THE PROJECTS AND CONSTRUCTION REVIEW

NINTH EDITION

Editor
Júlio César Bueno

THE LAWREVIEWS

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PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey,
est de résister et de réagir contre les vices de son époque.
Michel Villey, *Critique de la pensée juridique modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from new jurisdictions in this edition: Ghana and the Philippines. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors, and their law firms who graciously agreed to participate.

Finally, I dedicate this ninth edition of *The Projects and Construction Review* to a dear friend, the late John (Jack) Bernard Tieder, Jr, who died on 3 December 2017. Jack was the founding partner of Watt, Tieder, Hoffar & Fitzgerald LLP and the Global Construction and Infrastructure Law Alliance. He is much missed and I am most grateful for his friendship, and all his support and guidance during my path as a construction lawyer. He leaves behind a large extended family and many close friends and esteemed associates around the world.

Júlio César Bueno
Pinheiro Neto Advogados, São Paulo
June 2019

A dedication to Jack Tieder (1946-2017)
by Professor Doug Jones AO

Jack Tieder was one of the doyens of the International Construction Bar.

Graduating from John Hopkins University and Syracuse and American University School of Law in 1971, he commenced practice as lawyer with the firm of Lewis Mitchell & Moore where he progressed to the ranks of partnership. In 1978 he was a founding partner of the firm then called Watt Tieder Killian & Hoffar and was the senior partner of the firm now known as Watt Tieder Hoffar & Fitzgerald from March 1978 until his passing.

Over the course of his career he contributed to international construction projects practice through the establishment of project delivery and financing structures that ensured success for many major projects around the world. As counsel in court and arbitration he was formidable.

Jack though was more than an attorney. He was a contributor to legal education around the world and to the development of collegiate practice of construction law in the United States and elsewhere in the world. An example only was his foundation fellowship of the American College of Construction Lawyers.

I knew Jack for many years and his commitment in a variety of ways outside the law to the assistance of young people wanting to make their way in the law and to education of lawyers in parts of the world outside his home country was quite extraordinary. For many years he coached teams at the Willem C Vis Moot and regularly lectured in eastern Europe and Russia to local practitioners to bring to them an international perspective of the practice to which they aspired.

Jack was a runner of some note, who during his life maintained a fitness regime that was the envy of his friends. His expertise in, and love of, beer was legendary.

In recent times, Jack undertook a significant amount of work as an arbitrator and it has been my privilege to sit with him in that role. His experience of practice around the world equipped him well to decide disputes in the international construction context and his capacity for incisively cutting to the chase on the key issues in complex cases was awe-inspiring.

In a case recently concluded I worked with Jack in hearings during the period in which he was undergoing some quite significant medical procedures. His cheerful acceptance of what for many would be regarded as seriously debilitating effects of surgery and other treatment was inspiring to those of us who were working with him. His mind remained sharp until the end and in very recent times his dedication to the conclusion of issues in the case was remarkable, his work insightful and his judgement impeccable. Upon recent news of the return of his illness, he faced the position with courage and amazing good humour.

We have lost a giant of the construction law industry, who will remain a legend to all who knew him.

It has been our privilege to have Jack as a Fellow and mine to have him as a colleague and a friend.

He will be missed by all of us, but not nearly as much as by Rufus and the family. At this time all our thoughts and prayers are with Rufus and the children and grandchildren with whom doubtless the memories of Jack's personality and contribution to their lives will remain strong forever.

Chapter 12

MEXICO

Vanessa Franyutti and Alejandro Alfonso[1]

I INTRODUCTION

Mexico has an infrastructure development strategy sustained by a series of national and specific sector development plans, principally consisting of two official documents issued by the executive branch of Mexico.

