QUESTIONNAIRE RELATIF AUX PARTENARIATS PUBLIC PRIVES
QUESTIONNAIRE ON PUBLIC PRIVATE PARTNERSHIPS

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I. Concept

When did the concept of public-private partnerships first appeared in legal literature in your country and with which meaning?

The concept of Public-Private Partnership ("Asociación Público-Privada") first appeared in Argentina only in early

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2000, as a financial tool used by multilateral credit banks as a kind of Project Finance.

It first appeared in the Argentine legal system in 2005, upon the issuance of Decree No. 967/2005 by the Federal Executive Branch, which was published at the same time as Decree No. 966/2005 setting forth the Federal Rules on Private Business Enterprises ("Iniciativa Privada").

Does a legal definition (from statute law or case-law) of PPP exist in your country? If so, what is the definition? If not, is there a legal definition of contracts which are close or part of the PPP concept (such as the "contrats de partenariat" in France) and what is this definition ? Is there a legal text (i.e. statute law or secondary legislation) which deals with all types of PPPs or certain types of PPPs? Could you quote the legal sources?

Decree No. 967/2005 approves the Federal Rules on Public-Private Partnerships. Section 1 of the decree provides that "Public-Private Partnership contracts are cooperation agreements between the Public and Private Sector by which the parties are bound with an aim to partner for the execution and development of public works and services or any other delegable activity, in accordance with the following principles: a) Efficient performance and compliance with the State's duties; b) Respect for the rights and interests of users of the public services and of the private entities which are engaged in the execution of the public ventures; c) Non-delegability of the State's regulation duties and police power; d) Tax liability in the execution and performance of the relevant contracts; e) Transparency in decision-making and operation; f) Economic sustainability of Public-Private

Partnership projects; g) Allocation of risks based on the management capacity of the contracting parties and best practices." Section 4 of the referred decree sets forth that Public-Private Partnerships shall be organized as corporations, trusts, or under any other form which allows for financing by public offering.

From an academic point of view, what is generally considered as PPP in your country? Are there several concepts of PPPs and if so what are they? Is there a distinction drawn between institutional PPP (i.e. joint venture between public and private bodies) and contractual PPP from a legal point of view or from an academic point of view?

From an academic point of view, the concept of "public-private partnership" had never been used before the issuance of Decree No. 967/2005.

For many years now, there have been in Argentina several "classic" government contracts or forms of association that would be considered as public-private partnerships in other countries: Public Works Concession Contracts or Concession Contracts for the Provision of Public Services (Public Utilities), and Partially State-owned Companies.

Lastly, it is worth mentioning that, at the federal level, the concept of Private Business Enterprises had been incorporated several years before in the Law on Public Works Concessions (Law No. 17520), under which private parties could submit proposals to the State to bid projects as public work concession (onerous, free, or to be supported with subsidies). If such proposal was approved by the State, the "proposing party" would have priority in the bidding process.

Decree No. 966/2005, which approves the Federal Rules on Private Business Enterprises, extends the scope of the former law to encompass public works contracts and concession contracts for the provision of public services; and exclusively requires private financing for the projects.

Decree No. 967/2005 promotes, in our opinion, the concept of institutional Public-Private Partnership (corporations or trusts).

Generally, Argentine authors do not refer to Contractual Public-Private Partnership as a legal concept independent from classic government contracts.

Regarding institutional PPPs, is there a specific legal text for them? If so, what are the objectives and the content of this legal text? Is there a procedure (like an award procedure) for selecting the private party after competition? If so, could you briefly explain the content of this procedure?

Institutional PPPs are expressly provided for under Decree No. 967/2005, a copy of which is attached to this questionnaire. Section 1 of the decree sets forth the principles governing them, as described above.

Section 2 specifies the subject matters or purposes of Private-Public Partnerships (a) Execution and/or operation and/or maintenance of public works and/or services; b) Expansion of existing public works and/or services; c) Planning, financing and construction of public works and/or services, including, among other modalities, turnkey operations; d) Total or partial provision of public services,

whether prior execution of the relevant public works is included or not; e) Performance of delegable duties which are of the Government; f) Execution of public works, including the subsequent provision of the service or not, for later lease by the Government).

Section 3 establishes certain basic rules that must be complied with (a) The effective term of the Partnership must be compatible with the amortization of the investments to be made; b) The right to partially subcontract works and/or services; c) The parties must establish the applicable sanctions in the event of breach of the contractual obligations by the private partner or the Government; d) The parties must agree on the grounds for contract termination before the expiration of the Partnership effective term; e) Adhesion to the provision on public offering under Law No. 17811 and its supplementary provisions).

