

**Georgia****ASSESSMENT OF THE QUALITY OF THE PPP LEGISLATION AND OF THE EFFECTIVENESS OF ITS IMPLEMENTATION**

2011

I- PPP Legislative Framework Assessment (LFA)	Compliance of the PPP legal framework with PFI Guide recommendations¹ and Best Practice		
Core Area		Rating	Assessment
1- PPP Legal Framework	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	7/18	Very Low Compliance
2-Definitions and Scope of the Law	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	10/24	Low Compliance
3-Selection of the Private Party	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.	8/39	Very Low Compliance
4-Project Agreement	Flexibility with respect to the content of the provisions of the Project agreements which should allow a proper allocation of risks without unnecessary or unrealistic/not bankable/compulsory requirements/interferences from the Contracting Authority (obligations, tariff, termination, compensation).	5/30	Very Low Compliance

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

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5-Security and Support Issues	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.	6/21	
6-Settlement of Disputes and Applicable Laws	Possibility to obtain proper remedy for breach under the applicable law through international arbitration and enforcement of arbitral awards.	10/15	
General LFA Rating		35,8%	Low Compliance
II-Legal Indicators Survey (LIS)	Effectiveness Assessment : How the PPP law works in practice		
Core Area		Rating	Legal Indicator Survey
7- Policy Framework	Existence of a policy framework for public private partnerships	4/24	
8 Institutional Framework	Existence of an institutional framework for public private partnerships	7/24	
9- PPP Law Enforcement	Award and implementation of PPP projects in compliance with the Law	8/31	
General LIS Rating		24,1%	Very Low Effectiveness
OVERALL RATING		29,92%	Very Low Compliance/Effectiveness

Local Expert²: Mgaloblishvili, Kipiani, Dzidziguri (MKD) Law Firm

² 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 question in this Checklist as the Consultant was free to use any other sources of information for its final determination.

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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.

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- **"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



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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.



GEORGIA OVERALL ASSESSMENT OF THE QUALITY OF CONCESSION LEGISLATION:

An implicit general policy framework for improving the legal environment and promoting PPP has been identified in Georgia (numerous government statements).

The Georgian Law (*Law of Georgia "On the Procedure for Granting Concessions to Foreign Countries and Companies"*) has been adopted in 1994 and nothing have changed since the last assessment in 2008.

The Law needs to be improved regarding the scope of application (concessions are defined as "long-term leasing agreements" and seem to be limited to natural resources and activities related thereto; Contracting Authority is not clearly defined - "authorised body as defined under legislation" - and domestic investors are discriminated against). The Law provides for the adoption of a list of objects that can or cannot be subject to concessions but no such list could be identified.

Moreover, the Law contains very few provisions regarding the selection of the concessionaire and provides for the adoption of regulations in this respect. No such regulations could be identified. Also, the law refers to the establishment of a special register of concession agreements, but no such register could be identified. Thus, the selection procedure is (at this stage) insufficiently regulated. We note, however, a certain number of positive elements (e.g. concessionaires' right to bring claims to the court or to the arbitration court "against public organs for their abuse of power").

The Law contains very few elements regarding the project agreement, government support and financial securities. We note, however, a certain number of positive elements in this respect (e.g. reference to the protection of rights and security guarantees, to the right of the concessionaire to manage its own products and profits after paying all dues and taxes, and to the obligation of the Contracting Authority to reimburse all damages suffered by the concessionaire due to "illegal acts of state organs").

Finally, the possibility of international arbitration is not clearly provided for.

Thus, despite the existence of numerous positive elements, the Law does not constitute a sufficiently solid legal basis for the development of PPP. We note that a first step towards improvement could be the adoption of numerous legal texts provided in the Law, with certain minor amendments to the law (in particular concerning concession definition and sectors concerned



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>From 1994 Georgia has a law on “on the Procedure for Granting Concessions to Foreign Countries and Companies’.</p> <p>Besides the Regulation on transfer of state-owned property for usage (management) rights under the forms provided by Civil Code of Georgia, as approved by Resolution No. 218 of the Government of Georgia, dated 3 December 2005 regulates the issues falling under the notion of concession</p>



