Private Law Issues of Concession and Investment within the Framework of Public-Private Partnership

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Abstract

Concession is one of the forms of public-private partnership. Financial sources, on the other hand, for many public-private partnership projects are generated by private investment. Both concession and investment play a significant role within the public-private partnership. Analysis of the Law of Georgia on Concession with relevant laws of the other countries clearly underlies that institutional and legal mechanism of concession relations in Georgia do not comply with the best international standards established in many other countries. Law of Georgia on Investment also contains certain shortcomings in that respect. Therefore, it is necessary to improve and further develop private law norms of concession and investment in order to create those institutional and private law basis which are vital for implementation of public-private partnership.

Keywords: Concession, Investment, Public-Private Partnership

Introduction

National legal mechanisms play a significant role in implementation of public-private partnership projects. National and private law norms are vital for successful realization of partnership between public and private sector and finalization of relevant projects. In this paper, we will discuss and analyze private law norms on concession and investments. Concession is one of the forms of public-private partnership. Financial sources for many public-private partnership projects are generated by private investment. Therefore, concession and investments play a significant role in implementation of relevant public-private partnership projects.

Scope of Public-Private Partnership:

Public-private partnership is a vehicle by which infrastructural and other public projects are implemented by participation of private investment in such partnership and by means of its financial contribution. Participation of

private sector in implementation of various infrastructural projects became more important since the 80th of the 20th century (UNCITRAL, 2001). Therefore, public-private partnership requires effective institutional and legal mechanisms which ensure protection of rights and interests of private sector as well as creation of balance between the rights and interests of private and public sector (*Foreign Words Dictionary,* trans.).

Notion of Concession:

Concession means a grant of rights, grant of specific privileges by a government (*Foreign Words Dictionary,* trans.). Concession is one of the forms of cooperation between public and private sector or enterprise (PPIAF, 2009). Within such cooperation, private sector and private enterprise is granted rights, on contractual basis, to construct, manage and maintain certain public infrastructure (PPP Models, "n.d"), extract natural resources and maintain enterprises (*Black's Law Dictionary,* 2004).

Concessionaire is granted certain rights under a concession agreement (*Foreign Words Dictionary,* trans.). Concessionaire has the right to manage and maintain certain infrastructure developed by him, right to receive profit derived from management and maintenance of that infrastructure. Concessionaire may have the right to keep fees from a toll highway built by him. Together with the rights granted to the concessionaire, concessionaire also has certain obligations towards the state. Concessionaire is responsible for provision of services, development of infrastructure, its maintenance, management and capital expenditure and making an investment on that infrastructure (ADB, "n.d").

Comparative Analysis of Law of Georgia on Concession:

Countries have different practice in respect of concession law. Some countries have concession laws, while some others do not have it. Subject matter of and areas covered by concession laws of those countries which have such laws is quite broad (UNCTAD, 2009). European and Asian countries are good example of that. Some other countries do not have concession laws and legal regulation of concession is made by other laws, including laws on competition or privatization (UNCTAD, 2009).

In some countries, concession laws are called public-private partnership laws and they regulate legal issues relating to concession. Such countries are Croatia (Public-Private Partnership Act of 2012), Ireland (State Authorities (Public Private Partnership Arrangements) Act of 2002), Slovenia (Public-Private Partnership Act of 2006), Vietnam (The Decree on Public-Private Partnership Investment Form of 2015). That once again marks an importance of concession as one of the forms of public-private partnership. In some other countries, laws regulating concession relations are called

concession laws. Those countries are Czech Republic (Act on Concession Contracts and Concession Procedure (the Concession Act) of 2006), Ukraine (Law of Ukraine on Concessions of 1999), Spain (Concession Law of 2003).

Law of Georgia "On the Procedure for Granting Concessions to Foreign Countries and Companies" (hereinafter the "Law of Georgia on Concession") has been adopted in 1994. Preamble of Law of Georgia on Concession states that "[it] establishes general principles and rules for granting concessions, on the special agreement, to foreign investors for exploitation of natural resources and other activities relating thereto on the territory of Georgia". That means that the basis for the concession relations is "the special agreement". However, neither the Law of Georgian on Concession nor any other legal act defines "the special agreement". Therefore, it is unclear what does "the special agreement" mean, or what elements should "the special agreement" have in order to distinguish it from other agreements.