First, the National Development Plan (PND), which gathers the strategy, national objectives and priorities for Mexico's sustainable development. Second, the National Infrastructure Programme (PNI), aligned with the PND with a focus on boosting infrastructure development as a strategic measure for improving Mexico's competitiveness, while increasing productivity and creating more and better paid labour opportunities. The PND and the PNI are six-year programmes mandated by each new presidential administration. Mexico held presidential elections in 2018, which resulted in a left-wing party with a populist president taking office. The PND and PNI for the 2019–2024 governing period have not yet been published by the federal government;[2] however, the PNI is expected to establish the strategies and action points to foster sustainable economic growth during a climate of stability within the main infrastructure sectors, namely telecommunications, energy and electricity, hydrocarbon and transport. Further, the PND is expected to put a special emphasis on certain areas: gender equality, non-discrimination and inclusion, the fight against corruption and sustainable social development.[3]

There are different legal schemes for the development of infrastructure projects in the public and private sectors:

a Concessions: mainly used in the transport sector for roads, ports and airports. The private entity is usually selected through a bidding process and is in charge of building, maintaining and operating the facilities. All investment returns are obtained through fees paid by customers.

b Financed public works: widely used in various sectors. The private entity is usually selected through a bidding process, investing and constructing a project for delivery to the public entity in exchange for a consideration equivalent to the total investment plus a margin.

1 Vanessa Franyutti is a partner and Alejandro Alfonso is an associate at Nader, Hayaux y Goebel, SC.

2 Andrés Manuel López Obrador, the president of Mexico, began his administration on 1 December 2018 and it will conclude on 30 September 2024. The National Development Plan [PND] was released at the end of April 2019.

3 For more details of the new PND, see https://www.gob.mx/shcp/prensa/comunicado-no-021-plan-nacional-de-desarrollo-2019-2024.

c Joint ventures: used in a limited manner, mostly in the hydrocarbon sector. A risk-sharing equity investment scheme between a private entity and a public entity.

d Public-private partnership (PPP) contracts: generally used for social infrastructure projects (such as schools, hospitals and prisons) and in the water and transport sectors. A PPP contract is a long-term contract through which a private entity, usually selected through a bidding process, designs, builds, finances, operates and maintains infrastructure for the provision of public services, in exchange for an economic consideration, usually on a fixed basis paid by a public entity, but can also be structured on a mixture of bases whereby the private sector can take some of the demand risk.

In recent years, there has been a notable increase in the number of finance projects developed in Mexico, mainly as a result of the enactment of substantive energy reforms in 2013[4] and the approval of the Public-Private Partnerships Law (the PPP Law) in 2012. Before these reforms, Mexican authorities had to rely primarily on the Public Works and Related Services Law or, for the concessions described above, the specific law applicable to the industry in question.

Although tailor-made legislation and laws that can make bid processes more efficient are still needed to boost infrastructure development in Mexico, the energy and PPP Law reforms, and general open market policies, have helped to reduce the infrastructure gap in the country.

II THE YEAR IN REVIEW

Mexico is one of the few economies that has achieved sustained economic growth in the past 10 years. According to the National Institute of Statistics and Geography, in 2018 the service sector accounted for 66 per cent of gross domestic product (GDP) and employed 62 per cent of the labour force; the industrial sector accounted for 31 per cent of GDP and employed 23.8 per cent of the labour force; and the primary sector accounted for 2.8 per cent of GDP and employed 13.6 per cent of the labour force.

During 2018, Mexico continued to implement the 'structural reforms'[5] that, according to the government, will enhance the country's modernisation effort by increasing productivity, reinforcement and expansion of citizens' rights, and by establishing a democratic regime. The structural reforms have allowed private companies to participate in markets that were traditionally reserved for the public sector, mainly in the energy sector, in particular in hydrocarbon and electricity (including renewable energy), which enabled substantial private investment during 2018 in comparison with previous years and other sectors.

There are currently almost 300 new infrastructure projects, 178 of which are in the execution stage, mainly in the energy, hydrocarbon, social (hospitals, universities, prisons

4 The new administration seems inclined to slow down the effects of the 2013 energy reform; however, to formally do so would require amendment to the Federal Constitution, which, at the time of writing, does not seem to be one of the priorities of the new administration.

