

The decline of the Public-Private Partnership (PPP) regime in Colombia



El decaimiento del régimen de las Asociaciones Público-Privadas (APP) en Colombia

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Received: January 04, 2024

Approved: May 09, 2024

ABSTRACT

The main objective of this research is to identify the main causes of the current decrease in the use of Public Private Partnerships (PPPs) in the development of the country's infrastructure, since the issuance of Law 1508 of 2012 to date. To this end, a mixed type of research was carried out with a causal correlational scope, as it sought to explain the relationship between the problems that PPPs have had in Colombia and their lack of use in recent infrastructure projects. In addition, from a quantitative point of view, information was collected from the Registro Único de Asociaciones Público-Privadas (RUAPP) and the Sistema Electrónico para la Contratación Pública (SECOP) to identify PPP projects and their duration.

Key words: Public-Private Partnerships (PPP), Public Initiative, Infrastructure, Project Financing.

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RESUMEN

El objetivo principal de esta investigación es identificar las principales causas de la actual disminución en el uso de las Asociaciones Público Privada- APP- en el desarrollo de la infraestructura del país, desde la expedición de la Ley 1508 de 2012 hasta la fecha. Para lograr tal fin, se llevó a cabo una investigación de tipo mixto con un alcance correlacional causal, en tanto se buscó explicar la relación que existe entre las problemáticas que han tenido las APP en Colombia y su falta de utilización en los últimos proyectos de infraestructura. Además, desde el punto de vista cuantitativo se recolectó información del Registro Único de Asociaciones Público-Privadas (RUAPP) y del Sistema Electrónico para la Contratación Pública (SECOP) para identificar los proyectos de APP y su duración.

Palabras clave: Asociaciones Publico Privadas (APP), Iniciativa Pública, Iniciativa Privada, Infraestructura, Proyecto de Financiación

Introduction

The importance of infrastructure in a country lies in the fact that it enables its economic growth, competitiveness and social development. Thus, in the opinion of the former President of Mexico, Enrique Peña Nieto (2014), international experience shows that the more and better the infrastructure, the greater and better the opportunities for investment, job creation and income for the population. Consequently, in order to achieve these objectives, countries must be concerned about having state-of-the-art facilities in airports, roads, ports, telecommunications, among others.

Colombia is no stranger to the need to develop its infrastructure and achieve the social

and economic benefits that this entails. In this regard, the World Bank (2023) indicated in April of this year that Colombia continues to be one of the most unequal countries in the world and that, in order to reduce poverty, it needs to improve the quality of education, health and infrastructure. From this context, public-private partnerships (PPP) have been considered a tool that for more than thirty (30) years has been used worldwide to develop the infrastructure of the countries. In Colombia, specifically, with the issuance of Law 1508 of 2012, the legal framework for its implementation was created.

Before the issuance of the referred law, Colombia had a significant delay in the development of its infrastructure, as indicated by the Colombian Chamber of Infrastructure -CCI- (2011) when mentioning that, despite the fact that by that date the investment in transportation infrastructure had doubled, it was not enough (from 1.2% to 2%), since, for example, it had the same quality in road structures as countries such as Zambia, Bolivia, Zimbabwe and Cameroon. Thus, by 2011, a greater investment in infrastructure was required to overcome the backwardness in spite of public investment, as shown in the following graph, where the projected investment for 2020 in Colombia did not exceed 2.3 % of the gross domestic product (GDP). Within this framework, Law 1508 of 2012 was issued with the purpose of attracting private investment in infrastructure, since public investment was not enough to achieve development in electric power, communications, basic sanitation, hydrocarbons, transportation, among others.

However, after reviewing the information of the Single Registry of Public-Private Partnerships (RUAPP) as of the year 2023, it became evident that there is a trend in the decrease in the filing of projects carried out under this modality, since in the first years of Law 1508 of 2012, an average of more than one hundred (100) projects were filed per year under the PPP modality and, subsequently, after the year 2021, it decreased significantly to an average of thirty (30) per year. The above contrasts with the diagnosis presented by the National Planning Department -DNP- (2022) regarding PPPs in Colombia. In this report, the entity highlighted that during the last 10 years around 835 PPP projects have been presented, which indicates the great acceptance it has had in the country and its use as a tool to achieve infrastructure development.

In that order of ideas, and after a background search on the subject, no work, analysis or approach is found that addresses the decline of PPPs in Colombia. On the contrary, these works highlight their progress, which is not in accordance with the trend in the decrease of projects registered in the RUAPP in the last four (4) years, as well as the

fact that some of the last major infrastructure projects, such as the first and second lines of the Bogotá Metro and the Canoas WWTP, will not be developed through PPPs but through traditional concessions, as well as the 80th Street Metro in Medellín and the 13th Street in Bogotá, which will be developed through public works contracts. Therefore, the purpose of this article is to expose the main causes identified for the current decrease in the use of PPPs for the development of the country's infrastructure. To achieve this objective, the main projects developed through PPPs in Colombia since the date of issuance of Law 1508 of 2012 were first identified. Subsequently, the main difficulties encountered in PPP projects were identified. Finally, the infrastructure projects that were not developed through PPPs and the reasons why they were not developed through this modality were identified.

