



## Albania

### ASSESSMENT OF THE QUALITY OF THE PPP LEGISLATION AND OF THE EFFECTIVENESS OF ITS IMPLEMENTATION

2011

<b>I- PPP Legislative Framework Assessment (LFA)</b>	<b>Compliance of the PPP legal framework with PFI Guide recommendations<sup>1</sup> and Best Practice</b>		
<b>Core Area</b>		<b>Rating</b>	<b>Assessment</b>
<b>1- PPP Legal Framework</b>	Existence of specific PPP law or a comprehensive set of laws regulating concessions and other forms of PPP and allowing a workable PPP legal framework	13/15	
<b>2-Definitions and Scope of the Law</b>	Existence of a clear definition of the boundaries and scope of application of the concession legal framework (e.g. definition of "PPP", sectors concerned, competent authorities, eligible Private party) limiting the risk of a challenge to the validity of PPP contracts, irrespective of whether the act is specifically targeted at PPP	24/24	
<b>3-Selection of the Private Party</b>	Mandatory application of a fair and transparent tender selection process. Limited exceptions allowing direct negotiations, competitive rules for unsolicited proposals and the possibility to challenge illegal awards.	43/45	
<b>4-Project Agreement</b>	Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper	23/27	

<sup>1</sup> UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*, 2001 (hereinafter the "PFI Guide")



	allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interferences from the Contracting Authority (obligations, tariff, termination, compensation).		
<b>5-Security and Support Issues</b>	Availability of reliable security instruments to contractually secure the assets and cash-flow of the Private Party in favour of lenders, including "step in" rights and the possibility of government financial support, or guarantee of, the Contracting Authority's proper fulfilment of its obligations.	8/15	
<b>6-Settlement of Disputes and Applicable Laws</b>	Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.	14/15	
<b>General LFA Rating</b>			
		<b>85.7%</b>	<b>High Compliance</b>
<b>II-Legal Indicators Survey (LIS)</b>	<b>Effectiveness Assessment : How the PPP law works in practice</b>		
<b>Core Area</b>		<b>Rating</b>	<b>Legal Indicator Survey</b>
<b>7- Policy Framework</b>	Existence of a policy framework for public private partnerships	11/24	
<b>8 Institutional Framework</b>	Existence of an institutional framework for public private partnerships	12/27	
<b>9- PPP Law Enforcement</b>	Award and implementation of PPP projects in compliance with the Law	18/24	
<b>General LIS Rating</b>		<b>55%</b>	<b>Medium Effectiveness</b>
<b>OVERALL RATING</b>		<b>70,3/%</b>	<b>High Compliance/Effectiveness</b>

## Local Expert<sup>2</sup>: Kalo & Associates

<sup>2</sup> The Local Experts in charge of each country have been consulted for the elaboration of the responses to the Checklist in their capacity of well recognized established law firm in the country but the Local Experts as well as EBRD are in no way responsible for the responses given to any questions in this Checklist as the Consultant was free to use any other sources of information for its final determination.

## Checklist Albania



3.

**RATING**: Key for assessment of Each Question

✓ ✓ ✓	Yes	3 points
✓ ✓	Yes, with reservations	2 points
× ×	No, with Limited compliance / redeeming features	1 point
× × ×	No	0 point
N/A	Not applicable	0 point/Not included in total

## Key for Assessment of Each Core Area and for Overall Assessment

≥ 90%	Very High Compliance/Effectiveness
≥ 70%-89%	High Compliance/Effectiveness
50%-69%	Medium Compliance/Effectiveness
30%-49%	Low Compliance/Effectiveness
< 30%	Very low Compliance/Effectiveness

**TERMINOLOGY**

*So as to keep answers consistent and avoid ambiguity, we set out below some brief definitions of the terminology used in this questionnaire. Any definition is provided solely to clarify some of the terminology used below. The reader should note that any such definition does not correspond with any given definition under best international practice (which does not provide for any standardised PPP legal definitions recognised worldwide) neither should it be interpreted that we recommend the adoption of such definitions under actual documentation, but they are included in the interests of clarity for the completion of this questionnaire, and we should be grateful if you could adopt such definitions for the purposes of completing the questionnaire.*

**Checklist Albania**



4.

- **"Public Private Partnership" - "PPP" or "PPP project"** includes all types of long-term arrangements between public authorities and private institutions, including but not limited to; Concessions, BOT and derived forms, PFI and Institutional PPP. For the purposes of this questionnaire, PPP excludes the sale of public assets or of public company shares which are part of a privatisation process and also excludes public works, services or supply contracts which are subject to public procurement rules.

The following types of Public - Private Partnership Agreements may be adopted by a Contracting Authority for undertaking infrastructure projects. These are solely indicative in nature and the Contracting Authority may seek to adopt a combination of the different contractual arrangements, which incorporate some of their elements or combine elements.

- **"BOT" - (Build-Operate-and-Transfer)- and derived forms** : a contractual arrangement whereby the Private Party undertakes to finance, design, construct under a turnkey risk basis, operate and maintain an Infrastructure project for a specified period after which period the project facilities are transferred to the Granting Authority usually without payment of any compensation.