5 The structural reforms consist of a series of amendments to the Mexican Constitution and secondary laws implemented between 2012 and 2018 for the energy, antitrust, telecommunications, tax, finance and labour sectors.

and tourism) and communications (bridges and toll roads) sectors. Examples of projects that are currently being considered for development or are under development are outlined in the table below.[6]

Project	Sector	Estimated investment	Stage
Mayan train	Transport	US$7.5 billion	Planning
Cancun-Tulum train	Transport	US$2 billion	Pre-investment
Interconnection of Baja California, Baja California Sur and Sonora Electric System and the National Interconnected System	Transport	US$1.6 billion	Pre-investment
Programme for the development of the Tehuantepec isthmus	Transport	Pending definition	Planning
Dos Bocas Refinery, Tabasco	Hydrocarbon	US$8 billion	Planning
Licence agreement for hydrocarbon exploration in deep waters in the Gulf of Mexico, in a block of 1,285km² for light oil extraction	Hydrocarbon	US$7.424 billion	Execution
Gas pipeline 'Sur de Texas-Tuxpan'	Hydrocarbon	US$2.111 billion	Execution
Photovoltaic power plant in the State of Hidalgo	Electricity	US$3.34 billion	Assignment
CFE interconnection SIN-BCS transmission line	Electricity	US$1,604,964,888	Pre-investment
Photovoltaic power plant in the State of Chihuahua	Electricity	US$581 million	Execution
Multi-modal transfer station, Taxqueña, Mexico City	Social infrastructure	US$265 million	Execution
Papantla prison complex	Social infrastructure	US$191,402,173	Pre-investment
Mazatlán Aquarium	Social infrastructure	US$76.22 million	Execution

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In a public or public-private infrastructure project, a contract or concession is awarded through a bidding process to an entity. Generally, these projects would be structured through the creation of a special purpose vehicle (SPV) in the form of a limited liability company in charge of the contract or concession. If the project falls within the scope of a specific area in which a licence, permit or concession is needed, the ancillary rights may be granted as part of the contract.

The contract will state that the SPV will carry work or provide services to the public entity. Hence, the structure of the contract differ depending on the public needs and the sector involved. For instance, water projects, prisons, hospitals and toll roads would usually involve design-build-operate-transfer structures or operation and maintenance services. Although the enactment of the energy reform was a milestone in Mexican legislation, the hydrocarbon sector still needs further regulation to ensure the bankability of the projects.

The funding of the project will also vary depending on the structure. For example, according to the PPP Law and the PPP Regulations, a PPP project may take the following form, depending on the source of funding:

a pure PPP project: if the funds are obtained solely through budgeting in the federal budget or a public trust known as a national infrastructure fund;

b self-sustainable PPP project: if all the funding and investment is obtained through private resources or end users; and

6 A complete list of infrastructure projects can be found at http://www.proyectosmexico.gob.mx/en/home/.

c combined PPP project: if the above-mentioned funding schemes for pure and self-sustainable projects are combined.

The following funding and financing options are available to long-term PPP projects:

a Federal funds through the Federal Expenditure Budget (PEF): prepared by the Ministry of Finance (executive branch) and approved by the House of Representatives (legislative branch). The PEF is one of the most important public finance documents as it defines the amount, distribution and destination of public resources.

b National Infrastructure Fund: a public entity that supports infrastructure projects by providing non-refundable economic resources, issuing subordinated debt or entering into credit agreements with private developers.[7]

c National development banks (such as Banobras, Bancomext, Nafinsa and FOCIR): usually complement commercial bank funds with applicable financial products for each PPP project.

d Multilateral development banks: Mexico has benefited from the participation of multilateral organisations in infrastructure projects such as the Inter-American Development Bank, the International Finance Corporation and the World Bank. These organisations have supported Mexican infrastructure especially in the water, education, health and transport sectors.

e Commercial banks: there has been active participation from commercial banks worldwide in the funding of infrastructure projects. Thanks to regulatory entities (such as the National Banking and Securities Commission and the Bank of Mexico), the banking system in Mexico can rely on a safe investment environment.

f Investment vehicles:[8] the private sector in Mexico has been increasingly relying on its mature capital market to diversify its debt options and equity portfolio. Market and financial instruments, such as stock exchange certificates, real estate trusts, equity funds and, most recently, energy and infrastructure investment vehicles, have been a viable option for private entities in need of project finance.

ii Documentation

The documentation needed for infrastructure projects is not substantially different from that used worldwide for this type of project, which generally takes the following two forms:

a Project-related documentation: typically consists of a contract between an SPV and a public entity as sponsor; ancillary permits and authorisations; and construction, supply, operation and maintenance services or engineering, procurement and construction agreements entered into by and between the SPV and third parties. The project-related documentation is typically audited by a lender or syndicate of lenders financing the project. Under the public contract, the SPV is usually allowed, subject to certain restrictions, to subcontract services with third parties to fulfil its obligations.