Concession relations have an interdisciplinary legal regime. Concession agreement, from its legal perspective and under its theoretical and practical elements, has its distinct and independent nature. Arguably, legislator meant such legal nature of concession relations and concession agreements while referring to "special" elements of concession agreement in preamble of the Law of Georgia on Concession. However, no clarification is provided under the law and thus that could be regarded as an assumption. Therefore, for accepting or rejecting such assumption, one could suggest that the legislator gives a proper definition in preamble and uses a clear terminology. There would not have been any legal and practical misunderstanding in such case.

In addition to those, we should refer to a status of concessionaire. In accordance with a current legislation, concessionaire could be regarded as "foreign investor". It will be discussed further in this study about an investor and investment within the framework of a public-private partnership. However, an important issue herein relates to nationality and residency of concessionaire. Arguably, as the law covers only foreign investors, this reality, from legal perspective, discriminates in favour of foreign investor against local entities. Local entities, irrespective of their organizational and legal form, and a legal status they have, are left behind the law.

Article 1 of the Law of Georgia on Concession includes a definition of concession. In accordance with that Article, "[a] concession is a long-term lease agreement signed by the State for the exploitation or renewable and non-renewable natural resources, and for other related economic activities for the purposes of investing foreign capital. Particular terms of relations in the field of concessions shall be determined on the basis of an agreement". In accordance with Article 5 of the Law of Georgia on Concession, the party to a concession agreement, next to a state, is foreign natural and legal persons and foreign governmental and international organizations.

There are several important points in this part of the Law of Georgia on Concession, in particular:

a) The essential element of concession relates to foreign capital expenditure with the aim of making an investment. In this case, concession is similar to investment. Concessionary could be regarded as foreign investor.

b) Concession relations are only private law relations which are implemented in a form of a long-term lease agreement.

c) Limited area of concession – exploitation of natural resources and related economic activities.

Each points set out hereinabove are to be discussed and a certain comparison with concession laws of other countries is to be made. Firstly, it should be clarified as what is meant under a foreign investment and relevant investment activities.

Definition of investment plays an important role in terms of protection of foreign investor and investment (Khatidze, 2013, trans.). The importance of this issue is based on the following:

a) Only those activities of investor which are regarded as an investment could be protected by international agreements and national laws (Khatidze, 2013, trans.). Only in such case is foreign investor and its investment capable of using those protective mechanisms which are included in international agreements and national laws (Khatidze, 2013, trans.).

b) In case of a dispute between foreign investor and home state, such dispute, to be resolved by relevant dispute resolution centers, should be qualified as the one which is derived out of an investment (*Malaysian Historical Salvors Sdn Bhd v. Malaysia,* 2007) (*Malaysian Historical Salvors Sdn Bhd v. Malaysia,* 2009) (Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965).

All international investment agreements entered into by and between Georgia and other countries include investment definition provisions (Agreement between the Republic of Austria and Georgia for the Promotion and Protection of Investments of 2001) (Treaty between the Government of the United States of America and the Government of the Republic of Georgia Concerning the Encouragement and Reciprocal Protection of Investment of 1994) (Agreement between the Government of Georgia and the Government of the Republic of Latvia for the Promotion and Reciprocal Protection of Investments of 2005) (Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal Protection of Investments of 2009). Definition of investment is also given in the “Law of Georgia on Promotion and Guarantees of Investment Activity” adopted in 1996 (hereinafter “Law of Georgia on Investment”). It is quite interesting that definition of investment also includes and covers concession in almost every international investment agreement entered into by and between Georgia and other countries. So, under

those international agreements, whenever concessionaire is a foreign investor, concession activities undertaken by him are regarded as a foreign investment. Under a definition of investment given in the Law of Georgia on Investment, concession is not regarded as an investment. Therefore, it seems that there is a lack of clarity in that respect under a national law. First, when under the Law of Georgia on Concession, concession relates to foreign investment, it is unclear why concession could not be regarded as an investment under the Law of Georgia on Investment. Second, the Law of Georgia on Investment should exhaustively include those economic and entrepreneurial activities which are regarded as an investment, especially when such activity – concession activity – is regarded as an investment under international investment treaties entered into by and between Georgia and other countries. National laws should be synchronized with international agreements. That is the best international practice relating to investment law which should be adopted by Georgia (Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal Protection of Investments of 2009).