Section 4 provides the form of business entity applicable to PPPs under the law (corporation or trust).

Section 5 sets forth the types of contributions that may be made by the State (a) Payment in cash; b) Assignment of tax credits and/or granting of tax benefits in accordance with Section 6 of Law No. 17520; c) Granting of rights over specific public property in the form of concessions, permits, authorizations, or any other legal document except for the relevant ownership rights; d) Granting of rights over assets exclusively owned by the State; e) Any ancillary consideration pursuant to Section 50 of Law No. 19550, if applicable based on the relevant type of work and form of business entity; f) Any other contribution as duly authorized under the law).

Under Section 7, private partners are under a duty to provide any such guarantee as may be necessary for the performance

of their duties. Further, Section 9 provides that any dispute that may arise between the parties may be resolved by means of conciliation and arbitration.

Section 6 sets forth that the selection process of private partners must be conducted pursuant to the provisions of the Law on Public Works (Law No. 13064), the Law on Public Works Concessions (Law No. 17520), and the Procurement Rules of the Federal Government (Decree No. 1023/2001), which govern the typical selection processes, i.e. public tender, private tender, and direct procurement.

How did the category of contractual PPPs (or some PPPs such as PFI in the UK) have been integrated in the existing legal categories? Is this considered as a genuine category? If not, are PPPs included in one or several categories and what are they (public procurement contracts? concession contracts? other types?).

Argentine laws do not contain express provisions on Contractual Public-Private Partnerships. Agreements are framed under Public Works Concession Contracts, Concession Contracts for the Provision of Public Services, and Concessions or Permits for the Use of Public Property, besides, naturally, Supply Contracts.

Within the contractual PPPs category, does the law and/or the practice and or/the soft law distinguish between PPP of a concession type, i.e. with paying users (such as financially free standing PFI in the UK) and PPP of a public procurement type, i.e. paid by the public sector (such as services sold to the public sector PFI in the UK)?

We refer to the answer to the above question.

How come the contractual PPPs can be seen as new with regard to « classic » public contracts? What are the specificities of these contracts as compared with public procurement contracts or concession contracts (if the latter are not themselves considered as PPPs)? What are the expected advantages and disadvantages with regard to "classic" public contracts?

As we have already explained, Argentine laws do not expressly provide for Contractual Public-Private Partnerships; they only refer to Institutional PPPs.

When multilateral banks or institutions talk about PPPs in Argentina, they usually refer to what Argentine law defines as Public Works Concession Contracts or Concession Contracts for the Provision of Public Services, whether they are onerous, free, or supported with subsidies.

Are contractual PPPs more considered in legal literature as financial tools (i.e. with the main objective beeing to find ways to finance a project) or as work contracts or services contracts? Legally speaking, are contractual PPPs considered as work contracts or services contracts? If there is no legal answer from a statute law or from the case law, what is your opinion? Does the answer depend on each contract or do the PPPs should be necessarily seen as work contract or service contract?

We refer to the answers to the questions above. It may be added that, in our view, the tendency of multilateral banks

and institutions towards contractual PPPs is aimed at improving the way to finance projects (in this sense, they would be a kind of Project Finance) rather than being chosen for specific legal purposes.

What is the economic importance of contractual PPPs? Do you have statistics regularly updated?

During the '90s, Concessions played a major role in Argentina's economy since they were one of the main means through which the government implemented the so-called State Reform and Public Sector Privatization process. Today, due to a number of decisions adopted by the current administration (specially, the tariff freeze), Concessions are quite unprofitable business ventures.

II. Attribution / Award

Are they any legal limits (from your constitution or from another legal source) to the use of PPPs? If so, what are they and what are the justifications of these limits?

There are legal and practical limits to Public-Private Partnerships which are established by federal statutory laws (Decree No. 967/2005, providing for institutional PPPs, as explained above).

From a legal standpoint, the current administration considers that there is an additional limit or legal hurdle besides the requirements specified in the answer to question 4 in section I: Public-Private Partnerships can only be created upon approval by a law passed by the Argentine Congress on an individual basis.

This conclusion is based on Section 5(a) of Law No. 25125, as amended, which provides that "A Law shall be enacted to create any decentralized body, public company of any nature and Trust Fund which is made up, in whole or in part, of assets and/or funds of the STATE."

Even though we do not precisely agree with it, such is the prevailing opinion of the current federal administration in Argentina.

From a practical point of view, there is still another limit: The creation of Public-Private Partnerships can only be proposed by the agencies comprising the Public Administration (Decree No. 967/2005, Sections 10 through 14). Decree No. 967/2005 does not contain any express provisions allowing private parties to do so.