7 More information about the National Infrastructure Fund can be found at http://www.fonadin.gob.mx.

8 More information about investment vehicles can be found at https://www.bmv.com.mx and https://www.gob.mx/cnbv.

b Finance-related documentation: include all documents drawn up by and between an SPV and a lender, such as credit agreements, subordinated or mezzanine loans, escrow agreements, security documents (in many cases consisting of collection rights and cash flows), among others. These documents may be governed by Mexican law or foreign law, while the security package will generally be subject to Mexican law.

Regarding the content of a contract (e.g., a PPP contract), the PPP Law establishes minimum clauses that shall be contemplated, including parties' rights and obligations, characteristics and standards that the construction or services are required to meet, terms and conditions under which the SPV shall guarantee its obligations against its creditors, risk allocation, and the legal regime relating to the assets transferred to the SPV for the development of the project.

iii Delivery methods and standard forms

The most common delivery method for an infrastructure project is the contract itself. Although most government contracts are not standardised, it is common that for similar types of projects, the contracts have similar terms and conditions. Although not standardised, many agencies will usually use the same form of contract for similar projects.

Notwithstanding the foregoing, in many cases, the project is required to go through the following process (summary):

a Registration and prioritisation: projects using federal funds must be registered with the Investment Unit (the administrative office of the Ministry of Finance). The Investment Unit is in charge of verifying the feasibility of a PPP project, considering a value-for-money determination through a public-private comparator.[9]

b Bidding process: there are different types of tenders, depending on the type of project: domestic and international public tenders (national tenders and international tenders under commercial agreements and open international tenders), close tenders and negotiated tenders. The bidding process consists mainly of the following phases: tender guidelines, briefing meetings, proposal submission, opening of proposals, technical and economic assessment, and contract award.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Risk allocation in Mexican projects is generally regulated under each separate contract or concession. The laws will set basic standards in some instances, such as force majeure. Owing to the complex land ownership regulation in Mexico, in the past, the government assumed the risk regarding the acquisition of the lands or easements necessary to develop a project; however, in recent years, supported by reforms, this risk has been allocated in many instances to the SPV.

In the event of force majeure, the basic principle is that no party is liable. However, project requirements may force the parties into agreeing to share the risk; for instance, making no payment or a reduced payment from the sponsor to the developer, with a right

9 Projects sponsored by state-owned production companies are not required to be registered with the Investment Unit.

to terminate by the developer after a certain period of time has elapsed without the force majeure event lifting. The circumstances regarded as force majeure shall be defined within the contract and shall refer to unforeseen events, or foreseeable events that could not have been prevented, such as public riots, strikes, war, insurrection and acts of God.

ii Limitations of liability

Limitations of liability shall be agreed by the sponsor of the project and the SPV. The limitations can vary depending on the entity that may incur liability and the nature of the liability. However, for certain projects (e.g., those relating to healthcare or tourism) it is customary to agree on a maximum liability amount, equal to the annual price of the contract based on the financial model of the project.

iii Political risks

Unlike many decades ago when some activities were state-controlled, Mexico has since made great strides in taking action to diminish political risks. To make the country attractive to both local and foreign investors, law enforcement and respect for human rights has been a priority to secure the rule of law. In this regard, many laws have been enacted and modified to protect human rights against any unlawful government intrusion, mainly property. For instance, most of the legal background for project finance is acknowledged in the Mexican Constitution, to provide investors and private companies with a solid institutional and legal framework to protect their investment.

V SECURITY AND COLLATERAL

A contract shall establish the terms and conditions under which the lenders of the SPV may exercise their step-in rights to temporarily take over the project if the SPV fails to comply with its obligations, or is negligent in complying with its obligations. In such an event, the sponsor under the contract must authorise the execution of the step-in rights.