The Private Party has the right to collect contract or market based tariffs or fees from the users of the infrastructure project, as specified in the PPP agreement, to recover its investment and operating and maintenance expenses for the project. A BOT type of PPP arrangement may provide for all the implementation and operational efficiencies of the private sector, together with new sources of infrastructure capital. Derived forms of BOT contractual arrangements exist such as Build-Own-Operate-and-Transfer (BOOT) similar to the BOT agreement, except that the Private Party owns the Infrastructure project during the specified term before its transfer to the Contracting Authority or its designee, or such as Build-Own-and-Operate (BOO) which is a contractual arrangement similar to the BOT agreement, except that the Private Party owns the Infrastructure project and no transfer of the project to the Contracting Authority or its designee at the end of the fixed period is envisaged. Derived forms incorporating Lease right rather than Ownership or dealing with rehabilitation or extension rather than construction which extend the possible combination which for the purpose of this questionnaire will all be hereafter referred to as BOT for simplification purpose except where legal specificity requires specific treatment.

- **"Concession"**: is an act attributable to the State whereby a Contracting Authority entrusts to a third party the total or partial management of public services for which that authority would normally be responsible and for which the third party assumes all or part of the risk.
- **"PFI" (Private Finance Initiative)** : a form of cooperation and partnership between public authorities and Private Parties which aim to ensure the funding, construction, renovation, management or maintenance of an infrastructure or the provision of service to the infrastructure without the delegation of the public service itself. It is a contractual arrangement whereby the Private Party



5.

undertakes the financing and the construction of an infrastructure project and after its completion transfer it to the Contracting Authority or its designee. This arrangement may be employed in the construction of a public service facility for which the public service must be operated directly by the contracting authority for whatever reason but the operation and maintenance of the facility remain the responsibility of the Private Party for the entire duration of the PPP agreement. The contracting authority will reimburse the total project investment on the basis of a rent based of an agreed schedule with the payment starting from the date of commencement of operation and pay for the services rendered to the facility on a performance basis.

- **"IPPP"**(Institutional PPP): a structural or corporate form of PPP which provide for the cooperation between public authorities and a Private Party through a joint venture or mix (publid- private shareholding) company in which case all reference to the slection process refers to the selection of the Private Party.

Other definitions:

- The **"Law"** or **"PPP Law"**: a law regulating any form of PPP including but not limited to Concession, BOT, PFI, IPPP and including, for the purpose of this questionair, the set of rules applicable to any PPP in the absence of a specific PPP law. The Law for the purpose of this questionnaire also includes any implementing regulation and any form of governemental act regulating PPP.
- **"BOT Law"** : a law regulating a BOT type of PPP in their multiple forms.
- **"Concession Law"**: a law regulating a Concession form of PPP.
- **"Contracting Authority"**: a public authority empowered to award a PPP and enter into Project Agreements
- **"PFI Law"**: a law regulating a PFI form of PPP.
- **"PPP unit"** : specialized institution/agency/ministerial department established to promote and take care of PPP.
- **"Private Party"** : Private Party or other entity in the form of a special purpose company to which a Project Agreement in general has been awarded. [*The word Private party will be used for the sake of this study even in case the PPP regulation allows PPP business partner to be a mix company or even a public entity.*]
- **"Project Agreement"**: an agreement(s) between the Contracting Authority and the Private Party regulating their respective rights and obligations with respect to the PPP project.



### **REFERENCE TO BEST PRACTICE**

- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001 (hereinafter the "**PFI Guide**") and UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2003 (UNCITRAL Model Legislative Provisions).
  
- EC - Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005.COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI)); European Commission Guidelines for Successful Public-Private Partnerships (2003).Commission Interpretative Communication Brussels, 05.02.2008 C (2007)6661on the application of Community law on Public Procurement, and Concessions to Institutionalised Public-Private Partnerships (IPPP);
  
- EBRD Core Principles for a Modern Concessions Law – selection and justification of principles Prepared by the EBRD Legal Transition Team.2005;
  
- UNIDO Guidelines for Infrastructure Development through Build Operate Transfer (BOT) Projects, 1996 (UNIDO BOT Guidelines); and
  
- OECD Basic Elements of a Law on Concession Agreements, 1999-2000.



### **OVERALL ASSESSMENT ALBANIA 2011**

Even though a general policy framework for improving the legal environment and promoting PPP has not been identified in Albania, the way the Government recently approached concession legal framework reform shows its interest in promoting and using PPP in its infrastructure and services. The Albanian Law, dated 2006 is very close to the PFI Guide recommendations.

It is one of the few Laws in the region that includes in its definition the transfer of risk to the concessionaire and the remuneration considerations. It also requires a value for money analysis. Reference to “management contract” in article 2 is however unclear. Entities involved and concerned sectors are clearly identified. Sectors eligible for PPP include *inter alia* transport, electricity, water, waste water, solid waste, education, health care and prison sectors as well as any other sector approved by government resolution.

The Law contains provisions assuring fair and transparent selection process (pre-selection of bidders, procedure for requesting proposals - with a distinction drawn between technical and financial proposals-, possibility of two-stage procedure, publication of concession award, limited exceptions to concession award without competitive procedure, existence of review procedures, parameters for the negotiation process, etc.). The provisions regulating the project agreement give clear guidance on the main issues to be covered yet remain sufficiently flexible, thus allowing the parties to freely negotiate its terms.

However, the Law is rather silent on security and support issues. We understand that this comes from the fact that the country is particularly concerned with the degree of public debt and potential consequences on the public budget of PPP projects.

The Albanian Law is one of the best drafted laws in the region. The lack of practical experience in the implementation of the Law may be an obstacle for investors at this stage.

The law was further amended back in 2009 and 2010, and a new review body for hearing complaints was introduced, namely the Public Procurement Commission. The new amendments details the procedure of administrative review in front of the Public Procurement Commission by setting clear provisions, timeframes and procedures to be followed during the review process.