The development of these objectives was carried out through a mixed type of research with a causal correlational scope in that it sought to explain the relationship between the problems that PPPs have had in Colombia and their lack of use in recent infrastructure projects.

From a quantitative point of view, information was collected from the Single Registry of Public-Private Partnerships (RUAPP) and the Electronic System for Public Contracting (SECOP), in order to establish the PPP projects that have been presented, both public and private initiatives, and the average duration (prefeasibility, feasibility and awarding) of each project. Information from the Ministry of Finance and Public Credit was also consulted to analyze the progress of PPPs.

From a qualitative point of view, the advantages and disadvantages that have been presented in the use of PPPs were identified, as well as the reasons why this tool has not been used in recent infrastructure projects. Thus, this article will be developed through the following sections: (i) main PPP projects in Colombia since the creation of Law 1508 of 2012, (ii) main difficulties presented in PPP projects, (iii) main infrastructure projects in Colombia and their move away from the PPP modality.

Law 80 of 1993 establishes that the public service seeks to satisfy collective needs, which is based on Articles 1, 2, 334 and 365 of the Political Constitution of Colombia. Article 1 of the Political Constitution establishes that Colombia is a social rule of law, which implies guaranteeing the effectiveness of citizens' rights, which can be achieved through the adequate provision of public services. According to Article 2 of the Constitution, one of the essential purposes of the State is to serve the community, promote general prosperity and "guarantee the effectiveness of the principles, rights and duties" enshrined in the Constitution. In that order of ideas, according to the

Constitutional Court (2002), when it seeks to satisfy collective needs, the general interest is being considered above individual interest.

Therefore, in a social State under the rule of law, the satisfaction of collective needs is a matter of great relevance, since according to Article 334 of the Political Constitution, the State will intervene in a special way to ensure “in a progressive manner, that all persons, particularly those with lower incomes, have effective access to all basic goods and services”.

In this sense, the public service must be in accordance with the real needs of the population and seek to satisfy the general interest. To achieve these objectives, state contracting is established as a tool for state entities that allows them to do so, to the extent that it provides the goods, services or works required by a community. State contracting, as a tool, must be in accordance with the reality and current needs of the community, in order to be able to respond to the new challenges presented by the social, economic, technological and cultural changes it is undergoing. One of the ways of providing public services is through the participation of private parties. Thus, PPPs are a modality used to achieve this objective. The IDB (2010) has indicated that PPPs are long-term investment schemes to develop productive infrastructure, which incorporate techniques, risk sharing, objectives and resources between private parties and the Government.

(DNP) (2016 a) in the document Guía de Asociaciones Público Privadas allows understanding the notion of a PPP and why its implementation has been important in other countries to develop infrastructure and the provision of public services, to the extent that it has been an instrument to attract private investment when the State does not have sufficient resources, Therefore, the private party can finance the construction, operation and maintenance of the project, being remunerated with the economic exploitation of the infrastructure and with resources from the State, having the right to it when the works have been completed and the standards of quality and availability of the infrastructure in the maintenance and operation of the infrastructure are met.

He also indicated that these projects require investing more time to define the levels of services and greater rigor in their structuring, i.e., it requires public entities to invest more time in the planning and structuring of the project. The definition of PPP is found in Article 1 of Law 1508 of 2012 for the case of Colombia. According to said article, the purpose of PPPs is: (i) the design and construction of an infrastructure and its associated services, (ii) construction, repair, improvement of an

infrastructure, (iii) equipment of the infrastructure. The above activities must involve the operation and maintenance of the infrastructure.

In accordance with Law 1508 of 2012 the characteristics of Public Private Partnerships are the following: (i) instrument of linking private capital, (ii) it is materialized in a contract to be entered into with a natural or legal person, (iii) retention and transfer of risks between the parties, in order to perform an adequate administration thereof, (iv) projects exceeding 6000 SMMLV, (vii) the retribution consists of the economic exploitation of the infrastructure and contributions of the State, and (viii) application of the principles of the administrative function, contracting and fiscal sustainability. The difficulties presented by PPPs have been identified by Hall (2015) in the work entitled *Why Public-Private Partnerships (PPPs) do not work*, an analysis from which we will start to identify whether the decline of PPPs in Colombia is explained from the reasons exposed by the aforementioned author and which are summarized below. Among the main causes exposed by Hall (2015) regarding the non-functioning of PPPs is the fact that they lend themselves to corruption. This is evidenced by indicating several cases, especially what happened in Albania, Nigeria, India and El Salvador, where this type of projects generate numerous resources for periods of 25 to 30 years, which leads to the use of corruption to guarantee large resources and for long periods of time. He also indicated that corruption also occurs in the governmental sectors, where this type of contracts are entered into to grant gifts to relatives and friends, as well as a way to pay political favors.