This hurdle could be overcome if Decree No. 966/2005 regulating the Federal Rules on Private Business Enterprises would be simultaneously applied. But such has not been the case so far.

All in all, the existence of the referred legal and practical hurdles is the reason why, as of today, more than four years after the publication of the aforementioned Decree, no Institutional Public-Private Partnerships have been formally created in Argentina under the Federal Rules on Public-Private Partnerships.

Is there a legal text (or guidelines) demanding (or recommending) to evaluate or to compare PPPs with other legal solutions before choosing a PPP? If so, does the PPP cannot be chosen only if it is proved that it is the best solution?

There is not any such legal text or guidelines in Argentina. At the federal level, we have a Law on Public Works, a Law on Public Works Concessions, a Law on State Reform which contains a few provisions regarding Concessions for the Provision of Public Services (Law No. 23696), Regulations for the Acquisition, Sale and Procurement of Goods and Services of the Federal Government (Decree No. 436/2000, regulating Supply Contracts), Procurement Rules of the Federal Government, Federal Rules on Private Business Enterprises, and Federal Rules on Public-Private Partnerships.

In addition, there are special rules governing the different economic or industrial sectors (telecommunications, electricity, gas, roads, water and sanitation, among others).

The provisions of Decree No. 967/2005 on Institutional Public-Private Partnerships allow for several types of public business enterprises (see answer to question 4 in section I).

Is there one (or more) expert body(ies) which assist public bodies in the follow up of the award and/or the performance of PPPs? Is the assistance of this(ese) expert(s) compulsory? Is it (are they) independant from the government ? How are the members nominated? Do they have also to do training sessions to civil servants from public bodies who wish to enter into a PPP?

The only body now existing in our country whose functions are similar to those of the bodies referred to in this question, is the Public-Private Partnerships Assessment and Development Commission, established by means of Decree No. 967/2005, which is composed of representatives of the Ministry of Economy and the Ministry of Federal Planning, Public Investment and Services.

The Commission is not a legal entity separate and distinct from the Federal Government. Its members are appointed by resolution approved jointly by the referred Ministries. The Commission is responsible for receiving and assessing the PPPs proposals which are submitted by the agencies of the Public Administration (Section 2 of the Decree above quoted, and Sections 10 through 13 of the Rules).

If the applicable admissibility requirements are proven to be met, the Commission assesses the extent to which public interest may be compromised under the relevant proposal, and submits a detailed report on the proposal to the Federal Executive Branch, stating whether it considers that it should be admitted or not. Then, the Executive decides on the public interest assessment and the admissibility of the relevant proposal for the creation of the pertinent Public-Private Partnership.

As regard to evaluation, are there any models of PPPs? If so, are they built on a sector by sector basis or are they applicable to any economic sectors? Are they compulsory?

There are neither any models of PPPs nor any limitations applicable on a sector by sector basis. The only limits are the

types of public business enterprises in which PPPs may be engaged. Public-Private Partnerships are not compulsory.

What the award procedure for contractual PPPs? Is there any specificity as compared with the award of public procurement contracts? Do you consider these procedures as appropriate to this kind of contracts, in particular if there is a ban on negotiation?

As we have already explained, Argentine laws do not expressly provide for Contractual Public-Private Partnerships.

Are there any legal guarantees as to ensure that a certain amount of the contract will be handled by small and medium sizes enterprises? If so, what are they?

Section 8 of Decree No. 967/2005 sets forth that Law No. 25551 must be applied to PPPs. Under said Law tenders submitted by Small and Medium-Sized Companies (*PyMES*) are given some priority, and reference is made to Law No. 25300 on the Promotion of Micro, Small and Medium-Sized Companies, which also gives priority to the tenders submitted by them.

Are there any legal garantees as to ensure a good architectural quality?

The only guarantees required under the Federal Rules on Public-Private Partnerships are those to be provided by private partners in accordance with Section 7 (as referred to above).

Joint Resolution No. 527/2005-MEP and No. 1232/2005-MPFIPS governs this matter and provides for the following guarantees:

"a) Guarantee for Payment of Contributions, which shall be provided in the form of surety (whether or not it is provided on the condition that the guarantor is secondarily liable, all the debtor's assets are seized before requesting payment from the guarantor and, if there is more than one guarantor, the amount due is divided among them) to the full satisfaction of the PUBLIC-PRIVATE PARTNERSHIPS ASSESSMENT AND DEVELOPMENT COMMISSION, and shall be delivered at the time of execution of the Company's Articles of Incorporation. The guarantee shall be equal to ONE HUNDRED PER CENT (100%) of the total amount yet unpaid by the private partner at the above-referred time and shall be cancelled upon actual payment thereof."