A typical security and collateral package to guarantee financing agreements under a Mexican contract consists of the following:

a pledges for the SPV's shares; and

b formation of a management and payment trust agreement to which the SPV and its shareholders (as applicable) would contribute, among other things, shares of the SPV and any collection rights under the contract. Through this type of trust, agreement funds and collections would flow through a defined waterfall, and different accounts are clearly defined, segregated and identified within the trust in such a way that the lender receives payment first from the project income generated by the project-financed asset.

It is common for a lender to enter into direct agreements with subcontractors under an infrastructure contract to facilitate the execution of the agreed step-in rights of the lender.

VI BONDS AND INSURANCE

The guarantees normally required for infrastructure projects are typical in other parts of the world, such as Spain. For construction services, a performance guarantee is customary (the amount ranges between 10 per cent and 25 per cent of the total construction and equipment value). Bonds and letters of credit are the most common guarantee instruments.

Before entering into a contract, an SPV usually hires a third party insurance specialist to investigate and assess the risks that may be associated with the project during its development. This assessment will help to determine the insurance needed, which, as a minimum, will cover the final users of the infrastructure, the infrastructure itself, the assets used to provide the service and third-party liabilities.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

Security interests can generally be enforced when a secured claim is due. Although there might be special procedures available for lenders to enforce security interests, they can be enforced in different ways depending on the security (contractual foreclosure of the title, execution of pledge assets, public auction, etc.).

Bankruptcy under Mexican law is divided into three stages: insolvency, reconciliation and bankruptcy. During the first stage, a judge appoints a visitor who renders an expert opinion on the company's finances. The objective of the second stage is to reach an agreement and avoid declaring bankruptcy. If this is achieved, the parties will sign an agreement; if not, the judge will declare bankruptcy.[10]

Commercial insolvency, bankruptcy (either voluntary or involuntary), liquidation, dissolution or similar relief under applicable law would typically be considered a breach of contract by the developer and would give the sponsor of the project or the lender under the financing documents grounds for termination of the contract without the need of a legal process.

Notwithstanding the foregoing, some security interests (such as lender's step-in rights) can be enforced outside commercial insolvency or bankruptcy procedures.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

The absence of a correct permit or licence will result in early termination of a project. Depending on the contract, the SPV and the sponsor may share the burden of obtaining the necessary permits and licences.

Among others, the following are required for a project development:

a concession title for the use and exploitation of a public domain asset;
b construction permits;
c land-use permits, which are granted by both federal and state authorities;

10 Rojas Vértiz, Rosa, 'El nuevo concurso mercantil en México' (2002), Boletín Mexicano de Derecho Comparado (105), Instituto de Investigaciones Jurídicas. Available at https://revistas.juridicas.unam.mx/index.php/derecho-comparado/article/view/3742/4618.

d environmental impact authorisation issued by the Ministry of Natural Resources. In this important document, certain environmental conditions are established to develop the work and activities based on the effects that the project may have on the ecosystem;
e clearance from the National Institute of Anthropology and History, which conducts studies to determine whether there are archaeological findings on the site designated for the project; and
f for electricity projects, an authorisation from the Energy Regulatory Commission or the National Energy Control Centre.

ii Equator Principles

Some financial entities require, as a condition within financing documents, that the parties of a contract, and the proposed project, observe and comply with the provisions of the Equator Principles. The Equator Principles are mandatory enforcement provisions for financial institutions that have voluntarily adopted them.[11]

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPP contracts have become important for project finance in Mexico and will most likely continue to be important in the coming years. Most of the PPP projects thus far have been developed by the federal government under the PPP Law.

PPP projects can be carried out in Mexico by the following: entities of the Federal Public Administration; federal public trusts not considered as state-owned entities; federal entities with constitutional autonomy; and federal entities, municipalities and other public entities with federal resources.

PPP projects are not subject to procurement laws but have their own procurement process and laws. Observance of the PPP Law is optional and other federal laws may apply. The PPP Law contemplates a relatively new contractual scheme known as 'unsolicited proposals', through which the private sector may reach out to the government to propose the development of a new infrastructure project through a PPP scheme.