We strongly believe that the proposed amendments to the Concessions Law allowing "step in" right shall significantly improve the bankability of private investments in the infrastructure area and also shall serve to minimize collateral financing of such investments in order to help sponsors that are in difficulty of finding external collaterals to secure their loans. The proposed set of amendments has been already submitted to the Government of Albania.

#### **Checklist Albania**



### ASSESSMENT & LEGAL INDICATOR SURVEY

#### 1. LEGAL FRAMEWORK

##### 1.1 Existence of different forms of PPP legal framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the country have a single act dealing specifically with Concessions or a generalised act incorporating the legal framework for PPP, including Concessions?	✓ ✓ ✓		<p>A general act incorporating the legal framework for PPP has not been identified yet, but Albania has a single act dealing specifically with Concessions.</p> <ul style="list-style-type: none"> <li>• Law no. 9663, dated 18.12.2006 “On Concessions“, as amended with Law no. 9995, dated 22.09.2008, Law no. 10 137, dated 11.5.2009, Law no. 10 157, dated 15.10.2009 and Law no. 10 281, dated 20.05.2010.</li> </ul>



2. Does the country have an act that allows BOT or derived forms such as BOOT, BOO or other forms either as part of a specific act or as part of a general PPP Law?	✓ ✓ ✓	2. (2)	According to the Law on Concessions, concessions are considered as agreements, <b>notwithstanding the term</b> , between the Contracting Authority and the Concessionaire. The law does not specify the types of concessions, but leaves it open to the contracting parties to agree on the form of the concession.
3. Does the country have an act that allows PFI, either as part of a specific act or as part of a general PPP Law?	✓ ✓ ✓	4. (1)	The law is applicable on non merchant sector such as : d) education and sport; e) health; ë) tourism and culture; f) prison infrastructure; Which imply that the law includes PFI.
4. If the answer is <i>No</i> to any of the three first questions concerning a specific form of PPP does the Constitution or other general act (ex: the Civil Code, sectoral law) recognise the basic principles of the concerned PPP and regulate its granting?	N/A	59	The Constitution of the Republic of Albania encourages the private initiative and also encompasses the role of the public institutions towards sustainable development of the economy and society in general.

**For our general information: Is a new PPP Law or an amendment to the existing Law being prepared, or considered, in the country?**

**If so, at what stage of the legislative process is such new PPP Law or amendment to the existing Law?**

On April 2010, the International Finance Corporation (“IFC”) officially launched the Renewable Energy Albania Project (RE Albania) as part of the wider Western Balkan Renewable Energy Program – BREP. Kalo & Associates together with Gide Loyrette Nouel acted as legal advisor for IFC on the regulatory part of this project and on 21 March 2011 successfully concluded the final phase of the Renewable Energy Regulatory Improvements in Albania. As one of the most important outputs of this project, Kalo & Associates together with the international advisor, proposed a draft amendment to the Concessions Law and to the standardized concession contract, aiming to fully enable the step-in rights of the financing institutions which will ultimately allow the financing institutions (such as banks, lenders or insurance companies) to substitute a defaulting concessionaire by envisaging the legal procedure for the appointment of the substituting entity. The Albanian Concessions Law is

## Checklist **Albania**



based on the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects and indeed reflects most of the provisions of the UNCITRAL PFI Guide recommendations. The UNCITRAL PFI Guide has been taken as a reference to draft the proposed amendments for enabling the step-in right of the financing institutions.

During the previous phases of the project, the legal advisors conducted a series of meetings with local banks in order to correctly understand the concerns and obstacles faced by the banks in extending financing to private investments in the infrastructure area. It was obvious that financing institutions have requested detailed step-in rights to be reflected both in the primary legislation (i.e. law on concessions) and also a clear mechanism to be included in the concession contract to be entered with the contracting authority. Having acknowledged such concern of the financing institutions which at a certain degree hinders the financial viability of several project financing, Kalo & Associates proposed a set of amendment to the concessions law and to the standardized concession contract. In line with best international practices several new definitions were proposed to be included in the law: definition of the direct agreement, financing institutions, step-in rights, procedure for enabling the step-in right.

As suggested by the UNCITRAL PFI Guide recommendations, under certain conditions specified in the direct agreements, lenders can replace the concessionaire with a third party as counterparty to the project agreements. These conditions usually entail circumstances that would justify terminating the relevant contract due to default by the concessionaire or situations that would entitle lenders to enforce their security interests. The purpose of these provisions is clear: lenders reserve the right to either transfer the shares of the existing concessionaire or replace the latter with a different party in the project contracts both to prevent the possibility that a default by the concessionaire may trigger termination and to take control of the project, by means of a substituting entity, if the need should arise. In almost all project finance cases, lenders demand the right to unilaterally “deprive” the concessionaire of the project agreements (to assign them to a third party—a possible buyer of the project) if certain events of default have been verified. Of course this unilateral right of the lenders has been carefully drafted in order to save the right equilibrium between the interests of the public authority and those of the private entity extending finance to the sponsors.