<p>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?</p>	<p>✓ ✓</p>		<p>On September 6, 2005 TAV signed a BOT contract with Joint Stock Company Tbilisi International Airport for a comprehensive airport design, engineering, construction, operation and maintenance package covering both the international and domestic facilities. The construction itself was completed by TAV Construction. The BOT contract was for a period of 20 years.</p>
<p>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?</p>	<p>× × ×</p>		
<p>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?</p>	<p>N/A</p>		<p>Since the concession agreement should have a form of lease contract, the provisions of Civil Code on general contract law as well as chapter of lease contract can be applied. Neither Civil Code nor Constitution of Georgia explicitly mentions PPP.</p> <p>However, implicit references to PPP in Georgian Constitution are the following:</p> <p>Article 30: obligation of government to contribute and uphold the development of industry and free competition.</p> <p>Article 21: ownership is generally recognised and ensured. The abolition of this right is not permitted.</p> <p>Article 39: Constitution of Georgia does not deny other generally recognized rights, freedoms as well as guarantees not specifically stated in the constitution and being in compliance with the constitutional principals.</p>

For our general information: *Is a new PPP Law or an amendment to the existing Law being prepared, or considered, in the country? No*



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

1.2 Specificity and integration of PPP 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?	✓ ✓		The Law on Public Procurement does not refer to PPP specifically, but the two regimes are separated. The Law of Georgia on Public Procurement applies to "state procurement" i.e. procurement of any goods, construction works or services to meet state needs and financed by state budget, credits under state guarantee, etc.
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?	× × ×		
7. Does the country have a Law allowing the Institutional form of PPP (IPPP) which regulates IPPP participation to PPP?	× × ×		



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

2.1 PPP definition³

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><i>For our general information, please provide the given definition(s), if any.</i></p>	✓ ✓	1	The concession means a long-term leasing agreement made between and by the state and a concessionaire for the purpose of making foreign investments, exploitation of recoverable and non-recoverable natural resources and doing business related thereto. Thus, under the Georgian legislation the notion of concession is very narrow.
<p>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</p>	× ×		Under the legislation of Georgia, concession, licence, usufruct right and lease are different legal categories, even if the definition of concession implies the leasing agreement.

³ 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))



<p><i>(concession, license, usufruct right, lease, etc.)?</i></p>			<p>The main distinction between a concession and a lease is that the parties to a concession agreement are a foreign investor and an authorised body. The parties to a lease agreement could be any natural and legal persons (Civil Code).</p> <p>Furthermore, the Law precisely defines the objects of a concession agreement (natural resources, business, scientific, technological and exploitation activities on the territory of Georgia). The object of a lease agreement is general (The Civil Code only provides that the subject may be the definite property).</p>
<p>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>)?</p>	<p>XX</p>		<p>The Law on concessions does not contain information on licenses. Pursuant to article 13, the "contracting authority" is defined as the "party giving permission on conclusion of concession agreement". Thus, it is unclear whether or not the special license is necessary and if it is, at what stage it is required.</p> <p>In this respect, the Law of Georgia on Licences and Permits as of 24 June 2005 contains an exhaustive list of types of licences and permits (concessions are not mentioned). Thus, there is no clear link in the existing legislation between licenses and concessions for natural resources.</p>

2.2 Contracting Authority

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QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>4. Does the Law identify (or allow clear identification by reference to other laws or regulations) the public authorities ("Contracting Authorities") that are empowered to select projects, prepare for, and award PPPs and enter into Project Agreements ?</p>	<p>XX</p>	<p>5, 6</p>	<p>Vague identification: "An authorised body as defined under legislation of Georgia":</p> <ul style="list-style-type: none"> • concludes the concession agreement; • coordinates the activities related to the conclusion of the concession agreement; • draws up and publishes the list of concession facilities, preliminary conditions of concession and the list of Georgian organisations which, together with foreign investors, will be responsible for the drawing up of draft of the concession agreements . <p>Prior to the amendments of 19 September 1996, the "Contracting Authority" was the Cabinet of Ministers of the Republic of Georgia or a special organ designated by the Cabinet of Ministers for this purpose."</p> <p>Conclusion of concession agreement is subject to a permit. The state organ which is authorised to issue such a permit is not defined.</p>

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

- *National authorities (e.g.: the government, ministries, and independent agencies);*
- *Regional/state-level authorities;*

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- *Local or municipal authorities; or State owned companies?*

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>)?	✓ ✓	5	Definition about concession only: “Concessionaire is a party to the concession the agreement. Concessionaires may be foreign legal and natural persons, foreign states and international organisations.”

