

Project Finance 2012 – Colombia

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1. How common is project finance in your jurisdiction? In what sectors is project financing most common?

Project financing became common in Colombia after the economic liberalisation of 1991. Since then project finance has been a customary way of financing infrastructure projects in Colombia.

The different types of projects that have been most commonly developed are related to the energy sector, oil & gas sector, transport and telecommunications.

Project finance in Colombia was scarce at the turn of the century due to security problems and the Colombian economic crisis of the late 1990s. With enhanced optimism and an improved security situation, project finance has regained momentum and a number of projects have started to be developed since 2005.

2. What kinds of institutions typically act as sponsors and lenders in your jurisdiction? Why?

Multilateral agencies and ECAs have acted together with commercial banks as the primary lenders in project finance structures in Colombia. Lately there has been interest on the part of local pension funds to participate through private equity funds. Additionally, project bonds have resurfaced as an alternative.

Sponsors are generally oil majors in oil & gas projects, local and international strategic agents in energy and local developers and local construction companies in road transportation.

3. What structures are most common?

There are a number of structures used, depending on the type of asset or sector. In the road transport sector the preferred structure is a BOOT structure. Oil & gas projects assume a BOO structure. Energy projects also take the form of a BOO structure except in certain specific cases.

4. Does local law require that the project company be organised under the laws of your jurisdiction? What is the typical legal form of a project company and why? Does local law require that any of the project company's equity be held by local investors?

As a general rule, the project company is required to be organised under the laws of Colombian jurisdiction. Article 474 of the Colombian Code of Commerce lists certain activities that require a permanent establishment in Colombia. Project companies generally fall within one of those categories (ie, acting as a contractor in the performance of works, participating in extractive industries, acting as a public concessionaire or performing activities ancillary to a concession) and, as a result, have to establish themselves in the country either as

company incorporated in Colombia, or as a Colombian branch of a foreign company.

The typical form of a project company is similar to a corporation (*sociedad anónima*), or any other form that provides for limited liability. Certain sectors, such as public utilities, require that the project company be organised as a share company (*sociedad por acciones*), which can take the form of a *sociedad anónima*, a *sociedad en comandita por acciones*, or a *sociedad por acciones simplificada*. Irrespective of the corporate form taken, project companies generally prefer to establish as a *sociedad anónima* or as a *sociedad por acciones simplificada* because of the limited liability protection they provide. However, it must be noted that Colombia's insolvency regime (Law 1116 of 2008) has a provision pursuant to which the parent company shall be held liable for the obligations of its insolvent subsidiary if the insolvency was caused as a result of acts or omissions of the parent company taken in its interest and against the subsidiary's interest. The parent company's responsibility in these cases will be presumed.

While only a few, there are restrictions that must be taken into consideration regarding possession of equity by foreign investors; they will be addressed in the answer to the following question.

5. Please describe the foreign investment regime in your jurisdiction.

The regime of foreign investment in Colombia has four ruling principles:

- no discrimination between national or foreign investments;
- universality (foreign investment is welcome in all economic activities in Colombia, except in those that are expressly prohibited by law);
- automatic registration (upon filing of a Form 4 before the Central Bank, foreign investments will be automatically registered as such, except in those situations established by law); and
- stability (the requirements for redeeming the investment and those applicable to the remittance of profits, valid at the time of said investment, shall not be amended in any way that diminishes the rights of an investor).

Foreign investments in Colombia fall into one of two possible categories: direct investments or portfolio investments (those made through investment funds).

Among the activities that require a previous authorisation from the Colombian government (and operate under a special regime), there are those related to TV concessions, certain kinds of financial investment, and portfolio investments. Activities related to defence and security, and to the processing and disposal of toxic waste, are among those in which foreign investment cannot participate.

A recent development worth mentioning is Law 963 of 2005, which regulates legal stability contracts; such agreements are entered by the state with a given contractor, and guarantees to the latter, provided compliance with legal requirements, that any unfavourable change in legislation will not be applicable to them for a determined period.

Colombia benefits from projects undertaken by the Overseas Private Investment Corporation (OPIC), is a member of the Multilateral Investment Guarantee Agency (MIGA) and has also ratified the International Center for the Settlement of Investment Disputes (ICSID) Convention. It has also ratified bilateral investment treaties with Peru, Switzerland and Spain; further investment protections in treaties are in place in respect to Mexico and Chile, and a number of negotiations are taking place for other countries.