We strongly believe that the proposed amendments to the Concessions Law shall significantly improve the bankability of private investments in the infrastructure area and also shall serve to minimize collateral financing of such investments in order to help sponsors that are in difficulty of finding external collaterals to secure their loans. The proposed set of amendments has been already submitted to the Government of Albania



## 1.2 Specificity and integration of PPP the legal framework

5. If the country has a Public Procurement Law, to what extent does the Public Procurement Law apply or not to the granting of a PPP?	✓ ✓ ✓	4. (5)	The Law on Concessions is not applicable in cases of public procurement of goods, services and constructions, as well as for private investments.
6. If the country has sectoral laws regulating PPP in specific sectors, is it clear which law is applicable to the granting of PPP for each particular sector?	N/A		No sectoral laws regulating PPP in specific sectors.
7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?	× ×		The law does not specify (does not prohibit either) the possibility for public entity to participate as a member of consortium and does not provide for such specific rules in such case.



## 2. DEFINITIONS AND SCOPE OF THE PPP LAW(S)

### 2.1 PPP definition<sup>3</sup>

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>1. Does the Law define one or several term(s) (<i>i.e.</i> "PPP", "Concession", "BOT", "Partnership" <i>etc. and/or respective agreements</i>) for the arrangements to be regulated by the Law which specify the limits of application of the Law?</p> <p><b>For our general information,:</b> <i>please provide the given definition(s), if any.</i></p>	<p>✓ ✓ ✓</p>	<p>2 4</p>	<p><b>Concession</b>, means the agreement, notwithstanding the term, between the Contracting Authority and the concessionaire which provides for requirements and conditions in terms of which the Concessionaire:</p> <p>(a) Carries out an economic activity which would otherwise be carried out by Contracting Authority related to a concession project, management contract or other public services;</p> <p>(b) Assumes all or substantial part of risks related to such economic activity;</p> <p>(c) Receives a benefit by way of:</p> <p>(i) Direct payments paid by or on behalf of contracting authority;</p>

<sup>3</sup> PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and Commission Interpretative Communication on Concessions Under Community Law dated 12 April 2000; together with additional EU major documents/decision /recommendation on concessions including Directives 2004/18/EC and 2004/17 EC of 31 March 2004; Green Paper on Public Private Partnerships and Community Law on Public Contracts and Concessions dated 30 April 2004; Report on the public consultation on the Green Paper (SEC(2005) 629- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (Brussels, 15.11.2005. COM(2005) 569) European Parliament resolution on public-private partnerships and Community law on public procurement and concessions (2006/2043(INI))



			(ii) Tariffs or fees collected from users or customers; (iii) A combination of such direct payments and tariffs.
2. Does the Law apply to all contracts entered into that fall under the definition(s) given above, irrespective of the name given to such contract ( <i>concession, license, usufruct right, lease, etc.</i> )?	✓ ✓ ✓	2	<b>Concession</b> means the agreement, notwithstanding the term, between the Contracting Authority and the concessionaire.
3. Does the Law make a clear distinction between a PPP agreement ( <i>such as a Concession</i> ) and a license ( <i>i.e. an authorisation to operate by a public authority</i> )?	✓ ✓ ✓	4. (4)	This Law shall not apply to grant of licenses, except to the extent that a license is issued within the framework of a Concession Contract.

## 2.2 Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law identify ( <i>or allow clear identification by reference to other laws or regulations</i> ) the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements ?	✓ ✓ ✓	5	



**For our general information:** *If yes, which of the following authorities are identified:*

- *National authorities (e.g.: the government, ministries, and independent agencies); (YES)*
- *Regional/state-level authorities;*
- *Local or municipal authorities; or State owned companies? (YES)*

### 2.3 Private Party and Project Company

QUESTION	ANSWER	ARTICLE	COMMENTARY
5. Is it possible for a PPP be awarded to a foreign company, a Private Party or to a domestic company with foreign participation in the share capital and/or management ( <i>without discrimination</i> )?	✓ ✓ ✓	2. (4)	“Concessionaire” is a legal person, Albanian or foreign, with or without local or foreign participation, that enters into a concession contract with the contracting authority.

**For our general information:** *can a PPP be awarded to public entities or to entities jointly owned by private and public entities (IPPP)? Are there restrictions imposed on such contracts?*

The Albanian legislation provides that public entities (or entities in which the state owns a percentage of the shares) are to be established in the form of joint stock companies by following the general provisions of the companies act in Albania. Since the law on concessions defines the concessionaire as a legal person, Albanian or foreign, with or without local or foreign participation, that enters into a concession contract with the contracting authority, therefore no restriction is posed on the participation of public entities in concessionary projects.



## 2.4 Concerned sectors<sup>4</sup>

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law identify ( <i>or allow identification by reference to other laws or regulations</i> ) the sectors and/or types of infrastructure and/or services in respect of which a PPP may or may not be granted?	✓ ✓ ✓	4	It identifies numerous sectors.
7. Do the sectors eligible for PPP correspond to an open-ended one ( <i>as opposed to being exhaustive</i> ) allowing ( <i>or at least not preventing</i> ) PPP to be granted in numerous sectors”?	✓ ✓ ✓	4	Council of Ministers, upon the proposal of the Minister responsible for economy, may authorize Concessions to be implemented in other sectors.
8. Do the sectors eligible for PPP include non commercial activities such as the provision of government services (such as schools, hospitals, prisons, defence and housing) in addition to merchant sectors of the economy (energy, transport, water, oil and gas) eligible for PPP.	✓ ✓ ✓	4	Yes.

<sup>4</sup> For further information on the concerned sectors please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendation 3 and 4.



