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# **Las Asociaciones Público Privadas en el Sector Minero-Energético:**

**Experiencia Nacional e Internacional**

Universidad  
**Externado**  
de Colombia

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Privadas (APP) en el  
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## **TURKEY'S PUBLIC-PRIVATE PARTNERSHIP JOURNEY: EXPERIENCES IN THE ENERGY AND MINING SECTORS**

DR. ÖZGE VARIŞ (LL.B, LL.M, PH.D)

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### LIST OF ACRONYMS AND ABBREVIATIONS

FDI:	Foreign Direct Investment
IGA:	Intergovernmental Agreements
HGA:	Host-government Agreements
PPP:	Public-Private Partnership
SPV:	Special Purpose Vehicle
BOT:	Build-Operate-Transfer
BLT:	Build-Lease-Transfer
TOR:	Transfer of Operating Rights
BO:	Build-Operate

### ABSTRACT

"Public-Private Partnerships" (PPP) are considered a fairly new concept in the Turkish legal system. The growth in the

number of PPP projects in Turkey has been as sudden as it has been lucrative in many aspects. For instance, despite the recent economic and financial obstacles faced by the country as a whole, statistics indicates that Turkey remains an allure for investors. This being the case, the legal framework surrounding the Turkish PPP projects is of crucial importance. This article will offer an overview of PPPs in Turkey and the practices and legal framework that surrounds them specifically in the context of the energy and mining sectors in comparison with other sectors. The article will conclude with a look at the past and offer a glimpse of the future effects of these legal and economic developments in Turkey.

**Key words:** *public-private partnerships, investments, energy, mining, development*

## 1. INTRODUCTION:

In Turkey, as in other national economies, project finance parts are of critical importance for development, the buoying of economic indicators and increase in long-term growth. The critical importance of the project finance part issues can be defined as *"financing of long term projects based upon a non-recourse or limited recourse financial structures upon which the viability of a project becomes based on the expected cash flows generated by it."* The economic status, along with political and governance indicators, of a country, are key for both local and international investors in their decision-making processes before and after their investments and financing projects get off the ground. Furthermore, these indicators are also decisive for sustainable growth and future projections in a country's development.<sup>1</sup>

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1 SCANNELLA, ENZO *"Project finance in the energy industry: new debt-based financing models"* International Business Research, Vol. 5, No. 2, February 2012

PPP projects have been a hot topic in investment policy – especially at the international level – when it comes to creating the resources to fund public projects and investments.

For instance, many different models and structures are used during the establishment and operational stages of PPP projects. For instance, the establishment of a SPV helps to separate the capital flow and assets of the founder of establishment. This new legal entity has its own legal personality, and can benefit from a number of financial and legal rights, thus raising the amount of operational expenses for a limited period of the PPP project.<sup>2</sup> Performance and profitability are calculated based on money flow and financial sustainability, as well as the consistency and allocated funds continuity of the PPP project.

Therefore, what makes PPP projects distinct from other private sector operations in the public sphere are their long term objectives. If the macroeconomic conditions and/or country specific conditions cannot be sustained, other terms of financings may be proposed, such as FDIS.

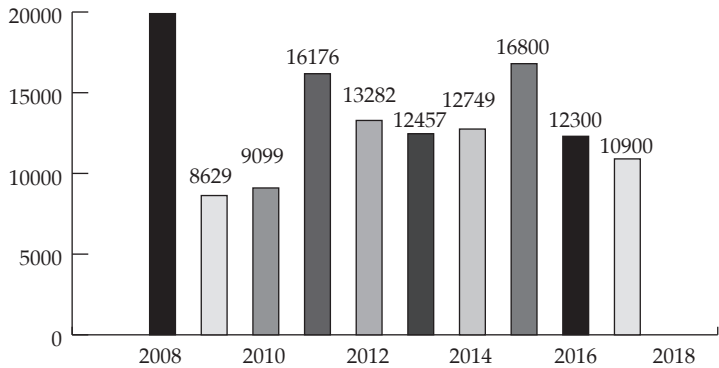
For the last few years, Turkey paved the way for a high amount of investment with large scale projects such as a third Istanbul airport, third Bosphorus bridge, so on. These investments account for significant portion of Turkey's GDP, which brings the crucial question in minds; as an emerging economy, how can Turkey finance these huge amount of investments?<sup>3</sup> The PPP model plays a key role for the financing of these projects and the continuation of investment flow into Turkey.