6. Are there any restrictions on payments abroad or repatriation of capital by foreign investors?

There are no restrictions on payments abroad, or on repatriation of capital by foreign investors, as a general rule. Provided that the foreign investment was made in accordance with Colombian law, the investor will have the right to repatriate the investment's profits, as well as reimburse the invested capital and its earnings. Exceptions to this rule may be found in the special regimes mentioned in question 5.

7. Is it permissible for a project company to maintain offshore foreign currency accounts?

It is permitted. However, when those funds are channeled for a foreign investment, the investor will have to do so mandatorily through the FX market, and consequently will have to use the registered compensation accounts system, or an FX intermediary. The compensation account can be used to pay imports, deposit money received in payment of exports, receive funds for foreign investment in Colombia, remit investment profits, receive external loan disbursements and make principal and interest payments, as well as to pay obligations stemming from free market operations.

8. What recent measures has your government implemented to make projects in your jurisdiction more attractive to foreign investors? Has this involved making government or other local sources of co-financing more available for projects?

The most recent measure taken by the government (in terms of credit and relevant to investment in projects) is the regulation of the system of multi-funds. This system began operating in Colombia in 2011, allowing pension fund affiliates to access different risk profiles. While investing in infrastructure was not prohibited for pension funds before this regulation, the multifund system does provide an incentive to fund managers and institutional investors, who have been reluctant in the past to invest in infrastructure. This recently enacted regulation, coupled with the recent integration of the Colombian, Chilean, and Peruvian stock markets, and with the growing initiative of private equity funds regarding infrastructure, are all factors to be taken into consideration regarding financing for projects in Colombia.

However, recent developments regarding Colombia's taxation laws must also be addressed. Law 1430 of 2010 introduced a new withholding tax on the payment of loan interests made to persons domiciled abroad, provided that the loan has a term equal to, or longer than, a year. This tax was also imposed on payments of lease interests and costs to persons domiciled abroad, and the amount due is equal to 14 per cent of the payment, in both cases. Loans taken by governmental and quasi-governmental entities (eg, municipal public utilities majority owned by local governments such as EPM, CHEC, ISA, ISAGEN, etc; national oil companies such as Ecopetrol and its subsidiaries; etc) are exempt from the referred withholding creating an asymmetry between the government owned (public) and the private sector for international lending purposes.

9. Will any of the financing or project agreements need to be registered or filed with any government authority or otherwise need to comply with local formalities to be valid or enforceable? Even if not necessary for enforceability, is there any special advantage in complying with local formalities?

Colombian security documents will have to be filed or registered depending on the nature of the document. Mortgages have to be executed by a public deed for validity purposes, and have to be registered in the local public instrument registry (*Oficina de Registro de Instrumentos Públicos*) for enforceability purposes (this is basically a real estate property registry).

Pledges over movable assets (with the notable exception of pledges over shares) have to be registered before the mercantile registry (*Registro Mercantil*) of the domicile where the assets will remain for enforceability purposes. On the other hand, pledges over shares have to be registered in the stock ledger of the company for enforceability purposes.

10. Are there any advantages in having the project company issue promissory notes that are governed by local law in addition to the credit agreement governed by New York?

For a project company, the advantage of issuing promissory notes governed by Colombian law is that such notes will contain clear, express and enforceable obligations subject to be enforced by means of executive proceedings (*proceso ejecutivo*), which are substantially shorter than ordinary proceedings. It also allows creditors to collect from the project company and/or its assets directly where they are located, avoiding having to go through proceedings in New York, for example, only to then obtaining recognition of such decision locally, to finally have it enforced by a local court.

11. Must any agreements be governed by local law?

In the context of a project finance, there is no doubt that a loan agreement or the documents pertaining to the financing may be governed by a foreign law as long as the lenders are foreign lenders. However, in relation to security documents that refer to the collateral located in Colombia, it is generally required that such documents be governed by Colombian law in the manner explained below.

As a general rule, agreements that are to be performed in Colombia must be governed by Colombian law. However, Law 315 of 1996 allowed parties to enter into agreements governed by foreign law as long as there is a connecting factor between the agreement and an international element that justifies the use of foreign law (ie, one of the parties is a foreign party, or the agreement 'affects international trade', etc); and the parties agree to international arbitration.

