong with the private provision of utilities formerly within the governmental realm. Many breaches and renegotiations of PPAs have occurred, especially over corruption allegations, fair tariffs and the fair and equitable allocation of foreign currency risk (for example, (1) the Dabhol project in India, in which the Maharashtra Electricity Board decided to breach the PPA and the central government failed to live up to its guarantee obligations, and (2) the experience of the Philippines).

Another potential pitfall in public–private partnerships is the lack of knowledge and transparency in the process. How will people find out about

22 Department of Treasury and Finance, Government of Western Australia, 'Partnerships for Growth, Policies and Guidelines for Public-Private Partnerships in Western Australia.' December 2002.

the projects being developed in public–private partnerships? It is important to have public and transparent tenders, which are well advertised and ensure equal opportunity to all qualified bidders and investors. This is another example of the value of a legal framework for public–private partnerships.

The success of public–private partnerships will be dependent on the government's ability to set forth clear and complete service and output specifications and performance standards. One of the difficulties private investors may face in the initial stages of public–private partnership programmes is the lack of technical, financial and negotiation skills on the part of their public sector counterparts. The best way to avoid this problem is better training for the public sector. To that effect, it may be advisable for governments to centralise their trained workforce in a single governmental agency, which is what the United Kingdom did, as well, as it seems, both Brazil and certain Brazilian states intend to provide for in their forthcoming public–private partnerships laws.

Policy frameworks should be developed for public–private partnerships within the context of the government's strategic planning. Random projects proposed by the private sector may be entertained, if set within a policy framework, but concentration should be on those projects that have high priority for the government.

Project management in the public sector tends to be less straightforward than in the private sector because the private sector is focused on making a profit, while the public sector is guided by the public interest, which involves many stakeholders and a more complex decision-making processes. The government and government officials should not unreasonably compromise the quality of the outcome of public–private partnerships for the sake of the process *per se*. The government should be as efficient as possible in managing public–private partnership procedures and projects. Timeliness and efficiency are valuable factors for the implementation of public–private partnerships and their effectiveness.

Certainty is also a very important factor for risk assessment and allocation by the private sector. Policy changes that result in delays or new requirements or obligations to the private sector late into public–private partnerships processes will, as a rule of thumb, increase the cost to both the private partners and the government.

Policy changes late into the process may be motivated by a change in government. Such political risk will always exist (including the risk of cancellation of the project). In order most effectively to mitigate this, practitioners representing the private sector should ensure that the public–private partnership contracts tie the public sector in to its obligations and institute penalties for the public sector in such case.

As in any venture, there is a risk that the public–private partnerships may not prosper. Among other things, this failure may be a result of poor risk allocation or market conditions. Practitioners may, however, play a key role ensuring that the risk allocation agreed to is optimal, and is duly reflected in the public–private partnership contracts.

The legal backgrounds, the legal systems and the existing legal frameworks of each country will determine how public–private partnerships are structured and implemented. Dealing with an enormous array of circumstances and situations poses a challenge for public–private partnerships. The creation of public–private partnerships taskforces may be an effective tool to develop public–private partnerships practice.

Moreover, it is important to avoid engaging in public–private partnerships solely for budgetary purposes. Value for money and optimal risk allocation concerns should prevail over budgetary capital investment reduction purposes. This could lead to public–private partnership projects with higher overall life cycle costs, which would not be consistent with sustainable public finances.

From a budgetary point of view, off balance sheet public–private partnerships have the advantage of allowing for an expedited process that may not necessarily require budget appropriations; but on the other hand, off balance sheet public–private partnerships have the disadvantage for the private partners of potentially inadequate legal support in the event that something goes wrong. Since the public sector's obligations are not on balance sheet, collection of payments due by the public sector to its private partners may be quite challenging. Enforcement of the sovereign's obligation, especially if they are off balance sheet, can be problematic for the private sector. The sovereign must waive its immunity. Effective dispute resolution mechanisms, such as use of the International Centre for the Settlement of Investment Disputes, are critical to public–private partnerships providing value. If the private sector rates the government's creditworthiness low, it will insist on a higher payment to militate against the collection risk.

Whether or not public expenditures incurred in connection with public–private partnerships should be on the public sector's balance sheet is to be determined by the public sector entity procuring the project and its auditors pursuant to the applicable laws and accounting principles.

Throughout Latin America, wherever public–private partnership frameworks are adopted, it is important that the determination of whether public–private partnerships will be on balance sheet or off balance sheet should be made by qualified agencies, which are consistent in their decisions. In Europe, the Statistical Office of the European Communities (Eurostat)

recommended that the assets involved in public–private partnerships be classified as non-governmental assets, thus off balance sheet for the government, if: (1) the private sector bears the construction risk; *and* (2) the private sector bears at least one of either availability or demand risk.

