

Bolivia

Project finance 2008

LATINLAWYER would like to thank contributing editor Melissa Racife-knappe of [Freshfields Bruckhaus Deringer LLP](#) for her invaluable assistance in devising the questionnaire for this section.

Contributed by Fernando Aguirre B and Ignacio M Aguirre U [Bufete Aguirre Soc Civ](#)

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

Project financing techniques have been used quite extensively in Bolivia to provide finance to major projects some years ago. This was mainly due to the nature of the projects being financed and lenders' policies (mostly foreign entities). Recently, this trend has shifted due to the fact that new private investment in Bolivia is at a standstill, mainly because of political uncertainties and, consequently, the scarcity of private projects to finance, particularly under a scheme of project financing.

Project financing has been used mainly in the natural resources and energy sectors, such as in mining, hydrocarbons and electricity generation. Telecommunications also merit attention.

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

The sponsors of the main projects have been major players in the project area, either because the project was the result of a 'privatisation' or 'capitalisation' process or because of the amounts of investment that were required. Local developers were normally limited to a small participation in the project.

Lenders have typically been major commercial banks and multilateral agencies.

3. What structures are most common?

The most common used structure is a combination of project and corporate finance.

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?

To have regular operations in Bolivia, foreign companies must have a permanent establishment. This is either by way of a branch or a Bolivian subsidiary, organised either as a stock company or by limited liability. The latter is more typical because both incorporate limited liability for their equity-holders and are less vulnerable to 'piercing of the corporate veil'. There is no requirement for any local participation when dealing with private companies. Certain projects are implemented through schemes of mixed state-private participation, especially in the hydrocarbons and mining industries.

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

Despite the current nationalistic environment, the policy of admission of foreign investment in most sectors of economic activity is in place, though in some areas there are new and changing rules because of nationalisation policies of the government. The 1997 Investment Law granting warranties for investment with a liberal approach continues in place, but changes can be expected in the future.

The Investment Law currently guarantees property rights to national and foreigners without restriction other than those determined by law (for example, no foreigner may in any manner, directly or indirectly, hold title on real estate property within 50 kilometres of the international borders, as provided in the political constitution). Private investment does not require any prior authorisation or additional registration to that required by law generally.

Private investment in the hydrocarbons industry requires contracts with the state oil company. The state is currently the owner of all hydrocarbons wealth and has the control of all of the production, transportation, trading and distribution phases. Concessions and licences are to be obtained for activities in state-regulated sectors (telecommunications, energy, transport, banking, insurance and similar).

Investors may freely hire investment insurance in the country or abroad. The guarantees for foreign investments as recognised by law, supported by bilateral or multilateral treaties between the government of Bolivia and other nations and international organisations, are still in place, although the denunciation of the ICSID Washington Convention is to be noted, as further mentioned below. Freedom of import and export and freedom to fix market prices for goods and services (other than in the regulated sectors) are also guaranteed, although for some exports the government has introduced temporary 'quotas'. National and foreign investors may yet agree that their disputes be subject to resolution by arbitration tribunals, in accordance with the political constitution and international rules (like treaties). National and foreign investors may enjoy such incentives as may be granted by the state. Some pre-existing incentives in the mining sector have been cancelled. The Investment Law formally recognised the possibility that investors may execute joint-venture agreements. For foreign companies, the only requirement is to have permanent establishment in Bolivia.

In certain regulated sectors, such as banking, micro-financing, insurance and administration of pension funds (currently under scrutiny with draft laws in Congress, which would force them to transfer such funds to a new state-run or mixed system), requirements of minimum capitals and other features are to be complied with. In the regulated sectors of telecommunications, transport and electricity, investors are subject to applying for and obtaining special registrations, permits, licences or concessions depending on the nature of their activities. Agro-livestock activities, commerce and industry generally can freely be carried out. Forestry rights are granted by a licensing and concession system, currently also subject to revision. Under a certain 2007 Decree, new mining concessions can no longer be granted until new legislation is in effect. Concessions will most likely be substituted by contracts.

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

No. Remission of dividends, interest, royalties and similar are subject to taxation, with a few exceptions granted to recognised bilateral and multilateral financial organisations.

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

Yes.

8. 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?

Any loan or credit agreement of a foreign source must be registered with the Bolivian Central Bank for statistical purposes. There are certain periodic reporting requirements related to said registration.

For enforcement of a loan or credit agreement or other project document in Bolivia, the document has to end up being in proper 'public' form and in Spanish, for which various methods may be used.