On the other hand, a foreign judgment will be enforced in Colombia as long as it does not relate to in rem rights over assets located in Colombia.

Hence, Colombian security documents are as a general rule governed by Colombian law, either because the Colombian security documents are generally considered performed in Colombia and it would be unadvisable to agree for arbitration for the enforcement of collateral, or because in the recognition of a foreign judgment enforceability issues may arise in respect of the execution of a collateral located in Colombia. In some cases pledges of shares over the shares of a Colombian company have been governed by US law, but the share certificates have been physically held outside of Colombia.

12. May a collateral agent act as the sole secured party for the benefit of a group of lenders whose composition may change from time to time?

In the first place, under the Colombian Civil Code, agreements granting securities are of an accessory character. Consequently, having a third party to the main obligation act as a collateral agent may be problematic to enforce. While the use of a collateral agent for offshore securities is normally accepted, for securi-

ties granted in Colombia to a group of lenders, a trustee is named to enforce a given security on their behalf rather than act as a sole secured party. The change in composition of the group of lenders implies the necessary acceptance of the agreement by which the group named the collateral agent.

13. May a security interest be granted with respect to all of a project company's assets? Are any types of property considered personal in nature or 'of public interest' such that granting a security interest therein would not be permissible?

A security interest may not, in general, be granted with respect to the universality of a project company's assets. However, a pledge may be granted in respect of commercial establishments and over futures. Regarding the pledge over commercial establishments, the items included are:

- the commercial name and trademarks;
- rights over inventions created or used in the business;
- assets in inventory; property, plant and equipment;
- the lease contracts in respect of the real property where the business operates;
- the right to impede client poaching and to receive good will protection; and
- any rights and obligations that stem from the activities of the business as long as such rights and obligations have not been originated in agreements entered into in consideration of the owner of the business unit.

Concessions and certain permits are considered *intuitio personae* under Colombian law. However, it is not possible under Colombian law to grant a security interest over a concession or a permit. Some structures try to go around this limitation by conditionally assigning to the lenders concession agreements or off-take contracts. Nonetheless, these assignments always require the consent of the governmental entity involved and such entity will look into the assignee's capabilities and expertise.

There are no specific limitations on granting security interests (pledges or mortgages) over assets used for the rendering of a public service or that are specifically utilised in an activity of public interest. However, in the context of an insolvency of a public utility project company, the Superintendency of Public Utilities (*Superintendencia de Servicios Públicos*) has the right to initiate proceedings to take possession (*toma de posesión*) of the project company and its assets in order to guarantee the continuity of the public service. This could ultimately entail the discharge by operation of law of liens granted as a result of the initiation of such proceedings, leaving the lenders with no collateral. However, this is a very extreme scenario.

It is also customary for lenders to take pledges over the equity interests of the project company and in a regular scenario these can be enforced. However, in the context of an insolvency of a public utility company (*Empresa de Servicios Públicos* (ESP)), the Superintendency of Public Utilities can take the possession in order to take over the management of the project company and in that process it may order the dilution of the shareholders of the project company by reducing the par value of the shares, making the collateral decline in value dramatically.

14. What costs are associated with registering collateral security interests in your jurisdiction? Are such costs determined with respect to the obligations secured or the approximate value of the property?

As a general rule, the costs applicable to the registration of collateral security interests are determined with respect to the value assigned to the obligation secured, not with respect to the approximate value of the property. For the registration of mortgages the tax rate is currently established at 1 per cent of the obligation secured, while an additional 0.5 per cent must be paid as a filing fee for the registry (*registro de instrumentos públicos*), and lastly a fixed cost, while minor, must be paid for the tradition certificate of the real estate property. On the other hand, pledges over certain assets and commercial establishments, reg-

istered through the Chamber of Commerce in the mercantile registry (*registro mercantil*), are normally subject to a 0.7 per cent tax over the value of the obligation secured, plus a small filing fee.

15. Does your jurisdiction require lenders to stipulate the value of their collateral security in the relevant security documents? If so, what happens if at the time of foreclosure the property is worth more? Must such amount be stated in local currency even if the financing is in a foreign currency? If so, what protections may be implemented against devaluation of the local currency?