**For our general information:** Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP:



### 3. SELECTION OF THE PRIVATE PARTY<sup>5</sup>

#### 3.1 General Considerations

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law require, in principle, the Contracting Authority to select Private Parties through a competitive tender process?	✓ ✓ ✓	10	
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	✓ ✓ ✓	1	
3. Is there a provision in the Law concerning the publication of information related to the competitive procedures in the country media and in the international media ( <i>for large projects</i> )?	✓ ✓ ✓	11	

<sup>5</sup> For further information on the selection of the Private Party, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 14 to 39 included.



4. Are there provisions within the Law or any special manual or recommendations governing in detail the selection of the Private Party ( <i>i.e.: the pre-selection of bidders, the procedure for requesting proposals or other procedure such as competitive dialogue/two stage procedure</i> )?	✓ ✓	11-21	Regulations are adopted but contain a degree of confusion.
5. Does the Law provide that if the Contracting Authority rejects an applicant at the time of pre-selection or disqualifies a bidder, it must make public the reasons for the decision ( <i>or inform the rejected bidder thereof explaining the reasons for rejection</i> )?	✓ ✓ ✓	15 21	

### 3.2 Award of PPP

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide that all proposals are ranked solely on the basis of a predefined evaluation criteria set forth in the pre-selection documents/ request for proposals?	✓ ✓ ✓	15 21	
7. Does the Law provide for the publication of a	✓ ✓ ✓	21	

### Checklist **Albania**



notice of the award of the project, identifying the Private Party and including a summary of the essential terms of the project agreement?			
8. Does the Law provide that the Contracting Authority or any other public authority maintain records of key information pertaining to the selection and award proceedings?	✓ ✓ ✓	2	
9. If the answer to the previous question is <i>Yes</i> , does the Law provide that such record is accessible to the public, or at least to interested parties?	✓ ✓	2	Not specified but may be implied. In Albania there is a specific law on the access of the public to official documents (1999) which provides for the right of information.

### 3.3 Final negotiations

QUESTION	ANSWER	ARTICLE	COMMENTARY
10. Does the Law contain provisions regulating final negotiations (i.e. post contract award) so that transparency, equal treatment and competition are preserved?	✓ ✓ ✓	21. (2)	Final negotiations shall not concern those contractual terms that were stated as nonnegotiable in the final request for proposals.
11. Does the Law provide that the Contracting	✓ ✓ ✓	21. (3)	

### Checklist **Albania**



Authority has the authority to terminate negotiations with the invited bidder if it becomes apparent that the bid will not result in an agreement and start negotiations with the second ranked candidate?			
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### 3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
12. Does the Law provide that the Contracting Authority has the authority to award a PPP without a competitive process? Is this only in limited/ exceptional circumstances?	✓ ✓ ✓	22	
13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?	✓ ✓ ✓	22	

*For our general information, please specify the conditions which would allow such direct negotiations?*

Contracting authority may conduct the negotiation of concession contracts without using the selection procedure, only with the approval of Council of Ministers, where:

(a) the project affects national security. The cases where national security is affected, as a consequence of implementation of selection procedure, shall be approved upon the decision of National Security Council;



- (b) the concession contract has been terminated due to a serious violation by the concessionaire and where there a selection procedure is not possible to be implemented, due to the urgent need to ensure continuation of activity;
- (c) because of a serious infringement by the concessionaire, the substitution of the concessionaire is required by the financing institutions, based on the step-in right.

### **Special case of unsolicited proposals**

QUESTION	ANSWER	ARTICLE	COMMENTARY
14. Does the Law provide for an adequate framework for the Contracting Authority to manage unsolicited proposals/private initiatives (i.e. a proposal relating to the implementation of a PPP that is not submitted in response to a request or solicitation by the Contracting Authority) that ensures transparency and equal treatment and does not distort competition?	✓ ✓ ✓	23	

### **3.5 Review procedures**

QUESTION	ANSWER	ARTICLE	COMMENTARY
15. Does the Law allow the bidders who claim to	✓ ✓ ✓	25	

### **Checklist Albania**



have suffered, or that may suffer loss or injury, to seek review of the Contracting Authority's actions or failure to act?		26	
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#### 4. **PROJECT AGREEMENT**<sup>6</sup>

##### 4.1 **Model or list of provisions**

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law contain (or refer to) a model PPP agreement (which is an optional template agreement for guidance only) or a list of mandatory material provisions which must be included in the agreement ( <i>the content of such provisions being left for negotiation</i> )?	✓ ✓ ✓	27	

##### 4.2 **Duration and extension of the Project Agreement**

QUESTION	ANSWER	ARTICLE	COMMENTARY
2. Does the Law provide that the duration of the Project Agreement should depend on the length	✓ ✓ ✓	27	Up to 35 Years

<sup>6</sup> For further information on the project agreement definition, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 12 and 40 to 68 included.



of time taken for the amortisation of the Private Party's investment and an appropriate return on the capital?			
3. Does the Law provide that the renewal or extension of the Project Agreement should be limited and depend on exceptional circumstances ( <i>such as Contracting Authority default or an event of force majeure</i> )?	✓ ✓ ✓	27	

For our general information, please provide the given minimum and maximum duration (if any)

#### 4.3 Termination of the Project Agreement

QUESTION	ANSWER	ARTICLE	COMMENTARY
4. Does the Law leave open to the Project Agreement negotiations the list of possible ground for termination and the content of to the termination provision?	✓ ✓ ✓	28	Restricted list but including major usual ground for termination.
5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of	N/A		