Agreements creating a lien over immovable or movable (registered or not) property (except for the pledge of shares or credit) are executed in Bolivia in Spanish and registered with the Commercial Registry and the pertinent registries, depending on the type of asset. Lack of said registration may impair the ability of the agreement to be held valid before third parties.

9. 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?

Under Bolivian law, promissory notes that comply with certain requirements are considered 'autonomous' or 'independent' and literal negotiable securities, which cannot incorporate terms and conditions by reference to the loan agreement or other documents. From a Bolivian law perspective, the use of a promissory note is not necessary and may not be advisable, nor does it

give any specific advantage (provided proper proof of disbursement of the loan is created) unless the holder intends to negotiate the note with third parties independently from the loan document, a very uncommon practice. A Bolivian promissory note requires protest for default in payment (a waiver of protest not being valid), which may create some logistical difficulties. Expedited proceedings can be attained without necessarily using a promissory note.

10. Must any agreements be governed by local law?

Under Bolivian conflict of law principles, there is no prohibition of choice of foreign law to govern any agreement. However, in any enforcement actions before the courts of Bolivia, the Bolivian law will be used to construe the agreement and the obligations of the borrower, notwithstanding the choice of law as per the agreement. Bolivian courts will not apply a foreign law.

Any document creating a lien over immovable or movable (registered or not) property (except for the pledge of shares or credit) must be governed by Bolivian law. In the case of pledge of shares issued by a Bolivian company there is an ongoing debate as to whether such pledge must be subject or not to Bolivian law.

11. 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?

Yes, it is possible to have a collateral agent as the sole secured party for the benefit of a group of lenders. Depending on the scope of the transaction and its documentation the collateral agent might need to receive proper powers of attorney in addition to authority under contract.

12. 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 single security interest covering all assets without distinction is not feasible. Not every asset and right in the patrimony of a borrower has the same condition; real estate property and real estate rights and personal property subject to registration (for example vehicles) can be subject to mortgage - most other personal property may be subject to pledge. But exclusions can be important in the context of 'project financing': intangibles are not subject to pledge. This includes, among other things, the concession or licence granted for authorising business activities generally, or licences or concessions for specific regulated activities. Other than physical assets, only credit rights (including shares) can be pledged under special conditions. There has been a change with mining concessions, which no longer are treated as real estate property. They can no longer be subject to transfer of title or to mortgages.

The Commercial Code recognises the concept of 'enterprise' as comprising all the elements in a commercial venture, including intangibles. Although in principle the enterprise may be subject to mortgage, the institution has not been used for lack of proper regulations and because of contradictions it creates with other rules of law and of difficulties in recording of liens.

The possibility of assignment of contracts, assignment of rights, assignment of interests and similar need to be evaluated under basic rules in the Civil Code under which there are only two types of assignment: of contract and of credit or credit rights. Any other 'assignment' would not qualify as such. Under an assignment of contract, the lender would substitute the assignor for all purposes in the contractual position. The lender or its agent is assuming not only the rights but also the obligations of the contract. Assignment of credit or credit rights does not pose any major difficulty other than practical ones of proper identification of credit or credit rights and the collection thereof. An assignment of credit must be notified to the debtor.

An assignment of contract as such (which should in any event be conditional upon default and subject to obtaining, when legally possible, all required third party or governmental authorisation) makes sense to the extent that the lender, its agent or an appointee may become the actual 'owner' of the borrower's business, whom it replaces to carry it out to allow repayment. Under this concept there are two difficulties: (i) not every contract is assignable and (ii) when contracts have been assigned, it may well yet be that the lender has not been able to complete the process of becoming the 'owner' because of other restrictions. For example, in many cases a concession may not be assignable, the concession being the basic authorisation enabling the business to be carried out. So if the lender cannot be considered as the concessionaire for purposes of carrying on the business, the question becomes what is the point in becoming a counterparty to a contract, by assignment, which creates a number of obligations that it will be unable to carry out without the condition of a concessionaire.

Many contractual arrangements, dealing with delivery of proceeds of revenue of a borrower that are to be delivered to the lenders or agents for purposes of the loan (more than assignment, as such), are irrevocable arrangements creating a certain stream or flow of revenue. An 'assignment' would not change title on such revenue by the borrower. Delivery of proceeds is on behalf of the borrower for credit purposes under the loan agreement. Other creditors could be entitled to attach such revenue with a proper judicial injunction for the time that technically and accounting-wise it enters into the borrower's patrimony, even if by the assignment arrangements, there is no physical delivery into borrowers accounts or control.