For our general information: *can a PPP be awarded to public entities or to entities jointly owned by private and public entities (IPPP)? Yes. Are there restrictions imposed on such contracts? No.*

2.4 Concerned sectors⁴

QUESTION	ANSWER	ARTICLE	COMMENTARY
	✓ ✓	4	As regards to concession: "The subject of the

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



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?			concession agreement may be the rights to search for, processing and exploitation of Georgian natural resources as well as to conducting business, scientific, technological and exploitation activities on the territory of Georgia." Thus, concession seems to be limited to natural resources.
7. Do the sectors eligible for PPP correspond to a large extent 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”?	XX		Very limited sectors/activities are provided in the law
8. Do the sectors eligible for PPP includes the merchant sectors of the economy (<i>energy, transport, water, oil and gas</i>) eligible for PPP in addition to non commercial activities such as the provision of government services (such as <i>schools, hospitals, prisons, defence and housing</i>).	XXX	7	"Authorised body as defined under legislation of Georgia ", in the areas of their competence, are obliged to set up and publish the list of objects to be transferred by concession agreements. No such lists could be identified.

For our general information: Please indicate the restrictions if any imposed by the Law on the sectors eligible for PPP:
Concessions are limited to natural resources.



3. SELECTION OF THE PRIVATE PARTY⁵

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?	✓ ✓ ✓	3	One of the fundamental principles of concession is a “competitive approach to the selection of concessionaires based on the assessment of tenders”.
2. Is there reference in the Law to the principles of transparency, equal treatment and proportionality?	× × ×		
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>)?	× ×	7	Reference to the publication of the list of concession facilities, the preliminary conditions of the concession and the list of those Georgian organisations which, together with foreign investors, will be responsible for the drawing up of the draft concession agreements. No such published list could be identified.

⁵ 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>)?	XX	3	Reference to the regulations on tenders to be provided “by the Georgian legislation”. However, no such regulations could be identified for concessions. The pre-selection of bidders, the procedure for requesting proposals, and other procedure such as competitive dialogue/two stage procedure not specified.
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>)?	XXX		

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?	XXX		
7. Does the Law provide for the publication of	XXX		

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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?	✓ ✓	10	Reference to the establishment of a special Register of concession agreements by “an authorised body as defined under the legislation of Georgia”. However, no such registry or authorised body could be identified.
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?	✗ ✗		Not specified in the law on concession. However, we would like to note that the Chapter 3 of General Administrative Code of Georgia ensures the freedom of information and specifically access to state records, archives and obtaining required 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?	✗ ✗ ✗		
11. Does the Law provide that the Contracting	✗ ✗ ✗		

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<p>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?</p>			
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3.4 PPP Award without competitive procedure

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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?</p>	N/A		<p>No reference to the award of concession without competitive procedures.</p>
<p>13. Does the Law provide for a procedure, set of rules or principles to be respected when awarding a PPP without a competitive process?</p>	N/A		

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



3.5 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?	XXX		

3.6 Review procedures

QUESTION	ANSWER	ARTICLE	COMMENTARY
15. Does the Law allow the bidders who claim to have suffered, or that may suffer loss or injury, to seek review of the Contracting Authority's actions or failure to act?	XXX	12,13,19	<p>The concessionaire has the right to bring claims to the court or arbitration court against public organs "for their abuse of powers". A dispute in connection with a concession agreement is to be settled in court.</p> <p>The party which has issued the permit to conclude a concession agreement is obliged to:</p> <ul style="list-style-type: none"> - protect foreign investments, legislative acts of Georgia,



21.

			<ul style="list-style-type: none">- reimburse damages supported by concessionaire due to illegal acts of state organs;- not interfere in the affairs of concession entities, except in cases envisaged by agreement. <p>However, these tools are available only to the concessionaire and not to bidders.</p>
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4. **PROJECT AGREEMENT**⁶

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>)?	✓ ✓	8	List of provisions, no model agreement.