Currently there are over 36 PPP projects under development, involving a variety of sectors, including water and environment, transport, telecommunications and social infrastructure. Some of the most significant are in the following table:

Project	Sector	Estimated investment	Type of contract
Las Varas–Puerto Vallarta highway section	Transport	US$360,796,298	Federal PPP
Waste water treatment plants in the State of Mexico and Mexico City	Water	US$47.5 million	Federal PPP
General Hospital in Tlahuac, Mexico City	Healthcare	US$149.18 million	Federal PPP
Desalination plant in Playas de Rosarito, State of Baja Californa	Water	US$453,644,113	State PPP
Nichupte Vehicular Bridge	Transport	US$200 million	State PPP

11 See https://equator-principles.com/about/.

ii Public procurement

The Public Works and Related Services Law governs the awarding of public procurement agreements. Article 134 of the Mexican Constitution states the fundamental principles for the administration of public economic resources: efficiency, effectiveness, economy, transparency and honesty. As a general rule, public entities are obliged to select a contractor through a tender process (with the exception of those expressly determined by law). The tender process for public procurement is substantially similar to that described in Section III.iii, point (b).

Although PPP projects have become a vitally important part of the project finance sector, public procurement continues to be a significant tool in the achievement of infrastructure projects for Mexico and, considering the new administration's public policy, will probably grow in number in comparison with other types of infrastructure contracts.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Many restrictions regarding foreign investments have been eliminated over the years, with the aim of attracting investment into the country and increasing economic competition. Currently, according to Article 6 of the Foreign Investment Law, the following activities are exclusive to Mexicans or Mexican entities with a foreigners exclusion clause: national land transport of passengers, tourists and cargo, excluding courier services; development banking institutions, under the terms of the applicable law; and the rendering of professional and technical services expressly indicated by the applicable law.

The following restrictions are applicable to foreigners wishing to participate in certain activities or companies:

a Maximum foreign investment permitted: 10 per cent. Applies to production cooperative societies.

b Maximum foreign investment permitted: 49 per cent. Applies to:
- manufacture and commercialisation of explosives, firearms, cartridges, ammunition and fireworks, not including the acquisition and use of explosives for industrial and extractive activities, or the development of explosive mixtures for the consumption of said activities;
- printing and publication of newspapers for exclusive circulation in the national territory;
- series 'T' shares of companies that own agricultural, livestock and forestry land;
- fishing in freshwater, coastal waters and in exclusive economic zones, excluding aquaculture;
- integral port administration;
- port services for piloting ships to carry out inland navigation operations, in accordance with the applicable law;
- shipping companies dedicated to the commercial exploitation of vessels for inland navigation and cabotage, with the exception of tourist cruises and the exploitation of dredges and naval artefacts for the construction, conservation and operation of ports;
- supply of fuel and lubricants for boats, aircraft and rail equipment;
- broadcasting. Within the limits of foreign investment, maximum investments will be tailored to an investor nationality basis considering reciprocity agreements with the corresponding country; and
- certain air transport services.

According to Article 8 of the Foreign Investment Law, special authorisation is needed for a foreigner to have a participation of more than 49 per cent in the following activities and companies:

a port services for vessels to carry out inland navigation operations, such as towing, and rope lashing;

b shipping companies dedicated to the exploitation of vessels exclusively in high altitude traffic;

c companies licensed to operate commercial air strips;

d private services for preschool, primary, secondary, mid-high, higher and combined education;

e legal services; and

f construction and operation of public railways, and public rail transport services.

Regarding the removal of profits and investments, the Foreign Exchange Commission, formed by officials from the Ministry of Finance and the Bank of Mexico, is responsible for foreign exchange policy. At the end of 1994, the Commission determined that the exchange rate would be determined by market forces (floating exchange rate and free float regime).[12] Although the federal government implemented a plan for Mexican companies to repatriate foreign earnings in 2017, there is currently no programme that would facilitate this under Mexican law.

XI DISPUTE RESOLUTION

i Special jurisdiction

There are no specialist courts in Mexico to which project finance transaction disputes can be submitted. It is customary for parties to submit any dispute arising from a contract to which Mexican law applies to the federal courts in Mexico City. However, this standard process may be affected by several variables, such as the location of the project and the parties involved. Some PPP contracts contemplate a previous court dispute resolution consisting of an expert committee to which the parties can submit the dispute and even stipulate that the committee's decision is binding on the parties. In any case, the parties may agree on the dispute resolution process in the corresponding contract.

ii Arbitration and settlement

Under certain contracts, parties may agree to go before the Ministry of Public Function (comptroller) to file a conciliation process regarding dispute resolution under the contract. If no agreement is reached through this conciliation process, parties may agree to submit the dispute to arbitration, which must be governed by Mexican law because in project finance transactions, one of the parties is a public entity.

