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Draft addendum to the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects

Note by the Secretariat

**Compilation of comments by Governments and international
organizations**

Addendum

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* Revised dates.



II. Compilation of comments

A. States

1. Belarus

[Original: Russian]

1. On the basis of their consideration of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, the relevant State authorities have formulated the following comments.
2. The characteristics of investment activity carried out on the basis of concessions in the Republic of Belarus are governed by the Investment Code of the Republic of Belarus (hereinafter referred to as “the Code”). Article 49 of the Code establishes that investment activity relating to the subsoil, bodies of water, forests, land and assets that are wholly owned by the State and activities over which the State enjoys exclusive rights may be carried out on the basis of concessions.
3. In the law of the Republic of Belarus, a concession is deemed, under article 50 of the Code, to constitute a contract concluded by Belarus with an investor on the transfer, for a consideration and for a specified period of time, of the right to engage, within the territory of Belarus, in a particular activity over which the State enjoys exclusive rights, or of the right to use property owned by the Republic of Belarus.
4. The recommendations put forward by UNCITRAL are to a large extent reflected in the legislation in force in Belarus.
5. For example, recommendation 2 is reflected in article 52 of the Code, which establishes that one of the parties to a concession contract shall be the Government of the Republic of Belarus or a national State administrative authority authorized by it (the concession authority).
6. Recommendations 4 and 5 are reflected in article 51 of the Code. Recommendations 10 and 11 are covered by existing economic procedural law, under which national economic courts resolve disputes of an economic nature, including those involving foreign persons. In such cases, the rights and obligations of foreign persons are equal to those of national persons.
7. Recommendation 13 is covered by articles 14 and 15 of the Code, which deals with State support for investment activity in the form of tax and customs duty exemptions, Government guarantees, centralized investment resources and supplementary guarantees for investors.
8. Article 52, subparagraph 2, of the Code corresponds to section II of the draft model legislative provisions for privately financed infrastructure projects (model provision 3, “Authority to enter into concession contracts”).
9. Model provision 4, “Eligible infrastructure sectors” is covered by article 53 of the Code.
10. Section II (Selection of the concessionaire), model provision 5, “Rules governing the selection proceedings”, and part 1 (Pre-selection of bidders), model provision 6, “Purpose and procedure of pre-selection”, correspond to chapter 12 of the Code.

11. Model provision 7, “Pre-selection criteria” is covered by article 63 of the Code, which relates to applications to participate in tenders or auctions. Model provision 8, “Participation of consortia” corresponds to paragraph 3 of the same article.
12. Model provision 9, “Decision on pre-selection” and the section on the procedure for requesting proposals are not adequately covered by existing Belarusian law.
13. Article 59, paragraph 4, of the Code, provides that the negotiation of concession contracts without competitive procedures is possible in only two sets of circumstances: in the event that only one application is received, or by a decision of the President of Belarus when, for the purposes of State security or defence, the concession contract has to be concluded through direct negotiations with a particular investor. Therefore, model provision 18 does not correspond to Belarusian law.
14. Belarusian law does not provide for unsolicited proposals; there is no need for such a provision, since a concession contract may be concluded only on the basis of a tender or auction, with the exception of those cases provided for in article 59, fourth paragraph, of the Code.
15. Model provision 24, “Confidentiality of negotiations” corresponds to article 63, fourth paragraph, of the Code, which establishes that information received about the participants in a tender or auction shall constitute a commercial secret.
16. Model provision 25, “Notice of contract award” corresponds to article 64, second paragraph, of the Code. Model provision 27, “Review procedures” corresponds to article 65.
17. With regard to model provision 28, “Contents of the concession contract”, we would like to point out that articles 67-70 of the Code set out terms for inclusion in a concession contract that are not fully consistent with the model provisions.
18. We agree with the content of model provision 29, “Governing law”, which establishes that the concession contract is governed by the law of the host State unless otherwise provided in the concession contract. It should be borne in mind that, under economic procedural law, disputes about immovable property or about violations of the rights of the owner or other lawful proprietor that do not involve dispossession fall within the sole jurisdiction of the place where the property is located. Article 130 of the Civil Code of the Republic of Belarus states that immovable property covers land, subsoil, isolated bodies of water and everything that is closely connected with land, including forests, buildings and installations.
19. The requirements set out in model provision 30 do not exist in Belarusian law. It seems appropriate to use the recommendations reflected in that model provision when we complete work on our legislation.
20. The content of model provision 31, “Ownership of assets” corresponds to the special terms for inclusion in a concession contract. Model provision 34, “Financial arrangements” is also reflected in the special terms.
21. With regard to model provision 32, “Acquisition of rights related to the project site”, article 12 of the Land Code of the Republic of Belarus states that ownership of land may be transferred to legal persons in the Republic of Belarus, including

businesses with foreign investment, when property owned by the State is privatized. Ownership of land may also be transferred to legal persons in the Republic of Belarus when investment projects are implemented. In such cases, the concession contract has a time limit; it is therefore envisaged that, when land is made available for use, land leases may be drawn up with the time limits of a concession contract.

22. With regard to model provision 33, article 3 of the Land Code of the Republic of Belarus establishes that a landowner is entitled to require the owner of neighbouring land or, where necessary, the owner of other land to grant him or her the right to restricted use of the neighbouring land (easement). Easement is established for the purpose of transit through neighbouring or, where necessary, other land, for the construction and use of electricity transmission lines, communication lines and pipelines, for ensuring water supplies and carrying out land improvement, and to meet other needs. The owner of land that is subject to an easement is entitled, unless otherwise provided by law, to require proportionate payment for use of the land from persons to whom an easement is granted.

23. The assignment of a concession contract, covered by model provisions 36 and 37, is not provided for in Belarusian law.

24. The content of model provision 39, "Compensation for specific changes in legislation" is reflected in article 76 of the Investment Code, which establishes that the terms of a concession contract shall remain in force for the entire duration of the contract.

25. With regard to section IV, "Duration, extension and termination of the concession contract", we would like to point out that article 72 of the Investment Code establishes that a concession contract may be concluded for a period of up to 99 years. Upon expiration of the contract, a concessionaire who has fulfilled the principal terms of the contract in good faith shall enjoy a priority right to renew the contract. Moreover, the President of Belarus or, on the President's instructions, the Government of Belarus may, at the request of the concessionaire, decide to extend the contract for the same period without holding a tender or auction. A concessionaire shall submit a written application for the extension of a contract to the concession authority not later than one year prior to the expiration of the concession contract. Belarusian law does not govern these legal relationships in greater detail.

26. It is envisaged that the model provisions in this section could be used to improve national legislation.

27. Section V, "Settlement of disputes" does not contradict Belarusian law. However, with regard to model provision 50, which states that the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility, it should be noted that Belarusian law does not establish such powers for a party to a concession contract. The rights and legal interests of the user are protected in accordance with the procedure established in Belarusian law.