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	× × ×	17	The Law provides that the terms of the concession agreement shall be defined under legislation (it is unclear under which legislation). We note that before

⁶ 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?			the amendments of 1996, the Law provided for minimum and maximum concession duration: 5 to 50 years.
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>)?	XXX		

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?	XXX	18	<p>Before the amendments dated 1996, the law on concessions provided for termination of the concession agreement "either by agreement of the parties or by court judgment".</p> <p>This condition is now worded as follows: "the alteration, prolongation or termination of a concession agreement terms shall be effected under legislation of Georgia."</p>



5. If the answer to the previous question is <i>No</i> does the Law provide for a list of grounds of 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>)?	XXX		The law on concessions does not refer to any list of ground for termination. Thus, general contract law, specifically, the Civil Code of Georgia is applicable.
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?	XX	13	The party, which has issued a permit to conclude a concession agreement, is obliged <i>inter alia</i> to reimburse damages suffered by the concessionaire due to illegal acts of state organs.
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?	XX		Not Specified. Not Prevented.

4.4 Tariff setting, service standards

QUESTION	ANSWER	ARTICLE	COMMENTARY
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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 that regulate tariffs and service standards?	×××		

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?	××	12	The Private Party has the right to manage its own products and profits which are left after payment of all dues and taxes.
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>) ?	×××		



5. SECURITY AND SUPPORT ISSUES⁷

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?	✓ ✓	2, 12	<p>Indirect reference to security guarantees: “The protection of rights and security guarantees of foreign investors operating on the basis of a concession shall be effected under legislation in force”.</p> <p>Concessionaire has the right to manage its own products and profits which are left after payment of all dues and taxes. Thus, it seems that the concessionaire can pledge or assign such products and profits as well as its own property.</p>
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)?	× × ×		<p>There is no provision in the Law empowering the concessionaire to pledge or assign the assets for which it has user rights under a project agreement or shares of the project company or project agreement.</p>

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

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



27.

- *the proceeds and receivables arising out of the PPP;- N/A*
- *the assets for which it has rights of use under a project agreement;- N/A*
- *its property;-N/A*
- *shares of the Project Company; N/A*
- *the project agreement; or- N/A*

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?	× ×		Not specified, not prevented.
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?	✓ ✓	2, 12, 13	“The protection of rights and security guarantees of foreign investors operating on the basis of a concession shall be effected under legislation in force”.

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			Reference to the right of concessionaire to "take advantage of importing equipment, tools, working clothes and food without paying duties; but the concessionaire shall not use them outside of concession spot."
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>)?	XX		Reference to the obligation of the party which has authorised the concession to "protect foreign investments and to establish favourable conditions for the implementation of the concession."



5.3 Lenders' rights

QUESTION	ANSWER	ARTICLE	COMMENTARY
<p>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>)?</p>	<p>XXX</p>		
<p>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?</p>	<p>XXX</p>		



6. SETTLEMENT OF DISPUTES AND APPLICABLE LAWS⁸

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?	× ×	12, 19	<p>“A dispute in connection with a concession agreement shall be settled in courts”. One of the concessionaire’s rights is to bring claims to the court or arbitration court “against public organs for their abuse of power.”</p> <p>Unclear. No specific reference to international arbitration.</p>
2. Has the government of the country ratified the Washington Convention on the Settlement of Investment Disputes (ICSID) (1965)?	✓ ✓ ✓		
3. Has the government of the country ratified the New York Convention on recognition and enforcement of foreign arbitral awards (1958)?	✓ ✓ ✓		

⁸ 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>5. Has the country ratified any international convention for the protection of foreign investments?</p>	<p>✓ ✓ ✓</p>		<p>Georgia has concluded bilateral treaties on the Promotion and Mutual Protection of Investments with the following countries:</p> <ol style="list-style-type: none"> 1. Austria (18 October, 2001) 2. Azerbaijan (8 March, 1996) 3. USA (7 March 1994) 4. Belgium-Luxemburg economic union (23 June 1993) 5. Germany (23 June, 1993) 6. UK (15 February 1995) 7. Egypt (3 June 1999) 8. Turkey (30 July 1992) 9. Turkmenistan (20 March 1996) 10. Iran (26 September 1995) 11. Israel (19 June 1995) 12. Italy (15 May 1997)