Concession relations are one of the important forms of public-private partnership. Ensuring the rights and interests of private persons, whether foreign or local, within the framework of public-private partnership, is a prerequisite for a successful implementation of concession relations as well as public-private partnership projects. National laws should ensure existence of those prerequisites. It is also important that national laws are in compliance with international agreements.

In addition thereto, we shall discuss the following issue. As it was mentioned, under the Law of Georgia on Concession, concession relates to foreign investment and concessionaire is regarded as a foreign investor. Hence, there are two main elements herein – investment, and that that investment is a foreign one. There is an additional guarantee for a foreign concessionaire when such concessionaire has a legal status of an investor. However, it is important that this status is verified by and is in compliance with the Law of Georgia on Investment. This is an international practice in that respect (World Bank Group, 2010).

Investment could be domestic as well as a foreign one. Therefore, there are foreign investors and domestic ones. Investment activities, whether foreign or domestic, means certain entrepreneurial and economic activities with the aim of gaining a profit (Law of Georgia on Promotion and Guarantees of Investment Activity of 1996). However, all entrepreneurial and economic activities could not be regarded as investment activities and therefore investment. National laws on concession of many countries do not regard concession only as an investment, moreover as a foreign investment (Act on Concession Contracts and Concession Procedure (the Concession Act) of

2006) (Law of Ukraine on Concessions of 1999) (The Decree on Public-Private Partnership Investment Form of 2015).

As per first element which means that concession is regarded as foreign investment, it could be said that that is a state practice and each investment practice is determined individually by the state. There is an additional legal guarantee for a concessionaire when such concessionaire relates to and is regarded as investor and that serves as a protective mechanism for a private entity within the framework of public-private partnership. Our remark herein, however, relates to the second element – where concessionaire could only be a foreign person (legal entity or natural person). It is unclear why a concessionaire may not be a local private person (legal entity or natural person), including a domestic investor, when an investor is defined not only as foreign investor but also as a domestic one (under Article 2, clause 2 of the "Law of Georgia on Investment").

As already mentioned, Law of Georgia on Concession discriminates in favour of foreign investor against local entities as the law covers only foreign persons (legal entities or natural persons). Local entities, irrespective of their organizational and legal form, and a legal status they have, are left behind the law. Additional element with respect to the Law of Georgia on Concession relates to contractual forms of implementation of concession relations. More specifically, in accordance with Article 1 of the Law of Georgian on Concession, concession relations are defined as private law relations which are implemented in a form of a long-term lease agreement.

In accordance with Article 1 of the Law of Georgia on Concession, concession agreement has a nature of private law. Concession relations are implemented in a form of a long-term lease agreement. However, in that respect we should also take into account Article 2, clause 1, sub-clause (g) of General Administrative Code of Georgia in accordance with which administrative contract is a civil law contract concluded by an administrative body with a natural person or legal entity, or with another administrative body, for a purpose of exercising public authority. Arguably, we have a reality herein under which one law ("Law of Georgia on Concession") says that a concession agreement has a nature of civil law; however under another law (General Administrative Code of Georgia) concession agreements include elements of administrative law. Such dual approach to legal nature of concession agreements meaning that one law refers to a private law nature of concession agreements, while another includes elements of administrative law, makes legal nature of concession agreements and concession itself quite complicated.

There is a confusion in terms of intersection of Article 1 of the Law of Georgia on Concession with Article 2, clause 1, sub-clause (g) of General Administrative Code of Georgia. Confusion also relates to legal nature of concession relations with respect to Article 1 and Article 11 of the Law of

Georgia on Concession. As it has already been mentioned hereinabove, legal nature of concession is of private law as per Article 5 of the Law of Georgia on Concession. On the other hand, however, under Article 11 of the Law of Georgia on Concession, consent of a relevant body is required for entering into a concession agreement. Such procedure which is required for making a concession agreement, makes concession's legal nature as of public law.

On the one hand, under the Law of Georgia on Concession, there is a resemblance between concession and foreign private investment, and legal nature of concession is regarded as of private law. On the other hand, state also relies on administrative law elements while entering into a concession relations with the foreign private investor. Concession relations, especially when the party to the concession agreement is foreign investor, require existence of balanced legal and institutional mechanisms. Those mechanisms in turn serve as a means for protecting a foreign investor against relevant risks in a host state (PPPIRC, 2016) (Wang et al. 1999) (World Economic Forum, 2015).