"b) Guarantees for Liability of Administrators, which shall be provided by each of the administrators appointed by the private partner or partners at the time of execution of the Company's Articles of Incorporation or Acceptance of the Position as Administrator of the Company or Trustee," in the amounts stated therein.

"c) Guarantee for Liability of Controlling Partners, which shall be required in the cases where the private partner or partners intend(s) to have lawful internal control of the Company. Private partners shall be deemed to have lawful internal control whenever they hold, either jointly or

individually, stakes in the Corporation, under any ownership title, granting the voting rights necessary to approve resolutions at corporate or regular meetings. The guarantee shall be delivered at the time of execution of the Company's Articles of Incorporation or at any time all the private partners take control; the amount thereof shall be divided proportionately based on the stakeholding of each private partner" in the amount to be established by said joint resolution.

The guarantees shall be made in the form of surety bonds.

Finally, Section 5 of the referred to resolution provides that "Failure to provide the aforementioned guarantees shall prevent the performance of the acts required to create the partnership or the acceptance of the position by the administrator, as the case may be. If the event giving rise to the requirement to provide guarantees occurs after performance of the referred acts, the stakeholding of the breaching private partner shall grant no political and economic rights. –The guarantee provided for in Section 3(b) of this joint resolution shall be enforceable in the event that any administrator facilities non-compliance with the provisions stated herein.– Any provisions in connection with these guarantees shall be included in the Bylaws of the company organized or else in the trust agreement, as the case may be."

Are there any legal guarantees as to ensure that commercial secret will be protected during the award procedure?

In this regard, there are no special guarantees applicable to Public-Private Partnerships. The general rules governing public and private tenders, and direct procurement apply.

Is there a duty for the partner to respect a minimum of transparency for the award of the contracts he will sign with third parties for the performance of the PPP?

No, there are no special provisions applicable to Public-Private Partnerships. The general rules applicable to contractors and concessionaires of the State apply.

In this regard, it is worth mentioning that Section 6, last paragraph, of the Rules provides that "Any contracts entered into between Public-Private Partnerships and third parties shall be governed by the laws that may be applicable based on the form of business entity under which it was created" (corporation or trust). "If such contracts with third parties are governed by public law, procurement contracts shall be made in accordance with the Procurement Rules of the Federal Government."

III. Exécution / performance

Do you have, in your country, surveys regarding the performance of existing or accomplished PPPs contracts? If so, could you explain what are the advantages and disadvantages showed by these surveys as compared with "classic" public contracts? Does the law (or the soft law) of your country provide with compulsory clauses or models of clauses? If so, what are they?

Argentine laws do not expressly provide for contractual PPPs. There is no practical experience as to how institutional

PPPs work, and, therefore, there are no surveys that can be used to evaluate the performance of PPPs as compared with classic public contracts.

The Federal Rules on Public-Private Partnerships establish basic rules which must be complied with in every PPP (Section 3, which has already been transcribed in the answer to question 4 in section I).

In practice, what are the clauses specific to PPPs that are commonly used? Are there, in practice, clauses of gain sharing in the case of refunding, clauses of assignment of debts?

There is no practical experience as to how PPPs work in Argentina due to the reasons described above.

Section 1(g) establishes as a principle for PPPs the "Allocation of risks based on the management capacity of the contracting parties and best practices."

What is the situation of the constructions and/or goods that are due to be rendered to the public body at the end of the contract? Are these constructions/goods owned by the private partner during the contract?

In this sense, Section 2, last paragraph, of the Federal Rules on Public-Private Partnerships provides that "In the cases of execution of private works, the work shall be owned by the

State upon termination of the relevant Public-Private Partnership."

Are there models or guidelines of risks sharing between public and private partners? What is the key principle of risks sharing? What are the identified risks in these models?

No, there are not. The only express provisions in this regard are those contained in Section 1(g) described above.

Are there rules to recognize PPPs in public balance sheet? If so, what are these rules on consolidation types (based on the types of risks such as eurostat – construction/demand/availibility or based on risk and reward –like FRS – or based on control criteria – like IPSASB – or other types) ?

There is no experience on that issue due to the fact that no Institutional PPP has been formally created under the Federal Rules on Public-Private Partnerships. Public Trusts general rules could apply.

Is there a way of controlling, by the public party, the contracts signed by the partner with third parties?

