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As Guatemala jumps on PPP train, not everyone's on board

As the Central American nation looks to the private sector to help it finance $3.2bn of needed infrastructure spending over the next six years, an ongoing dispute over a voided railroad concession has some investors feeling sceptical about the opportunity.

Cezary Podkul | 17 November 2008

Guatemala is set to put a law governing public private partnerships on its books “by no later than” March 2009, as the Central American country seeks to address a $3.2 billion infrastructure spending need over the next six years.

Of that, $2.5 billion is needed for toll roads and freeways, $200 million for airport upgrades and nearly $500 million for ports, according to a study commissioned by Invest in Guatemala, a government-affiliated group that seeks to promote investment in the country.

Mario Marroquin, executive director of Invest in Guatemala, told Infrastructure Investor that at least half the investment would come through public private partnerships (PPPs), one of the reasons the organization was pushing hard to get the law onto the statute books as soon as possible.

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— *Henry Posner III*

“Our focus will be to have the law approved by no later than March 2009. That will be the best case scenario. Best case could be even before the end of the year,” Marroquin said. The congressional economic committee is currently reviewing the legislation before it moves to congress for a vote.

RDC in Guatemala: a trip cut short

However, given the country’s ongoing arbitration process with Pittsburgh-based Railroad Development Corporation (RDC) over a 50-year railroad concession that the government voided eight years after it went into effect, some investors remain skeptical about the attractiveness of the investment opportunity.

“They’re really focusing on the wrong thing. A PPP law doesn’t mean a lot in a country where the rule of law does not necessarily apply,” said Henry Posner III, chairman of RDC.

Posner’s RDC won a 1997 sealed-bid tender process to bring the country’s then-defunct national railroad back to life. Teaming up with local investors, the resulting concession company, Ferrovias Guatemala, began operating in 1999.

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But a 2006 declaration by the country's then-president, Oscar Berger, voided Ferrovias Guatemala's rolling stock and equipment leasing contract with the state, essentially taking away its legal right to run the railroad and legitimizing free-riding. In September last year, RDC shut down its operations.

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The government holds that Ferrovias Guatemala did not hold up its part of the contract by investing adequately in the concession. Posner points to $15 million of investment and has taken the dispute to international arbitration under the Central American Free Trade Agreement (CAFTA), seeking $65 million in lost revenues and investments.

Marroquin says that the dispute "has been a reference for us when designing the PPP law", from which lessons have been learned, such as best practices for bidding and procurement processes and dispute resolution.

"The law that will be eventually enacted in congress will be a very modern PPP law that will give investors assurances about the interests of the state", Marroquin said. The RDC dispute notwithstanding, Guatemala has "a proven track record of respecting contracts and we expect to do the same with the PPP contracts", he added.

But Posner, who has over the years invested in railroads in Malawi, Peru, Mozambique and Estonia, remains skeptical. "Our experience in Guatemala is unlike in any other [country] in that it was such a unique combination of corruption and Kafka-esque logic", he said. "What we were forced to do was go outside the country to seek justice. That in itself reflects the root of the problem, which is the lack of rule of law within Guatemala."

In April, the International Centre for Settlement of Investment Disputes, the legal arbiter under CAFTA, named a three-person panel to hear the case. The Washington DC-based panel held the first hearing in June and will continue deliberations just as officials in Guatemala City sit down to ponder the nation's PPP legislation.

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