Likewise, the same author indicated that PPPs are full of lies and exaggerations. Regarding the former, since they do not indicate the real costs in the subscriptions of the contracts, which in many cases are high; therefore, it is necessary to celebrate later substantial additions to continue with the execution of the project. Regarding the latter, PPPs exaggerate the real demands of the projects so that they can be awarded, but later, during execution, the number of users of the service does not exist, and the projects are wrongly sized. In the same sense, Hall (2015) expressed that this type of projects go against transparency because not much information of the projects is disclosed under the cover of commercial confidentiality. Another criticism of PPPs has to do with the fact that, if they are not commercially viable, they are not subscribed by individuals, which generates that political decisions are focused on that premise and that sometimes projects are not executed because they do not meet that condition.

He also indicated that these projects have a negative impact on the environment and trade union rights, since environmentally friendly resources are not used in order to

optimize the profits generated by these projects. As for union rights, since the service is not provided by a single entity, as, for example, when it is carried out by the public sector, but by several companies, union power is spread and minimized. In addition, in the private sector, in order to obtain higher profits, they sometimes resort to downsizing.

On the other hand, another of the reasons presented is related to the fact that the private sector does not really generate additional resources to finance the projects, but that the resources come from the treasury and from the rates or charges made to the users, therefore, the benefit in terms of the generation of additional resources is not true.

He also indicated that one of the justifications for developing projects through PPPs is the transfer of risks to the private party, but that this transfer is in no case free, but rather the private party charges a high value for the assumption of the risks in the project.

Finally, there have been several failures of PPPs, which is why he does not recommend this modality.

In summary, Hall (2015) pointed out that PPPs do not work because of corruption issues, the exaggerations and lies surrounding PPPs are limited to their acceptance by private parties, the high costs that must be paid to the private party to assume the project risks and there are several cases of failure of PPPs.

Eurodad (2018) also mentions several causes why PPPs fail. Among them, he indicates that PPPs carry excessive risk for public entities to the extent that it has to assume the costs when the project is not working. In addition, he points out that they had major environmental and social problems due to the lack of adequate socialization with the communities.

Taking into account Hall's (2015) arguments, one of the great evils suffered by state contracting is corruption. According to the Comptroller General of the Republic in a publication of the magazine *Semana* (2021), corruption affects 18% of public procurement in the country.

According to data from *Monitor Ciudadano de la Corrupción* (2021), corruption in public procurement corresponds, in the years from 2016 to 2020, to 42% of the cases in administrative corruption and 17% of political corruption. To that extent, corruption is an evil that corrupts public procurement, without being attributable to a single contracting modality, as is the case of PPPs.

In Colombia, both in PPPs or similar modalities and in the traditional contracting of companies and public entities, there have been cases of corruption that affect finances

and the provision of public services. For example, before the entry into force of Law 1508 of 2012, one of the most recent cases was the Ruta del Sol 2, which, according to Nuevo Siglo (2020), was carried out through a concession, a modality very similar to PPPs, and where one of the biggest corruption scandals occurred due to the payment of bribes for the award of the contract made by the company Odebrecht.

Likewise, in Colombia it was known the contracting carousel of Bogota (La República (2023), the surveillance (Attorney General's Office (2015) and school meals (LA FM (2015), which mostly corresponded to contracting modalities other than PPPs or similar models, where the traditional contracting modalities were used by public entities and generating serious damages to the State and, above all, to the provision of services.

In conclusion, corruption cannot be attributed to a single contracting modality, but covers each one of them, where the problem is a society that must be more radical and not tolerate this type of behavior by strictly applying the principle of administrative morality and severely punishing these crimes.

However, corruption has also affected PPP contracts entered into under Law 1508 of 2012. Of the fifty-one (51) contracts entered into to date, three (3) have been terminated early, and where, in addition, one was affected by the corruption cases of the company Odebrecht, majority partner of the company Navelena SAS that executed the concession for the navigation of the Magdalena River. Last September 13, 2014, between Cormagdalena and the company Navelena SAS entered into PPP contract 01 of 2014, the purpose of which was to recover the navigability of the Magdalena River. Among the obligations that the contractor had to comply with was to obtain the financial closure, that is, to obtain the financing resources for the project. On this matter, W Radio (2016) stated that, due to the corruption scandals, Odebrecht was seeking to cede its shareholding to achieve the financial closure, for which it presented three (3) possible candidates to Cormagdalena.