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2 ALAM, ZINAT S. "An Empirical Analysis of the Determinants of Project Finance: Cash Flow Volatility and Debt Capacity" Date Written: March 15, 2010 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1571656](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571656)> accessed 01/12/2018

3 ÖGE H. & BAS T. "Public-Private Partnership Healthcare Projects in Turkey" *İşletme Bilimi Dergisi (JOBS)*, 2016; 4(2) p.105-119.

<sup>4</sup> FIGURE 1



Source: Tradingeconomics.com. Investment Support and Promotion Agency (ISPAT).

Although the term PPP is a new concept for the Turkish legal system, PPP projects have manifest themselves in Turkey in various forms and have a fragmented nature based on their various sectoral differences. Despite the currently high level of uncertainty over the Turkish economy, current and projected growth is moderate.<sup>5</sup> This being the case, Turkey's intra- investment and public expenditures may be expected to increase, yet on-going projects and those concluded show promising prospects for the future.

This article seeks to shed a light on Turkey's PPP policy and legal frameworks in the energy and mining sector in order to clarify some of the advantages and disadvantages of the Turkey's PPP regime. Despite the main focus of this article being focused around these specific sectors, the general PPP and investment framework and their status within the Turkish domestic legal system should be discussed before

4 The data and the chart is taken from Trading Economics <<https://trading-economics.com/turkey/foreign-direct-investment> > accessed 01/01/2019

5 World Bank Economic Outlook, Country Turkey <<https://www.worldbank.org/en/country/turkey/overview#3> > accessed 01/01/2019

any extra details pertaining to the mining and energy sectors are given a more specific analysis.

## 2. THE ANATOMY OF TURKEY'S PUBLIC- PRIVATE PARTNERSHIP POLICY AND LEGAL FRAMEWORKS

Turkish PPP projects have been in operation for a rather long time. Very primitive versions of the concept of PPP projects were developed during the time of the Ottoman Empire, while and modern manifestation of PPP projects have constantly attracted investments in the country as it exists today since 1986.<sup>6</sup> Turkey's PPP and investment policies saw a transformation after 2003. After this time, all laws and regulations were overhauled and adapted to attract foreign investors. Statistics shown in figure 1 indicate that these transformation and revisions had a positive effect on Turkey's PPP potential. However, both as a result of domestic economic uncertainties and political developments, the legal framework of PPP projects is far from coherent and uniform within the country's legal regime.

The PPP policy has been crucial basis to the financial flow of Turkey's investments in the last decade. In order to analyze this effectively, the evolution of Turkey's legal framework and the PPP legal regime development should be discussed in terms of three main pillars; administrative law/ public procurement, sector or issue specific private laws and investment law.

Being the home to many large PPP projects that are among the highest valued of their kind in the world, such as the third bridge over the Bosphorus, Turkey has, over time, developed many different PPP models and projects in different

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6 Republic of Turkey Investment Support and Promotion Agency Report, April 2018 < <http://www.invest.gov.tr/en-US/infocenter/publications/Documents/INFRASTRUCTURE.INDUSTRY.pdf> > accessed 25/12/2018



sectors such as the following: “*build-operate-transfer (BOT) model for infrastructure projects such as highways, airports and electricity generation facilities; build-lease-transfer (BLT) model for healthcare projects (and education facilities, under a separate piece of legislation yet to be implemented); transfer of operating rights (TOR) for ports and airports; and build-operate (BO) model for thermal electrical energy generation facilities.*”<sup>7</sup>

Further to such models, Turkey has also implemented a number of PPP projects through agreements struck at a governmental level, through IGAS and host-HGAS. These have centered around energy projects, including nuclear power plants and oil pipelines. The most commonly used models in Turkish PPP (particularly greenfield projects) are the BOT and BLT models.<sup>8</sup>

The list of applicable regulations on PPP projects in Turkey are;