As a general rule, lenders are not required to stipulate the value of their collateral security in the relevant security documents, regardless of whether they are pledges or mortgages; the fluctuation in the property's value is of no consequence. As stated above, what must be stipulated is the value of the obligation secured, and such value may be indicated in a foreign currency.

16. Does each item of collateral need to be individually identified in the security document to grant a valid security interest in that item? Or would a general description of the types of collateral covered be sufficient?

As a general rule, each item of collateral must be individually identified (ie, a given piece of equipment) by means of its model and serial number, especially in respect to pledges without tenancy. However, it must be noted that in the case of a pledge over a commercial establishment (ie, a business unit) there is no need to specify each item of collateral.

17. How do lenders satisfy themselves with respect to the absence of other liens on their collateral? Are liens centrally recorded or searchable? May contractors file mechanic liens? If so, are lien waivers enforceable?

In order to satisfy themselves with respect to the absence of other liens on their collateral, mortgages on real estate are centrally recorded and searchable in the local *Oficina de Registro de Instrumentos Públicos* mentioned in question 9. In the case of pledges over movable assets and commercial establishments, these are recorded in the mercantile registry of the domicile where the collateral is located. With respect to pledges over shares, these are recorded in the stock ledger of the respective company. Recently, title insurance has started to become available.

18. What steps must a lender take to foreclose on a collateral security interest in your jurisdiction? How does a beneficiary of a guarantee provided by a local entity or granted under local law enforce such guarantee? Are any self-help remedies available? Is a public or private sale permissible or required? Is a judicial sale necessary? May lenders participate as buyers in any such sale, including by bidding the debt owed by the project company to them in lieu of cash? May any such sale be for foreign currency? Is foreclosure on a pledge of the ownership interests of the project company more efficient and less time-consuming than a foreclosure on individual assets of the project company?

When a given lender has a collateral security interest granted under local law, such interest is enforced by means of an executive proceeding (*proceso ejecutivo*), in which the lender is entitled to foreclose on the assets. On the other hand, to take the collateral in satisfaction of the debt is not a possibility and self-help remedies are not available in Colombia. As part of such proceedings, and provided that no pleas are presented opposing the request, the judge is required by law to order the appraisal and sale of the assets in public judicial auction. The lenders may participate in such a sale, including by bidding the debt owed by

the project company to them in lieu of cash. There is no difference, in terms of efficiency, between foreclosure over ownership interests and foreclosure over individual assets of the project company.

19. What creditors would enjoy a higher statutory priority with respect to the collateral security than the lenders?

There are several creditors that would enjoy a higher statutory priority in respect of the collateral security than the lenders. The ones that are worth mentioning are employees to whom salaries, severance payments or indemnities are owed, as well as creditors whose credit relates to alimony; court costs; and fiscal credit related to taxes.

20. Would the lenders incur any liabilities upon foreclosure relating to project assets?

A distinction must be made between the consequences of the sole seizure of project assets and the consequences of foreclosure of said assets. In the first place, lenders do not incur any liabilities upon the mere seizure of the assets. In the second place, as a general rule, lenders do not incur any liabilities upon foreclosure relating to project assets, as opposed to equity. However, there are two exceptions that must be mentioned: the first one of which relates to the taking of pledges over commercial establishments, described in question 13. In the second place, when acquiring real estate assets, liabilities incurred by the purchaser would emerge out of proper obligations such as easements over the given asset. In relation to the answer to the following question, specific assets dedicated to the public service provided (such as a power generator) must be either sold to another ESP, or operated. If kept inactive, it is likely that it will be subject to compulsory taking by the government (*toma de posesión*).

21. What legal restrictions exist with respect to the operation of the project post-foreclosure by the lenders or their designee?

Legal restrictions to the operation of the project post-foreclosure exist whenever the project is related to providing a public service, which in Colombia can be said of most activities that are subject to project financing. As mentioned above, ESPs in Colombia are regulated under Law 142 of 1994. While restrictions on foreign ownership or operation are few (as mentioned in answer to question 5), TV-related operations have a restriction on the percentage owned by foreign investors. On the other hand, a lender can sell the shares of a project company providing a public service without government authorisation.