Subsequently, the assignment of its shareholding was not carried out and the financial closing, which it had initially achieved with Sumitomo Bank, did not materialize, as this financial entity pointed out that it had not managed to obtain all the internal authorizations to make the disbursements, for which reason, since the financial closing was not achieved, Cormagdalena, through resolution 078 of March 23, 2017, declared the expiration of the contract.

In summary, it can be evidenced how corruption cases have affected PPP contracts regulated by Law 508 of 2012 and, for this particular case, how this led to the early termination of the project for the recovery of the Magdalena River without having been re-hired to date and achieving the objectives that were set out with the execution of the contract.

Conclusions

From the research carried out, it was concluded that there is a decline in the use of PPPs in terms of the number of projects filed, awarded and investment amounts, being, to date, very little used this modality by public entities and concentrating most of this type of projects in the hands of ANI.

Among the main difficulties presented by PPP projects are the increase in structuring and contracting times. Regarding the other difficulties, such as environmental issues, corruption, costs and cases of successes and failures are common to any type of infrastructure project, regardless of the contracting modality.

Therefore, comparing the requirements to be met by a project that is structured and contracted under the PPP modality and another through the Concession of Law 80 of 1993, it can be indicated that in the latter case there are fewer requirements, activities and approvals, which results in less time to carry out and execute the project.

In this regard, it should be noted that in the development plans, infrastructure is an important issue to achieve the welfare objectives of a community, therefore, in the periods of four (4) years of government, the ideal is that such infrastructure projects can be structured and contracted to give continuity to them, However, as presented in the findings of this work, in recent years PPPs have taken more than four (4) years for their structuring and development, so that the concession of Law 80 of 1993 becomes an alternative so that in the period of a Mayor, Governor or President of the Republic their projects can be contracted.

As it was identified, PPP projects must comply with additional requirements to those of the concession established in Law 80 of 1993, such as: registration in the RUAPP; concept on its evaluation and prioritization according to sectorial policies; prior approvals to establish units and functions; approval of financial conditions; justification for the use of the PPP model; payment of fees for additions and extensions of PPP contracts. In addition, the requirements for the amounts of the PPP projects and that of the functional units, the terms of execution of the contract, the opportunity

and terms of the additions and extensions, the form of establishing the retribution, the management of the resources through an autonomous patrimony, identification of the beneficiary and formulas for early termination of the project must be complied with.

In spite of this, it has been maintained that PPPs bring several advantages such as the rapid availability of infrastructure; the optimization of public resources due to their adaptation to fiscal frameworks; bringing together the strengths of the public and private sectors;

incentives that allow projects to be delivered on time and according to budget; the use of better quality standards, accounting, risk analysis, costing systems and resource management systems; adequate allocation and management of project risks and stability in the quality and maintenance of infrastructure, because, in most cases, they are long-term contracts.

Despite the aforementioned advantages inherent to PPPs, it is identified that they can also be incorporated in traditional concessions under the principle of private will autonomy enshrined in Article 40 of Law 80 of 1993, as happened in the cases of the first and second line of the Bogotá metro and Regiotram de Occidente.

The World Bank (2015) in the lessons learned in Latin America and the Caribbean recommends the review of the legal framework of PPPs, in order to verify that it adapts the best practices and detect their strengths and weaknesses, for which, for our case, it would be relevant to improve the structuring and contracting processes, so that their duration does not continue to increase over time. On the subject, Jaramillo (2019) mentions that PPP projects must be subject to constitutional and civil service principles such as efficiency, speed, and economy, among others, therefore, the legal framework must be reviewed and verified that these principles of the administrative function are being complied with.

The above is also in line with what was indicated by the Inter-American Development Bank (IDB) (2015) when analyzing the case of Honduras, in which it makes recommendations to improve PPPs in that country, one of them being to improve project planning.

Gamboa, et al. (2017) described the aspects of Law 1508 of 2012 that, according to their criteria, provides legal uncertainty, including the definition, which was not broad enough by not including the PPP modalities, financing mechanisms and the obligatory nature of sponsors. In addition, it established recommendations to adequately structure a project, highlighting compliance with the planning principle and its

interaction with the market, in order to know its acceptance and if there are companies interested in participating in its execution.

Regarding the acceptance of the project by the market and the establishment of financing mechanisms, it was observed that the common element in the structuring and contracting of infrastructure projects is the project finance model.

Consequently, it is recommended that the requirements and the longer terms required for a PPP be reviewed in order to simplify and streamline them so that this modality does not continue to decay, since otherwise the option of using a traditional concession of Law 80 of 1993 is the most convenient due to its lower requirements and terms to develop infrastructure projects.

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