A 'guarantee trust' would have the effect of taking assets, accounts or rights away from the control and title of borrower, which are then 'transmitted' to a trustee, and consequently, it is said, other creditors cannot attach or have access to such assets since they no longer belong to the borrower. This feature has successfully been used in other countries in Latin America. In the case of Bolivia, although there are some such operations, the feature is open to challenge based on legal arguments such as:

- it may be said to 'hide' a pacto comisorio, which is forbidden;
- it may be invalid, based on the rule of invalidity of trusts entered fraudulently to affect other creditor's rights;
- the provisions of trust in the Commercial Code do not appear to reach a guarantee trust;
- it may hide a transfer of a non-transferable right (like a concession or a licence);
- it is not recognised as a specific legal means for creation of 'guarantee' as explained above; or
- it may fall as a contract subject to review as to its validity by a bankruptcy court if executed during the retroaction period.

Local banks do sometimes use the feature based on internal regulations approved by the Superintendence of Banks.

Under the regulatory laws of the SIRESE system (as is the case in other regulated sectors as well), the rights to carry on business are normally attained by applying for or receiving the award of a concession or a licence. Other activities are subject to registration. Licences, concessions or registrations may be personal in nature and consequently non-assignable, non-transferable or not subject to pledge. For a new 'owner' to substitute the prior holder, it would first have to apply for authorisation where so allowed. There may also be restrictions on indirect transfer or change of control (ie, transfer of equity participations).

Because of the regulated nature of certain of these activities, the concessionaires or licensees are subject to intervention by the competent authority or the authority can revoke such rights in case of breaches. When this happens there may be other consequences, especially when the activity is a public service whose continuity must be maintained, to assure which and as a consequence of a revocation, a substitute concessionaire or licensee must be appointed normally by means of a public bidding procedure. The continuity cannot be assured if the assets which are 'dedicated' to the activity - necessary to operate the service - are not transferred to the new concessionaire. The question is what happens if such assets are mortgaged or pledged? If the lenders have legitimately enforced their rights in court, how can those assets be transferred to them or to a third party other than the new concessionaire? Since there is a payment (which could be 'assigned' as a credit right) by the new concessionaire or licensee for the assets it is receiving, there are other doubts as to how such payment would be calculated (normally having to be on book value, but it being uncertain as to whether or not in such calculation all debts are to be deducted and consequently assumed by the new concessionaire or licensee).

In these cases there is also the regulation that the actions by creditors cannot have the effect of interrupting service. It is uncertain at this stage how far reaching is that restriction.

Step-in rights of lenders in case of default may not be viable by similar reasons to those above.

There are other mechanisms that have been used in substitution whose analysis is outside the scope of this paper.

Another important scenario to consider is that under the Civil Code there exists the so-called 'Acción Pauliana', which authorises a creditor to claim in court for the annulment of acts of disposition of the assets of a debtor when considered illegal.

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?

The official fees for registration of mortgages over real estate property or pledges over movable property is of 4 bolivianos per 1000 bolivianos of loan or value of the property, whichever is higher, payable to the real estate registry, plus a fee of between 137 and 175 bolivianos

depending on the type of company requesting the registration, payable to the Commercial Registry.

There are no official fees for registration of mortgages over vehicles. The applicable fees should be paid to the Commercial Registry as mentioned in the previous paragraph.

Since pledge of shares would normally be registered only with the company's ledger, there are no official fees applicable.

13. 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?

Under Bolivian law it is not required to stipulate the value of the collateral security in the security document unless parties want to limit the 'value' up to which the asset secures the obligation.

14. 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?

Each item of collateral needs to be individualised and identified. In the case of 'fungible' assets, a floating pledge is possible, subject to proper identification of type, volume and other details.

15. 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 case of real estate property the Real State Property Registry can provide updated information on whether a property has any prior mortgage or other annotations or restrictions. The same is true for vehicles, planes and boats with the proper registries. There is no full and proper registry for other movable property so reliable information may not be available. Non possessory pledges are recorded but verification may be difficult.

In the case of shares, the company's ledger should register any pledges, annotation or restrictions.

Mechanic liens are privileges which for validity do not require registration. Depending on the asset a waiver of such lien would only be possible by contract.

16. 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?

In Bolivia, as in other civil law countries, the pacto comisorio is strictly forbidden. By a pacto comisorio a creditor or lender would take over title on the collateral without having to resort to judicial enforcement to satisfy the debt.