#### Checklist **Albania**



termination which does not affect the balance between the parties rights and obligations ( <i>one sided provisions</i> ) or the stability of the contractual relation under the Project Agreement (e.g.: <i>too large or non exhaustive list</i> )?			
6. Does the Law provide for ( <i>or at least does not prevent</i> ) compensation of the Private Party for losses incurred as a result for termination on the grounds of public interest for losses incurred as a result of public authority acts?	✓ ✓	27	Not clearly specified as far as public interest is concerned but it apply in case of breach by the Contracting Authority.
7. Does the Law provide for ( <i>or at least does not prevent</i> ) compensation of the Private Party for all cases of early termination ( <i>including in case of serious breach or failure by the Private Party</i> ), for fair value after depreciation of the assets financed by the Private Party?	✓ ✓	27	The Concession Agreement should provide for the right of the parties to seek compensation, but the circumstances in which compensation is allowed are not clearly specified by the Concession Law, but are left in the hands of the parties to be predicted in the Concession Agreement.

#### 4.4 Tariff setting, service standards

QUESTION	ANSWER	ARTICLE	COMMENTARY
8. Does the Law provide clear guidance on all aspects of interaction between the bodies that have the power to award PPP and the bodies	✗ ✗	27. dh	

#### Checklist **Albania**



that regulate tariffs and service standards?			
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#### 4.5 Financial responsibilities of the Private Party and Contracting Authority

QUESTION	ANSWER	ARTICLE	COMMENTARY
9. Does the Law provide that the Private Party can collect tariffs or fees for the use of the facility or its services?	✓ ✓ ✓	2 29	
10. Does the Law provide for the possibility of fixed and/or consumption-based payments to the Private Party by the Granting Authority or other public authorities ( <i>in the case of Power Purchase Agreement , shadow tool or PFI for instance</i> ) ?	✓ ✓ ✓	2 29	



## 5. SECURITY AND SUPPORT ISSUES<sup>7</sup>

### 5.1 Security Interests

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law provide for ( <i>or does not specifically prevent</i> ) a Private Party to create security interests over the project assets, rights and proceeds or other valuable guarantees related to the project?	XX	27	There is no specific provision with this respect. Although, the law provides an indicative list of conditions that the concession agreement should contain, those conditions are not exhaustive. Therefore, the parties are free to negotiate about security interests or other valuable guarantees related to the project.
2. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which types of security can be provided and include some of the most common type of guarantees in project financing (such as those listed in the request for general information below)?	N/A		

**For our general information**, please can you confirm whether a Private Party may pledge or assign by way of security:

- *the proceeds and receivables arising out of the PPP;*
- *the assets for which it has rights of use under a project agreement;*

<sup>7</sup> For further information on support and financial securities, please refer to: PFI Guide, Consolidated Legislative Recommendations, Recommendations 13, 49, 57 and 60.



- *its property;*
- *shares of the Project Company;*
- *the project agreement; or*

*obtain other valuable guarantees (please specify)?*

## 5.2 Government support

QUESTION	ANSWER	ARTICLE	COMMENTARY
3. Does the Law provide for ( <i>or does not specifically prevent</i> ) the public authority to provide support to the Contracting Authority and a guarantee for the proper implementation of the PPP by the Contracting Authority?	XX	27. (j)	Although it is neither provided by the law nor is specifically prevented by it, the law states that the concession agreement should provide for eventual liabilities, if any, of the relevant public authorities or contracting authorities. Therefore, an eventual liability might be the support and guarantee for the implementation of the PPP.
4. Does the Law provide for ( <i>or does not specifically prevent</i> ) the Public Authority to provide financial or economic support for the implementation of PPP?	XX	27. (dh)	The concession agreement should provide for the remuneration of the concessionaire, regardless whether it consists of tariffs or fees for the use of the infrastructure facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; payments, if any, that may be made by the contracting authority or other public authority but the law does not specifically refer to the possibility of subsidy or other economic support.



5. If the answer to the previous question is <i>Yes</i> , does the Law clearly state which public authorities may provide such support and which types of support can be provided? (i.e. <i>tax and customs benefits; foreign exchange protection (convertibility and transfer guarantees; subsidies; equity or loan participation)</i> )?	N/A		No provisions in this respect.
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### 5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
6. Does the Law provide for the Parties to arrange the financing with reasonable flexibility under the Project Agreement without strict time constraints or other constraints ( <i>except with respect to security package and government support</i> )?	✓ ✓	28.(1) (b)	The Law provide the possibility of termination for the failure of the concessionaire to ensure the financing of the project within 12 months as of signing the concession contract which is not too strict.
7. Does the Law provide, in the event of the default of the Private Party for the lenders to “ <i>step-in</i> ” or substitute the Private Party with a qualified new Private Party without initiating a new tender process?	✓ ✓ ✓	27. p	The step-in right was introduced with the amendments made with the Law no. 9995, dated 22.09.2008.



## 6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS<sup>8</sup>

### 6.1 Settlement of disputes

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Does the Law permit the Contracting Authority to enter into a Project Agreement that is subject to international arbitration?	✓ ✓ ✓	31	
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		Signed on 15 October 1991 Entry into force on 14 November 1991
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		Accession on 27 June 2001 Entry into force on 25 September 2001

<sup>8</sup> For further information on the settlement of disputes, please refer to: PFI Guide, Consolidated legislative Recommendations, Recommendations 57, 69 and 71.