22. Would the agreement by a project company's equity holders to make capital contributions to the project company be enforceable by the lenders in bankruptcy proceedings of the project company?

Under the ordinary Colombian regime for insolvency, such an agreement would be enforceable. However, in respect of ESPs, a different regime for insolvency applies (the *toma de posesión* mentioned above). In such a scenario, the Superintendency steps into the project company by making capital contributions and diluting the shareholders. It even reduces the par value of the share. It is doubtful that such an agreement would be enforceable in such a scenario. On the other hand, all capitalisations made to a project company under insolvency proceedings substantially upgrade the creditor priority of whoever makes the capitalisation.

23. Can a project company organised under local laws validly submit to the jurisdiction of a foreign court?

Colombia does not have a conflict of law or conflict of jurisdiction statute that clearly addresses this issue. The matter has to be decided under the old rules of the Civil Code and the rules of the Code of Civil procedure.

A general interpretation of the available rules may lead to the conclusion that Colombian companies can validly submit to the jurisdiction of a foreign court when there is a relevant international element in the relationship. This, however, does not preclude Colombian courts from assuming jurisdiction if they consider that by law it has been entrusted to them. Even though Colombian law does not forbid Colombian companies to consent to a foreign jurisdiction when there is a relevant international element in the relationship, it does establish a rule whereby nobody can waive the jurisdiction of a Colombian court. This means that the consent to the jurisdiction of a foreign court could lead to parallel proceedings if the same subject matter, between the same parties, were to be discussed before a Colombian court.

Finally, it should be noted that Colombian law provides for a rule whereby the recognition of a foreign judgment should be denied if a Colombian court has decided or is in the process of adjudicating an identical controversy between the same parties or if the matter is subject to the exclusive jurisdiction of Colombian courts.

24. Is service of process by mail recognised in your jurisdiction or would the project company need to appoint a process agent?

Colombian law establishes clear rules for service of process, which must be followed by Colombian courts. These rules include service of process by mail (article 320 of the Code of Civil Procedure). In the case of foreign courts performing service of process on Colombian territory, it has been argued that letters rogatory are required. This can be a difficult, cumbersome proceeding. From the standpoint of service of a Colombian company, being performed by a court of the United States, the most efficient mechanism for service is certainly the appointment of a process agent.

25. Are foreign judgments and arbitral awards enforceable in your jurisdiction? If so, does any process of ratification or additional review need to be carried out in the local court system as a condition to such enforcement? Do sovereign or quasi-sovereign entities have the capacity to arbitrate as a matter of local law?

Foreign judgments are enforceable under articles 693-695 of the Code of Civil Procedure. Recognition is granted if the foreign judgment complies with the legal requirements established in article 694 of the Code of Civil Procedure, and on the basis of reciprocity, which can be either diplomatic (by treaty) or legislative (by proving that the state whose court rendered the judgment affords judgments rendered by Colombian courts a treatment that is no less favourable than the treatment being requested of the foreign judgment in Colombia).

In what refers to awards, Colombia is party to a number of conventions related to arbitration:

- the New York Convention, which was enacted first through Law 37/79 and later with Law 39/90;
- the Panama Convention, adopted through Law 44/86;
- the 1940 Montevideo Treaty on International Procedural Law;
- the 1979 Montevideo Convention, approved by the Congress through Law 16/81; and
- the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) adopted with Law 267/95.

As a general rule, foreign awards (those issued in a country other than Colombia) are recognised under the New York Convention of 1958 by the Colombian Supreme Court. The Supreme Court, however, has held that a New York

Convention analysis must be coupled with an analysis under Code of Civil Procedure rules. Recognition proceedings may be lengthy in Colombia, even in spite of the fact that the ruling by the Supreme Court is the only requirement for recognition. Once recognised, the award may be enforced through the local court system, as any domestic award.

Finally, local law establishes no limitations for sovereign or quasi-sovereign entities to arbitrate, from a subjective standpoint. There exists, however, a limitation for the arbitration of issues dealing with administrative acts, as a matter of subject matter jurisdiction. Since sovereign or quasi-sovereign entities in Colombia tend to issue administrative acts in different scenarios, including contractual ones, this can become a barrier to arbitration.