Concession relations of foreign person, especially foreign investor with the state entails certain risks, such as using administrative mechanisms against foreign private person and investor by a state. Those risks also include expropriation of assets of foreign investor which is proved by the fact that the modern concession agreements provide provisions like stabilization clauses as a tool for ensuring a protection against such risks (Faruque, 2006). However, the following should be admitted in respect of stabilization clauses. First, the state hardly agrees on stabilization clauses to be provided by concession agreements. Second, such clauses are provided in those concession agreements which involve big financial contributions. Third, there is a lack of practice in terms of using stabilization clauses by the state in Georgia. Therefore, balanced institutional and legal mechanisms serve as the best tool for ensuring protection of concessionaires' rights and provision of guarantees for the concessionaire. For that purpose, it is necessary to improve legal mechanisms protecting rights of private persons and ensuring their guarantees by the Georgian legal system as well as approximate Georgian concession law to the best international practice.

There is an additional element that refers to limited area of concession with respect to the Law of Georgia on Concession. In accordance with Article 1 and Article 4 of the Law of Georgia on Concession, concession relations are established for the purpose of exploitation of renewable and non-renewable natural resources, and for other related economic activities. That provision contains certain shortcomings, both from legal as well as from institutional perspective. First, it is unclear why on one hand concessionaries are limited in their spheres of operation and on the other hand why does the state refuse to have quite diverse concession relations in a situation when a concession itself

could be regarded as one of the forms of public-private partnership. Under an international practice, concession relations between a state and a private sector are quite diverse which also include many sectors and economic activities like communications, construction, other infrastructural projects, services and other ones. That is particularly true when a concession is implemented in a form of investment, attracting of which is one of the priorities of an economic policy of the state. Second, if we compare law of Georgia on investment with the same laws of the other countries, quite clear differences regarding concession relations could be identified.

Concession laws of many countries, including post-soviet countries, provide quite a wide sphere of concession relations. Under Article 2 of Public-Private Partnership Act of Slovenia enacted in 2006 (which regulates concession relations) the subject matter of public-private partnership is a partnership between a state and private sector in spheres such as construction, maintenance, management of public infrastructure (Public-Private Partnership Act of 2006).

Under Article 1 of Law of Ukraine on Concessions enacted in 1999, which includes definition of concession, concession relations “denote the provision of a legal entity or a natural person with the right to establish (construct) and/or manage (operate) the object of concession by an authorized executive or local self-government institution on a paid and timed basis, in order to satisfy public needs, subject to the businesses’ taking obligations to establish (construct) and/or manage (operate) the object of concession and assuming the property liability and possible business risk” (Law of Ukraine on Concessions of 1999). Arguably, such formulation covers almost all theoretical and practical elements which are related to concession activities and relevant parties thereto. Such wording marks public purpose of concession and concession relations and also interest of private concessionaires, their obligations and risks undertaken within the concession relations. The given wording underlines interest and purpose of private entities/persons within the concession relations and marks existence of private law elements in and with the concession relations.

Sphere of concession relations is quite wide in Laws on Concession and Public-Private Partnership Laws of the other countries. For examples, Law of Croatia on Public-Private Partnership enacted in 2012 (Public-Private Partnership Act of 2012), Law of Ireland on Public-Private Partnership (State Authorities (Public Private Partnership Arrangements) Act of 2002).

Those examples given herein as well as comparative analysis of the Law of Georgia on Concession with relevant laws of the other countries, clearly underlies that institutional and legal mechanism of concession relations in Georgia do not comply with the best international standards established in

many other countries. Therefore, it is necessary to cure those shortcomings existed in Georgian legislation.

Importance of Investment in Public-Private Partnership:

Public-private partnership is implemented by means of various forms. However, irrespective of the form and means by which public-private partnership is implemented, great importance is given to a private entity/person taking part in such partnership. Such importance is due to the fact that private entity/person generates those financial sources without which it is impossible to implement public-private partnership projects.

In many cases, such private entity/person is an investor, including foreign investor and there are investment activities with the public-private partnership. Therefore, legal mechanisms which ensure promotion and protection of investment and investors' activities play a vital role for a successful implementation of public-private partnership projects.

For that reason, there is direct link between public-private partnership and investment activities. Moreover, it could be rightly admitted that investment activities are one of the important forms of implementation of public-private partnership.

Therefore, legal norms which ensure promotion and protection of investment activities must be analyzed herein.