There are no express provisions apart from what it was

stated in the answers to the above questions, and the practices that may be conducted by shareholders, and by trustors, trustees and beneficiaries, to control each other, in accordance with the general applicable rules.

Are there possibilities to terminate unilaterally (i.e. without the consent of the other party) a PPP contract? If so, who can terminate the contract (public or private partner?) and for what reason (default, general interest, other reason) ? In the case of an early termination (unilaterally of by consent), are the parties free to determine the amount of the damages? Is there a maximum of damages?

The Federal Rules on Public-Private Partnerships contain no express provisions in this regard, but only provide generally that certain rules must be complied with: (a) The effective term of the Partnership must be compatible with the amortization of the investments to be made; b) The parties must establish the applicable sanctions in the event of breach of the contractual obligations by the private partner or the Government; c) The parties must agree on the grounds for contract termination before the expiration of the Partnership effective term (Section 3 of the Federal Rules on Public-Private Partnerships).

We consider that the rules applicable to public contracts could be applied in this case, and that, therefore, PPP may be terminated on the grounds of breach by the State or the private partner, by mutual agreement or the like, as well as based on reasons of public interest, in addition to the potential expropriation of shares held by private partners by means of a law enacted by the Argentine Congress.

In the case of expropriation, the amount of damages is determined only based on consequential damage but not on loss of profit. In the case of termination based on reasons of public interest, the extent of damages is not clearly established; based on statutory provisions, the prevailing opinion is that the amount of damages should be determined as in the case of expropriation, although it has been extended in a recent decision of the Argentine Supreme Court. In the case of termination by mutual agreement or the like, in practice, there is some flexibility as to the determination of damages by the parties. In the case of termination for breach by the State, the extent of damages should be broad (consequential damage and loss of profit), but the Federal Law on Public Works excludes loss of profit. In the case of termination for breach by the private partner, the amount of damages due to the State is considerable.

IV. Recours contentieux/remedies

Are legal actions against contractual PPP awards frequent?

As we have already explained, the Argentine legal system contains no express provisions on contractual PPPs; it only provides for institutional PPPs, although they have not been implemented in practice. Therefore, there are no records on legal actions filed against PPP awards.

Are there specific procedures or remedies rules specific to contractual PPPs when it comes to remedies?

We refer to the answer to the above question. With respect to

institutional PPPs, the Federal Rules allow for dispute resolution by means of conciliation or arbitration as above stated.

Are there possibilities of interim reliefs (i.e. before the contract is signed) before a judge (or a board) in the case of contractual PPPs?

We refer to the answer to question 1 in this section.

Is there a specialized judge or a board who has jurisdiction over the award and/or the performance of contractual PPPs (or public contracts more generally)? If so, what are the reasons of the specialized judge or board ?

There are not courts having exclusive jurisdiction to hear PPPs cases. But there are Federal Courts in Contentious Administrative Matters having exclusive jurisdiction over cases related to government contracts signed by the State, among other matters. Nonetheless, it is worth recalling the alternative methods of dispute resolution specified in the answer to question 2 in this section.

The exclusive jurisdiction of the referred courts in contentious administrative matters, including cases related to government contracts, is granted by law.

If the contractual PPPs are subject to the same remedies rules

than the public contracts, is there a specificity as compared with private contracts? If so, what is the specificity of these rules?

If a dispute is heard by Federal Courts in Contentious Administrative Matters, it is very likely that they may apply the federal rules specifically providing for public, government contracts, which are based on the French Conseil d' Etat case law and the administrative rules of European continental states (unequal treatment of the parties, clauses exceeding the realm of the general principles of the private law, private partner cooperation with the Government, public interest involved, non-application, in principle, of the *exceptio non adimpleti contractus* (noncompliance exception) , and so on).

If an unilateral termination is allowed, can it be done by one party on its own or does it have to ask a judge to be able to do it? Does the other party can seek the annulment of this decision or can it only claim damages?

The Federal Rules on Public-Private Partnerships governing Institutional PPPs do not contain any express provisions in this regard.

In accordance with the general rules on government contracts in Argentina, the State may terminate contracts unilaterally by filing administrative proceedings (the relevant decision being enforceable) without the need to resort to a court of law. Private partners may request the annulment of the decision rendered by the relevant administrative authority or seek damages in a court of law.

On the other hand, private partners may only "request" termination from the State by filing administrative proceedings. The State will then decide whether to terminate the contract or not. In the event it refuses to terminate de contract (by means of express denial or omission), private partners may seek termination in a court of law.

V.

If you wish to draw the attention of the general reporter on questions which were not present in this questionnaire, please do so below.