- Built-Operate-Transfer (Law No:3096, 3465, 3996)
- Law No 3096 was the first law which allowed for private sector involvement in the electricity sector.
- Law No. 3465 removed the monopoly position of the General Directorate of State Highways for highway construction, maintenance and operation.
- Law No 3996 became the basis law for BOT implementations in Turkey.
- Built-Operate (Law No: 4283)
- Law no. 4283 regulates the BO Model in the electricity generation sector.
- The Transfer of Operational Rights especially in the areas where the transfer of ownership is no longer possible due to Law No: 4046, 5335, 3465, 3096.
- Long Term Rent (Law No:5335, 4046)

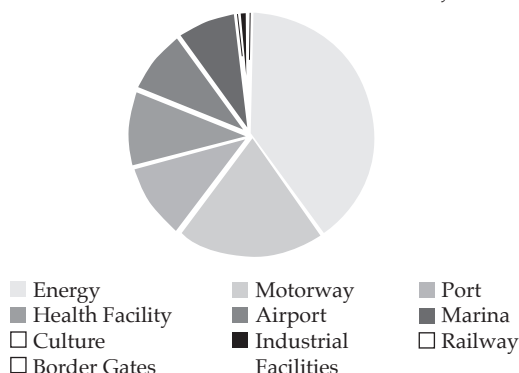
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7 Getting the Deal Through PPP Turkey Chapter 2018 <<https://gettingthedealthrough.com/area/71/jurisdiction/54/public-private-partnerships-2019-turkey/>> accessed 28/11/2018

8 Ibid.

- Privatisation Law No. 4046
- Law No 5335 authorizes the State Airports Authority to totally or partially transfer its airports to the private sector through long term leasing or transfer of operation rights methods.
- Built-Rent-Transfer (Law No: 5396)
- Law No 5396 allows PPP in form of Built Rent Transfer model in the health sector.<sup>9</sup>

<sup>10</sup> FIGURE 2. NUMBER OF PPP PROJECTS



According to general consensus, the advantages of the Turkish PPP legal framework are;

- “ - *Maximized use of private sector experience and skill*
- Affordable projects
- Life cycle cost risk is undertaken by the private sector
- Budgetary certainty regarding the projects
- Ensured level of quality
- The state makes the payments to the private sector only upon the delivery of services

9 World Bank <<http://siteresources.worldbank.org/WBI/Resources/213798-1259011531325/6598384-1268250381749/PPPEPECAGT.pdf>> accessed 19/10/2018

10 Data source Ministry of Development of the Republic of Turkey

- Encouraging injection of private equity
- Lower long term use of state resources”<sup>11</sup>

On the other hand, the most significant general disadvantages of the PPP legal framework in Turkish system are considered;

- “ -Inability to transfer absolute risk
- State’s inability to day to day control of the management of the services provided in PPP Projects
- Slow pace of the state’s decision making and costly PPP projects
- The private sector has a higher cost of finance
- Lack of organizational focus at state level
- Lack of flexibility in public sector (heavy bureaucracy)”<sup>12</sup>

However, Turkey’s PPP policy and legal framework should be analyzed beyond the above mentioned information – including the local and global economy within the framework.

In regular circumstances, PPP projects can be concluded in six steps;

1. Determination of project content and announcement: The coverage of a PPP projects and its framework is announced in this stage.

2. Strategy Construction: After the tender strategy, the outcome of the tender group and the realization of the risks are realized.

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11 Delivering the PPP Promise, A Review of PPP Issues and Activity, PriceWaterhouseCoopers, pg. 4

Turn Risks and Opportunities into Results, Exploring the Top Ten Risks and Opportunities for Global Organizations, Ernst&Young, pg. 48

KPMG-International Experience with PPP Programmes: Success, Failure and Key Lessons, February 22, 2012, pg.1.

GURKAYNAK, G. “Legal Framework of Public- Private Projects in Turkey” Mondaq. Published 5 April 2013 <<http://www.mondaq.com/turkey/x/230474/Government+Contracts+Procurement+PPP/Legal+Framework+Of+Public+Private+Partnership+Projects+In+Turkey>> accessed 10/11/2018

12 Ibid.

3. Procurement: Depends on the domestic law and regulations, this stage may take long time.

4. Negotiations: Parties are negotiated for the best possible conclusions before the contract stage.

5. Decision of the Contract: After assessment of risks and finances the contract is concluded between public authority and the private entity.