Public–private partnerships in the natural resource sector

Although public–private partnerships are more commonly viewed as applying to infrastructure, an argument can be made that public–private partnerships have been used and would be effective if used more in Latin America as a mechanism for attracting private investment for projects in the natural resource sector, such as mining and oil and gas.

The natural resource sector throughout Latin America has evolved from a system of foreign ownership and exploitation, to nationalisation, to some privatisation. The minerals sector, for example, in which Latin American countries excel, was first explored in the pre-Columbian period, followed by colonial exploration, followed in turn by post-independence exploitation. As a result of an ideological turnaround, governments throughout Latin America claimed ownership of mines, and all of the country's natural resources, which are generally considered national patrimony. A period of prolonged nationalism ensued, and only years later did some Latin American economies open up and begin to relinquish state monopolies over natural resource exploitation through the sale of shares of state-controlled companies, the sale of assets and public–private endeavours.

Chile's mining sector history illustrates this point: the Andean region contains the largest copper deposits in the world. Regulatory reform in Chile preceded that of other Latin American countries by a decade. Mixed public–private companies began the Chileanisation of the copper sector in 1966.[23] Copper mines were nationalised in Chile in 1971 after a series of pre-saging decrees and then by force of a constitutional amendment.[24] The state-owned Corporación Nacional de Cobre de Chile (CODELCO) was created a few years later, in 1976,[25] to own and operate the formerly private copper assets in Chile. CODELCO is a leading international mining company, and remains 100 per cent state-owned. It does, however, partner with private companies in Chile and abroad when developing and exploiting

23 Chilean Law No 16,452 (1966).

24 Chilean Law No 17,540; amendment to art 10 of the Chilean Constitution (1971).

25 Chilean Law Decrees 1,349 and 1,350 (1 April 1976).

new mines and opportunities thereby bringing the financial and technical strength of the private sector to bear on the sector.[26]

These public–private endeavours in the mining sector are examples of an effective approach in attracting private investment even in the natural resource sector, where nationalism is most evident. A combination of public and private sector interests, skills and comparative advantages benefits the sector as a whole. Public–private partnerships would advance the collaboration of governmental and private sectors and could go a long way to increasing the efficiency in the development and management of Latin America's natural resources and need not be any less beneficial to the welfare of the citizens of these countries than strict government control of the sector.

Progressive governments throughout Latin America are now committed to creating a favourable environment for private investment. However, there are examples of present-day reversions to nationalisation in Venezuela and Bolivia following in the footsteps of the Argentine financial crisis that led to the Argentine nationalisations in the hydrocarbon sector.[27]

Despite the essential distinction that the Latin American mining sector has developed over centuries, while oil and gas exploitation is a fairly recent phenomenon, dating back only about one century, there are significant similarities between the two sectors. Both present intensive capital demands and can greatly benefit from increased efficiency, but are considered national patrimony.

Both in the oil and gas sector and in the mining sector, exploration and upstream and downstream development would benefit from private development, as governments in Latin America often have little investment capital and lack efficient management and technical skills, which can be contributed by the private sector.

The Bolivia-Brazil Natural Gas Pipeline Project was the largest public–private infrastructure project in the history of South America, extending over 3,100 kilometres from Bolivia into the heart of Brazil, and is a good example of a project that was developed jointly by public sector entities and the private sector without a formal public–private partnership law or

26 The Al Abra mine created in l994 through 49 per cent participation of CODELCO and 51 per cent of Cyprus El Abra Corporation and Cyprus Amax Mineral Company (related to Phelps Dodge). Agua de la Falda developed in l996 with 49 per cent ownership by CODELCO and 51 per cent ownership by Homestake to explore for gold in Region II of Chile.

27 'Memorandum of Determination' Expropriation Claim of Ponderosa Assets LP, Argentina, Contract of Insurance No D733. See contrary view in ICSID Proceedings Between CMS Gas Transmission Company (Claimant) and The Argentine Republic (Respondent), Case No ARB/01/8 Award, 12 May 2005.

arrangement. The Bolivia-Brazil Natural Gas Pipeline Project was financed using a combination of project and corporate financing techniques, which also promoted effective risk allocation among all parties. The sponsors of this project were able to secure governmental authorisations, governmental incentives and a contractual structure that spread individual risks to parties well suited to bear them effectively. The project proved that it was possible to achieve efficiency and high quality without an existing public–private partnerships framework.

Governments do not necessarily dispose of, or choose to commit, the financial, technological and managerial resources necessary for the development of a country's natural resource sector or for an effective management and enforcement of natural resource sector policies. Governments' resources may be more efficiently employed in designing clear policies and regulations, monitoring the sector, enforcing policies and regulations and providing geological information to private and public–private companies, as well as promoting private investment. Governments now tend to strengthen their role as regulators rather than (monopolistic) mine owners or oil and gas companies.