26. Is subordination of debt recognised under the law of your jurisdiction?

Subordination of debt will not be recognised by a Colombian court, due to the imperative character of the provisions under the Civil Code regarding debtor categories. Moreover, the Colombian regime of insolvency makes direct reference to the statutory priorities it dictates. Senior and subordinated lenders will in consequence be paid on a *pari passu* basis (provided that they belong to the same statutory category and that neither possesses a security), leaving the senior lenders to collect against the subordinated lenders under the terms of the subordination agreement in another court.

Please note, however, that Law 1116 (Insolvency Law) contemplates a statutory subordination in related party transactions. Hence, in an insolvency proceeding, sums owed by the debtor in possession to a related creditor (ie, an affiliate controlled by the debtor, an affiliate that controls the debtor or an affiliate that is under common control with the debtor) are considered to be legally deferred credits and are payable in the last order of priority, once all other unsecured unsubordinated credits are paid.

27. Are there laws in your jurisdiction that regulate how tariffs payable to a service provider must be calculated?

Law 142 of 1994, which deals with public utilities, establishes the manner in which tariffs payable to the service provider must be calculated. That legislation grants authority to various governmental commissions to define the formulas for tariff calculation according to the respective public utility (to regulate energy and gas, water or communications).

28. Do environmental, tax or other liabilities relating to the project extend beyond the project company to the direct or indirect owners of the project company or to the lenders?

As a general rule, direct or indirect owners of the project company are not liable beyond their contributions of capital. However, for companies created under one of the types of *sociedades de personas* (similar to partnerships under United States law), it is legally established that the owners are liable for both tax and labour debts that the company is unable to pay. In addition, the situation regarding responsibility of the parent company in insolvency proceedings, addressed in question 4, must be taken into consideration.

29. Are there any limitations with respect to importation of equipment or materials to be used in the project?

The importation of equipment and materials to be used in the project is normally channelled through the modality of temporary imports, which are either short-term or long-term. Both kinds of temporary imports may benefit from VAT exclusion provided for in article 428(e) of the Colombian Tax Statute, regarding the temporary importation of heavy machinery (and its accessory or complementary parts) for what is defined as basic industries (mining, oil and gas, energy generation and transmission, among others).

Short-term temporary importation is fully exempt from paying both cus-

toms and VAT, and the equipment or materials are granted a period of up to nine months in the country under such category. When that period expires, there are three possible scenarios: the equipment or materials are modified into long-term temporary imports, in which case they can last up to five years in the country (minus the time already spent in the country), under the conditions that will be explained below; they are modified into ordinary imports, with the consequence of having to pay Custom taxes (both duties and VAT); or they are re-exported. On the other hand, a given product of heavy machinery for basic industries, declared as a long-term temporary import is exempt from paying taxes during a period of up to five years, and has the possibility of paying duties in biannual instalments. When such term ends, the importer has the possibility of declaring the product as an ordinary importation without having to repay duties. Notwithstanding the fact that VAT tax has to be paid in these circumstances, the possibility exists of entering into agreements with the tax authorities in order to pay the VAT in instalments. The importer may also choose to re-export the product, in which case it would have paid duties, but not VAT, during its period in Colombia.

Concerning long-term temporary imports, there is a further possibility to be mentioned. It consists in entering into leasing agreements for the product under the figure of long-term temporary importation. However, being under a leasing agreement, the term during which the product has such status is equal to the period that the contract is stipulated to last, and not limited to five years. In such a situation, while duties still have to be paid in full at the end of the first five years, the biannual instalments are calculated as a portion of the period the contract will last, rendering such instalments considerably lower.

While that situation applies to importation of heavy machinery regarding basic industries, a further specific analysis should be made on two particular aspects by anyone wishing to import equipment or materials for a project in Colombia. The first one relates to the agreements (free trade or other sorts) entered into by Colombia with other countries, on account of the particular advantages established for equipment or materials which have their origin on those countries. In the second place, an analysis must be made of the specific legislation within the basic industries, for they include also in particular circumstances of exemption from duties.

Finally, there is a tax deduction equivalent to 30 per cent of the value of investments made in the acquisition of real productive fixed assets.

30. What land issues might there be in connection with a project financing in your jurisdiction? Are there any restrictions on foreigners' ownership of land or natural resources? How difficult is it to obtain rights of way?