## 6.2 Applicable laws

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>4. Does the Law permit (<i>or does not prevent</i>) the Contracting Authority) to enter into side agreements to the Project Agreement (such as <i>a direct agreement with the lenders to the project or a support and guarantee agreement in respect of the Project Agreement</i>) that is governed by foreign law.</p>	<p>✓ ✓ ✓</p>	<p>30.2</p>	
<p>5. Has the country ratified any international convention for the protection of foreign investments?</p>	<p>✓ ✓</p>		<p>Albania has ratified the Agreement on protection of foreign investments between the Republic of Albania and OPEC International Development Fund and entered into bilateral agreement with the following countries: Slovenia, Bulgaria, Austria, Czech Republic, Tunisia, USA, Turkey, Belgium and Luxemburg. Implementation sometimes is questionable.</p>



## II- EFFECTIVENESS ASSESSMENT: HOW THE LAW WORKS IN PRACTICE:

(Please comment based on the previous 2006 effectiveness general assessment)

### 7. POLICY FRAMEWORK

#### 7.1 Existence of PPP Policy Framework

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a general/national policy framework (explicit or implicit) for PPPs for infrastructure or public services?	✓ ✓		A general policy framework for improving the legal environment and promoting PPP has not been identified in Albania. However, the way the Government recently approached concession legal framework reform shows its interest in promoting and using PPP in its infrastructure and public services.
2. Is there any administrative guidance or printed information edited by the government or the PPP Unit concerning the legal framework for PPP projects in the country?	✓ ✓		There are some manuals and printed information with regard to PPPs in Albania. They are issued by government agencies such as: the National Agency of Natural Resources (NANR), the Albanian Investment Development Agency (AIDA) and the Ministry of Integration. For example, NANR issued Invest in Albanian Natural Resources with regard to Mineral Resources, Renewable Energies in Albania, Hydro energetic Potential, Hydrocarbon Potential.
3. Is there a municipal/regional policy framework	✓ ✓		Yes there are municipal and regional policy framework

### Checklist **Albania**



(explicit or implicit) for PPPs in infrastructure or public services?			for PPPs in infrastructure and public services. They concern mainly the water-supply system of main cities and regional landfills.
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## 7.2 PPP Awareness and Sustainability

4. Is there a national and/or municipal /regional long term programme for PPP promotion and awareness?	× × ×		
5. Are there PPP training programmes on a national and/or municipal/regional level for public servants and other PPP concerned people?	✓ ✓		The Albanian government in cooperation with non-profit organizations organise training programmes for people who are concerned about PPPs. For example, Ministry of Economy Trade and Energy and International Finance Corporation (IFC) organise a training programme named Albanian and Foreign Sponsors for concessionaires with financial difficulties.
6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	× ×		We do not have information with regard to this question.



### 7.3 Obstacle to implementation of PPP Policy

<p>7. Are you of the opinion that there are no social/political obstacles to implementing PPP in the country (e.g. grass roots opposition, policy measures against private sector participation in public infrastructure/services, etc.)?</p>	<p>✓ ✓</p>		<p>There are social obstacles that rise between the concessionaire and the private owners of the lands where the concession project is designed to be established. Although, the private owners are obliged to abide the expropriation, they can cause several obstacles. Local tariffs and local taxes constitute other obstacles to implementing PPPs, because they vary from one locality to another in Albania and this can damage the concessionaire. HPPs with deviation can cause other social obstacles as well, such as reducing the quantity of the water used for irrigation, for water supply systems for the population. Political obstacles are not evidenced so far, but a concession gone wrong, can be exploited politically by the opposing party in the parliament.</p>
<p>8. Are you of the opinion that there are no legal obstacles to implementing PPP in the country (e.g. non-publication of a decree provided under the Law and necessary for such law to become effective, etc.)?</p>	<p>× ×</p>		<p>There are legal obstacles. The contradict between the central government, who owns the natural resources and promotes PPPs, and the local governments, that have the right of managing the territory where the natural resources or the PPPs are determined to be established. The grant of the building permits is given by the municipality, and agreeing for the grant of the permit between the central government and the municipality can take a long time.</p>



For our general information, please describe the existing impediment and obstacles if any with respect to the two previous questions

## 8. INSTITUTIONAL FRAMEWORK

### 8.1 Existence and role of PPP Central Units/Agency

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Is there a specialised institution/agency/ministerial department established to promote PPP and to serve as Central PPP Unit?	✓ ✓ ✓	8	Concession Treatment Unit (ATRAKO)
2. Is such Central PPP Unit composed mainly of specialists recruited from the business community and not exclusively composed of civil servants coming from different public ministries?	✗ ✗		No provisions in this respect. The director of the Concession Treatment Unit is on the dependency of the Minister of Economy, Trade and Energy.
3. Is the role of such Central PPP Unit comparable to a "task force" assisting in the development of projects in general and not limited to promotion of PPP?	✓ ✓		The Unit is not limited to the promotion of PPPs, but has several competencies. <ul style="list-style-type: none"> <li>Article 5 of the Decision no. 150, dated 22.03.2007 On the organizing and functioning of the Concession Treatment Unit.</li> </ul>
4. Is the consent or recommendation of such	✓ ✓		The Unit's consent or recommendations are necessary for

## Checklist **Albania**



Central PPP Unit necessary for the development and granting of most PPP projects ( <i>except small or local PPP</i> )?			the Contracting Authority, but they are not obligatory.
5. Is one of the roles of the Central PPP Unit to assist in building capacity namely of the public sector with respect to PPP?	× × ×		No provision in this respect.

