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Argentina Creates New Public Private Partnership Regime Aimed at Promoting Infrastructure Development

On November 16, 2016, the Argentine Congress passed new legislation on Public-Private Partnerships (PPP) aimed at promoting foreign direct investment and allowing a balanced and predictable cooperation between the public and private sectors in a wide variety of areas, including infrastructure.

The new PPP regime is built upon regulatory frameworks used in other Latin American countries, such as Chile, Colombia, Mexico, Peru and Uruguay, and was discussed with local business associations, multilateral entities and law firms.

The new PPP Act provides general guiding principles and certain mandatory terms that must be included in any PPP contract. It is expected that the Executive Branch and other applicable government bodies and entities will subsequently issue the implementing regulation as well as project-specific tender terms.

The main features of the new PPP regime are as follows:

- ***Broad purpose.***
  - Government bodies and entities may enter into PPP contracts with private parties in connection with the development of projects relating to infrastructure, housing, services, production, applied research and technological innovation.
  - Eligible activities include the design, construction, expansion, improvement, exploitation, operation and financing of projects, and the supply of equipment or other goods.

- ***Flexible legal structure.***
  - PPPs may be structured through either incorporated or unincorporated joint ventures, and the government is allowed to have equity stakes in any special purpose vehicles so created.
  - Special purpose vehicles and financial trusts channeling the PPP will be permitted to seek financing through public offerings of securities.

- ***Extended term.***

  PPP contracts may last up to 35 years, including any extensions of the initial term.

- ***Enhanced protection to private contractors.***

  The PPP regime is intended to limit government rights in connection with public contracting and to enhance protection to developers and lenders.

  Among others, the PPP regime contemplates the following protections:

  - The government power to unilaterally amend the project terms is limited to 20% of the total contract value.
  - The contracting party must receive adequate compensation for any unilateral variation to preserve the economic balance of the original contract and ensure bankability of the project.
  - The PPP contract may allocate risks between the parties, including risks arising from government action, force majeure and early termination.
  - The PPP contract may also ensure a minimum guaranteed income to the contractor.

- The government may not terminate the contract for illegality without court approval.
- Private contractors may assign all or part of the PPP contract to eligible third parties once a 20% of the original term has elapsed or 20% of the committed investment has been made.

- ***Exclusion from the current public procurement framework.***
    - The PPP regime is designed to be an alternative to existing public procurement regimes.
    - PPP contracts are excluded from the application of certain laws and regulations that grant to government parties, special prerogatives that are not generally available to other parties (such as the Public Works Act No. 13,064, the Concession of Public Works Act No. 17,520 and the General Public Procurement Regime governed by Decree 1023/2001).
    - PPP contracts are also expressly excluded from the application of legal provisions prohibiting indexation of debts and permitting cancellation with local currency of foreign currency-denominated obligations.
    - The liability of the parties to a PPP contract will be governed by the terms and conditions agreed between them and by the Argentine Civil and Commercial Code.

- ***Full compensation for early termination.***
    - In case of early termination, the PPP regime provides that the contractor must receive, prior to any such early termination, full compensation as may be determined through the valuation methodology and determination procedures set forth in the implementing regulation and applicable tender terms.
    - The compensation may not be lower than the amount of the unamortized portion of investment in the project and must ensure the repayment of any third-party financing.
    - PPP contracts are expressly excluded from all legislation restricting government liability or excluding compensation for lost profits in the event of early termination on public interest grounds.

- ***Transparent and fair contractor's selection process.***
    - The PPP regime requires a transparent, public, competitive and fair procurement process.
    - Accordingly, government bodies and entities must follow a public tender process, domestic or international as appropriate, to select the private counterparties to a PPP contract.
    - The PPP regime empowers the Executive Branch to follow a competitive dialogue mechanism, allowing pre-qualified contractors to participate and collaborate in the drafting of the tender terms. Such novel mechanism has already been used in the recent renewable energy tender.
    - The government must promote the participation of small and medium-sized companies and national industry and work. In addition, PPP contracts must ensure that one third of the goods and services supplied to a PPP project are Argentine sourced. The Executive Branch may, however, grant exemptions on a case by case basis.

- ***Broad choice of financing credit enhancement structures.***
    - PPP projects are expected to be financed through a combination of government budget allocations, development agency loans, and project and bank financing.
    - To improve bankability, the PPP regime allows, with prior congressional approval, the allocation or transfer of assets, funds and tax revenues (including to newly-created or existing trusts) to finance or secure payment obligations under the PPP contracts.
    - The new regime also permits the issuance or contracting of guarantees or other credit support mechanisms, the granting of step-in rights to lenders, and the creation of any type of security interest.

- ***Environmental preservation.***

  PPP projects must be structured with a view to promoting the preservation and protection of the environment. As a result, the Ministry of Environmental and Sustainable Development must be consulted prior to the approval of any PPP project.

- ***Arbitration as a dispute resolution mechanism.***

  - Any disputes arising from PPP agreements may be settled through domestic or international arbitration; however, international arbitration before foreign arbitral tribunals may only be agreed upon with prior approval by the Executive Branch and subsequent notice to Congress.
  - In no event may the local courts revise the findings of an arbitral tribunal.
  - If so stipulated under the applicable tender terms, the government party must continue making payments while the dispute is ongoing, but the funds subject to dispute must be deposited in escrow until the dispute is finally resolved.
  - Government oversight.
  - The PPP Act creates a PPP unit within the Executive Branch that will be in charge of providing assistance to the Executive Branch in the development and regulation of PPP projects and disseminating information on PPP tenders and contracts. The PPP unit may also assist government procurement agencies in the design and structuring of PPP projects.
  - In addition, the PPP Act creates a specialized congressional committee to monitor performance of PPP projects and compliance with the PPP regime.

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It remains to be seen whether the new regime will be successful to attract and channel private investment in public infrastructure. Although much of the specifics are left to the implementing regulation and there is significant room for improvement, this new piece of legislation is undoubtedly positive and constitutes a clear signal that Argentina is open for business.

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