6. Service Delivery: The last stage of a PPP project, which involves the build-up and operation, and potentially transfer parts.<sup>13</sup>

Over the course of Turkish PPP projects, stages of the projects are fully structured and codified. the above-listed phases offer a Turkish PPP legal regime which provides flexibility and adaptability for changing circumstances. These are important for the kind of costly and large-scale projects mentioned; and thus flexibility and adaptability are considered the strongest features of the Turkish PPP legal regime.

Additionally, the lack of uniformity and coherence between different sectors provides public authorities with the freedom to create tailor-made solutions for potential PPP projects' targets, shaping the system based on their needs.

On the other hand, this regime makes the system less trustworthy because the definitions and fundamental legal norms and principles are not crystal clear. In other words, in case of fundamental changes of circumstances, the consequences can be unforeseeable or hard to determine.

More explicitly, the lack of general framework, and a single PPP institution, provides a space for the parties to negotiate and establish big projects; yet as not all risks of the investors and stakeholders are guaranteed by the public

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13 BALCIOGLU, H. "Role pf Public Private Partnership (PPP) Model in Energy Investments", *EcoForum*, Vol. 6, Issues, 1 (2017) <[https://econpapers.repec.org/article/scmecofrm/v\\_3a6\\_3ay\\_3a2017\\_3ai\\_3a1\\_3ap\\_3a38.htm](https://econpapers.repec.org/article/scmecofrm/v_3a6_3ay_3a2017_3ai_3a1_3ap_3a38.htm)>

authority, the stage is also set for bigger disputes and risks in the long term.

A “fundamental changes of circumstances” is a board concept, and excuses made in terms of national security, public interests reasons or economic crises – such as those experienced in past Argentinian investment disputes<sup>14</sup> - can be used for the nationalization or termination of PPP projects or licenses, or termination of concessions, as well as the requesting adaptation of contracts. The Turkish Council of State explicitly states that all concessions relevant to PPP projects have public service status under Turkish law so they are subject to the legal opinion of the Turkish Council of State and all legal disputes fall under the review of the Turkish Council of State.<sup>15</sup>

Furthermore, if the investment flows declines – as is currently the case –<sup>16</sup> it makes the country’s growth and development vulnerable by making PPP projects harder to sustain. This is an important factor for investors and may be weaken Turkey’s investment policy overall.

In addition to all these legal risks, as settlements are based on the terms of contract, so disputes settlement clauses should be carefully shaped by the parties, and the disputes which are arisen out of the content of the contract must

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14 J. E. ALVAREZ, “Public International Law Regime Governing International Investment Law”, Hague Academy of International Law Pocket Books Series, 2011

15 The full version of the precedent is Turkish Council of State 10<sup>th</sup> Chamber, 29.4.1993, Case No. .991/1-Decision No. 993/172, “*kamu hizmeti niteliği taşıyan bir görevin yerine getirilmesi, idari bir sözleşme ile özel girişimciye devredilmişse, kamu hizmetinin imtiyaz usulü ile yürütülmesi söz konusu olup imtiyaz süresince hizmetten bedelin yasa ile saptanacak bir tarife üzerinden tahsil edilecek olması ve bu hizmet devrinin uzun ve belli bir devre için yapılması, kamu hizmeti imtiyaz sözleşmelerini diğer sözleşmelerden ayıran özelliklerdir.*” The decision was published in Turkish Council of State Journal, Vol. 88, p. 463

16 World Investment Report 2018, UNCTAD, <[https://unctad.org/en/PublicationsLibrary/wir2018\\_overview\\_en.pdf](https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf)> accessed 20/09/2018

solved under the Turkish administrative law and relevant aspects of Turkish law.

Essentially, Turkey's PPP regime does not have a uniform regulatory regime and is fragmented based on sector. Each sector has their own rules, yet these are not directly related to the PPP framework. Each economic sector is codified based on their own needs and technical requirements. As listed, all general pros and cons of the system indicates, despite the flexibility and adaptability advantages, the high level of risks in case of disputes cannot be eliminated.