*For our general information, please name such establishment and specify its place in public hierarchy, format and key functions (regulatory, operational, know how collecting, etc. or a combination thereof).*

## 8.2 Other institutions concerned by PPP

6. Is there any PPP unit/agency or department of the Central PPP unit either at the municipal or regional level?	× × ×		The residency of the Concession Treatment Unit is in Tirana.
7. Is there any specific PPP unit department in any ministry (other than the central PPP unit) or at sectoral level?	✓ ✓		
8. Is there either a specific " <i>one stop shop</i> " for PPP authorisations and formalities or a " <i>one stop shop</i> " which services are available to the sponsors of PPP project as well as other	✓ ✓		National Licensing Centre (NLC)



investors?			
9. Is the division of power between different public authorities involved in the PPP granting process simple and coordinated?	✓ ✓		The division of power is clear in the Law, but a degree of confusion exists in Regulations. Implementation is sometimes questionable.

## 9. PPP LAW ENFORCEMENT

### 9.1 Effectiveness of PPP enforcement and compliance with the Law

QUESTION	ANSWER	ARTICLE	COMMENTARY
1. Have any PPP projects in any form ever been awarded in the country on the basis of the Law discussed above ? ( <i>with or without specific reference to the Law</i> )	✓ ✓ ✓		
2. Have such PPP projects, if any, been awarded generally following a transparent competitive selection procedure ( <i>and only through direct negotiation under exceptional legal circumstances as may be provided by the Law</i> )?	✓ ✓ ✓		
3. Have any PPP projects or similar long term	N/A		

## Checklist **Albania**



agreements ( <i>falling under the definition of PPP under this questionnaire</i> ) been awarded on any legal basis different from the Law since the Law has been in force?			
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*For our general information, please give example of legal instruments, or reasons used, to bypass the Law and establish a PPP.*

## 9.2 Statistics on PPP implementation under the Law

4. Have most of the awarded PPP projects been successfully implemented and put into operation in compliance with the Law?	✓ ✓ ✓		
5. Has a PPP project ever been awarded and implemented in the country at the local /regional /municipal level in compliance with the Law?	✓ ✓ ✓		Yes, the local or regional water-supply systems and landfills of some main cities. Eg. in Shkodra and Elbasan.
6. Have PPP project ever been awarded in the country in the non merchant sector ( <i>such as Hospital, School, prisons</i> ) and not exclusively in the merchant sector ( <i>energy, water, transport</i> )?	× × ×		



**For our general information:**

- Approximately how many PPP projects are presently in operation (figure or order of magnitude) in the country and in what sectors have PPP projects been awarded (energy, water, education, health for example)?

There are actually 294 Hydro Power Projects (HPP) in Albania that are been awarded for concessions. 34 of these HPPs have started operating, 30 HPPs have just started the building process and 15 HPPs are in the process of gaining licenses and permits.

- Please give some examples of the most significant project awarded:
  - under which legal form have such PPP projects been awarded (Concession, BOT, PFI, other):

Most of the awarded concessions in Albania are BOT type, very few are ROT and BOOT. (E.g EVN AG, Stratkraft AS and Devoll Hydropower SHA and METE is in BOOT form)

- have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) municipal government as Contracting Authority;

In almost all cases the Concessions have been granted by the central government acting through the line ministries.

- when did PPP begin to be awarded in the country: (i) in the last 10 years or before; (ii) in the last 5 years; or (iii) within the past few years only; and

The old Albanian Law on Concessions (Law for Concessions and the Participation of the Private Sector in Public Service and Infrastructure) was adopted in 1995. This law rather clearly defines its scope of application and was one of the rare laws in the region which specifically regulates government support to concessions and refers to financial securities (e.g. mortgage of concession companies' properties). Also, the 1995 law clearly states that its aim was the participation of the private sector in public services and infrastructure. The old law on concession has repealed back in 2007 with the entry into force of the new concession law.

- *please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form)*

N/A

**Checklist Albania**



- are there any PPP/Project Agreements in discussion?

Apart from the energy sector with many concession contracts award for the construction of hydropower plants, The GoA is currently implementing a PPP agreement for the operation and maintenance of the Reshen-Kalimash highway, a corridor linking the port of Durrresi with Kosovo.

### 9.3 Challenge of PPP

7. Are you of the opinion that there is a reasonable chance for an unsuccessful bidder to successfully challenge in the country a PPP awarded under conditions contrary to the Law?	✓ ✓	25 25/2 26	Each bidder is entitled to request an administrative review of the selection process to the Concession Agency. Furthermore, the bidder is entitled to take an appeal against the decision of the Concession Agency.
8. If the answer to the previous question is <i>Yes</i> , are you of the opinion that there is a reasonable chance for the plaintiff to get some compensation or for such action to result in the cancellation of the award?	✓ ✓		No provisions in this respect, but may be implied.
9. Have PPP project been implemented by the parties most generally without serious claims/arbitration by either Party concerning the performance of the Project Agreements under the Law?	✓ ✓		There are no court decisions so far with regard to the performance of Project Agreements. There are courts decisions concerning the selection process of the bidders, when one of the bidders appeals against the decision of the Concession Treatment Agency.



10. If any Project Agreement has been terminated prior to the end of the contractual period by the Contracting Authority, has fair compensation been paid to the Private Party in compliance with the Law?	N/A		
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**For our general information,** *can you provide any examples of a successful legal challenge in the courts or otherwise of a PPP award in the country based on the PPP Law? Please describe the matter and, if known, the outcome of such matter.*

N/A.