Analysis of National Legal Norms and Laws of Georgia on Investment Promotion and Protection:

Currently, two main laws, with the purpose of promoting and protecting of investment are in force in Georgia. "Law of Georgia on Promotion and Guarantees of Investment Activity" (the "Law of Georgia on Investment") was adopted in 1996 and the "Law of Georgia on State Promotion of Investment" was adopted in 2006. Both laws were adopted in different periods of country's development. However, neither the first nor the second law complies with the best international practices with respect to investment legislation and neither of them creates a balance between public and private spheres regarding the below given provisions.

Preamble of the Law of Georgia on Investment sets out the purpose of the law that is "[to determine] legal grounds for the implementation of both foreign and local investments in the territory of Georgia and guarantees for their protection". The law also intends to "define a legal order to promote investments". However, preamble of the law does not highlight clearly one of the main purpose of investment law which is protection of investor's rights and property of investor. Clear references to protection of investor's rights and property of investor into the preamble of the law ensures that investment law

is in compliance with the best international practice and reflects the guarantees given by the state to the investor.

Indication of those elements ensures a clarity of one of the main purpose and function of the Law of Georgia on Investment, which in turn serves as a means for creating a mechanisms for protection of investor's rights and property of investor. Protection of investor's rights and property of investor is one of the main prerequisites for implementation of public-private partnership projects and such rights of investor should be guaranteed by the law. Violation of investors' rights, expropriation of investors' assets and other actions undertaken by a state against investor is often a case in countries with high level of political risk (OECD, 2008).

Definition of "investment" also plays a significant role in terms of protection and promotion of investment from substantive as well as from procedural perspective. Definition of investment is one of the key issues in international investment law and national investment laws. Only those assets and activities of investor which are regarded as an investment are entitled to those protection mechanisms which are included in international investment agreements and national investment laws. Therefore, it is important that the Law of Georgia on Investment contains a clear definition of "investment" which is also synchronized with international investment agreements, including bilateral investment treaties. It is also important to clarify the terms such as "investor", "local investor", "foreign investor" and "investment dispute". Moreover, in order to have a clear definition of "investment" and distinguish investment activities from non-investment economic activities, it is necessary that definition of "investment", which is given in the law, excludes those non-investment related economic activities and other arrangements which are not regarded as an investment. For example, such non-economic activities which are not regarded as investment include claims arising out of or in connection with a single sale of product and/or service under a commercial agreement, single commercial transaction and short-term financial operations.

While analyzing investment promotion and protection mechanisms, investment protection standards must be discussed herein. Among those standards, National Treatment (Dolzer, 2005) is one of the most important one in international investment law which is also included in international investment agreements and national investment laws of many countries.

National Treatment ensures that while making an investment, treatment accorded to foreign investment shall be no less favorable than that which is accorded to national investment in like circumstances. "Like situation" or "like circumstances" is an important element of that standard.

Law of Georgian on Investment contains National Treatment standard, however, no references to "like situation" or "like circumstances" are made

therein. In such case it is unclear as when and in which circumstances may the state accord to foreign investment treatment that is different or similar to that which is accorded to national investment.

Provisions against expropriation also play a vital role in protection of investment. Provisions relating to expropriation and compensation therefore are included in Law of Georgia on Investment. However, those provisions are not sufficiently structured and do not make reference to indirect expropriation.

As seen over a past period and evidenced by an investment practice, cases of indirect expropriation of investor's assets are quite frequent than the cases of direct expropriation. Therefore, provisions relating to protection of investment against indirect expropriation are important for investors and serves as an additional guarantee for investment.

Provisions relating to protection of investment against indirect expropriation are included in all bilateral investment treaties entered into by and between Georgia and other countries and therefore, such provisions should also be included in Law of Georgia on Investment.

Law of Georgia on Investment should also cover and include those elements which make expropriation lawful. Those elements are as follows – (i) expropriation should be made for a public purpose, (ii) due process must be followed, (iii) expropriation measure must not be arbitrary or discriminatory, and (iv) expropriation measure must be accompanied with prompt, adequate and effective compensation.

Conclusion

On one hand, concession is one of the forms of public-private partnership. On the other hand, financial sources for many public-private partnership projects are generated by private investment. Therefore, both concession and investment play a significant role within the public-private partnership. As seen, it is necessary to improve and further develop private law norms of concession and investment in order to create those institutional and private law basis which are vital for implementation of public-private partnership.

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