### 3. ENERGY & MINING SECTOR EXPERIENCE OF PPPS IN TURKEY

Currently, 155 PPP projects are on-going or planned in energy sector, while 58 PPP projects are on-going or planned in the mining sector in Turkey.<sup>17</sup>

Although there is no specific information regarding the mining sector, it is clearly seen in the figure above, that energy is the second most invested sector after the airport PPP projects. Turkey's geopolitical location naturally puts the energy sector ahead of many other investment opportunities. Moreover, projects such as nuclear power plants, pipelines and uranium mining, make the mining and energy sector strategically important in achieving Turkey's future political and economic goals.

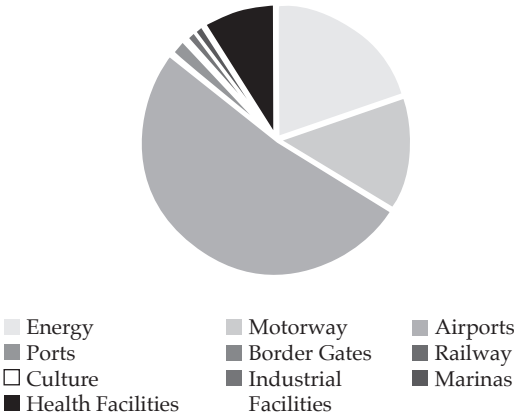
Turkey's fragmented PPP framework allows for public authorities to choose the most effective and profitable PPP model for them; however, in the case of the energy sector, PPP models tend to vary according to the energy type and the activity type. For instance, on one hand, the BO model is generally preferred for renewable energy sources, while

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17 Data is based on the Ministry of Development of the Republic of Turkey's official web-site.<<http://www.sbb.gov.tr/kamu-yatirimlari/#1540465305436-c2204d27-a7d4>> accessed 10/01/2019

IGA-HGA mix models are preferred for the nuclear power plant deals.

<sup>18</sup> FIGURE 3. INVESTMENT BASED ON SECTORS



For pipelines, BOTs are preferred, but multilateral international agreements and other relevant international law instruments do not set aside during the projects.

In the example of the Blue Stream Pipeline, Turkey is a transit country. Formally, Turkey’s section of the project, known as “the Blue Stream Gas Pipeline Sea Section Project” makes up one part of the “Russian Federation-Italy Blue Stream Pipeline BV. Company”. The BOT model has been chosen as the relevant model for this project, which sees construction companies get to work on a natural gas pipeline running under the Black Sea.<sup>19</sup>

<sup>18</sup> Data is Based on The Ministry of Development of the Republic of Turkey (2017) On the date of this article is written the most recent data is from 2017. 15/01/2019

<sup>19</sup> Blue Stream Pipeline Gas Pipeline Under Sea Section Project Information<<https://ppi.worldbank.org/snapshots/project/Blue-Stream-Gas-Pipeline-Sea-Section-Project-3803> > accessed 17/11/2018

In the case of Toroslar Electricity Distribution Company (or “Toroslar Elektrik Dağıtım A.Ş.”), this PPP project, saw a competitive bidding model applied during procurement – yet the PPP project took a rehabilitate, operate and transfer model in the end. Unlike the Blue Stream Pipeline Sea Section project, the concession is provided for thirty years and Turkey guaranteed to pay revenues in the Toroslar Electricity Distribution Company project.<sup>20</sup>

The Karapınar Solar Power Plant project, meanwhile, has been seen as a success story for stakeholders (so far, at least). This project calls for the construction of a solar power plant in Konya’s Karapınar district. The province of Konya was selected as it has the lowest annual rates of rain, its dry agricultural methods, the growth of Konya city center<sup>21</sup>, and the area’s mining potential. The project is of a rather experimental nature as a means of testing for alternatives to Turkey’s very limited fossil fuel resources. The fossil fuel trade makes up approximately 15% of all imports in Turkey, thus contributing to a remarkable trade deficit.

The Karapınar Solar Power Plant project is not only expected to simply boost electricity production and the distribution of sustainable energy but also afford the Province with environmental improvements and job opportunities.