In this sense, the primary advantage of using public–private partnerships in the natural resource sector is, as in the infrastructure sector, obtaining value for money with increased efficiency and high-quality, cost-effective services. In addition, better risk allocation, reduced regulatory risk for the private sector and the potential mitigation of fiscal and budgetary constraints, where appropriate, may be the advantages of attracting private sector investment and channelling it to public–private partnerships in natural resource projects.

Public–private partnerships allow for optimal government participation in natural resource projects while still retaining ownership of natural resources, which are considered national patrimony.

The same principles that guide public–private partnerships in infrastructure should guide public–private partnerships in the natural resource sector, the principles of value for money and good governance being important factors to the success of any such arrangement.

In our analysis, it is advisable for governments throughout Latin America to set up or maintain, as the case may be, legal and policy frameworks for private sector participation also in the natural resource sector. Whether or not these frameworks are packaged as public–private partnerships-incentive laws is not as important as providing the private sector with the basic assurances it needs regarding the rule of law and enforcement of contractual arrangements against the public sector if need be, and good governance principles applicable to the government's development, procurement and

management of public–private partnerships. Such a framework allows for reliable and creditworthy public–private projects.

Conclusion

To the extent Latin American governments choose to foster private sector investment in general, and private sector involvement in infrastructure in particular, public–private partnerships can advance governments' policies.

It is never an easy task to set up infrastructure public–private partnerships. It takes time and effort successfully to transfer public–private partnerships experience and expertise across sectors, and throughout the different levels of government, federal/national, regional, state/provincial, and municipal/local.

Governments choosing to develop public–private partnerships should put in place the appropriate legal framework. Clear frameworks benefit both public and private sectors.

The choice between forming public–private partnerships and traditional forms of private sector participation in the economy is to be made on a case-by-case basis, pursuant to previously set rules and processes. Public–private partnerships are only a process for enhancing governments' value for money. Public–private partnerships are certainly not the right answer to all public infrastructure and natural resource projects in Latin America, but they offer a solution for the more rapid provision of public services for the people of Latin America.

Ultimately, it is in the hands of Latin American governments to determine whether public–private partnerships will prove to be the salvation of public utilities and infrastructure in Latin America, or merely a tool for deception in budgets and public accounts.

Bibliography

Department of Treasury and Finance, Government of Western Australia, 'Partnerships for Growth, Policies and Guidelines for Public–private Partnerships in Western Australia' (December 2002).

HM Treasury, UK Government, 'Credit Guarantee Finance Technical Note'.

HM Treasury, UK Government, 'Public–private Partnerships: The Government's Approach'.

HM Treasury, UK Government, 'Standardization of PFI Contracts Version 3'.

International Monetary Fund, Fiscal Affairs Department, 'Public–private Partnerships,' www.imf.org.

'Pipe Dreams,' *Latin Finance Magazine* (October 2004).

UK Department for Transport, 'Green Public–private Partnerships,' www.dft.gov.uk/stellent/groups/dft_about/documents/page/dft_about_503209.hcsp.

United Nations Economic Commission for Europe, 'Governance in Public–private Partnerships for Infrastructure Development – Draft' (Geneva, 2004).

Boeuf, Patrick, 'Public–private Partnerships for Transport Infrastructure Projects.' Transport Infrastructure Development for a Wider Europe Seminar, Paris, 27-28 November 2003. Section 2 – Financing of the Infrastructure.

Heald, David, and Alasdair McLeod, 'Public Expenditure' in *Constitutional Law, 2002, The Laws of Scotland: Stair Memorial Encyclopedia* (Edinburgh, Butterworths), para 512.

HM Treasury, UK Government, www.hm-treasury.gov.uk.

Irish Government Public–private Partnership, www.ppp.gov.ie/splash.php.

Montague, Adrian, 'Public–private partnerships in the UK – Lessons for International Projects.' Presented at the 7th Annual Conference for Public–private Partnerships, 23 November 1999, www.pppcouncil.ca/pdf/montague/pdf.

National Council for Public–private Partnerships, 'How Partnerships Work,' www.ncppp.org.

UN Foundation, 'Understanding Public–private Partnerships,' www.unfoundation.org/files/pdf/2003/Public_Private_Part_Bro.pdf.

UNCITRAL, 'UNCITRAL Legislative Guide on Privately Finance Infrastructure Projects' (2001).

World Bank, The, 'A Mining Strategy for Latin America and the Caribbean' (1996), www.worldbank.org/html/fpd/mining/m3_files/ienim/lams.htm.