This is not possible. In order for a creditor to foreclose on a collateral security, proper judicial process must be followed - demanding payment and if payment is not made, applying to the court for sale of the asset by public bid. If after two biddings, the asset is not transferred to a third interested party, a lender may request the court to have the asset assigned to it as total or partial payment of its credit depending on the court's valuation of the asset. For a lender to acquire title, the first or second auction arrangements can be made through a third party.

The credit is payable in the agreed currency. Exchange regulations may become applicable.

Foreclosure on a pledge of the ownership interest of the project company may be more efficient and less time-consuming than a foreclosure on individual assets, although foreclosure must also follow the judicial bidding process. For such an eventuality, a lender could be given certain temporary rights of representation of equity, pursuant to the pledge agreement. Note the comment in question 12 regarding regulated activities. In financings to industrial entities, embargoes on the industry's assets are to be substituted by judicial intervention.

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

In a bankruptcy scenario the following basic general degrees and preferences would be recognised:

- judicial and court expenses;
- remunerations and social benefits of workers and employees;
- authors' rights (copyright);
- fiscal credits (taxes and social security contributions).
- creditors with secured or registered credits (mortgages or pledges) - in this case, such creditors can apply to the bankruptcy court for independently enforcing their individual rights with the assets securing their credits; and
- unsecured creditors.

However, more detailed rules as foreseen in the Civil Code are to apply since there exist general privileges, special privileges over real estate property and special privileges on personal property.

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

Lenders would normally not incur any liability upon foreclosure of project assets if the agreements based on which foreclosure takes place has been entered into an 'arms-length basis' and on market conditions, and of course in good faith. This is particularly important in the case of bankruptcy of the project company because the bankruptcy court may review and declare null certain agreements that affect creditors' rights that have been executed up to two years prior to bankruptcy.

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

As mentioned above, foreclosure does not necessarily result in the lenders (or their designees) operating the project. Should such a situation arise from an authorised procedure, and depending on the specific case, there are no restrictions on the foreign ownership of equity. Continued operation of the project results from the organisational documents of the company: shareholders are to appoint a board of directors, as the internal entity entrusted with administration, which in turn can delegate executive functions to duly designated attorneys. Where the project company renders regulated public services, consideration is to be given to the various factors previously described. Regulations are not the same for all regulated companies, so a case by case analysis is required.

20. 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?

There is a possibility of continuation of the project company's operation under certain conditions as part of the bankruptcy proceedings. Based on a report by the receiver or on experts' opinions indicating that the bankrupt company has the possibility of continuing its activities, the bankruptcy court may decide to approve continuation fixing at the same time the conditions thereof. If it finds that continuation is not possible, it can resolve the cessation of the company's activities. However, one of the immediate consequences of a declaration of bankruptcy is that all debts of the company become due and payable with a suspension in the payment of additional interest.

Lenders then have those rights as recognised by the rules on bankruptcy. Lenders could not separately and independently from the proceedings enforce any rights they may have against the equity-holder to make capital contributions to the project company, since those contributions require actions by the company, whose administration in bankruptcy is fully entrusted to the receiver appointed by the court, acting under the supervision of the court and creditors' meeting.

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

A Bolivian project company can validly submit to the jurisdiction of a foreign court in a lending operation.

Enforcement of a foreign judgment is subject to a number of conditions and requirements fixed by the Bolivian Code of Civil Procedure.

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

Under Bolivian law evidence of receipt of any notice would need to be produced for any applicable contractual or enforcement purposes. Under Bolivian law it is not legally possible to notify judicial acts and service of process by any form of mail.

The appointment of a process agent, if done properly, would be valid for purposes of service of process in a foreign jurisdiction as long as such appointment is supported by a proper power of attorney granted to the agent and registered with the Commercial Registry.

23. 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?