As in the case of the Toros Electricity Distribution Company project, a thirty-year tender for the construction and operation of the Karapınar Project was put out for public tender. The difference of the Karapınar PPP project is the build -operate model as a PPP.<sup>22</sup>

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20 Toroslar Electricity Distribution Company < <https://ppi.worldbank.org/snapshots/project/Toroslar-Elektrik-Dagitim-A-S--7941> > accessed 17/11/2018

21 Population of the Konya city is approximately 2 million people

22 The Karapınar Power Plant Case <[https://www.unece.org/fileadmin/DAM/ceci/documents/2018/PPP/Forum/Documents/Case\\_Study\\_Database\\_2018.pdf](https://www.unece.org/fileadmin/DAM/ceci/documents/2018/PPP/Forum/Documents/Case_Study_Database_2018.pdf)> accessed 11/11/2018



Such examples considered, the Turkish energy sector's practices and experiences in PPP is promising and holds high expectations for the future - all this in the face of economic uncertainty and the general risks endemic to Turkey's general PPP framework. The practice on PPP model choices is relatively more coherent and well-regulated in the energy sector.

Contrary to the experience of the energy sector, the PPP experience as practiced in Turkey's mining sector is considerably less regulated and more prone to far more conflict with Turkey's general PPP and investment policies.

These PPP projects are not regulated as PPPs as such, but rather licensing and concessions contracts governed by the sector. The procurement stage in the mining sector is, similar to other sectors, based on competitive biddings.

The significant difference comes in the legal status of mining contracts. Hence, the Mining Law (Act No. 6309)<sup>23</sup> outlines that licensing and concession contracts regarding mining in Turkey does not allow for the transfer of any rights or establishment of a public services, as these are only creating legal relationships assisting the public authorities on the operating and processing of public goods. In this regard, the legal status of mining licensing and concession contracts differ from other PPP contracts in that the mining act is limited in its framework as a public licensing contract.<sup>24</sup>

Although the legal definition emphasizes that these are not considered in the same vein as other PPP contracts, the management structure of process and contents of contracts do not differ from other PPP contracts. For instance, Law

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23 The Mining Act (Act No. 6309) <<http://www.mevzuat.gov.tr/MevzuatMetin/1.5.3213.pdf>> accessed 11/11/2018

24 BİLGİN P., "Kamu Hizmeti Hakkında", İstanbul Faculty of Law Journal, Vol.1, Issue 1, 1980, p.113-116

No. 3996 explicitly states that mining projects should be governed under the BOT PPP model principles.<sup>25</sup>

Therefore, it is clear that mining activities are held under a separate legal status. However, the procurement and project governing model are the same as other PPP projects. In this regard, mining projects are not typical PPP projects and have *sui generis* legal status.

#### 4. CONCLUSION:

As outlined, the legal framework of PPPs in Turkey falls under three pillars. The first is governed by Turkish administrative law and the general norms and principles of the law; the second falls under the rulings of sectoral regulations; while the last is relates to the norms and principles of international law, including the sustainable development and investment law related frameworks.

The risks and advantages are the same in all economic sectors, not discluding mining and energy. The difference occurs in the legal status of the mining contracts.

Generally, then, a holistic perspective in the transformation and development of the Turkish PPP framework is a promising move, even in the face of global FDI flow and country's economic uncertainties.

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25 Act No. 3996 "Law Regarding Governing Model of Some Investments" < <http://www.mevzuat.gov.tr/MevzuatMetin/1.5.3996.pdf> > accessed 11/11/2018

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Colombia enfrenta un reto constante en el buen uso de los recursos asignados para fomentar diversos segmentos de su economía. Las denominadas Asociaciones Público Privadas (APP) pueden brindar una solución a la hora de optimizar los limitados recursos económicos con los que cuenta el país. Así, este libro recoge las fortalezas de asociarse en la búsqueda de objetivos comunes, tanto del sector público como del sector privado, por medio del uso de esta figura, y examina el uso de las APP desde la experiencia recogida por autores en diversos países, aplicada concretamente al sector petrolero, energías renovables, gas, infraestructura eléctrica y minería.