Dispute resolution with lenders may be submitted to arbitration, governed by arbitration rules (International Chamber of Commerce rules are customary).

12 More information on currency controls can be found at www.banxico.org.mx/portal-mercado-cambiario/foreign-exchange-markets--exc.html.

XII OUTLOOK AND CONCLUSIONS

Although there is still a lot to be done to modernise Mexico's legislation, there is little doubt that progress has been made during the past 18 years in attracting national and foreign investment in major infrastructure projects. The enactment of the PPP Law in 2012 and the energy reform in 2013 represent a milestone for project finance transactions. Private entities have been given greater powers on decisions, while the public sector has been able to receive better and more economically efficient design, construction, operation and maintenance proposals. In addition, PPP projects are a more flexible scheme for the government as they do not necessarily involve public resources. PPPs will continue to be relevant in the country's projects and infrastructure scenes; however, the current administration's policy against corruption and in favour of economic efficiency will result in a higher level of scrutiny by the authorities and a conservative and cautious use of PPP structures with an increase in public procurement.

On the energy hydrocarbon front, private projects in the renewable energy and midstream sector continue to be developed. However, the government has recently cancelled auctions for the purchase of energy and has emphasised that it will strengthen the structure and market participation by both Pemex (Mexican Petroleum) and the CFE (the federal electricity commission). It is therefore debatable whether private investment in these fields will continue to grow at the same pace.

The new federal administration is expected to implement public policies based on anticorruption, social responsibility and gender equality; however, there is uncertainty stemming from the investment market and credit rating agencies on the government's ability to adopt fiscal policies to achieve an equilibrium between revenue and expenditure. For the moment, it is hard to tell whether the number of project finance transactions with public investment will continue to increase as was seen between 2012 and 2018, or if the focus will be on specific identified government projects.

Appendix 1

ABOUT THE AUTHORS

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Vanessa Franyutti specialises in real estate finance and investment, projects and project finance, energy, structured finance, financing of public entities and M&A. She has particularly strong experience in financing and investments in the hospitality sector as part of a wide real estate practice that also covers the retail, residential and industrial markets. Her hospitality work includes advising on investments in hotels, mega-developments, fractional and timeshare regimes, and their related financing.

Vanessa is also an expert in project finance and public-private partnerships, including energy and infrastructure projects. She was instrumental in implementing the PPP schemes in Mexico, advising both local governments and the federal government on the structuring, bidding and implementation of the first PPS projects, and has since been involved in major hospital, road, water and prison PPP projects. She has also advised clients on the preparation of unsolicited proposals and bids under the Mexican PPP law.

Vanessa's international experience is substantial. She regularly advises multinational and national clients, particularly major hotel, tourism and leisure groups, on real estate investments and development in Mexico, as well as in forming bidding consortiums and other aspects of infrastructure and energy projects in Mexico. She also advises financial institutions participating in tourism, energy and infrastructure.

Vanessa is ranked in Band 1 in projects and in Band 2 in real estate by *Chambers Latin America*, in which she has been described as a key partner who, according to clients, is 'a great negotiator who really knows how to communicate information'. Vanessa obtained her LLM from the University of Chicago Law School, having graduated as an attorney from the Autonomous Technological Institute of Mexico with honours. She is fluent in English.

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Alejandro Alfonso's practice focuses on the structuring and financing of infrastructure and energy projects, government procurement, public-private partnerships, real estate finance and investment and related corporate matters, including joint ventures, mergers and acquisitions.

He has represented clients from Mexico and Latin America in a wide range of sectors, including water projects, toll roads, oil and gas, renewable energy, social and cultural infrastructure, in which he has advised financial institutions, government entities, state governments, national and multinational companies and private equity funds.

Alejandro graduated as an attorney at law from the Ibero-American University (2012) and received a master's degree in government and public policies from the Panamerican University (2015) and a master's degree in constitutional law from the Centre for Political and Constitutional Studies in Madrid, Spain (2017).

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