A final and conclusive judgment in respect of an agreement obtained from a court outside of Bolivia may be authorised for enforcement in Bolivia by the Supreme Court of Bolivia against the borrower through the Bolivian courts provided that the following conditions and requirements are met:

- There is a treaty between Bolivia and the state in which the foreign judgment was issued allowing for such enforcement, in which case the provisions of such treaty shall apply.
- In the absence of a treaty, the reciprocity rule is applicable, signifying that the Bolivian courts will give to a foreign court judgment the same treatment that may have been given to an application for the enforcement of a Bolivian judgment before the courts of said foreign jurisdiction. If the foreign courts have rejected enforcement, the Supreme Court of Justice of Bolivia will not authorise enforcement on the same grounds as those for said rejection by the foreign courts.
- In the absence of a treaty or impossibility of determining if reciprocity can be applied, the Supreme Court of Bolivia would authorise enforcement after hearing the defendant in a summary proceeding, provided that:
 - such judgment does not resolve matters that are subject to the exclusive jurisdiction of Bolivia courts;
 - a defendant domiciled in Bolivia had been legally served with notice of process with respect to acts and proceedings under the foreign court (taking into account that service of process by mail

may not be considered a valid procedure);

- the obligation being enforced is valid in accordance with Bolivian law;
- the judgment does not contain provisions contrary to public order;
- the judgment is final, without any right of appeal under the laws where it had been passed;
- the judgment complies with the necessary requirements to be treated as such under the laws where it has been passed and with the conditions that it be legalised and authenticated in accordance with Bolivian law; and
- it is not incompatible with other judgments passed before or simultaneously by a Bolivian court.

A foreign arbitration award is also enforceable but requires the exequatur of the Supreme Court of Justice, although Bolivia recognises the New York Convention as a source of law. The Supreme Court of Justice could refuse enforcement on the grounds that the resolution is contrary to Bolivian public order.

Sovereign or quasi-sovereign entities can agree on an arbitration clause in contracts of a civil or commercial nature or scope.

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

Subordination of debt is a matter of contract and not law. In principle it would be recognised as such under Bolivian law even in case of bankruptcy of the project company. Accounting-wise it is considered a 'quasi-equity'. However, there is an ongoing discussion on whether or not, in case of bankruptcy, the contractual arrangement continues in place. There are opinions, though no judicial precedent exists, that subordinated debt should be treated *pari passu* with all other unsecured debt in case of bankruptcy.

25. Are there laws in your jurisdiction that regulate how tariffs payable to a service provider must be calculated? If so, please describe briefly.

Most regulated sectors in Bolivia are subject to procedures that must be followed to calculate and fix tariffs to the service provided. This is particularly the case for electricity generation, distribution and transportation, hydrocarbons transportation, telecommunications, water supply and similar public services. Specific regulations provide parameters and technical criteria to determine how tariffs are fixed.

26. 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?

Environmental, tax or other liabilities relating to the project itself do not in principle extend beyond the project company and its administrators to the owners of the project company or the lenders. However, shareholders' liability on environmental responsibilities could be triggered since shareholders' meetings have to approve the actions of the administration. This is not necessarily the case for taxes and other liabilities generally. Lenders should not be liable unless there is some form of wilful misconduct.

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

There are no specific limitations other than those in the general customs regulations. There are some incentives with respect to importation of equipment or materials for some sectors, such as the return of certain taxes paid upon importation of the equipment (draw-back in case of exports of the company's products). Project companies located in certain specified regions or cities could enjoy certain special tax privileges.

28. 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?

As mentioned before, according to the Bolivian constitution, no foreign individual or company may hold land or property within 50 kilometres of the Bolivian border unless with prior necessary declaration by proper law. Other than that, there are no current restrictions for foreign individuals or companies to own land subject to applicable conditions of the law. However, certain activities, as mentioned above, are subject to prior licences, contracts or concessions. Forestry activity for example is subject to licences and concessions. Title or use of land for agricultural or livestock activities are highly regulated. Water rights are also regulated. A full set of rules are to be followed for exploitation or development, or both, of mining and hydrocarbon resources.

Procurement of rights of way or easements is possible but sometimes may be cumbersome and time-consuming. For hydrocarbon activities there are obligations to consult the indigenous communities.

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

It is important to bear in mind the current political atmosphere in Bolivia. The government, led by Evo Morales since January 2006, inaugurated a new political cycle characterised by strong nationalistic and indigenous people's social and political influence. Mr Morales, an indigenous person himself, started developing policies quite distinct from the ones of a liberal nature that characterised the democratic cycle inaugurated in 1985. The very strong criticism of the economic model of a free market and liberalised economy, which had fostered large foreign investment especially in the hydrocarbons industry (oil and gas) during the 1990s, became the basis for new nationalistic policies.

A key element of the agenda of changes was the inauguration of a Constitutional Assembly in August of 2006, called to draft and approve a new political constitution, which is still pending final approval by means of a national referendum.