In Colombia there are no restrictions on foreigners' ownership of land. However, it is constitutionally established that natural resources are property of the state, and in consequence their exploitation must be authorised by the government. The obtaining of rights of way (easements, in general) is not difficult, due to the legal status of activities of public interest that mining and oil and gas activities have. For these particular circumstances, the applicable legal regime enables contractors to have access to particularly quick proceedings in order to be granted easements or even the expropriation of land when needed.

31. Please describe any other relevant legal considerations relating to project finance in your jurisdiction.

Not applicable.

32. Has specific PPP-enabling legislation been passed in your jurisdiction? If so, and if applicable, has it been passed at the federal, state or municipal level and is it sector-specific?

As stated in the answer to the following question, laws 80 of 1993 and 1150 of 2007, as well as the State Budget Statute (*Estatuto Orgánico del Presupuesto*) are applicable to PPPs. CONPES documents 3535 and 3538 of 2008, (state planning

documents) are also relevant. However, decree 4533 of 2008 is the sole specific PPP-enabling legislation enacted in Colombia, and resolutions 167 and 2894 of 2009 of the National Institute for Concessions (INCO) develop the content of such decree; it is not sector specific and was passed at a national level.

33. What legal limitations, if any, are there on PPP transactions? Are there any limitations on the contracting power of the state, the state's ability to incur long-term fiscal obligations, or the extent to which certain government functions may be performed by the private sector?

Rather than limitations on its contracting power, the state is subject to comply with the procedural requirements set forth in Laws 80 of 1993 and 1150 of 2007. On the other hand, the state may incur long-term fiscal obligations pending approval by the Council for Fiscal Policy (CONFIS), provided that it has complied with requirements set forth in articles 23 and 24 of the State Budget Statute.

34. What are the most significant PPP transactions that have been completed to date?

It must be emphasised that PPP transactions (in the strict sense of the term, or that which has its origin in private initiative) are a novelty in Colombia. In that sense, port-related projects such as the Port Societies of Cartagena and Santa Marta, and the Troncal Carbonera highway (while not fully completed) are the most significant PPP transactions.

On the other hand, under a broader definition of the term, the concession system in Colombia does have an extended use, particularly in transport infrastructure, where it has been used in 25 highway projects and 17 airports up to this date. Among the many projects, the recently awarded concession of Ruta del Sol stands out as one of the most important. The main projects to be initiated in 2011 include renewing the airports of four department capitals (the cities of Florencia, Neiva, Quibdó and Puerto Carreño), as well as the construction or expansion of eight different ports. In the four year period of the present government, which ends in 2014, it is planning to spend over 30 trillion pesos (approximately US\$17bn) in infrastructure.

This system, however, has been recognised by the government as one in need of substantial reform. Specifically, government officials have pointed to the stages of the project in which public funds are disbursed, because contractors are currently receiving a huge percentage of the total public funding, immediately after the construction begins. The government is seeking to reform such practice, disbursing such funds only after construction of the project has ended and supply of the service is guaranteed. On the other hand, the governmental institution in charge concessions is in the process of being transformed as well.

In the oil & gas sector it is important to mention the developments in oil transportation and several projects that are being planned to be under construction very soon. The Oleoducto del Bicentenario (an approximately 1000km, US\$5bn pipeline) is already in structuring stages. Other expansions such as Ocesa's Open Season, the Oleoducto del Pacífico and the Ronda de Capacidad en Firme of Ecopetrol, promise to expand Colombia's lagging oil transport system.

Finally, it is important to note that the disastrous consequences of this year's winter in Colombia have led to the allocation of very large sums of money in order to face the crisis. Only regarding road infrastructure, the government has had to repair approximately fifty important segments. These events have also provoked the postponement of many of the major infrastructure projects mentioned above, which have been announced to be assigned in 2012, such as the Autopistas de la Montaña, a group of projects for highways in the department of Antioquia.

35. What do you see as the primary impediments and drivers, both legal and commercial, to the development of PPP in your jurisdiction?

The excessive formalism of state contract legislation under Colombian law is the greatest impediment to the development of PPP. Parties interested in operating under such a system, bound by the procedural requirements mentioned above, are usually subject to a series of obstacles during the process such as the provisional halting of the adjudication process, or rejection of papers presented on account of non-compliance with the smallest of technicalities.

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