Checklist Georgia



			<p>13. Moldova (28 November 1997) 14. Netherlands (3 February 1998) 15. Romania (11 December 1997) 16. Greece (9 November 1994) 17. France (3 February 1997) 18. Armenia (4 June 1996) 19. Uzbekistan (4 September 1995) 20. Ukraine (9 January 1995) 21. Kazakhstan (17 September 1996) 22. Kyrgyz Republic (22 April 1997) 23. China (3 June 1993) 24. Republic of Finland (24 November 2006)</p> <p>As a Member of the WTO, Georgia is party to the Agreement on Trade Related Investment Measures (TRIMs).</p>
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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?	XX		- Numerous Government statements; - New legislative initiatives promoting PPP (e.g. Georgian Law on State Procurements as of 20 April 2005, Georgian Law on State Support of Investments as of 30 June 2006);
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?	XXX		
3. Is there a municipal/regional policy framework (explicit or implicit) for PPPs in infrastructure or public services?	XXX		



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?	×××		
6. Are there PPP courses as part of university curriculum or specialist departments and faculties in universities teaching PPP?	×××		



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>Georgia has constantly and extensively followed a privatization program since 1992 which has now covered most of industrial former state property as well as public services such as hospitals and utilities (electricity and water supply) despite the fact that informations concerning the conditions of such agreement are either classified or difficult to obtain. Recent invitation to prequalification for expression of interest for the private management and re-development of Kutaisi Airport show the possible trend toward PPP after the privatization process as been nearly achieved.</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 problems for implementing PPP in Georgia. First of all, there are no sufficient regulations and law regarding PPP.</p> <p>Georgian legislation mainly focuses on procurement law, which to some extent involves PPP and also investments law. However, there are no specific law regulating either BOT or PFI.</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?	✓ ✓		There is a Georgian National Investment Agency (GNIA), which is a sole public agency responsible for promoting and facilitating foreign direct investment in Georgia. However, it does not deal with specifically PPP.
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?	× × ×		National Investment Agency composed of public servants, it is division of Ministry of Economy and Sustainable Development.
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?	✓ ✓ ✓		Georgian National Investment Agency (GNIA) is a sole public agency responsible for promoting and facilitating foreign direct investment in Georgia. GNIA plays a moderators role between foreign investors and the Government. Being responsible for export promotion as well, Agency is a main bridge between investors, foreign companies and Georgian companies.



			GNIA serves as a way to render relevant free services to investors. This includes arrangement of forums, conferences, to raise awareness on Georgia’s potential as well as specific studies on Georgia’s investment climate and sector-specific information (including particular projects).
4. Is the consent or recommendation of such Central PPP Unit necessary for the development and granting of most PPP projects (<i>except small or local PPP</i>)?	XXX		
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?	XXX		

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?	XXX		
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7. Is there any specific PPP unit department in any ministry (other than the central PPP unit) or at sectoral level?	✓ ✓		As already mentioned above, there is a Georgian National Investment Agency which is a legal entity under the Ministry of Economy and Sustainable Development. However, it does not specialize specifically in PPP only.
8. Is there either a specific "one stop shop" for PPP authorisations and formalities or a "one stop shop" which services are available to the sponsors of PPP project as well as other investors?	× × ×		
9. Is the division of power between different public authorities involved in the PPP granting process simple and coordinated?	N/A		

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</i>	✓ ✓		Tbilisi International Airport: The implementing agency and the borrower for the project is TAV Urban Georgia, a concessionaire and SPV for the

Checklist Georgia



<i>reference to the Law)</i>			construction and operation of Tbilisi International Airport.
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 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?	× ×		As part of the privatization process for hospital and water supply with conditions similar to BOO. The Batumi Airport also has been constructed and operated by TAV Airports since 2007 apparently not on a concession model.

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?	× ×		

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<p>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>)?</p>	<p>× × ×</p>		

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)?
- Please give some examples of the most significant project awarded: N/A
 - under which legal form have such PPP projects been awarded (Concession, BOT, PFI, other): Concession mostly (however, there is a lack of practice even regarding concessions)
 - have such PPP project been granted by (i) central, (ii) sub-sovereign/regional (if applicable) or (iii) municipal government as Contracting Authority; - Central Government.
- 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
- please give examples of any PPP projects awarded but not implemented (or not implemented under a PPP form)
- are there any PPP/Project Agreements in discussion? N/ A

9.3 Challenge of PPP

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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?	×××		
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?	N/A		
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?	N/A		
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		



42.

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.- Since there is no PPP law well-developed, there is no practice of the courts regarding this issue.