The new political constitution proposed by the Morales administration is strongly influenced by the proposals and ideology of the indigenous peoples' movements and rural peasant

communities. Its clear nationalistic and indigenous focus is a matter of concern to opposing groups and to the private sector, both national and foreign.

Among numerous provisions that may be analysed, some are quite relevant for foreign investment.

To mention a few, the proposed constitution provides that national investment will have priority over foreign investment. Foreign companies are to be subject to Bolivian laws and authorities, which is a similar rule of law to one currently in the constitution, which until now has been interpreted as not precluding, for example, international arbitration. With an underlying nationalistic approach - influenced by the Calvo doctrine - such interpretation could be different in the future. In respect of the hydrocarbons industry, for example, there is an express constitutional proposal that the contracts signed by the state oil company cannot provide for international arbitration. In no case should a foreign court or jurisdiction be accepted. The rules on the mining industry show again a very nationalistic approach, particularly for private companies, which would be forced to change from the current mining concessions system to a new system of contracts with the state, the nature of which is yet uncertain. Private forestry operators would suffer if a proposed constitutional rule providing for exclusive exploitation rights for the indigenous peoples and peasant communities is finally approved. Some private public services may also suffer. The state would be authorised to form mixed economy companies with foreign companies for the exploitation of natural resources, having to assure the reinvestment of economic profits in the country. No person or company may register ownership rights over natural resources in stockmarkets, nor can they use them as means for financing securitisation or collateralisation. Registration of reserves is an exclusive right of the state.

In this political environment, the Morales government has executed various nationalisation measures of rights and interest of foreign companies.

On 2 May 2007, the government of Bolivia filed with ICSID in Washington its instrument of denunciation of the ICSID-Washington Convention. It was the first of the more than 140 parties to the convention to do so. The six-month 'suspension' period established in the convention elapsed in November 2007. Beyond different opinions in the international arbitration community over the effects of denunciation, it is evident that the ICSID arbitration mechanism for settlement of investment disputes in Bolivia agreed under BIT will hardly be available for investors in the future.

2008 is a year of changes and uncertainties. It will, however, shape what Bolivia as a country will be in the future.

The international front will also be shaped differently, with exporters to the US market struggling to maintain the customs preferential treatments they currently and temporarily enjoy. New agreements with the US, on a number of subjects, are pending. Trade negotiations with the European Community are underway through the Andean Community, with Bolivia criticising liberalisation policies. Bolivia's continued support to the new nationalist international trade, social and integration approach fostered by Cuba and especially Venezuela is to be expected.

Latin American integration efforts will continue, in the middle of no minor controversies.

It is within this changing environment that Bolivian laws on protection of foreign investment and project financing are to be read and understood.

30. 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?

The most common form of PPP is that of joint-venture agreements or mixed economy stock companies applied in various areas of activity especially mining and more lately hydrocarbons. Legislation goes back to the 1997 Investment Law. Mixed economy stock companies have long been recognised by the Bolivian Commercial Code. All legislation is of a national scope since Bolivia is not a federal state. State entities of various kinds, including municipal entities, may participate in these forms of PPP.

31. 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?

Joint-venture agreements are limited in time depending on the area of activity. Mixed stock companies essentially operate as permanent private commercial companies with all corresponding rights and obligations. Legal limitations depend on the area of activity. Regulations approving mixed stock companies may include special incentives granted to the company because of the state's participation normally attained through state companies.

'No change in law' guarantee or stability clauses by agreement are not common particularly in respect of taxation.

In hydrocarbons' operation contracts the private party essentially participates as a service provider subject to numerous rules. The current trend in constituting mixed stock companies is for the state equity participant to hold a majority and control.

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

If in the form of joint venture agreements the most relevant one of recent times is the agreement between a state mining company and Jindal of India for the development of the rich iron ores in the eastern part of Bolivia. Several long-existing joint-venture agreements in the mining sector are subject to revision to grant the state a greater stake. There are a number of mixed economy companies in various sectors. The most relevant recent one is the company, Petro Andina, constituted between the state oil companies of Venezuela and Bolivia for the development of large blocks with potential in the hydrocarbons sector. A couple of joint-venture agreements for industrialisation of mineral resources complete the most recent picture.

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

The current nationalistic trend of the Bolivian government may be an impediment to a more extensive development of PPP in Bolivia, except for strategic projects involving a greater stake or a majority participation by the Bolivian state, particularly with projects requiring substantial private investment, national or foreign, which is mainly the case with exploitation and development of natural resources or their industrialisation, or both.

Industrialisation is a key policy under the current government's development plan.